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A Sociological Perspective on Bankruptcy

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"Bankruptcy is a gloomy and depressing subject. The law of bankruptcy is a dry and discouraging topic."

If those words of legal historian Charles Warren still reflect the views of legal scholars, they must be read as an incredibly understated hint to the reception that the topic bankruptcy would receive if introduced into a gathering of sociologists. This will change, however, with the publication of As We Forgive Our Debtors. Although these data were collected to help ground policy debates, this study of bankruptcy—when read with a sociological eye—is provocative: It should stimulate both thought and research among sociologists. Indeed, I would hazard that what Kalven and Zeisel did for jury research, Sullivan, Warren and Westbrook may have done for the study of bankruptcy.

It seems to me that sociologists who follow Sullivan and her colleagues will tackle the topic of bankruptcy with one of two goals in mind. The first goal would be to respond to the agendas laid down by the legal profession and policy makers by picking up where Sullivan, Warren and Westbrook left off; bringing sociological research to bear on the task of making sense of bankruptcy law, its workings, and consequences. As Sullivan, Warren and Westbrook have already demonstrated, such an approach has a great deal to recommend it.

For many sociologists, however, the goal of bankruptcy research will be more broadly conceived. Society is an amorphous entity; seemingly in constant flux. Many years ago, Emile Durkheim, one of the founders of sociology, suggested that law might profitably be viewed as a "visible symbol," or an "external index," of some of society's more fundamental and enduring qualities. The law of bankruptcy is a case in point. The compelling fact that emerges from As We Forgive Our Debtors is that the study of bankruptcy and bankruptcy law can augment our understanding

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1. C. WAREN, BANKRUPTCY IN UNITED STATES HISTORY 3 (1935).
4. E. DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY 64 (1933).
of the nature of important social relations and, indeed, of society itself. Insofar as creditor-debtor relations are ubiquitous in this society, knowledge about not only the legal and economic but the social and social psychological underpinnings of these relations is essential if we are to understand society.

TOWARD A SOCIOLOGY OF BANKRUPTCY

Achieving a truly sociological understanding of bankruptcy will first require moving beyond the study of bankruptcy as something that happens to individuals and looking at the meaning of bankruptcy at the social level. Making that leap from the individual to the social can be tricky.

For example, Sullivan, Warren and Westbrook make many references to the notion that the current rate of bankruptcy is a symptom of some larger "social pathology" or "social problem." They emphasize this by drawing an analogy between bankruptcy law and medical care:

The purpose of bankruptcy law, properly used rather than abused, is to serve as a financial hospital for people sick with debt. If hospital admissions rise dramatically, there are at least two explanations for the increase. It may be that doctors have started admitting patients who are not seriously ill and who could be treated as outpatients. Or the crowded hospital wards may simply reflect a breakdown of health in the community.

There is no gainsaying that bankruptcy is a trauma for each of the thousands of people who undergo it, a trauma perhaps akin to serious physical illness. Yet, this fact provides no basis for inferring social pathology. To make such an inference is to fall prey to what methodologists call the individualistic fallacy. Although I am wary of overextending the medical metaphor, an equally likely explanation for a rise in hospital admissions may be an increase in hospital beds and/or the creation of a more humane admissions policy that makes medical care available to people who, in earlier times, would have died in the streets. In that case, the rise of hospital admissions would certainly be seen as a sign of increased societal health. Similarly, the 1978 overhaul of the bankruptcy law, or merely the presence of "bankruptcy advertisements ... in every Sunday newspaper," may now

5. In 1986, more than 400,000 American consumers filed for bankruptcy, a number that had "more than doubled in less than a decade." AWFOD, supra note 2, at 3. But, "[a]fter the enormous increases in filings of the late 1970's and early 1980's, there has been something of a plateau in the last part of the 1980's." Id. at 324.
6. Id. at 6.
7. The individualistic (or reductionist) fallacy occurs when one makes inferences about groups from data collected about individuals. The identification of this fallacy came about as a result of Robinson's discovery of the "ecological fallacy" which results when inferences about individuals are made from aggregate level data. See Robinson, Ecological Correlations and the Behavior of Individuals, 15 Am. Soc. Rev. 351 (1950).
8. AWFOD, supra note 2, at 16.
be bringing the opportunity for financial salvation to people in desperate need who previously may have gone unaided.

The idea that dysfunction at the individual level does not necessarily generalize to dysfunction at the social level is not, of course, a new one. As Durkheim noted long ago in *The Rules of Sociological Method*, what is pathological for the individual and what is pathological for society are questions that are "independent of each other." Durkheim's cogent demonstration of this independence invokes the example of crime, for "[i]f there is any fact whose pathological character appears incontestable, that fact is crime." Still, crime—however pathological for the individual—may indicate social health:

> Crime, for its part, must no longer be conceived as an evil that cannot be too much suppressed. There is no occasion for self-congratulation when the crime rate drops noticeably below the average level, for we may be certain that this apparent progress is associated with some social disorder.\(^9\)

Durkheim goes on to point out that, for example, the rate of criminal assault falls dramatically during times of economic depression.\(^12\) Thus, although this decrease in crime might be welcomed by the naive observer, it would actually be a symptom of social ill-health. Similarly, the idea that the current rate of financial death is an indication of social pathology is better treated, I think, as an untested hypothesis than as a grounding assumption; it might be that the rate of bankruptcy we see now is the average level—a sign of societal health.\(^13\)

The empirical test of any such hypothesis cannot be made without more data. However, there is evidence that what we are seeing now is less a symptom of some newly developed fiscal fragility than part of a long-standing American (or perhaps, even more generically, capitalist) tradition of boom and bust business cycling.

Legal historian Peter J. Coleman, writing about the history of the "insolvent debtor," for example, has argued that:

> [T]he incidence of default has always been higher than previously realized. Historians have not ignored the depressions and panics which have dotted American history from the hard times of the Puritans in the 1640's to the almost universal devastation of the Great Depression of the 1930's, but they have been so blinded by economic progress that

\(^10\) Id. at 65.
\(^11\) Id. at 72.
\(^12\) Id.
\(^13\) It may be, on the other hand, that the current rate of bankruptcy is pathologically low. As Sullivan, Warren and Westbrook point out, in spite of recent reform, there are many people who exist in, or on the verge of, "that financial twilight zone of people too broke to go bankrupt." AWFOD, *supra* note 2, at 329. See also *infra* note 30.
they have underplayed the darker side of the story. They have treated economic crises as aberrant and temporary interruptions, and they have neglected, even ignored, the fact that even in ordinary times thousands of borrowers could not pay their debts.

The crude and imperfect evidence of the late eighteenth century suggests that as many as one householder in three may each year have been hauled into court as a defaulting debtor, and that by the early nineteenth century one householder in every five would, during his working lifetime, fail outright rather than merely default on a particular debt. The incidence of difficulty probably rose as the century advanced. For example, three Philadelphians in every eight spent some time in a debtors' prison in the late 1820's, and the equivalent of one householder in each one hundred applied for a discharge under the short-lived national bankruptcy law of 1841. Nearly thirty-four thousand persons petitioned under the act and almost $400,000,000 in debts were written down, an average of more than $11,000 a case.¹⁴

The statistics describing individual debtors in As We Forgive Our Debtors, as Sullivan, Warren and Westbrook point out time and time again, are myth-shattering. Further research might shatter one more myth—viz. that bankruptcy is necessarily a symptom of social pathology.

Of course, just as abnormally high (or low) crime rates may be evidence of a society in trouble, abnormal bankruptcy rates may signal some degree of social morbidity. How can we tell a normal from a pathological rate of bankruptcy? Drawing further upon Durkheim's analysis is instructive. Normalcy, he says, can be inferred "by showing that the generality of the phenomenon is bound up with the general conditions of collective life of the social type considered."¹⁵

There can be no doubt that bankruptcy is bound up with the general conditions of collective life in capitalistic society. Even the most rudimentary understanding of economics suggests that capitalism is bound up with risk. To the degree that one participates in the economic life of this country, one is vulnerable. As Sullivan and her colleagues show in the chapter titled "Reluctant Creditors," it is indeed difficult to avoid this sort of vulnerability.¹⁶

That credit, debt, and fear of financial failure have long been part of the American way of life was observed by Alexis de Tocqueville. Writing in the 1830's, a time when bankruptcy for debtors was typically involuntary (that is, action for bankruptcy could only be brought by creditors), he noted that:

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¹⁴. P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900, at 287-88 (1974). As a point of comparison, the current number of bankruptcies filed each year works out to 0.2 percent of the population. See supra note 5.
¹⁵. E. DURKHEIM, supra note 9, at 64.
¹⁶. AWFOD, supra note 2, at 293.
In America there is no law against fraudulent bankruptcies, not because they are few, but because they are many. The dread of being prosecuted as a bankrupt is greater in the minds of the majority than the fear of being ruined by the bankruptcy of others; and a sort of guilty tolerance is extended by the public conscience to an offense which everyone condemns in his individual capacity.\(^7\)

Those fears of nineteenth century Americans foreshadowed the statistical risk that today's average American runs of financial failure. As Sullivan, Warren and Westbrook emphasize repeatedly, "debtors in bankruptcy are not some 'other,' but part of mainstream America."\(^18\)

Arguably, to the degree that this risk of failure is distributed equally throughout society, bankruptcy could be considered—in Durkheim's terms—"normal" for capitalistic society and not a symptom of pathology. Indeed, although one cannot help but be struck by the increases in debts accumulated by Americans in recent years, this accumulation of debt demonstrates, in addition to economic vulnerability, the degree to which Americans increasingly have come to participate in their economy. In any case, as an indication of social trouble, the amount of debt and failure may not be the most crucial factor; more relevant than the rate of bankruptcy is its distribution.

The data presented by Sullivan and her colleagues suggest that the risk of bankruptcy is not distributed equally. While we are not necessarily alarmed to learn that entrepreneurs fail disproportionately\(^9\) (for it seems likely that they are voluntary risk-takers), it is alarming to read that people in two other demographic categories are disproportionately at risk: single women heads of households and couples who try to survive on a single income.

The finding that single women heads of households are particularly vulnerable is certainly dismaying, but hardly surprising, for as Sullivan and her colleagues note, this is simply a confirmation of "the marginal economic position of American women, especially women heading their own households."\(^20\) What will come as a shock to many, however, is the finding that "[m]arried women who have chosen a traditional role, staying at home as housewife and mother, appear to be at greater risk for bankruptcy than are those who join the national trend of two-income families . . . . The middle-class wife who does not work may be an endangered species."\(^21\)

Although, in most states, the law no longer explicitly charges the husband with the sole burden of family support, there lingers at least an implicit vision that the "typical" family is "a husband who is living with and

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17. A. de Tocqueville, Democracy in America 230 (1945).
18. AWFOD, supra note 2, at 141.
19. Id. at 112 ("[T]he proportion of self-employed in bankruptcy [is] about three times higher than their proportion in the general population . . . .").
20. Id. at 329.
21. Id. at 330.
supporting his wife and children . . .”22 The inadequacy of this view is dramatically shown by the data gathered in the Consumer Bankruptcy Project.23 These findings about the distribution of bankruptcy suggest a need for rethinking policies even more fundamental than bankruptcy law. It is clear that the paucity of resources (childcare, etc.) that exists for women and, indeed, parents who work outside the home, has created a risk that is not bound into capitalism. 24

**The Debtor-Creditor Relationship: Beyond Economics**

That part of our legal system which governs the distribution of funds through various sorts of social insurance programs has never articulated its own version of Blackstone's maxim “that it is better that ten guilty persons escape, than that one innocent suffer.”25 In this respect, bankruptcy law is exemplary. At best, there exists what Sullivan and her colleagues call a “perpetual tension” when it comes to bankruptcy laws, a tension between providing “enough help for the truly needy, but not so much help that everyone will use them.”26 For policy makers the question must be: how best to manage this tension? The answer, I think, must come from an understanding of the sociological underpinnings of the debtor-creditor relationship in this society.

As Sullivan, Warren and Westbrook note, the current incarnation of bankruptcy law developed in an empirical vacuum, guided by the primitive social psychology espoused by law and economics adherents: When the “economic incentives” of bankruptcy outweigh the “economic disincentives,” people will choose bankruptcy. In other words, the “carrot-and-stick approach to bankruptcy has flourished.”27 Yet, the data gathered in this research flatly contradict such conventional wisdom. As the authors sum it up: “[T]he simple economic model can be laid to rest as a powerful predictor of debtor behavior . . . .”28

If economic costs and benefits are not the sole (or even the most important) predictors of whether a debtor will choose bankruptcy, what

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23. AWFOD, supra note 2, at 4-5.
24. Unless, of course, one believes that the very existence of capitalism depends upon the presence of an exploited unpaid labor force. See Hartman, The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union, in WOMEN AND REVOLUTION 1 (L. Sargent ed. 1981).
25. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769).
26. AWFOD, supra note 2, at 143.
27. Id. at 231.
28. Id. at 254. Whether economic models will actually lie down and die a peaceful death is, of course, another question. The intransigence of policy makers with respect to economic models brings to mind Justice Frankfurter's reference to T. H. Huxley's observation that sometimes "a theory survives long after its brains are knocked out." Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128, 138 (1956).
factors are crucial in the decision? There is a suggestion that there are but two extant: "moral conviction" (commitment to keep promises) and "social pressure" (fear of being stigmatized). Given the finding that even people in desperate financial trouble struggle long to stay out of bankruptcy, we can say that these controls are working well, at least for now. But why? And, what of the future?

These are important questions to ask. As Sullivan, Warren and Westbrook intimate, one need not subscribe to the theory that this society is beset by a decline in moral virtue to suggest that the strength of these controls ought not to be taken for granted. For example, they point to the fact that:

[m]any of us have heard from parents and grandparents stories of years of deprivation to pay Depression debts . . . . These stories of sacrifice and heroism are wholly admirable for their moral conviction and strength of character. It is less clear, however, that the present generation would applaud the choices made . . . . For example, each reader can make a judgment about the relative virtue of debt payment versus the loss of companionship between parent and child or the lessening of the child's opportunities, educationally and otherwise.

Notwithstanding the implications of the statement that "each reader can make a judgment," most sociologists would argue that the calculus underlying such decisions is not completely dependent upon individual preference. Assuming that individuals generally continue to prefer to do the "right thing," then we can also assume that they will continue to look to other members of their communities to help define what the right thing is. This means that an understanding of social perceptions of right and wrong, and specifically how these affect and could possibly change the nature of debtor-creditor relationships, will help us understand the workings of bankruptcy law.

Many would be loathe to accept the simple assessment that "[b]ankruptcy is merely a legal consequence of economic facts," and would respond that the consequences (and anticipation) of social stigma, of a stain on one's reputation and one's "good name," are factors that cannot be overlooked in attempting to come to an understanding of the decision to declare bankruptcy. But in this increasingly depersonalized society, how important is a good name? Apparently, it is still very important. People still fight to

29. AWFOD, supra note 2, at 336-37. It is difficult as a sociologist to sustain an analytic distinction between the effects of "moral commitment" and "social pressure," for morality does not develop in the absence of social processes.
30. Id. at 337.
protect their good names.\textsuperscript{32} Indeed, people's willingness to take such fights to court has created what some have called a "libel crisis" in this country.\textsuperscript{33} And, in an age where the presumption is that litigation is in large part prompted by avarice, research suggests that the libel suit represents a clear exception; people do not sue "to obtain monetary relief for financial harm. Instead, the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance."\textsuperscript{34}

Stigma must be viewed as more than simply a residual category (or error term) in a costs-benefits analysis of the decision to declare bankruptcy.\textsuperscript{35} In a world in which social assessment of personal worth is grounded (or so many believe) in the belief that "bad things happen to bad people,"\textsuperscript{36} the emotional and social consequences of bankruptcy cannot be ignored.

But, this brings up another question that must be addressed if we are to have continued faith in the power of stigma to affect people's choice to declare bankruptcy. What is the source of this stigma?

It is perhaps tempting to argue simply that bankruptcy indicates failure—failure to succeed financially as well as failure to keep contracts—and, in this competitive society, failure in and of itself is stigmatized. But this seems a glib (and inaccurate) generalization. Not all failures result in one being marked as the object of disgrace or social reproach. This is true even of failures that have important consequences. For example, the failure of a presidential candidate to win office, an actress to win an Oscar, an athlete to win an Olympic gold medal, and a student to score the highest mark on an exam are hardly failures that bring on opprobrium. Vince Lombardi's famous (alleged) dictum notwithstanding, it must be noted that, if losing does not bring honor, neither does it necessarily occasion disgrace. What, then, is the difference between failures that result in stigma and failures that do not?

\textsuperscript{32} The fact that it costs money to file bankruptcy may seem "functional" (to the very cold-hearted, at least) inasmuch as this puts bankruptcy out of the reach of the most poor who may also have the least reputational stake in avoiding bankruptcy. Still, evidence suggests that having the "least reputational stake" in avoiding bankruptcy does not mean having no stake. Although one study reported that education was positively related to the degree of stigmatization felt by bankrupts, H. Jacob, DEBTORS IN COURT 122-24 (1969), David Caplovitz noted that, when "the OEO-sponsored legal services program in Washington, D.C., made a concerted effort to assist overextended debtors declare bankruptcy" in the 1960's, "[o]f those eligible, less than one fourth of those approached opted for this remedy." D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 59 n.1 (1974).


\textsuperscript{36} See M. LERNER, THE BELIEF IN A JUST WORLD (1980). This belief, in many respects, is similar to the "blaming the victim" syndrome discussed by Sullivan, Warren and Westbrook. See AWFOD, supra note 2, at 103 (citing W. RYAN, BLAMING THE VICTIM (1976)).
Achieved stigma is a normative status; and history tells us that bankruptcy has long been regarded as more than mere failure—it is a serious moral indiscretion. At one time insolvency was a crime; debtors could be imprisoned and (in England) even put to death. While, in time, people came to be more sympathetic toward the plight of the debtor, personal bankruptcy continued to be regarded as disgrace. One hundred and fifty years ago, James Buchanan of Pennsylvania argued against liberalizing bankruptcy laws: “Do not, I beseech you, teach [the people] to think lightly of the solemn obligation of contracts. . . . [O]ur institutions depend altogether upon the virtue of the people.” In the nineteenth century, generally, many Americans opposed discharging debts on grounds of principle and practicality. They thought such laws against the public interest, partly because borrowers should be held fully accountable, partly because any promise of relief encouraged profligacy, recklessness, and fraud, and partly because such laws created more problems than they purported to solve.

Extending the opportunity for bankruptcy, or so many believed, would spread a “moral taint through society which would corrupt it to its very core.” For at least some, the very existence of a bankruptcy law was a “moral hazard.”

Much has changed, to be sure, but evidence suggests that the moral aversion to and the stigmatization of bankruptcy survives. In the late 1960's, the Brookings Institute commissioned the Gallup Organization to poll people about their attitudes toward bankruptcy. More than 1500 people in a national probability sample were asked, “Suppose you, yourself, got into a very difficult financial situation—how would you feel about going bankrupt?” Fifteen percent said “don't know.” But of the rest, nine out of ten said something to the effect that they “would go bankrupt only as a last
resort”; would “rather die” than go bankrupt; would feel “terrible” or “disgraced,” etc.\textsuperscript{42}

That this stigma persists is attested to by Sullivan, Warren and Westbrook’s finding that many people go to unreasonable lengths to avoid bankruptcy. As these researchers note:

[T]he debtors we saw were in so much financial trouble we had to wonder how they had stayed out of bankruptcy so long . . . . The fact that the debtors in our sample did not choose bankruptcy earlier, given the disastrous state of their affairs, suggests to us that many of them tried longer than was reasonable to avoid discharging their debts.\textsuperscript{43}

What makes such heroics on the part of debtors even more intriguing, I think, is the finding that while debtors are trying to be responsible, creditors appear to be irresponsible. For example, Sullivan and her colleagues report that

[c]redit card issuers were willing to give out the fifth, sixth, or seventh bank card and to approve charges after debtors already owed short-term debt so large that they could not possibly pay the interest, much less the principal. The consumer credit system currently tolerates debtor irresponsibility because the system is not well organized to police it. Creditors have not organized their information systems to detect and halt credit abuse. Having failed to make fairly inexpensive adjustments to reduce abuse, creditors bear some responsibility for their losses.\textsuperscript{44}

Still, from one point of view, “irresponsible” may be an unfair assessment of the credit industry’s approach to lending. As Sullivan, Warren and Westbrook note, the voluntary players in the credit game—commercial and consumer lenders—are in it purely for the money.\textsuperscript{45} And, loan losses obviously affect profitability, but “[r]educing losses is desirable only if the loss reduction exceeds the foregone profits from making fewer loans.”\textsuperscript{46} In other words, “maintaining the current state of affairs is cost effective for

\textsuperscript{42}D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEMS, PROCESS, REFORM 230-31 (1971).
\textsuperscript{43}AWFOD, supra note 2, at 338. A contrary assessment of debtor attitudes was offered by the president of a debt collection agency who, when asked to explain the significant decline in the average recovery rate achieved by collection companies—from about 33 cents on the dollar in 1965 to 24.7 cents in 1975-1980—emphasized changing attitudes: the bill collector’s traditional asset—that debtors are afraid of him, plagued by guilt feelings, and embarrassed—has been eroded by an increasing proportion of debtors who seem unconcerned about their reputations and are willing to stall or be defiant.

\textsuperscript{44}AWFOD, supra note 2, at 332.
\textsuperscript{45}This, of course, in no way exempts lenders from acting—at some level—in the public good. Yet, arguably, notwithstanding the effects on particular debtors, widespread and easy access to credit (coupled with the protections afforded debtors by bankruptcy laws) is a public good. Indeed, to ask the credit industry to restrict access to credit is tantamount to a kind of paternalism that does not fit well with liberal democratic principles.
\textsuperscript{46}AWFOD, supra note 2, at 289.
the industry, even if it produces lending that seems irresponsible as to particular debtors."

The usual assessment of the modern creditor-debtor relationship is summed up by Sullivan, Warren and Westbrook in their introduction:

"Most credit has become impersonal, a matter of computer printouts and objective indicators such as income and payment record. Few creditors today base credit decisions on the personal characteristics that were so important to the neighborhood banker in a simpler time. Conversely, it was a lot harder to let down one’s banker-neighbor, Mr. Reed, than it is to stiff a huge, impersonal Sears or Citibank."

However, the data presented in As We Forgive Our Debtors support an alternative point of view; that it is only the professional creditor—not the individual debtor—who views the extension of credit as an impersonal matter. In other words, modern creditors and debtors perceive the nature of the creditor-debtor relationship quite differently. Understanding the nature of this difference allows us to make a tentative assessment of the continued viability of stigma as a deterrent to bankruptcy.

DEBTORS AND CREDITORS: TRUST AND RELIANCE

Recently, social scientists have shown a great interest in the concept of trust. This is perhaps an attempt to explain social relations not explainable using simple (or even complex) economic analysis; but more generally, this interest has been spurred by a need to explore the implications of what many perceive to be a loss of public trust in important institutions and actors. As Bernard Barber summed it up:

The fundamental importance of trust in social relationships and social systems is attested to by social thinkers and theorists of widely divergent theoretical persuasions. Niklas Luhman says trust is necessary to "reduce complexity" in social systems. Economist Fred Hirsch defines it as a "public good" necessary for the success of many economic transactions. In his social exchange theory the sociologist Peter Blau describes trust as "essential for stable social relationships." Carol Heimer, a sociologist using a variety of exchange theories, sees trust as one way in which actors in social relationships can cope with the "uncertainty and vulnerability" that exist in all such relationships. The moral philosopher Sissela Bok speaks of trust as a "social good . . . When it is destroyed, societies falter and collapse." Finally, Talcott Parsons, in his discussion of the four symbolic media of exchange among social systems—commitment, influence, power, and money—deals with trust as a conse-

47. Id. at 332.
48. Id. at 13.
quence of commitment, which involves appeals to obligations in terms of basic norms and values.\(^\text{50}\)

While there is widespread agreement that "trust" is important in society, there is at the same time a lack of agreement on what exactly constitutes trust. It is likely, I think, that we have oftentimes confused "trust" with what only appears to be trust. What each of these authors is writing about is actually something better labeled more generally as "confidence." Now, some forms of confidence are indeed trust; but others are not. For present purposes I propose a distinction be made between two types of confidence: "trust" and "reliance."

In part, behaviors based on trust and those based on reliance are the same: As a result of either, one may choose to assign or delegate resources to another. In other words, an "agency relationship"\(^\text{51}\) may be created on the basis of either trust or reliance. But, however similar they look, there are important differences between relationships based on trust and those based on reliance.\(^\text{52}\)

The first difference has to do with the origins of the feeling of confidence: In the case of trust the principal has confidence in an agent because the principal trusts in the good faith of the agent. This trust may arise, for example, as a result of the principal having learned through actual experience that he or she and the potential agent have important and deeply held values in common.\(^\text{53}\)

The delegation of resources in relationships based on reliance is motivated by quite different factors.\(^\text{54}\) In these relationships, the principal's choice to

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51. An agency relationship has been defined as one "in which one person acts for or represents another by latter's authority, either in the relationship of principal and agent, master and servant, or employer or proprietor and independent contractor." Black's Law Dictionary 57 (5th ed. 1979).
52. The concepts "trust" and "reliance" here are used as what sociologists call ideal or pure types. It is likely that few, if any, relationships are based solely on either trust or reliance.
53. But trust not only arises as a result of personal experience; people may also choose to bestow trust because a potential agent has been "certified" or credentialed by others who the principal trusts. Thus, when a bishop consecrates a priest, this act of consecration alone may be enough to cause believers to bestow trust on the priest. In this sense, a bishop is a gatekeeper of what might be called a "moral community," or community of believers. Likewise, at one time, it may have been that admission to the bar was the equivalent of consecration for young lawyers. This sort of derived trust is not only bestowed on professionals; other moral communities exist: It is said, for example, that members of certain fraternal organizations (e.g., Rotary, Masonic Temple) will loan money to a "brother" in difficulty even when that brother is a stranger from out of town.
54. My conception of reliance bears some resemblance to what Susan Shapiro refers to as "impersonal trust." Shapiro, The Social Control of Impersonal Trust, 93 Am. J. Soc. 623 (1987). The two are not, however, the same. In her scheme, impersonal trust is a kind of confidence not embedded in interpersonal relations; these relations may or may not be developed as a result of choice on the part of the principal. In my view, relations based on reliance may be either "impersonal," or embedded in social relations. Relations based on trust are probably most often embedded in interpersonal relationships, though they need not be. See supra note 53. Moreover, it is important to stress that this discussion of confidence between agents and principals is intended to apply only to relationships into which individuals choose to enter.
rely on an agent results from his or her objective calculation of the probability of an agreeable return from the agent. In such calculations, the potential agent's credentials (including his or her track record) may certainly be a factor, but only insofar as these inform the principal's knowledge of the odds of success or failure.

Important differences also exist in terms of expectations the principal may have about the behavior of the agent. In a trust relationship, resources are entrusted to an agent who is seen as "responsible" for outcomes; the principal expects unreasonable, even supererogatory efforts on his or her behalf. In a trust relationship, then, there is an expectation of service "above and beyond the call of duty." No such expectation exists in a relationship based on reliance. In such relations, the principal invests resources in an agent who is held "accountable" for following proper procedures; the principal expects reasonable and prudent efforts.

Intuitively, the difference between a relationship based on trust and one based on reliance is the reason that one "trusts" a priest, but "relies" on a stockbroker—even given the same amount of personal contact. Similarly, we may rely on colleagues and acquaintances but trust best friends and family members.5

The most important difference between confidence based on trust and confidence based on reliance has to do with what follows a negative outcome. In a trust relationship, a breach that is intentional or negligent (e.g., results from a lack of effort) constitutes a "betrayal." Once betrayed, the actor feels outrage; and if the trust is viewed in society as an important one, this outrage will be shared by others. This shared outrage leads to the stigmatization of the agent. Unintentional, non-negligent breaches of trust, however, are labeled as "failures" and cause "grief."

Negative outcomes for the actor in a relationship based on reliance bring about different reactions. Intentional or negligent breaches of reliance result in anger and cause the agent to be held "liable." On the other hand, the negative effect that the principal experiences as a consequence of unintentional, non-negligent breaches of reliance will most likely take the form of anger toward the self or guilt.6

The evidence presented in As We Forgive Our Debtors strongly suggests that individual debtors accept credit as an act of trust. This, at least, accounts for their oftentimes heroic attempts to avoid bankruptcy. Of course, it may well be that the bankruptcy occurs through no fault of the

5. Obviously, both trust and reliance can be misplaced. Trust might result from naiveté; reliance may be calculated on the basis of inadequate or inaccurate information.

6. The results of a positive outcome will differ as well. Positive outcomes in relationships based on trust will be affirming of the relationship between agent and principal. Positive outcomes in relationships based on reliance, on the other hand, will simply affirm the principal's own confidence in his or her ability to calculate and play the odds.
debtor and, therefore, ought to be labeled “failure” rather than betrayal. But, given the belief that “bad things happen to bad people,” a presumption of guilt or fault remains that is difficult to overcome. Bankruptcy is an indication that one has betrayed (or is betraying) a trust that is judged to be important by many. Thus, the debtor contemplating bankruptcy anticipates that betrayal of this trust will lead to a shared outrage and stigma. In consequence, the efforts of individual debtors to honor loan contracts surpass what might—under other circumstances—be considered “reasonable.”

Why is the trust betrayed by bankruptcy one that many judge to be important? It has to do with why the extension of financial credit is so highly prized in this society: Just as default has more than economic costs, being given financial credit has more than economic benefits.

The word credit is rooted in the Latin verb “to believe,” and to the degree that credit signals others’ confidence, more than financial resources are at stake. As sociologist Georg Simmel noted, modern life, owing to its increasing interdependence, “is a ‘credit economy’ in a much broader than a strictly economic sense.”\(^{57}\) So, confidence—in more than just economic terms—must be present for society to continue. But socially, credit in the economic sense seems to have become shorthand for credit in every sense. One may receive credit from many sources, but credit in other than the financial sense tends to be intangible and not easily traded on. Financial credit, on the other hand, is both public and tangible proof of personal worth (just see how people display their gold cards!). Because of this, proving oneself unworthy of financial credit discredits one’s claims to public approval.\(^{58}\)

Barbara Weiss makes a similar point about the meaning of debt in Victorian England. She notes that:

> In an older time, men proved their honor by fighting duels; by the time of Queen Victoria, at least among those men of business who valued mercantile honor and respectability, the “gentleman” seems to have been one who paid his debts. Thus in many novels . . . the hero feels obligated by his personal sense of honor to make enormous sacrifices to repay his debts, or even those of his father. Respectable men of business like Dickens’s Mr. Dombey and Arthur Clennam and Thackeray’s Colonel Newcome willingly beggar themselves in order to return to their creditors as many shillings in the pound as possible.\(^{59}\)

Decades ago, sociologist Max Weber observed that in early American society, a good reputation translated into instant creditworthiness.\(^{60}\)

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59. B. WEISS, supra note 40, at 32.
have changed; today, creditworthiness translates into a good reputation.

Contrary to what one might expect, if there has been a shift in values concerning debtor-creditor relationships, the bigger change has been in terms of how creditors—not debtors—perceive the relationship. Once, perhaps, creditors saw lending money as an act of trust, but, today, lenders’ decisions to enter into creditor-debtor relationships are more typically based on reliance.61 This is particularly true, as Sullivan, Warren and Westbrook illustrate, of consumer lending:

A creditor lending to 10,000 people to purchase goods or services for consumption uses a few fairly simple tests to predict likelihood of repayment. The creditor cannot be sure which debtors will pay and which will not, but over several thousand loans the creditor can predict with some accuracy the proportion of debtors who will default, and, among that proportion, how many will eventually pay and how many debts will have to be written off. The risk can be mathematically modeled, much as insurance company actuaries model the probabilities of death or disability.62

Lenders rely on their calculations; they do not trust in individuals.63 From the lender’s point of view, as long as proper procedures have been followed, the lender has acted appropriately. Morality does not come into play. It is meaningless to speak of creditors who lend on the basis of reliance as “irresponsible”—in their eyes, extending credit is an amoral act.64 They are only “accountable” if they fail to make money; they calculate the odds of doing so and proceed accordingly. As a merchant interviewed by David Caplovitz put it, “extending credit is not our responsibility, it is our risk.”65

LOOKING AHEAD

The big question is, of course, what does it all mean? While it is likely that creditors will continue to lend based on reliance, it is less clear whether debtors will continue to regard their obligations as arising from trust and thus make heroic attempts to avoid default.

61. Here I am referring to individuals in the “business” of lending. Most of the debt owed by bankrupts is owed to “professionals, those who actively sought consumer lending for the sake of profit.” AWFOD, supra note 2, at 303.
62. Id. at 285.
63. Ironically, however, in their calculations, creditors (at least implicitly) no doubt rely on the fact that consumer debtors will view loans as acts of trust and thus make heroic efforts to avoid default. Indeed, many banks encourage debtors to regard loans in this way by putting up a “trust front” and, for example, advertising the “friendliness” of their “personal” loan officers. At the other end of the process, collection agents play on the fear-of-stigma factor as they attempt to pressure delinquent debtors. See, e.g., A. COHEN, DEBTOR-CREDITOR Relations Under the Bankruptcy Act of 1978, at 492-504 (1979).
64. But see supra note 45.
If we come to the point, perhaps before the end of the century, where one American in ten, or even one in five, have [sic] been through personal bankruptcy, what might that mean for our society? Aside from the effects of continued increases in business bankruptcy filings by famous and respectable companies and individuals, how much bankruptcy stigma will there be if so many friends and neighbors have been through the process?66

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.67 More significant would be the impact of "so many friends and neighbors" undergoing bankruptcy. It is important to note, however, that the degree to which something is stigmatized is not necessarily related to how common it is. For example, it certainly could be argued that, as divorce has become more common in this society, the stigma of divorce has decreased. Yet, the opposite relationship between commonness and stigma holds for child abuse: As the discovered rate of child abuse has increased dramatically over the past three decades, so too has the stigma attached to child abusers. It may be that marriage has come to be seen more and more as a contract between two people rather than a sacred (social) trust; hence, a failed marriage is less and less a cause for stigma.68 The relation between parent and child has become, on the other hand, more and more a sacred (social) trust. Children are, after all, no longer regarded as the property of their parents. Thus, abuse of children is an occasion for public outrage.69

The idea that the stigma of bankruptcy results from a betrayal of trust implies that increasing rates per se of bankruptcy would not diminish the stigma of bankruptcy. It would reduce the stigma, however, if people came to regard the relationship in different terms. In short, if debtors came to view the receipt of debt as their creditors viewed it, then the stigma would likely disappear. At this point, the economists' worst fears would be realized (as would the predictive value of their models), for individual debtors would become similar to debtors who are professional players (e.g., corporations)

66. AWFOD, supra note 2, at 324.
68. This is not to argue that divorce is not an occasion for "private outrage" and blame. Gerstel found, for example, that "though categorical disapproval of divorce has declined, individuals may still feel they are held accountable and blamed for their divorce." Gerstel, Divorce and Stigma, 34 Soc. Probs. 172, 176 (1978).
69. Interestingly, concomitant with this is the fact that, for parents, children have evolved from economic assets to economic liabilities. As one scholar put it, "in strict economic terms, children today are worthless to their parents. They are also expensive." V. Zelizer, Pricing the Priceless Child: The Changing Social Value of Children 3 (1985).
in the credit/debt game. In other words, these consumer "amateurs" might—like the professionals—come to regard a resort to bankruptcy not as a sign of failure, but as a display of business acumen.

The results of the Consumer Bankruptcy Project reported in *As We Forgive Our Debtors* teach us a great deal about people who go into bankruptcy and the kinds of debt that put them there. Of course, much remains to be learned: How fragile is the debtor's view of credit as trust? What sorts of factors combine to encourage different kinds of confidence? What is the relationship between social and legal factors in agency relations and how do these influence the creditor-debtor relationship? What implications would a change in the social view of credit have for other kinds of social relations?

Whatever answers we find to such questions, one thing is now clear: Charles Warren was wrong. For the sociologist, the topic of bankruptcy is neither dry nor discouraging. Sullivan, Warren and Westbrook have opened up a new window on an increasingly important social relation.