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Bankruptcy Reform: Does the End Justify the Means?

by

A. Mechele Dickerson*

America is a country that believes in second chances. Consistent with this brief, bankruptcy laws historically have been used to give financially beleaguered debtors a second chance, a clean economic slate. Whether this second chance continues to be warranted has been the subject of intense debate for the last few years. Under intense pressure by well-funded creditor lobbying groups,¹ for the last three years Congress has considered legislation that would “means test” bankruptcy relief.² Making potential debtors satisfy a means test, critics argue, will ensure that bankruptcy relief is available only

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¹See *World News Tonight: Credit Card Companies Succeed in Lobbying Senate to Pass New Bankruptcy Law Making it More Difficult for Those with Credit Card Debt to Claim Personal Bankruptcy* (ABC television broadcast, Mar. 15, 2001); *Nightline: Paying the Piper; New Legislation Which is Expected to Pass Gets Tough on Those Who File for Bankruptcy* (ABC television broadcast, Mar. 14, 2001); Philip Shenon, *Hard Lobbying on Debtor Bill Pays Dividend*, N.Y. TIMES, Mar. 12, 2001; Christopher H. Schmitt, *Tougher Bankruptcy Laws – Compliments of MBNA?*, BUS. WK., Feb. 26, 2001, at 43; Donald L. Barlett and James B. Steele, *Big Money and Politics/Who Gets Hurt*, TIME, May 15, 2000 at 64 (reporting lobbying costs of more than \$5 million); Editorial, *Bad Ideas on Bankruptcy*, WASH. POST, Feb. 18, 2000, at A22 (noting that bankruptcy is in “the spotlight” due to “some pricey lobbying by financial firms”); Russ Feingold, *Lobbyists’ Rush for Bankruptcy Reform*, WASH. POST., June 7, 1999, at A19 (“[C]redit card companies have spent tens of millions of dollars to push a bill that legal experts and judges say won’t work.”); Dan Morgan, *Creditors’ Money Talks Louder in Bankruptcy Debate: Consumer Groups Fight New Curbs on Insolvent Debtors*, WASH. POST, Jun. 1, 1999 at A04 (reporting critics’ concern that the drive to overhaul bankruptcy laws presents “a case study of the impact of money on the political process.”); Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard to Get Harder Laws*, WALL ST. J., June 17, 1998, at A1 (reporting that credit trade group held a \$1,000-a-head fundraiser for a chief proponent of bankruptcy reform).

²See Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H. R. 333, 107th Cong. (2001); Bankruptcy Reform Act of 2000, H.R. 2415, 107th Cong. (2000); Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. § 102 (1999); Bankruptcy Reform Act of 1999, S. 625, 106th Cong. (1999); A Bill to Amend Title 11 of the U.S. Code to Modify the Application of Chapter 7 Relating to Liquidation Cases, H.R. 333, 106th Cong. (1999); Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 101 (1998); Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998, H.R. 3146, 105th Cong. § 8 (1998); Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 102 (1997); Responsible Borrower Protection Bankruptcy Act of 1997, H.R. 2500, 105th Cong. § 101 (1997).

to people who can document a quantifiable need for this economic relief.³ Though means-testing bankruptcy relief is theoretically unobjectionable, crafting a workable means test is controversial and divisive.⁴

Means-testing is theoretically sound because it is not irrational to encourage (if not force) debtors to accept the consequences of their fiscally irresponsible behavior by making them attempt to repay debts within their means. Means testing is controversial and politically divisive because an ill-conceived test potentially would discourage some deserving consumers from seeking formal debt relief and may ultimately prevent some needy consumers from discharging their debts.⁵ It also is controversial because it would authorize the bankruptcy system (i.e., bankruptcy trustees and attorneys) to use bankruptcy relief to enforce social or moral expectations.⁶

Until recently, means-testing proposals have had at best lukewarm legislative support.⁷ Because of the dramatic increase in bankruptcy filings in the last ten to fifteen years, certain industry critics have convinced Congress that the goal of decreasing the number of consumer filings now justifies imposing a means test. Critics also suggest that reforms are needed because debtors now view the discharge as a guaranteed federal entitlement and view bankruptcy as a value-free nonstigmatizing process.

The Essay argues that the current push to means-test bankruptcy relief can be explained and justified by examining the recent shift in the public's

³See *infra* notes 130-35.

⁴This Essay assumes that at least some aspects of consumer bankruptcy relief will be means-tested or that, at a minimum, means-testing proposals will continue to be presented to Congress. This Article will not debate the virtues or vices of means-testing as others already have exhaustively tackled this divisive and controversial topic. For views opposing means-testing, see Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1 (1998); Gary Klein, *Means Tested Bankruptcy: What Would It Mean?*, 28 U. MEM. L. REV. 711 (1998); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079 (1998).

⁵Editorial, *Reform Choice for Mr. Bush*, WASH. POST, Feb. 19, 2001, at A32 (noting that the challenge "is to limit irresponsible abuse of bankruptcy without being too harsh toward those who deserve second chances.").

⁶David Frum, *Bankruptcy Reform Is a Moral Issue*, WALL. ST. J., Feb. 11, 2000, at A14 ("What we're really arguing about when we argue about bankruptcy law is how far individuals should be expected to go on carrying responsibilities that have grown onerous.").

⁷However, virtually all the arguments (and their accompanying rhetoric) heard during recent legislative debates over proposed bankruptcy reforms were made and used twenty years ago when Congress replaced the Bankruptcy Act with the Bankruptcy Code, and over a decade ago when the Code was revised to make it harder for consumers to discharge debts in Chapter 7. Then (as now) commentators argued that existing bankruptcy policies encouraged debtors to behave irresponsibly and that bankruptcy laws should be amended to encourage debt repayment and discourage discharging debts. See, e.g., Charles G. Hallinan, *The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretative Theory*, 21 U. RICH. L. REV. 49, 51 (1986) (observing that the fresh start policy lacks a "coherently articulated content"); Philip Shuchman, *An Attempt at a 'Philosophy of Bankruptcy'*, 21 UCLA L. REV. 403 (1973) (discussing justifications for debt repayment and arguing that existing bankruptcy theories were no longer valid).

attitudes toward entitlements in general, and the evolving public view of the recipients of public benefits. Part I of this Essay examines the role means-testing has played in federal public assistance (i.e., welfare) programs. Over time, Congress has concluded that means-tested programs are appropriately used to force benefit recipients to conform their future social and economic behavior to comply with society's view of the model, economically self-sufficient citizen. This Part concludes by suggesting that the public's attitude toward the deserving poor changed dramatically once it appeared that (1) the recipients of public benefits treated those benefits as entitlements, rather than unearned gratuities, (2) the system that provided those benefits encouraged the recipients to engage in deviant, socially unacceptable behavior and (3) receiving welfare benefits was no longer viewed as a stigmatizing event. Notwithstanding sharply conflicting empirical data,⁸ critics also argue that Congress needs to substantially curtail access to the discharge because too many people with either present or future financial means are choosing to discharge their debts rather than attempt to repay them.

Part II then examines the historical justifications given for allowing people to discharge their debts in bankruptcy. In discussing the purposes of the bankruptcy discharge, this Part shows how the traditionally sympathetic view of the "honest debtor" changed once the public became convinced that individuals used the bankruptcy system to subsidize their reckless spending habits. Moreover, public support for the ability to have a second chance in bankruptcy appears to have eroded once the public was lead to believe that the bankruptcy system discouraged debtors from repaying debts even though they had the means to do so. Finally, public support eroded once the public became convinced that filing for bankruptcy, once viewed with shame, no longer stigmatizes debtors.

Part III concludes by suggesting that, while bankruptcy relief should not be viewed as an entitlement, it nonetheless should be viewed as a component of the federal public assistance system. Restricting bankruptcy relief to those who can document a financial need (i.e., means testing) is consistent with the types of restrictions Congress historically has imposed on the recipients of nonentitlement public assistance benefits. Similarly, using a means test to stigmatize debtors and force them to modify their behavior is consistent with the role stigma played during welfare reform debates. This Part argues, however, that a means-tested bankruptcy system must do more than just shame debtors or otherwise make it harder for them to discharge debts. To help people avoid the need to file for bankruptcy, the bankruptcy system must also

⁸U.S. GEN. ACCT. OFF., *Personal Bankruptcy: Analysis of Four Reports on Chapter 7 Debtors' Ability to Pay*, REP. NO. 99-103 (1999) (noting wide disparity between the results reached in empirical studies).

find ways to help debtors both change their overall views toward credit and spending and resolve any underlying causes for the economic problems.

I. THE FEDERAL PUBLIC ASSISTANCE SYSTEM

A. IN GENERAL

This country historically has been willing to provide public economic assistance to people deemed to be the "deserving" poor.⁹ Indeed, few people dispute that the government has a duty to provide minimal economic relief to the truly deserving poor. To fulfill this duty, the federal government created public financial assistance (i.e., "welfare") programs. The welfare state generally consists of programs that provide social insurance benefits (which are viewed as entitlements) and programs that provide income-indexed, or "means tested" grants of cash or goods.¹⁰

A program is an entitlement program if the enabling statute governing the program mandates that the economic assistance be provided to all who establish that they have certain predefined attributes.¹¹ Legislative or funding bodies must then appropriate funds in amounts sufficient to provide benefits for all recipients who possess the statutorily-defined attributes regardless of their actual economic need for the benefits. Perhaps the most familiar social insurance entitlement benefits are (1) those benefits provided to workers who pay into the social security system and, at a certain age, exercise their right to receive money from the system and (2) the medical benefits provided by the Medicare program.¹² Based in large part on the enormous public support for these programs, all attempts to means test social security and Medicare benefits have failed.¹³

Means-tested public assistance benefits are provided to people whose financial resources fall below a specified level. The most prominent means-

⁹See generally CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 78 (1992), where the author discusses legislators' willingness to generously support the "deserving poor" (children, the elderly and disabled) but not the undeserving poor (single mothers and "marginally employable men whose unemployment benefits had run out"); Lawrence Bobo & Ryan A. Smith, *Anti-poverty Policy, Affirmative Action, and Racial Attitudes*, in *CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE* 365, 372 (Sheldon H. Danziger et. al. eds., 1994) (noting public's support for government assistance to the poor, but insistence "that the role be limited and not replace an individual's obligation to pursue self-reliance").

¹⁰A third type of assistance, "socialized" enterprises, consists of industries the government has nationalized to make a product universally available to all. A classic example is public education.

¹¹See DAVID KELLEY, *A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* 17 (1998).

¹²See A. HAEWORTH ROBERTSON, *SOCIAL SECURITY: WHAT EVERY TAXPAYER SHOULD KNOW* 22 (1992) (discussing components of social security program).

¹³See Peter J. Ferrara, *A Bad Deal Could Get Worse*, *PLAIN DEALER*, May 11, 1999, at 11B ("Means testing Social Security and Medicare also begins the process of turning them into welfare programs. The more these programs are means tested, the less the public will support them.").

tested benefits are those provided by Temporary Assistance to Needy Families (which replaced the program formerly known as Aid to Families with Dependent Children), food stamps, supplemental security income, subsidized public housing, and Medicaid.¹⁴ Eligibility for benefits is based on economic need and is not linked to the recipient's prior economic behavior. Benefits provided typically are lower in amount than those provided through social insurance programs and the benefits vary widely from state to state.¹⁵ Because recipients have not earned or otherwise paid for public assistance benefits, benefit recipients are sometimes viewed as unworthy dependents and the benefits they receive often are characterized as unearned gratuitous benefits. This is in sharp contrast to the public's characterization of the benefits provided by social insurance or other entitlement programs.¹⁶

The public's view toward programs that provide income-indexed aid to poor families has evolved over time. The next section discusses the public's increasing dissatisfaction with the lifestyle choices it perceived were being made by never-married welfare beneficiaries and the public's insistence that federal public assistance programs stress the importance of work and reintroduce stigma to the public assistance system. Finally, this section shows how the philosophy of the federal public assistance system is now a reciprocal one that insists that, in exchange for accepting economic benefits, recipients of means-tested public assistance accept certain lifestyle burdens.

B. AID TO NEEDY FAMILIES

1. Overview

The Aid to Families with Dependent Children (AFDC) program was enacted as a part of the Social Security Act of 1935.¹⁷ The program was aimed at providing means-tested cash aid to help increase the income of poor widows with young children.¹⁸ Contemporary mores held that the proper role of women was to marry, produce children, then remain in the home to

¹⁴See Matthew Diller, *Entitlement Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 367 (1996); Kelley, *supra* note 11, at 26.

¹⁵See Janice Peterson, "Ending Welfare As We Know It": *The Symbolic Importance of Welfare Policy in America*, 31 J. ECON. ISSUES, 425, 429 (1997).

¹⁶See Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and the Undermining of Democratic Citizenship*, 7 HASTINGS WOMEN'S L.J. 213, 214 (1996).

¹⁷STAFF OF H.R. COMM. ON WAYS AND MEANS, 102D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS: 1992 GREENBOOK 603 (Comm. Print 1992) [hereinafter 1992 Greenbook].

¹⁸See Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 257, 261 (1996); Gary Burtless, *Public Spending on the Poor: Historical Trends and Economic Limits*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 51, 55 (Sheldon H. Danziger et al. eds., 1994). The program provided cash payments for needy children deprived of parental support or care because a parent was either absent from the home continuously, incapacitated, deceased, or unemployed, and for other family members in the household of such needy child. See 1992 GREENBOOK, *supra* note 17, at 603. Eligibility for AFDC ended on a child's eighteenth birthday, or at the state's

rear these children. Given this, widowed mothers were viewed as victims who deserved financial assistance because they became impoverished through no fault of their own.¹⁹ At that time, no one seriously suggested that welfare laws be used to encourage widowed mothers to leave the home and seek paid work in the labor market. In other words, policymakers did not insist that welfare beneficiaries accept the burden of marketplace work in exchange for accepting the economic benefits the welfare system provided.

Though policymakers viewed widowed mothers²⁰ sympathetically, the benefits awarded by the program initially were not regarded as entitlements.²¹ AFDC ultimately was viewed as an entitlement program that provided benefits for all recipients who applied and established their eligibility through a means test.²² Once it became an entitlement program, AFDC benefits were backed by a Congressional commitment to provide unlimited, open-ended funding, and required the states to match federal dollars with state dollars.²³

The AFDC program received public attention (and ultimately public derision) when the AFDC caseload swelled in the 1960s and the characteristics of both welfare and nonwelfare mothers changed. Specifically, the program became increasingly controversial as more nonwhite, nonwidowed women became welfare recipients.²⁴ Moreover, as women of all socioeconomic clas-

option, on the child's nineteenth birthday, if the child was a full-time student and likely to complete the educational program before reaching age 19. See *id.*

¹⁹See SAR A. LEVITAN, ET AL., *WORKING BUT POOR AMERICA'S CONTRADICTION* 116 (1993).

²⁰Originally available only to single parent families, the AFDC program eventually was revised to extend benefits to needy two-parent families. See Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in *CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE* 168, 179 (Sheldon H. Danziger et al. eds., 1994). Despite this expansion, policymakers still viewed benefits provided by the program as temporary relief for two-parent families who faced a period of economic crisis caused by unexpected unemployment. See SHELDON DANZIGER & PETER GOTTSCHALK, *AMERICA UNEQUAL* 16 (1995) ("Poverty was seen as primarily an effect of unemployment: if the unemployed could get jobs in the expanding postwar economy, they would not be poor.").

²¹See Berrick, *supra* note 18, at 261. Originally, policymakers viewed AFDC payments as gratuities that should be dispensed in accordance with the administrative whim of the government. See William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 2 (1985).

²²See Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 116 (1998).

²³See Mary R. Mannix et al., *Implementation of the Temporary Assistance for Needy Families Block Grant: An Overview*, 30 CLEARINGHOUSE REV. 868, 870 (1997). AFDC gave the states discretion to define the type of recipients who should be treated as "needy," set their own benefit levels, establish (within federal limitations) income and resource limits, and administer or supervise the administration of the program. See 1992 GREENBOOK, *supra* note 17, at 603. The states were required, however, to apply their standards of need uniformly to all families in similar circumstances. See *id.*

²⁴Between 1940 and the mid-1990s, the percentage of white, widowed AFDC residents dropped from approximately eighty-five percent to less than forty percent. Moreover, by the mid-1990s, half of the AFDC recipients were mothers who had never been married whereas less than two percent of the recipients were widows. Dan Bloom, *AFTER AFDC WELFARE-TO-WORK CHOICES AND CHALLENGES FOR STATES* 7 (1997), available at <www.mdrc.aapswiweb.com/Reports/AfterAFDC/After%20AFDC.htm>

ses entered the labor market, many openly questioned why the government should maintain an entitlement program that paid able-bodied women to remain home and rear their children rather than earn wages in the labor market to support those children.²⁵ As a result, the government no longer actively discouraged states from requiring mothers to perform work in return for receiving AFDC benefits, even though this meant that the benefit recipient's sole job would no longer be bearing then rearing children.²⁶ In other words, starting in the late 1960s governmental policy shifted away from viewing the welfare system as one that provided no-strings attached entitlements toward a system that tied the "benefit" of public assistance to the "burden" of work.

2. Replacing Entitlement Policies with Work Policies

While widowed mothers originally were not expected to work in the labor market, a growing concern over never-married mothers' work histories (or lack thereof) and their perceived attitudes toward work lead Congress to enact work fare programs. To encourage welfare recipients to work, Congress initiated the Work Incentive Program (WIN) in 1968, which initially stressed institutional training to improve recipients' occupational skills and to provide job placement assistance for job-ready recipients.²⁷ The underlying philosophy behind these programs was that AFDC benefits recipients should ultimately become economically self-sufficient by taking advantage of available work, education and training opportunities provided.

When it appeared that some AFDC recipients received benefits for extended periods of time and seemed unwilling to become economically self-sufficient, Congress passed the Family Support Act (FSA) of 1988, which replaced WIN and other work programs with a mandatory new work-welfare program called Job Opportunities and Basic Skills (JOBS).²⁸ JOBS placed

(last visited June 1, 2001); see also Berrick, *supra* note 18, at 262-64 (stating that the percentage of widows receiving AFDC declined from 7% in 1961 to 1.6% in 1991, the percentage of divorced, never married mothers rose from 37% in 1950 to 88% in 1990, and the percentage of Caucasian women receiving AFDC declined from over 80% in 1939 to 40% in 1990).

²⁵See Blank, *supra* note 20, at 184; LEVITAN ET AL., *supra* note 19, at 116-17; see generally JENCKS, *supra* note 9, at 226-32 (noting that both liberal and conservative legislators agreed that single mothers should be encouraged (if not forced) to work outside the home because the majority of married mothers had wage-paying jobs).

²⁶See LEVITAN ET AL., *supra* note 19, at 117.

²⁷See Mark Greenberg, *Federal Welfare Reform in Light of the California Experience: Early Lessons for State Implementation of the JOBS Program*, 17 N.Y.U. REV. L. & SOC. CHANGE 419, 426 (1989-1990); Blank, *supra* note 20, at 181. In 1971, the Talmadge Amendments redirected WIN's focus to the immediate employment of AFDC recipients whenever possible. See Greenberg, *id* at 426-27. By the 1980s federal funding of social welfare programs vastly decreased and WIN was reformed to give states greater flexibility to design work programs. See *id* at 427-28; see also DANZIGER & GOTTSCHALK, *supra* note 20, at 25-28 (chronicling retrenchment during the Reagan era).

²⁸See 1992 Greenbook, *supra* note 17, at 610. See also DANZIGER & GOTTSCHALK, *supra* note 20, at 32 (discussing bipartisan efforts to create JOBS program). JOBS was designed to ensure that welfare mothers obtained education, training, and employment to help them avoid long-term welfare dependence.

much more emphasis on training and education, helped recipients with both job placement and ancillary work challenges (like obtaining decent and affordable child care), required employers to give JOBS workers certain employee benefits, and insisted that employers maintain specified health and safety standards.²⁹ Though JOBS somewhat improved welfare recipients' employment opportunities, it never received the resources necessary to transform the welfare system into one that transitioned recipients from stay-at-home mothers to mothers who earned wages in the market.³⁰ Moreover, because welfare recipients seemed "content" to receive benefits but do nothing in return for the benefits, stigma joined the demand for work as a key factor in the welfare reform debate.

3. *The Role of Stigma*

As mothers who were divorced, separated, or never married increasingly became the primary recipients of AFDC benefits, the public's attitude toward the system changed dramatically. Critics argued that the welfare system created intergenerational dependency and did not sufficiently focus on the values of work, marriage, and parental responsibility.³¹ Since early AFDC recipients were deemed to be deserving because of their status (as

This program capped federal matching funds for JOBS program costs to give states broader discretion to determine the scope and content of their program and services. See generally 1992 GREENBOOK, *supra* note 17, at 610, 611-15 (outlining the state's role in implementing JOBS).

²⁹See Blank, *supra* note 20, at 187; 1992 GREENBOOK, *supra* note 17, at 615. JOBS also ensured certain work standards for welfare recipients in the workplace. See Sharon Dietrich et al., *Welfare Reforming the Workplace: Protecting the Employment Rights of Welfare Recipients, Immigrants, and Displaced Workers*, 30 CLEARINGHOUSE REV. 903, 912 nn.69, 72 & 73 (1997) [hereinafter *Protecting Employment Rights*].

³⁰See RICHARD P. NATHAN & THOMAS L. GAIS, IMPLEMENTING THE PERSONAL RESPONSIBILITY ACT OF 1996: A FIRST LOOK 3 (1999) (noting failure of JOBS to "transform the operation and administrative culture of AFDC from a cash assistance program that stressed compliance with complex . . . eligibility criteria to one that emphasizes reducing dependency and getting people jobs.").

³¹See Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 351 (1996) ("There also seems to be a growing belief that when people resort to AFDC it is not a temporary status, but instead leads to generations of welfare dependency, crime, and low academic achievement."); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 66 (1994) (discussing view held by conservatives that the AFDC program "subsidize[s] immorality by providing benefits to illegitimate children . . . treats unmarried parents better than married ones . . . [and] creates a form of dependency that is . . . passed from one generation to another."); CHARLES NOBLE, WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE 127 (1997) (observing that social conservatives felt that the availability of AFDC encouraged single women to have children and caused families to break up); see generally MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 110-12 (1994); MELNICK, *supra*, at 117 (discussing results of experimental programs that indicated that income guarantees significantly increased likelihood of marital breakup, especially among racial minorities). But see Rebecca M. Blank, et. al, *A Primer on Welfare Reform*, in LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM 27, 30-34 (R. Kent Weaver and William T. Dickens eds., 1995) [hereinafter *Primer*] (citing evidence that refutes the claim that welfare payments caused the increase in teenage pregnancy and out-of-wedlock births).

widowed mothers), the system initially was not designed to stigmatize them. This soon changed.

To discourage women from applying for AFDC benefits and to preserve the purported goals of America's market-based economy, policymakers argued that the stigmatization process should deter all but the absolutely desperate from applying for benefits.³² Indeed, because AFDC recipients received a gratuitous, unearned benefit, the government presumed that it could stigmatize benefit recipients by demanding that benefit recipients alter their lifestyles. Stigma was deemed to be necessary to combat the view, which some argue developed in the 1960s, that AFDC was a value-free entitlement program.³³

Those who administered AFDC benefits helped perpetuate the stigmatization of poor mothers. For example, social workers involved with the welfare system often exhibited a commitment to an "ideology of condescending moralism" that viewed poverty as a symptom of personal failure and assumed that the poor (like children and lunatics) were incapable of making rational and responsible choices.³⁴ The AFDC program mandated that, as a condition of receiving benefits, recipients submit to governmental supervision of their housekeeping, child rearing, and sexual practices.³⁵ Thus, in addition to reviewing recipients' income to determine whether they satisfied the income-indexed means tests, the government reviewed how benefit recipients intended to spend their income and, to a limited extent, how they managed intimate aspects of their lives including their choices about procreation or cohabitation.³⁶ Governmental supervision and oversight of the behavior of

³²See Diller, *supra* note 14, at 374.

³³Of course, stigma is a subjective perception. It is quite possible that the recipients of public assistance never felt "stigmatized" even though nonrecipients may have viewed the recipients with disdain. See generally Joel F. Handler & Ellen J. Hollingsworth, *How Obnoxious Is the "Obnoxious Means Test"? The Views of AFDC Recipients*, 1970 WIS. L. REV. 114, 128-30 (1970).

³⁴See Simon, *supra* note 21, at 2.

³⁵See JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 89-90 (1995) (discussing reforms that sought to change social behavior and reformers' beliefs that poverty is primarily behavioral, not economic or environmental).

³⁶See Simon, *supra* note 21, at 2; see also Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L. J. 719, 723 (1992); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L. J. 1198, 1198 (1983) (discussing the imposition of sexual morality and "man-in-the-house" rules on AFDC recipients).

Because the AFDC program "deemed" income (i.e., attributed the income of a nonrecipient to the recipient), even being associated with, or providing economic assistance to, a recipient of public assistance gave the government the right to intrude into the lives of nonrecipients who had a relationship with the benefit recipient. See Diller, *supra* note 14, at 375. Under the old AFDC program, the income of stepparents, siblings, and grandparents was deemed to be available for the welfare recipient. See 42 U.S.C. § 602(a)(31), (a)(38), (a)(39) (1994) (repealed 1996). In essence, in return for providing benefits, the government essentially demanded that benefit recipients allow the welfare system to scrutinize their economic and noneconomic lifestyle choices.

AFDC recipients appeared to be designed to force welfare mothers to act like, and ultimately to be transformed into, "the middle class ideal of a working class person—industrious, economizing, sexually ascetic, politically complacent, and socially unambitious."³⁷ The stigmatization process intensified in the 1990s when both conservative and liberal politicians were unable to explain the concurrence of poverty and work in a strong U.S. economy.

4. Ending Welfare "As We Know It"

Policymakers clamored for an end to the entitlement status of AFDC benefits based on their view that calling these benefits entitlements prevented the government from making moral distinctions or judgments about benefit recipients' need for public assistance and from attaching burdens to the benefit award.³⁸ Because work was plentiful, policymakers concluded that AFDC recipients were not economic victims, but were instead individual failures who were allowed to exhibit dysfunctional behavior and maintain deviant lifestyles.³⁹ Moreover, when the numbers of recipients of public assistance swelled, critics began to argue that those programs imposed an undue financial burden on taxpayers.⁴⁰ In addition, critics argued that having a government entitlement system that guaranteed unearned income undermined the fundamental principles of a market-based economy.⁴¹ Liberals and conservatives ultimately agreed that only comprehensive reforms could eradicate welfare's entitlement status and give the states authority to exercise maximum flexibility to design their own welfare programs.⁴² These efforts re-

³⁷See Simon, *supra* note 21, at 2.

³⁸See Gertrude Himmelfarb, *Comment*, in *WORK AND WELFARE* 83 (Amy Gutmann ed., 1998) (suggesting the recent welfare policy eschewed moral distinctions and judgments and provided welfare as a matter of right, with no sanctions and no stigma attached to it).

³⁹See William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 105 (1998); see also LEVITAN, *supra* note 19, at 3 ("The concurrence of work and poverty is contrary to the American ethos that a willingness to work leads to material advancement, and it negates the prevalent view that the cause of poverty among adults capable of work is deviant behavior, particularly a lack of commitment to work."); Aaronson, *supra* note 16, at 231.

⁴⁰See Erik G. Luna, *Welfare, Fraud and the Fourth Amendment*, 24 PEPP. L. REV. 1235, 1283 (1997) (describing public assistance as "massive industry" and "unmitigated fleecing of taxpayer largesse").

⁴¹See William S. Kern, *Current Welfare Reform: A Return to the Principles of 1834*, J. ECON. ISSUES 427, 428 (1998) (noting that classical economists demonstrated the "incompatibility of poor laws with the self-regulating market order and principles of political economy"); DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 6 (1988) (noting conflict between public welfare assistance and societal values of autonomy, responsibility, and work). Cf. Martha Albertson Fineman, *The Nature of Dependencies And Welfare "Reform"*, 36 SANTA CLARA L. REV. 287, 291 (1996) (characterizing the American society as one that "mythologizes concepts such as 'self-sufficiency,' 'independence,' and 'autonomy,' and vilifies the concrete indications all around us that these ideals are unrealizable and unrealistic").

⁴²See Mary Jo Bane & Richard Weissbourd, *Welfare Reform and Children*, 9 STAN. L. & POL'Y REV. 131, 131 (1998); BILL CLINTON & AL GORE, *PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA* (1992); *We Offer Our People a New Choice Based on Old Values*, WASH. POST, Jul. 17, 1992, at A26 (reprint of Bill Clinton's Democratic nomination acceptance speech); David Whitman, *War on Wel-*

sulted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Act").⁴³

While the Act recognized the need to provide financial assistance to needy families, its stated purpose was to enforce traditional majoritarian norms such as the Protestant work ethic, heterosexual marriage and a "traditional" family structure.⁴⁴ The Act proceeded from the view that persistent unabated poverty results from a person's personal and moral shortcomings, that welfare had become a way of life for some recipients, and that welfare laws should be used to modify the behavior of both welfare recipients and the agencies that administered the benefits.⁴⁵ Moreover, the Act conclusively establishes Congressional authority to use public assistance programs to enforce social expectations.⁴⁶

fare Dependency, U.S. NEWS & WORLD REP., Apr. 20, 1992, at 34; *GOP Contract with America*, 52 CONG. Q. WKLY. REP. 3216, 3217 (1994); Barbara Vobejda, *GOP Welfare Plan Would Shrink the System*, WASH. POST, Dec. 7, 1994, at A23 (discussing GOP goal of ending welfare as an entitlement system).

⁴³Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 7, 8, 21 and 42 U.S.C. (Supp. II 1996)).

⁴⁴See 42 U.S.C. § 601(a) (Supp. II 1996). Congress included the following findings in the Act: marriage is the foundation of a successful society; marriage is an essential institution of a successful society which promotes the interests of children; and, promoting responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children. See *id.* § 601 Explanatory notes (1)-(3). The Act specifically seeks to advance certain "family values." See 42 U.S.C. § 607(h) (Supp. II 1996) (imposing additional requirements on noncustodial, nonsupporting minor parents). Likewise, it allows states to reduce or eliminate assistance for noncooperation in establishing paternity or obtaining child-support. See *id.* § 608(a)(2).

See generally HEALTH, EDUC. & HUM. SERVICES DIVISION, U.S. GEN. ACCT. OFF., REP. NO. 98-109, *States are Restructuring Programs to Reduce Welfare Dependence*, 14 (1998) [hereinafter GAO Report] (discussing objectives of TANF). Cf. *Welfare Reform Proposals, Including H.R. 4605, The Work and Responsibility Act of 1994: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 103rd Cong., 2d Sess. 1156-57 (1994) (statement of Deborah Lewis, Legislative Counsel, American Civil Liberties Union) (criticizing proposed paternity establishment requirement).

⁴⁵See GAO Report, *supra* note 44, at 17. See also JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 7 (1997) (stating that one of "family values" themes of 1996 welfare reforms was to require states to terminate welfare benefits if mother refuses to cooperate in establishing paternity and obtaining child support). Cf. LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 47 (1986) (arguing that prior welfare reforms were doomed to fail because recipients were never told what was expected of them in terms of their personal conduct).

⁴⁶See Handler & Hasenfeld, *supra* note 45, at 6-7 (discussing the four major themes of the new legislation, including the provisions dealing with family values, work ethic, etc.); see also GWENDOLYN MINK, *WELFARE'S END* 69-77 (1998) (characterizing 1996 welfare reform as an attempt to force men to act like responsible providers for the families). Few disputed that there was a close correlation between the increase in births to unmarried women and the increase in the number of children receiving public assistance. As these unmarried women were younger and more likely to be long-term welfare recipients, Congress sought to halt those increases by encouraging states to prevent and reduce the incidence of out-of-wedlock pregnancies by getting "tough" with unwed teenage mothers. See 42 U.S.C. § 601(a)(3) (Supp. II 1996).

Congress justified its goal of promoting marriage and two-parent families by relying on data that imply that poor single parents are bad parents. See 42 U.S.C. 601(a)(4) (Supp. II 1996). Congressional findings

The congressional findings in the Act revealed a national "crisis" which was addressed in the welfare program that repealed AFDC, Temporary Aid to Needy Families (TANF).⁴⁷ TANF consolidates federal funding for prior welfare programs and administers these funds as a block grant to each state.⁴⁸ TANF gives each state broad discretion in constructing its own assistance program and eliminates the AFDC guarantee of aid to eligible individuals.⁴⁹ Because TANF is not an entitlement program, states can now decide which categories of needy families to assist, how to assist them, and how best to treat a potential recipient's current assets or income.⁵⁰ To modify the bureaucratic behavior of states when they administer the grants, however, Congress retained the requirement that benefits be means-tested but also attached additional conditions to the TANF grants.⁵¹

TANF imposes one important restriction on the states' ability to assist needy families: mandatory work requirements.⁵² Recipients, even those with small children, generally are expected to work in the labor market while they

in the Act state that almost fifty percent of single mothers receive public assistance compared to only twenty percent of divorced mothers; the children of unmarried mothers are four times more likely to be expelled or suspended from school than the children of married mothers; and, areas with larger percentages of teenage youth and single-parent households have higher rates of violent crime. See *id.* § 601(b) Explanatory notes (9).

⁴⁷See *id.* § 601(b) Explanatory notes (10). TANF also replaced Emergency Assistance for Needy Families and JOBS. See Personal Responsibility & Work Opportunity Reconciliation Act § 103(a)(1), 110 Stat. at 2112.

⁴⁸See Joel F. Handler, *Welfare to Work: Reform or Rhetoric?*, 50 ADMIN. L. REV. 635, 638 (1998). TANF froze federal funding to the states through fiscal year 2002. 42 U.S.C. § 603(a)(1)(A) (Supp. II 1996).

⁴⁹See 42 U.S.C. § 601(a) and § 601(b) (Supp. V 1999). See also Himmelfarb, *supra* note 38, at 83, where the author observes that

In devolving welfare to the states, the national government, while continuing to fund welfare, no longer does so as a legal entitlement. And the states, by attaching conditions to welfare – work provisions or time limits, or denial of allowances for additional children born out of wedlock, or the requirement that teenage single mothers live with their parents – are sending important moral messages to the poor and to society at large.

⁵⁰With limited exceptions, each state is free to allocate its block grant in any manner reasonably calculated to achieve the goals of TANF (i.e., assist needy families) promote job preparation, work, and marriage, prevent and reduce out-of-wedlock pregnancies, and encourage the formation and maintenance of two-parent families. See 42 U.S.C. § 604(a)(1) (Supp. II 1996). TANF thus gives the state the option of moving away from cash benefits towards other forms of support. See Mannix et al., *supra* note 23, at 874.

⁵¹For example, Congress conditioned federal funding on the state's submission of a plan that outlines its family assistance program. See 42 U.S.C. § 602(a) (Supp. II 1996). In addition, to receive a full grant, each state must also maintain at least seventy-five percent of its historic level of state welfare expenditure and generally must continue to spend state funds equal to at least eighty percent of its AFDC-related spending. See *id.* § 609(a)(7); see also NATHAN & GAIS, *supra* note 30, at 1 (observing that welfare reform sought to modify the behavior of both recipients and bureaucrats).

⁵²See *id.* at 23. States are required to move an increasing percentage of welfare recipients into the workforce, starting with twenty-five percent of the adults in single parent families in 1997 and increasing to fifty percent by 2002. See 42 U.S.C. § 607(a).

are receiving TANF.⁵³ Politicians demanded that benefit recipients work to combat the prevailing view that the AFDC program denigrated the importance of work in the labor market.⁵⁴ States also must require a recipient to work within twenty-four months of receiving aid.⁵⁵ In fact, in many states welfare offices effectively function as job placement centers since many enroll mothers in welfare-to-work programs when the mothers apply for welfare benefits⁵⁶ and all require potential benefit recipients to sign "Personal Responsibility Agreements" that detail the level of their participation in job-search and related work activities.⁵⁷

TANF assumes that tough work requirements will reduce welfare costs, replace the entitlement status and permissiveness of the AFDC era, and promote the values of responsibility and self-sufficiency.⁵⁸ To emphasize that TANF benefits are *not* guaranteed welfare entitlements, TANF provides that any recipient who refuses to comply with its requirements (including engaging in work) faces a termination or reduction of benefits even if the

⁵³TANF restricts the ability of the states to exempt single parents with infants or toddlers from working in the labor market. While the JOBS program permitted states to exempt single parents of children under the age of three from work-participation, see 42 U.S.C. § 602(a)(19)(C)(iii) (repealed 1996), TANF allows them to exempt single parents of children under the age of one and for no longer than twelve months. See 42 U.S.C. § 607(b)(5) (Supp. II 1996).

⁵⁴For example, data indicated that some welfare users chose to be long-term system users because the system had weak incentives for them to work. See COMM. ON THE BUDGET, WELFARE AND MEDICAID REFORM ACT OF 1996: A HELPING HAND, NOT A HANDOUT, H.R. Rep. No. 104-651, at 4 (1996) (citing a Cato Institute Study which found that welfare benefits were more generous than work and thereby encouraged long term dependency); see also Robert A. Solomon, *Ending Welfare Mythology As We Know It*, 15 YALE J. ON REG. 177, 189-90 (1998) (book review) (citing findings which support the notion that some mothers choose welfare over work rationally.); JENCKS, *supra* note 9, at 223-25 (positing that welfare mothers refuse to work in low-wage jobs if they are left as poor as if they remained in the home); MEAD, *supra* note 45, at 109-11 (suggesting that poor should be forced to take any available job, even menial ones).

⁵⁵See 42 U.S.C. § 602(a)(1)(A)(ii) (Supp. II 1996). Unless it opts out, a state must also require recipients to undertake community service within two months of receiving assistance. *Id.* § 602(a)(1)(B)(iv).

⁵⁶See GAO Report, *supra* note 44, at 26.

⁵⁷See NATHAN & GAIS, *supra* note 30, at 4, 12. TANF prohibits states from treating education and training as work, and limits the weeks of job search and vocational education that count as work-participation. See *id.* § 607(c)(2). The Act supporters viewed education and training simply as a means of shirking work. According to Senator Gramm: "Work does not mean sitting in a classroom. Work means work." See Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 25 (1998). TANF also precludes secondary, post-secondary, and other educational placements of adults from work activity. See 42 U.S.C. § 607(c)(1)(A) (Supp. II 1996). The Act also mandates the minimum number of hours that a recipient must work and requires states to ensure that steadily increasing percentages of welfare families are participating in work activities. States risk fiscal penalties if they fail to meet their work-participation rates. See *id.* §§ 607(s)(1)(A) and 609(a)(3).

⁵⁸See Handler, *supra* note 48, at 642; see, e.g., MEAD, *supra* note 45, at 67 ("The moral lessons most people learn, that they must work and take care of their families if they are to prosper, were blocked for much of the underclass by federal policy. Society normally exacts work or other contributions from its members in return for support.").

recipient otherwise satisfies the means testing requirement.⁵⁹ In short, the principle of reciprocity—i.e., recipients must provide useful services in exchange for benefits—became the philosophical underpinning for the new *workfare* (i.e., old *welfare*) program.⁶⁰ Moreover, as the next section suggests, this principle is now changing the way *all* public assistance programs are viewed.

C. RIGHTS AND ENTITLEMENT POLITICS

The recent assault on entitlement programs indicates that policymakers will no longer allow any federal assistance program to be viewed as one that provides an entitlement unless the benefit recipient has earned the right to demand the benefit payments. Indeed, a marked discontent with “rights” and “entitlements” has permeated the political discourse for the last decade and politicians of both parties have called for a return to personal responsibility.⁶¹ Critics suggest that entitlement programs transform private, unregulated requests for funds into a guaranteed property interest and gives benefit recipients the legal right to demand that society protect that property right against any challenges to, or interference with, their right to the property.⁶²

Critics contend that modern welfare rights have been construed to be entitlements to certain goods or services, not merely the right to obtain those services using ones’ labor in the market.⁶³ This view of a “right” makes an entitlement different from the classical conception of rights, which conceived of rights as the rules that govern the process of producing goods and services that people desire.⁶⁴ Thus, rather than giving nonworking recipients of entitlements the right to work to earn goods or services, critics suggest that welfare rights require that the product or outcome of the efforts of working, productive members of society be redistributed to ensure that everyone (workers and nonworkers) enjoys certain goods.⁶⁵ Some criticize this view of the entitlement system because it gives benefit recipients the right to demand that others provide goods or services to them simply because they cannot (or will not) work to earn the goods or services themselves.⁶⁶

⁵⁹See 42 U.S.C. § 607(e) (Supp. II 1996).

⁶⁰See Diller, *supra* note 57, at 27.

⁶¹See Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 999 (1994).

⁶²See Patricia E. Diller, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1076 (1997). See also McClain, *supra* note 61, at 1039 (characterizing new communitarians’ view that legal rights “provide protection against legal coercion, preserving a zone of noninterference or immunity”). For an in-depth discussion of the structure and substance of legal entitlements, see Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822 (1993).

⁶³KELLEY, *supra* note 11, at 16.

⁶⁴*Id.* at 22.

⁶⁵See *id.*

⁶⁶See *id.*

In recent years, politicians and the public alike have harshly judged able-bodied people who depend on others for economic support, yet seem to feel no loss of esteem or remorse (i.e., stigma) for being economically dependent. Not surprisingly, there is even a stigma attached to the term entitlement. The term is now used pejoratively to reflect the public's disdain with the concept of claiming a right to an unearned gratuitous payment. Policymakers now reject the notion of calling an unearned benefit an entitlement because doing so suggests that the government does not have the right to place restrictions on those benefits and cannot use the system to control the recipients' social behavior.⁶⁷

Policymakers now advocate social welfare policies that combine compassion and a sense of obligation to those in need with an insistence that the individual (and the individual's family or community) rather than the government assume the initial responsibility of providing for the individual's economic needs.⁶⁸ Indeed, a philosophical perspective (commonly referred to as the "Third Way") has been advanced by politically moderate members of both political parties during the last few years. The Third Way generally advocates a partnership of the government and the corporate sector with "civil society."⁶⁹ Advocates of this principle believe that the dynamism of the free market should be combined with a commitment to social justice.⁷⁰ The hallmark of this combination is an end to entitlement politics, the eradication of the notion that people can get something for nothing or that rights can exist without corresponding responsibilities, and a renewed emphasis on stigma.⁷¹

Critics of entitlement politics attribute the loss of stigma to an excessive focus on rights, which takes place to the detriment of emphasizing personal accountability. The country's long relationship with entitlement politics has purportedly lead to an absence of a sense of personal and social responsibility, which critics argue explains a wide range of self-destructive and socially costly behaviors.⁷² This explosion of rights is alleged to be accompanied by a corresponding plunge in personal responsibility, which is then manifest in the

⁶⁷See Diller, *supra* note 14, at 458.

⁶⁸See McClain, *supra* 61, at 1023-24 ("it is likely that behind the charges of the rights explosion and flight from responsibility lie philosophical and political divisions over the appropriate role of government in alleviating human suffering and providing security against contingency, as well as disagreements over whether such government assumption of responsibility leads to or licenses individual irresponsibility") (footnotes omitted).

⁶⁹See Peter Edelman, *Welfare and the "Third Way,"* DISSENT, Winter 1999, at 14.

⁷⁰See *id.* Politicians are in essence espousing the views of "new" communitarians, who seek to rebuild the country's moral foundations and increase our sense of personal and collective responsibility. See McClain, *supra* note 61, at 999.

⁷¹See Edelman, *supra* note 69, at 14.

⁷²See McClain, *supra* note 61 at 1001-18.

tendency to shift blame away from one's personal faults, to look for external causes to blame, to hide these personal failures from neighbors and peers by masking them by rights talk, and generally to assume the "mantle of the victim."⁷³ Modern critics of entitlement politics further claim that "liberal rights talk" vitiates basic values like personal responsibility, family cohesion, and the work ethic, and thus licenses irresponsibility.⁷⁴

II. THE BANKRUPTCY SYSTEM

Given the unsavory, negative connotations surrounding the term entitlement and the notion that the term entitlement now means getting something for nothing (or receiving a gratuity but claiming it as a right), it is not surprising that critics argue that we must end bankruptcy "as we know it." Before discussing the proposals to modify existing laws, I first briefly discuss the evolution of bankruptcy relief from a purely punitive creditor-driven system to a somewhat more humane one that balances the needs of debtors and creditors.

A. HISTORY OF THE DISCHARGE

The bankruptcy system serves two primary (but contradictory) functions: to collect debts⁷⁵ and to forgive debts.⁷⁶ The debt collection function, unlike the debt forgiveness function, is relatively noncontroversial. Embedded in the American culture is the view that people should pay their bills and that they have a moral duty to make good on their promise to pay—even if bankruptcy laws give them a legal right not to pay.⁷⁷ To encourage people to repay their debts, early bankruptcy laws functioned as quasi-criminal statutes designed to deter financial irresponsibility.⁷⁸ Moreover, early bankruptcy laws were designed to stigmatize and punish people who failed to pay their

⁷³See *id.* at 1021, 1060.

⁷⁴See *id.* at 1023.

⁷⁵H.R. REP. NO. 95-595, at 365-68 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6321-24 (discussing debt repayment goal).

⁷⁶The fresh start policy gives "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

⁷⁷See Hallinan, *supra* note 7, at 140 ("[T]he moral obligation to keep one's promises is a virtually universal ethical precept."); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 215 ("Promise-keeping and an instinct for fairness and reciprocity are deeply embedded in our natures and underlie our social structure."); Shuchman, *supra* note 7, at 452-53 (characterizing the "obligation of debt as a social phenomenon, the common assumption being that in this society debtors should pay their debts to creditors. It is considered by many to be a part of our whole social fabric"). But cf. Shuchman, *supra* note 7, at 434 ("The legal rule of promising that will create an enforceable obligation does not by itself give right to a moral obligation.").

⁷⁸See CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 30-36 (1997); G. Stanley Joslin, *The Philosophy of Bankruptcy - A Re-Examination*, 17 U. FLA. L. REV. 189, 192 (1964); Charles Jordan Tabb, *The*

bills.⁷⁹ Creditors could have debtors adjudged "offenders" under these early laws and, until the mid-nineteenth century, could have debtors imprisoned.⁸⁰ Thus, bankruptcy initially functioned solely as a creditor-focused process designed to stigmatize debtors by stressing that their inability (or unwillingness) to pay their debts indicated that they had committed a moral indiscretion.⁸¹

The bankruptcy system developed a less creditor-focused approach in the mid-nineteenth century.⁸² The rise and importance of the merchant class, combined with the corresponding increase in business failures caused by this new economic class, fundamentally changed public attitudes toward buying on credit and toward the defaults that necessarily follow an increase in creditors.⁸³ Though the stigma associated with filing for bankruptcy appeared to exist until the middle of the twentieth century,⁸⁴ policymakers eventually abandoned the view that economic failure equated with dishonesty and irresponsibility.⁸⁵

By the late nineteenth century, bankruptcy laws began to consider the

History of the Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5, 7-8 (1995) [hereinafter Tabb, *History*].

⁷⁹*Id.*

⁸⁰See Tabb, *History*, *supra* note 78, at 7-8. See also Michael Higgins, *Putting Back the Bite*, 84 A.B.A. J., June 1998, at 74, 74 (commenting on "the days of ancient Rome, when debtors could be sold into slavery upon default, and the days of the colonial debtor prisons"). For a discussion of the general change in approach to a debtor's right to discharge legal obligations in bankruptcy, see Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L. J. 325 (1991).

⁸¹See Shuchman, *supra* note 7, at 455-56 ("[M]any, probably most, persons in our society view debt payment as a matter of duty. They repay their debts (and judge others accordingly) not so much because they think that it is just to do so or because it will bring about the most good for themselves or for all, but because it is proper and right to pay one's debts.") (footnote omitted).

⁸²The Bankruptcy Act of 1841 was the first American law that abandoned the idea that bankruptcy laws existed for the benefit of the creditors alone and allowed debtors to voluntarily bring their estates into the bankruptcy courts for equitable distribution. The law recognized the justice of granting a discharge to the honest, financially troubled debtor, but only if he had surrendered all his assets and aided his creditors in realizing as much as possible from the estate. See 1 HAROLD REMINGTON, *A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES* § 8, at 17 (5th ed. 1950).

⁸³See Hallinan, *supra* note 7, at 56, where the author discusses the developing perception at the time that there was a "significant possibility that economic failures were produced by economic forces no more controllable or predictable than visitation by a tornado or the bite of a wild dog."

⁸⁴One wonders when this alleged bankruptcy stigma last existed, as an academic commentator observed over thirty years ago that "while one may become somewhat stigmatized as a result of bearing the label of a bankrupt, this stigma is becoming of diminishing social importance." Joslin, *supra* note 78, at 192. See also Shuchman, *supra* note 7, at 413 (noting that bankruptcy is characterized as "a labeling process [that] inflict[s] a stigma upon the bankrupt" and cautions that "the anticipated or actual impact of bankruptcy may vary greatly by type of person or group"). But see Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 129-130 (1989) (questioning the continued importance of the consequences of social stigma, or a "stain on one's reputation and one's 'good name,'" but suggesting that lawsuits alleging libel indicate that at least some people remained concerned about social stigma).

⁸⁵See Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1052 (1987) (noting that "[t]he policy of rewarding the honest debtor with discharge represents a major depar-

needs and interests of both creditors *and* debtors by recognizing the importance of rehabilitating entrepreneurial merchants and traders (the only individuals initially eligible to be bankrupts).⁸⁶ Indebtedness, once regarded solely as a sign of extravagance and poor financial management, came to be seen as an appropriate (indeed essential) part of the development of America's commercial activities.⁸⁷ Faced with the practical reality that keeping entrepreneurs hopelessly insolvent ultimately harmed society and created expensive social costs, policymakers responded by making bankruptcy laws less punitive.⁸⁸

Though nineteenth century laws were somewhat more humane, the focus remained on assisting creditors and protecting society until Congress passed the Bankruptcy Act of 1898.⁸⁹ The Act, which allowed both entrepreneurs and wage earners to discharge their debts, was designed to encourage wage earners to restructure their debts, then pay them in full to avoid the stigma of being labeled "financially irresponsible."⁹⁰ During most of the twentieth century, however, bankruptcy filings by individuals were still rare, presumably because Americans continued to believe that they had a moral duty to pay their bills.⁹¹ Indeed, it appears that the continued bankruptcy stigma caused some Americans to file for bankruptcy only if they were in dire financial need

ture from the view that defaulters are, simply because of default, deserving of punishment for their guilt, negligence, or indolence").

⁸⁶Before Congress adopted the Bankruptcy Code in 1978, a person who filed for bankruptcy was referred to as a "bankrupt," a word whose very etymology implies "disgrace." See Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, n.2 (1938) (noting that the word bankruptcy is derived from a medieval custom of "breaking the bench" of a debtor who absconded with his creditors' property). The current term "debtor" does not carry as harsh connotations, which had lead some to suggest that this change in nomenclature has, itself, led to an increase in filings. See, e.g., Jones & Zywicki, *supra* note 77, at 219 (noting that replacing term bankrupt with debtor in the Code contributed to the loss of stigma associated with bankruptcy).

⁸⁷See Hallinan, *supra* note 7, at 56.

⁸⁸See Joslin, *supra* note 78, at 191 (noting that the "concern for the debtor and his rehabilitation" resulted from the "practical realization that a hopeless, unrelievable financial situation leads to . . . suicides, and criminality concomitant to financial despair.").

⁸⁹The Bankruptcy Act of July 1, 1898 (the Nelson Act), ch. 541, 30 Stat. 544 (repealed 1978).

⁹⁰See *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966) (discussing stigma associated with liquidating rather than repaying bills).

⁹¹See e.g., *Resolved: The Time has Come for Means Testing Consumer Bankruptcy - A Debate*, 17 AM. BANKR. INST. J. 6 (1998) (hereinafter ABI DEBATE) (Comment of George Wallace):

[A] second practical limit upon the use of bankruptcy [has] been a sense of personal responsibility amongst Americans that they will not use bankruptcy and shed their contractual, their moral obligations, to repay people that have loaned them money, unless they are in dire need. We call this "bankruptcy stigma" sometimes, but it is essentially a feeling of personal responsibility that has controlled the abuse of bankruptcy. The statute is vulnerable to abuse, but a sense of personal responsibility amongst Americans has controlled its use.

See also Treiman, *supra* note 86, at 189 (stating that the "stigma of bankruptcy" was as present in 1938 as it had been in the seventeenth century).

(but they still would sometimes repay debts that had been discharged in bankruptcy).⁹² Just as critics of the AFDC program argued that welfare rolls swelled because the welfare system condoned financially and morally irresponsible behavior, critics of the current bankruptcy system argue that consumer bankruptcy filings have increased over the last twenty years because the Bankruptcy Code⁹³ (which replaced the Bankruptcy Act) encourages debtors to discharge their debts without even attempting to repay some of them.⁹⁴

B. CURRENT USE/ABUSE OF THE DISCHARGE

People who choose not to repay their current debts from future income are eligible to discharge their debts in bankruptcy even though they technically may not be insolvent.⁹⁵ People with "means" are entitled to bankruptcy relief because the Code does not require that debtors prove that their total outstanding indebtedness exceeds the value of their assets (i.e., that they are unable to pay their debts).⁹⁶ As the Code does not require debtors to prove that they need debt relief due to insolvency, all people (whether members of

⁹²See F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 194 (1998) (noting that Sir Walter Scott and Mark Twain worked to repay debts even though they had been legally discharged). Professor Howard characterizes the situation facing the debtor as a "no-win" situation because:

[A] debtor unable to satisfy his obligations experiences resulting feelings of shame, but the bankruptcy process that is supposedly psychologically liberating is now said to be stigmatizing. Thus, the debtor hopelessly mired in debt faces psychological trauma whether he is in bankruptcy or not, and the process is alleged to be simultaneously freeing and stigmatizing.

Howard, *supra* note 85, at 1061 (footnotes omitted).

⁹³11 U.S.C. §§ 101-1330 (1994) [hereinafter "Code" or "Bankruptcy Code"].

⁹⁴See Brenda Anthony, "Substantial Abuse" Under Section 707(B) of the Bankruptcy Code: *American Consumers Learn Declaring Bankruptcy May Cease To Be A Way Out*, 67 U. CIN. L. REV. 535, 550 (1999) (noting creditors' argument that "the bankruptcy process allows, even encourages consumers to discharge debts they could afford to pay but want to escape"); Jones & Zywicki, *supra* note 77, at 209-15 (arguing that the increase in bankruptcy filings result from changes in the law which "increased the net economic benefit of filing bankruptcy"); Hallinan, *supra* note 7, at 89 (citing sources that attempt to explain the "sudden and undoubtedly large increase in the number of consumer filings almost immediately following the Code's effective date"); Frum, *supra* note 6, at A14 (suggesting that Code's "leniency" caused the wave of "consumer debt-skipping"); Robert J. Samuelson, *Bankruptcy for Profit*, WASH. POST, Aug. 25, 1999, at A17 (blaming the Code for increased filings). But cf. Susan L. DeJarnatt, *Once Is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L.J. 455 (1999) (noting that the Code consciously intended to promote Chapter 13 over Chapter 7 and arguing against reforms to prevent Chapter 13 filings).

⁹⁵Although the principle of insolvency was a principal concern of earlier bankruptcy laws, this is no longer true. See 1 HAROLD REMINGTON, *supra* note 82, § 16 at 33.

⁹⁶While earlier laws considered the sufficiency of a debtor's assets when an involuntary bankruptcy petition was filed, the Code replaces the insolvency requirement with an alternative ground: whether the debtor pays her debts when they become due. See 11 U.S.C. § 303(h)(1). Indeed, the Code requires proof of insolvency only when a municipality files for relief under Chapter 9. See 11 U.S.C. §§ 101(32), 109(c).

the lower, middle, or upper economic classes) are eligible for relief under Chapter 7 and can discharge their debts in a Chapter 7 liquidation case though they theoretically may have the means to pay at least some of their debts over time through a Chapter 13 wage earner's plan.⁹⁷

In recent years, people of all socioeconomic classes have filed for bankruptcy in record numbers.⁹⁸ Indeed, the popular media has widely disseminated the credit lobby's message that allowing people with disposable current, or anticipated future, income to discharge their debts encourages them to live beyond their economic means.⁹⁹ Despite intense criticisms of the current use and abuse of the discharge, and the fact that it embraces the "morally counterintuitive" concept of excusing people from repaying bills rightfully or legally owed,¹⁰⁰ bankruptcy commentators and critics do not suggest that Congress completely abolish the bankruptcy discharge. Critics of current bankruptcy laws argue instead that reforms are needed to combat the two main causes for the recent increase in consumer bankruptcy filings.

First, critics argue that current bankruptcy laws encourage people to run up debts a reasonable economic actor would never have incurred, then discharge them even though they have the present means or the future capacity to repay those debts.¹⁰¹ To prevent this, critics argue that the Code must be revised to discourage this opportunistic behavior.¹⁰² Second, critics suggest

⁹⁷In general, as long as a debtor has not engaged in certain acts of misconduct and has not dismissed any other case within the past 180 days, she is entitled to a Chapter 7 discharge. See 11 U.S.C. §§ 109(b), 727(a). If the court finds that allowing the case to proceed would be a substantial abuse of the bankruptcy laws, however, it may dismiss the case. See 11 U.S.C. § 707(b). For an exhaustive discussion of the factors courts should consider when determining what it means to have the "ability to pay" debts, see *In re Attanasio*, 218 B.R. 180, 184-211 (Bankr. N.D. Ala. 1998).

⁹⁸There were 287,570 nonbusiness filings in 1980, 718,107 in 1990, and 1,398,182 in 1998. See *Annual Total Bankruptcy Filings for 1990-1998* (last visited May 29, 2001) <<http://www.abiworld.org/stats/newstatsfront.html>>. Although the number of filings decreased in 1999 (1,281,581) and in 2000 (1,217,972), see *id.*, the numbers most likely will increase for the next few years if the economy slows, as is anticipated. See also NATIONAL BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT 20 YEARS* (1997), 82 [hereinafter REPORT] (noting bankruptcy filings are three times what they were in 1980). Peter Pae & Stephanie Stoughton, *Personal Bankruptcy Filings Hit Record, Easy Credit Blamed, Congress May Act*, WASH. POST, June 7, 1998, at A1 (reporting that filings increased twenty percent from 1996 to 1997 and that one in every seventy households filed for bankruptcy during that period).

⁹⁹See Samuelson, *supra* note 94 at A17 (arguing that laws are lax and encourage overborrowing); Frum, *supra* note 6, at A14 (blaming bankruptcy laws for filing increase); 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.

¹⁰⁰Steve France, *Shakespeare in Debt*, WASH. POST, May 18, 1999, at A23 (conceding that bankruptcy relief is "morally counterintuitive," but characterizing it as "right in tune with the primal American philosophy of second chances and fresh starts").

¹⁰¹Editorial, *Going for Broke*, THE BOSTON GLOBE, March 10, 1998, at A10 (stating that the present abuse of the system "requires tightening the mechanism for awarding bankruptcy protection"); John C. Weistart, *The Costs of Bankruptcy*, 41.4 LAW & CONTEMP. PROBS. 107, 110 (1977) (noting there are certain limited circumstances where "we must recognize that some debts are simply uncollectible").

¹⁰²Helen Dewar & Kathleen Day, *Senate Approves Bankruptcy Bill: Industry-Sought Overhaul Passes*

that filings have increased because there no longer is a stigma attached to being a debtor. They cite recent filings by celebrities to support their contention that Americans no longer believe that they have a duty to try to repay their debts.¹⁰³ To prevent this, they argue that the process to discharge debts must be made more onerous and that doing so will reintroduce stigma in the bankruptcy system.

1. *Bankruptcy Opportunism*

Academic and industry critics maintain that consumer bankruptcy filings increased because the system encourages debtors to engage in undesirable strategic financial behavior (i.e., it promotes bankruptcy opportunism). Bankruptcy opportunism occurs when a debtor systematically and strategically engages in morally or legally unconscionable and irrational economic behavior because of her knowledge that the bankruptcy system will subsidize the costs of her conduct.¹⁰⁴ This bankruptcy safety net, critics suggest, underestimates the real costs of the debtor's irresponsible spending by forcing individual creditors and society as a whole to subsidize or at least bear a portion of those costs.¹⁰⁵ Just as welfare reformers argued that the AFDC program incentivized behavior that was not consistent with this country's market-based economy, critics contend that the bankruptcy system incentivizes opportunistic behavior that also conflicts with fundamental tenets of our economy. In short, critics argue that bankruptcy opportunism explains the skyrocketing rate of bankruptcy filings in the last decade notwithstanding a strong U.S. economy and virtually full employment.¹⁰⁶

83-14, WASH. POST, Feb. 3, 2000, at A1 (noting that credit lobby argued that debtors are "exploiting loopholes" to escape paying their debts).

¹⁰³See Samuelson, *supra* note 94, at A17 ("Repaying what you borrowed was once an important part of the nation's moral code. It is increasingly less so."); McIntyre, *supra* note 84 at 133-37 (discussing the importance of trust in social relationships and social systems). But see Shuchman, *supra* note 7, at 429-30 (suggesting the impersonal nature of credit relationships have diminished the "elements of social and personal wrong in not paying one's debts").

¹⁰⁴See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1402 (1985). See also Buckley & Brinig, *supra* note 92, at 189-91 (noting that 1984 bankruptcy reforms were designed to curb debtor opportunism).

¹⁰⁵See *In re Mathenia*, 220 B.R. 427, 433 (Bankr. W.D. Okla. 1998) (referring to debtors in the case as "the poster children for the standard creditors' argument, to which this court does not subscribe, that bankruptcy is too easy, is constantly taken advantage of by unscrupulous debtors, and operates against the interest of society in general, not to mention creditors in particular"). Cf. Jackson, *supra* note 104, at 1422 n.95 (explaining why allowing a debtor to switch to a lower wage job to avoid repaying a debt creates a negative externality because the decision to earn less (but consume more leisure) costs the debtor nothing but imposes a social cost on creditors).

¹⁰⁶Until the year 2001, the economy was strong, as evidenced by several years of growth above three percent no recession or depression, and low unemployment rates. See S. Report No. 49, 106th Cong., 1st Sess. 2 (1999); Jonathon Peterson, *U.S. Economy Continues its Swift Growth*, LOS ANGELES TIMES, Feb. 5, 1999, at A1. See also REPORT, *supra* note 98, at 84 ("Despite low unemployment, low inflation, low mortgage rates, and a long period of economic expansion, a growing number of American families no longer

Just as welfare critics argued that TANF needed to replace the old welfare system, which encouraged mothers to remain unemployed, bankruptcy critics argue that current bankruptcy laws must be revised because those laws encourage debtors to incur debt irresponsibly then seek to discharge those debts without even attempting to repay them.¹⁰⁷ Notwithstanding this assertion, neither empirical nor anecdotal evidence suggests that most debtors strategically abuse current bankruptcy laws or are high wage-earners who intentionally engage in fraud.¹⁰⁸ Virtually no one disputes that at least some of the recent consumer filings represented debtors who encountered economic crises (including medical and divorce-related expenses or expenses caused by job dislocations) largely beyond their control.¹⁰⁹ Moreover, while some debtors may strategically manipulate bankruptcy laws to amass ex-

can make it from one paycheck to the next.”); Beatrice E. Garcia, *Lay the Cards on the Table*, MIAMI HERALD, Mar. 11 1999, at 1C (observing that the increase in bankruptcy filings during a period of low unemployment “[o]n the face of it, it doesn’t seem to make sense.”); Kenneth R. Gosselin & Dan Haar, *Easy Credit Boosts Boom and Bust Personal Bankruptcies on the Rise*, HARTFORD COURANT, Mar. 7, 1999, at A1 (noting dichotomy of plentiful jobs, low inflation and interest rates, and record level bankruptcy filings).

¹⁰⁷Jones & Zywicki, *supra* note 77, at 214-15 (attributing increase to people becoming “more aware of how to plan strategically for bankruptcy”); Editorial, *Bankruptcy and Responsibility*, CHRISTIAN SCIENCE MONITOR, May 20, 1999, at 10 (suggesting that increase in bankruptcy filings evidences that it is too easy for individuals to declare bankruptcy).

One prominent economist has observed that the increase in consumer filings is easily explained by the increased availability of credit card debt and the resulting credit card default rate. See Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249 (1997).

¹⁰⁸See Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 32 (1999) (observing that all empirical studies agreed that the “vast majority of chapter 7 debtors belong in that chapter.”). Indeed, recent research suggests that most debtors are solidly in the middle-class. See TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 32-36 (2000) [hereinafter *FRAGILE MIDDLE CLASS*].

¹⁰⁹See SULLIVAN ET AL., *FRAGILE MIDDLE CLASS*, *supra* note 108, at 16; Cf. REPORT, *supra* note 98, at 84 (noting difficulty in giving general reasons for financial problems because individual reasons vary on circumstances but suggesting that many filings occur after the debtor loses a job, is divorced, or has a medical catastrophe); *In re Attanasio*, 218 B.R. 180, 230 n. 75 (Bankr. N.D. Ala. 1998) (“Medical problems represent the most common form of calamity that causes economic problems and persistently impairs a debtor’s ability to pay debts”); Jagdeep S. Bhandar & Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 AM. BANKR. L. J. 1, 7-8 (1993) (discussing study that found that, while divorce was not significantly related to bankruptcy filings, divorce affects an individual’s capacity to service debt and debt servicing is significantly related to bankruptcy filings.); Higgins, *supra* note 80, at 76 (commenting on filings triggered when a overburdened debtor is “blindsided” by a job loss, divorce, health or other unexpected expenses); Christine Dugas, *Special Report: Going Broke*, USA TODAY, June 10, 1997, at 1A (citing poll results that suggest that job loss, divorce, and medical expenses frequently push debtors into filings for bankruptcy); Lisa Fickenscher, *Bankruptcies Fall; Warning Flags Still Fly*, AM. BANKER, Apr. 15, 1999, at 1 (citing findings by market research group that unemployment, medical debts, gambling, lawyer advertising, and loss of stigma fueled growth of consumer filings); Pae & Stoughton, *supra* note 98, at A1 (discussing debtor who filed because of medical expenses that were not covered because she was never employed long enough to collect health insurance and married couple who filed for bankruptcy after their income was reduced by one-third after the wife unexpectedly was laid off).

emptible assets and incur dischargeable debts, potentially just as many others became hopelessly overburdened with debt because of their financial naivete.¹¹⁰

Though not all debtors are frauds, it is impossible to deny that at least some debtors have an extravagant lifestyle¹¹¹ and attempt to use bankruptcy laws to subsidize the costs associated with that lifestyle.¹¹² Similarly, it is likely that—if current laws remain—some high-income debtors will file for bankruptcy once they realize (or are told) that bankruptcy laws let them keep some expensive assets but discharge many (or most) of their debts.¹¹³ Cur-

¹¹⁰See REPORT, *supra* note 98, at 93 (suggesting Congress look into certain credit industry practices such as targeting young people and those with low income); Julie Kosterlitz, *Over the Edge*, 29 NAT'L J. 870, 870 (1997) (discussing mother who used her benefits from Aid To Families with Dependent Children to pay her minimum credit card bills); John Schmeltzer, *Credit Easy; Bankruptcy Easy; Lessons Come Harder*, CHI. TRIB., Oct. 10, 1996, at 1 (reporting on couple who sought credit counseling when they accumulated debt once again after filing for bankruptcy); Gene Tharps, *Students: Beware the credit card trap*, ATL. J. & CONSTITUTION, Sep. 27, 1998 at R8 (citing consumer group report that only twenty percent of students knew how long it would take to pay off credit card debt if they make only the monthly minimum payment). Recent litigation involving Sears and other major retail stores revealed that some debtors agreed to repay fairly sizeable debts in return for the retailer's promise to extend them a nominal line of credit even though the reaffirmation agreements obligated them to pay actual annual percentage rates as high as 124.2%. See *In re Bruzese*, 214 B.R. 444, 448 (Bankr. E.D.N.Y. 1997).

¹¹¹See *In re Rembert* 141 F.3d 277 (6th Cir. 1998) (stating debtor filed for bankruptcy after using credit card to get cash advances for gambling purposes) *cert. denied*, 525 U.S. 978 (1998); *In re Melancon* 223 B.R. 300, 304 (Bankr. M.D. La. 1998) (reporting debtor accumulated over \$35,000 in credit card debt with all but approximately \$100 representing gambling losses); *In re Motaharnia*, 215 B.R. 63, 66 (Bankr. C.D. Cal. 1997) (noting debtor had over \$100,000 debt from sixteen unpaid credit card balances); *In re Uddin*, 196 B.R.19, 21 (Bankr. S.D.N.Y. 1996) (reporting debtor misrepresented income to get credit cards, charged \$60,000 in perfume, electronics and other luxury items, then filed for bankruptcy); Dan Herbeck & Michael Beebe, *The Bucks Stop Here. Court Won't Erase Couple's Huge Credit Card Debt*, BUFFALO NEWS, Aug. 29, 1998, at A1 (discussing couple who amassed \$336,328 on 59 credit cards for home renovations); John O'Brien, *Court Clerk Lived High Before Fall*, POST-STANDARD (Syracuse, NY), Oct. 20, 1997, at A1 (reporting on local court clerk who amassed \$47,000 credit card bill in luxury items and travel expenses, then filed for bankruptcy).

¹¹²See, e.g., *In re McNichols*, 249 B.R. 160 (Bankr. N.D. Ill. 2000) (commenting on the debtor's "opulent lifestyle" and her proposed "parsimonious payment" to unsecured creditors); *In re Haddad*, 246 B.R. 27, 40 (Bankr. S.D.N.Y. 2000) (finding that debtor engaged in excessive spending prepetition and that she chose to allow her creditors to "fund" her extravagant lifestyle); *In re Lewis*, 227 B.R. 886, 889 (Bankr. W.D. Ark. 1998) (finding debtor's "sole motive in filing" was to circumvent state court alimony and child support orders); *In re Emge*, 226 B.R. 396, 400 (Bankr. W.D. Ky. 1998) (dismissing a Chapter 7 petition after the debtor rejected the court's "admonishment" to reduce monthly 401K retirement contributions, cease paying the graduate school expenses of an adult child, and lease a less expensive car).

¹¹³See REPORT, *supra* note 98, at 81 (describing such practices as some of "the most egregious examples of abuse" in the bankruptcy system); *Bank Leumi Trust Co. of N.Y. v. Lang*, 898 F. Supp. 883 (S.D. Fla. 1995) (reporting that debtors moved from New Jersey to Florida then purchased, and were allowed to keep, a home and annuities with a combined value of one million dollars); *In re Primack*, 89 B.R. 954 (Bankr. S.D. Fla. 1988) (noting that debtors exempted a \$450,000 house even though they purchased it sixteen months before they filed for bankruptcy and they moved to Florida from a state that had a limited homestead exemption).

Debtors in some states can exempt a homestead of unlimited value. See, e.g., TEX. PROP. CODE ANN. § 41.002 (West Supp. 1997). See also *Border v. McDaniel* (*In re McDaniel II*), 70 F.3d 841, 843 (5th Cir.

rent laws appear to allow some unscrupulous debtors to engage in opportunistic behavior to ensure that all needy debtors are allowed to discharge burdensome debts. Just as TANF created a zero tolerance policy that imposed numerous reporting requirements on benefit recipient and mandated that they work, the proposed bankruptcy reforms appear designed to prevent all opportunistic behavior even if the reformed system prevents some truly deserving debtors from discharging their debts.

2. Bankruptcy Stigma

Critics also blame the increase in individual filings on changes in cultural mores which have de-stigmatized filing for bankruptcy.¹¹⁴ Specifically, supporters of bankruptcy reform argue that making bankruptcy a value-free system has caused debtors to breach the trust inherent in credit and lending arrangements and has convinced some debtors that they no longer have a moral duty to pay their debts.¹¹⁵ Debtors' unwillingness to work to repay their bills is not surprising, critics contend, because Americans no longer feel constrained by the cultural mores of the last generation.¹¹⁶

Three events, rare during the 1950s but now quite common, are cited to prove the shift in cultural mores: divorces, bankruptcies, and unwed pregnancies.¹¹⁷ Notwithstanding rhetoric used during welfare reform debates and recent bankruptcy reform hearings, it is impossible to conclusively prove why there has been an increase in these three activities. The increases most often are attributed to changes in the positive laws that govern these

1995) ("[W]e must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly—or even knowingly but powerless to avoid it—assist a dishonest debtor in wrongfully defeating his creditor." This may account for the oft-repeated creditor's lament: "Debtors either die or move to Texas.") (footnotes omitted).

¹¹⁴Frum, *supra* note 6, at A14 ("It's not a coincidence that this weakening of the sense of financial obligation occurred just [as] Americans were diminishing their feelings of obligation to family, community and nation."); Editorial, *supra* note 5 (arguing that filing increase "represent[] a damaging cultural shift toward irresponsibility.").

¹¹⁵While debtors are accused of violating their moral duty to repay their debts, critics rarely suggest that bankruptcy laws impose moral duty on creditors who lend to these debtors. Cf. Shuchman, *supra* note 7, at 435:

[I]f the creditor-debtor relationship is founded in morality, surely the creditor as well as the debtor must consider the moral consequences of insisting upon payment. Is it not immoral for the creditor to enforce payment though he or it knows (and on moral grounds should inquire) that the debtor's family will suffer thereby?

¹¹⁶Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 107 (1999) ("Those who scorn the massive increase in bankruptcy filings believe the increase is a direct result of lax moral standards and a culture of tolerance.").

¹¹⁷See Jones & Zywicki, *supra* note 77, at 216; Allen M. Parkman, *The Dischargeability of Post-Divorce Financial Obligations Between Spouses: Insights from Bankruptcy in Business Situations*, 31 FAM. L.Q. 493, 495 (1997); Megan Weinstein, *The Teenage Pregnancy "Problem": Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN'S L.J. 117, 132 (1998).

events, easier access to legal assistance and the judicial system, and to the decline in shame and stigma associated with the events.¹¹⁸ The most often cited cause is the purported loss of stigma. Though critics claim that the stigma previously associated (or claimed to be associated) with filing for bankruptcy has all but disappeared, it is virtually impossible to substantiate that claim. That is, it is hard to determine whether people ever viewed bankruptcy as a stigmatizing event, whether they no longer view bankruptcy as a stigmatizing event, or whether any decline in this purported bankruptcy shame or stigma has caused more people to file for bankruptcy.¹¹⁹

Perhaps not unsurprisingly, industry critics seem willing to virtually ignore the effect that bankruptcy filings of large, essentially solvent corporations may have had on the purported decline of bankruptcy stigma.¹²⁰

¹¹⁸See Higgins, *supra* note 80, at 75 (noting bankruptcy's diminishing social stigma as filings have become more common); France, *supra* note 100, at A23 (citing Republican allegation that declining bankruptcy stigma created "an epidemic of cavalier 'bankruptcies of convenience'"); Editorial, *Making it Harder to Dodge Debts*, ROANOKE TIMES & WORLD NEWS, May 14, 1999, at A14 ("Bankruptcy, much like unwed pregnancy, seems to have no stigma of shame attached to it these days."); Jacob M. Schlesinger, *House Approves Bankruptcy Overhaul Amid Criticism Bill May Be Too Tough*, WALL ST. J., at A28, May 6, 1999 (reporting that lenders and legislators blame the decline in bankruptcy stigma for the filing surge); Editorial, *Today's Scarlet Letter, Easy Credit: Bankruptcy May No Longer Carry a Stigma with Creditors but it Might with Employers*, BALTIMORE SUN, May 7, 1999, at 24A ("Just as failed marriages no longer carry a social stigma, personal bankruptcy no longer is an impediment to obtaining credit in the future.").

¹¹⁹See Howard, *supra* note 85, at 1061 (noting woeful lack of empirical data to support the "psychological dimension of bankruptcy known as stigma"); Shuchman, *supra* note 7, at 469 (observing lack of evidence to support "the conjecture that any single filing of a petition in bankruptcy will weaken the will of others or help to or tend to bring about many more bankruptcies"); Douglas R. Rendleman, *Bankruptcy Revision: Procedure and Process*, 53 N.C. L. REV. 1197, 1231 (1975) ("Everyone talks about the stigma, but no one analyzes it very thoroughly."). But see Jones & Zywicki, *supra* note 77, at 216-17 (discussing studies that suggest that stigma is a variable that affects a debtor's decision to file for bankruptcy).

Similarly, while lawyer advertising may have facilitated some debtors' decisions to file for bankruptcy, it is hard to determine whether increased access to legal assistance necessarily increases bankruptcy filings, especially since many debtors cannot afford to hire a bankruptcy lawyer and cannot proceed *in forma pauperis* in bankruptcy proceedings. See 28 U.S.C. §§ 1915, 1930(a) (1994). See also Samuelson, *supra* note 94, at A17 (blaming increased filings on aggressive lawyer advertisements); Jones & Zywicki, *supra* note 77, at 218 (suggesting that lawyers' ads in the phone book help fuel "an active bankruptcy culture"); *Testimony of the American Bankruptcy Institute on Consumer Debt, Delinquencies and Personal Bankruptcies: Hearing Before the Committee on Banking and Financial Services of the U.S. House of Representatives*, (Sept. 12, 1996) <<http://www.abiworld.org/legis/testimony/12sep96.html>> (statement of Ford Elsaesser, Vice-President of the American Bankruptcy Institute) (noting "secular change in attitude toward debt and personal responsibility" and fact the perception that "there is no shame in debt any more; the stigma associated with bankruptcy has largely disappeared" in part because of the "growth in lawyer advertising promising that you may be able to 'keep everything' and 'pay back nothing'"). But see *Another View of Why Bankruptcies are Increasing*, 34 No. 4, BANKR. CT. DECS. WKLY. NEWS & COMMENTS (LRP) A1, May 4, 1999 (noting that prominent market research firm admitted to a lack of data to support theory that the reduction in bankruptcy stigma or the increase in lawyer advertising caused the increase in consumer filings).

¹²⁰See Steven L. Schwarcz & Janet Malloy Link, *Protecting Rights, Preventing Windfalls: A Model for Harmonizing State and Federal Laws on Floating Liens*, 75 N.C. L. REV. 403, 431 n. 117 (1997) (discussing bankruptcy filings of Dow Corning, Texaco, and Johns-Manville). Cf. Terry Savage, *Bill would toughen*

Instead, critics cite the presence of celebrity bankruptcy filings¹²¹ to support their claim that only abusive consumer filings have caused the erosion of the stigma previously attached to filing for bankruptcy. While critics stress the need to stigmatize debtors, they have identified nothing that would actually reintroduce stigma or make someone feel ashamed that she filed for bankruptcy.¹²² Instead, just as welfare reformers argued that making it harder to receive public assistance benefits would—alone—stigmatize the recipients of those benefits, critics of the current bankruptcy system seem to believe that simply making it harder to discharge debts will stigmatize debtors.

C. INTRODUCING RECIPROCAL PRINCIPLES IN BANKRUPTCY

No empirical evidence or opinion poll suggests that the public wants to prevent the truly deserving from discharging their debts in bankruptcy. Instead, it appears that people have become hostile toward the bankruptcy system in general, and debtors in particular, because they think that (1) filing for bankruptcy has become too easy and current laws impose no burdens (like attempting to repay bills) on debtors and (2) debtors view the discharge as if it is an unearned entitlement that gives them the right to demand that wealth be redistributed from members of the responsible debt-paying public to the members of irresponsible debt-discharging public. Since the public's views of the importance of providing bankruptcy relief to the economically disabled is consistent with their views of providing welfare relief to the economically

bankruptcy rules, CHICAGO SUN-TIMES, May 11, 2000, at 66 (suggesting that the old moral arguments against bankruptcy are no longer effective because the filings of major corporations and entertainers have erased the stigma of filing for bankruptcy).

¹²¹See *In re Brown*, 211 B.R. 183, 184 (Bankr. E.D. Pa. 1997) (reporting bankruptcy filing of recording artist Rachelle Ferrell); Higgins, *supra* note 80, at 74 (reporting that critics argue that bankruptcy filings of the rich and famous prove that lax legal standards permit people with means to avoid repaying legitimate debts); Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit*, 27 HOFSTRA L. REV. 33, 34 (1998) (discussing bankruptcy filings of Willie Nelson, Kim Basinger, Burt Reynolds, and Toni Braxton); Christine Dugas, *Should Debtors Be Able to Keep Homes? Critics Say Bankruptcy Loophole Aids the Rich*, USA TODAY, June 26, 2000, at 10B (citing examples of well-to-do-debtors, including former Texas Governor John Connally, who took advantage of unlimited homestead exemptions); Editorial, *Lax bankruptcy laws make everyone pay*, USA TODAY, June 12, 1997, at 14A (noting bankruptcy filings of former baseball commissioner Bowie Kuhn, former Arizona Governor Fife Symington, and Wall Street financier Paul Bilzerian); Tonya Pendleton, *The Price of Fame can be Bankruptcy*, THE RECORD (Bergen County, NJ), Apr. 11, 1998, at Y1 (reporting the bankruptcy filings of recording artists MC Hammer and TLC); Higgins, *supra* note 80, at 74 (characterizing "going broke" as the "best career move in show business.").

¹²²Though not publicly advocated during the last reform efforts, Congress could amend or repeal the anti-discrimination protections provided in § 525 of the Code. Allowing employers to refuse to hire, to demote, or to terminate people simply because they filed for bankruptcy certainly would serve to reintroduce stigma. At least one person recently lost a high-profile employment opportunity because she and her husband had filed for bankruptcy after amassing over \$850,000 in debt. See Bernard Dagenais, *Bankruptcy: Not Quite a Free Ride*, WASH. TIMES, May 10, 1999, at D3 (discussing former debtor who withdrew application for superintendent of a suburban District of Columbia school system because of furor over credit card debts she incurred before she filed for bankruptcy).

disabled, it is likely that the public wants to reform the bankruptcy system to force debtors to modify their future spending, to repay more of their debts, and to ensure that they understand that the government has the right to scrutinize their personal lives and impose behavioral modifications.¹²³

Debtors, like husbandless mothers, are no longer viewed as economic victims. The manner in which means-tested aid to families has been transformed suggests that, unless the public thinks recipients have "earned" the right to receive economic assistance from the government, the benefits they receive will be means-tested and will not be viewed as entitlements. Indeed, the structure of TANF exhibits the current philosophical (and political) approach toward awarding federal benefits.¹²⁴ Moreover, rhetoric used during welfare reform debates, and the ultimate structure of the TANF program, indicates that reciprocal principles—the notion that recipients must do something in exchange for benefits—will be the philosophical underpinning of all public assistance programs. Given these changes in the public view toward government assistance to the needy, it is not surprising that critics are demanding a means-tested bankruptcy system.

D. JUSTIFICATION FOR MEANS-TESTING

The purported abuses of the current bankruptcy system caused Congress to pass legislation that means-tests bankruptcy relief. The view that the system is in a crisis and needs to be radically altered is somewhat surprising given the findings of the National Bankruptcy Review Commission (the "Commission").¹²⁵ Congress asked the Commission to consider whether existing bankruptcy laws and practices encourage people to overspend then seek to discharge their debts. When the Commission was appointed, Con-

¹²³Welfare public opinion polls never suggested that the public felt that the government had no duty to support the poor or that the public's primary concern was the cost of supporting poor people. Instead, public perception polls indicated that the public's primary concern with, and objection to, the old welfare system was that it created and encouraged deviant behavioral patterns. See R. Kent Weaver et al., *Public Opinion on Welfare Reform: A Mandate For What?*, in *LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM* 109, 112 (R. Kent Weaver and William T. Dickens eds., 1995). Specifically, these polls suggested that, when considering various welfare reforms, the public was more concerned with having a system that encouraged the importance of work, made users self-sufficient, and ended long-term dependency rather than a system that saved money or reduced the federal budget deficit. See *id.* at 115.

¹²⁴Using TANF to reduce welfare rolls and make poor mothers earn their benefits by working in the labor market is now the prevailing view even though the program may force poor mothers into a contingent workforce that will provide an uncertain employment future during slow economic times. See *Protecting Employment Rights*, *supra* note 29, at 904.

¹²⁵The Commission consisted of nationally recognized bankruptcy experts, including prominent lawyers and judges, a certified public accountant, and a former member of Congress. They were appointed in a bipartisan process by the President, the Chief Justice of the Supreme Court, and the majority and minority leadership of each house of Congress. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, tit. VI, § 604, 108 Stat. 4106, 4147 (National Bankruptcy Review Commission Act). For a comprehensive description of the history of the Commission, see *REPORT*, *supra* note 98, at 57-75.

gress indicated that it was "generally satisfied" with bankruptcy laws.¹²⁶ The Commission, while acknowledging that the bankruptcy system is not perfect and needed minor reforms,¹²⁷ concluded that imposing means or income based restrictions was not warranted because the vast majority of people who filed for bankruptcy lacked income sufficient to repay their unsecured debts.¹²⁸ Although this is now the second bankruptcy commission that has rejected means-testing,¹²⁹ recent legislative efforts all but guarantee that future debt-relief will be means-tested.

Making bankruptcy a means-tested system has been the primary goal of bankruptcy reform efforts for the last three years.¹³⁰ Critics cited the dramatic overall increase in individual bankruptcy filings, the highly publicized bankruptcy filings of the rich and famous, and filings by debtors who amassed substantial credit card debts by purchasing lavish goods to support their contention that people with means are using bankruptcy as a financial planning tool rather than as a tool of last resort.¹³¹

Though bankruptcy relief typically is not referred to as a federal public

¹²⁶H.R. REP. NO. 103-835, at 59 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3368. In appointing the Commission, Congress stated that it intended the Commission to review, improve, and update bankruptcy laws "in ways which do not disturb the fundamental tenets and balance of current law." *Id.*

¹²⁷See REPORT, *supra* note 98, at 79-82 (discussing the need for consumer bankruptcy reform in order to improve its integrity, efficiency, and fairness).

¹²⁸See REPORT, *supra* note 98, at 83. See also Editorial, *Today's Scarlet Letter, Easy Credit: Bankruptcy May No Longer Carry a Stigma with Creditors but it might with Employers*, BALT. SUN, *supra* note 118, at 24A (discussing Commission's findings).

¹²⁹Over twenty-five years ago, another bankruptcy commission (also appointed in a bipartisan fashion and consisting of bankruptcy experts) analyzed and recommended changes to the then existing bankruptcy laws. This commission also considered, but ultimately rejected, forced contributions from future income (i.e., means-testing) and concluded that there was not rampant abuse of bankruptcy laws. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93rd Cong., 1st Sess., pt. I, at 54, 159 (1973).

¹³⁰See Corrine Ball & Jacqueline B. Stuart, *The Battle Over Bankruptcy Law for the New Millennium*, 55 BUS. LAW. 1487 (2000) (stating that the "drive" to pass reform was sparked by the large increase in consumer filings despite a sustained strong economy); Dewar & Day, *supra* note 102, at A1 (observing that Senate-approved legislation was sought by the credit card industry); Henry J. Sommer, *Opposition to Reform Legislation Grows in Senate*, NAT'L L.J., Sep. 28, 1998, at B6 (noting that the credit industry lobbying and public relations campaign portray the "primary issue" as whether debtors with the ability to repay debts should be forced to do so); ABI DEBATE, *supra* note 91, at 6 (statement of George Wallace, representing the American Financial Services Association, stating that many who file for Chapter 7 actually have the ability to pay thirty to forty percent of their unsecured debts, and therefore should be required to do so); Dorothy Eisenberg, *Consumer Debtors: Combining Chapters 7 and 13*, 4 AM. BANKR. INST. L.J. 511, 511 (1996) (arguing that Chapters 7 and 13 should be combined to encourage debtors to repay some of their debt from future earnings).

¹³¹See, e.g., Jamie Clary, *Bill Would Make it Harder to Wipe Away Bankruptcy Debt*, NASH. BUS. J., Apr. 17, 1998, at 9 (quoting statement by general counsel of the Tennessee Bankers Association that "Bankruptcy is no longer a last resort. It has become a first resort."); Editorial, *supra* note 118, at A14 (contending that affluent Americans use bankruptcy as an option of first resort and view it as an investment strategy or financial planning tool).

assistance program,¹³² the arguments advanced to support means-testing are consistent with the philosophy that public programs should stress mutual obligations that require the benefit recipient to do something (or refrain from doing something) in return for receiving benefits. For debtors, this "something" would be agreeing to sacrifice to repay as many of his debts as possible and to curtail his future credit habits. Moreover, arguments raised during recent attempts to reform consumer bankruptcy laws suggest that policymakers think that the bankruptcy system (like the new TANF program) should be used to control the behavior of benefit recipients.

Though specific means-testing proposals were highly controversial,¹³³ the concept of means-testing is relatively simple. In general, means-testing will prevent debtors from discharging debts in Chapter 7 if they are deemed to have the current or future means to repay a certain percentage of those debts in a Chapter 13 plan.¹³⁴ Under the bills most recently considered by Congress, a debtor will be deemed to have the means to repay his bills if applying a statutorily prescribed formula indicates that (1) his income exceeds a certain state or national average and (2) after deducting expenses (also determined by a state/national figure) and certain debt payments, he can repay a certain percentage of unsecured claims within the next five years.¹³⁵ Opponents of recent means-testing opponents reject these proposals as unnecessary¹³⁶ because most judges already have the ability to prevent abusive filings,¹³⁷ because the majority of debtors appear to be genuinely unable to

¹³²A bankruptcy professional recently referred to bankruptcy as a "social welfare program" and a "system that provides a welfare benefit" at a public debate on Capitol Hill. See ABI DEBATE, *supra* note 91, at 6. Likewise, in a dissent to the Commission's Report, several of the Commissioners referred to bankruptcy as "a social welfare program . . . subsidized by creditors." See Report, *supra* note 98, *Recommendation for Reform of Consumer Bankruptcy Law By Four Dissenting Commissioners*, at 15; see also Schlesinger, *supra* note 118, at A1 (noting the credit industry's characterization of bankruptcy filers as "the 1990s version of President Reagan's 'welfare queens' . . .").

¹³³For a particularly vitriolic critique of the views expressed by the opponents of means-testing, see Jones & Zywicki, *supra* note 77, at 178 (characterizing views as "overwrought responses" and expressing concern that "well-known academics and bankruptcy specialists have chosen to oppose means-testing viscerally"); *id.* at 207 (characterizing views as "[a]pocalyptic rhetoric").

¹³⁴See H.R. 3150, at § 101.

¹³⁵See 5.420, 107th Cong. § 102 (2001); H.R. 333, at § 102. For a more extensive discussion of means-testing proposals, see Klein, *supra* note 4, at 714-28.

¹³⁶I include myself as one of those opponents, as I am one of the bankruptcy professors who signed a letter that opposed recent legislation. See Bankruptcy Professors September 7, 1999 letter to Senate Judiciary Committee, available at <http://www.abiworld.org/legis/profcrit.html> (last visited Mar. 1, 2001).

¹³⁷Some critics of means-testing, including bankruptcy judges, argue that amending the Code to explicitly provide for means-testing is unnecessary, as Section 707(b) of the Code already gives judges the authority to force debtors with means repay their bills. See, e.g., Leif M. Clark, *The Responsible Borrower Protection Act: A Not-So-Responsible Effort at Protecting Borrowers*, 28 U. MEM. L. REV. 741, 749-50 (discussing proposed means-testing bills and noting that it was "unclear whether the newly proposed legislation needlessly reinvents the wheel, simply codifies existing practice, or attempts to micromanage bankruptcy judges' adjudication of specific cases by providing statutory 'bright lines' for eligibility").

pay their debts,¹³⁸ and because Chapter 13 plans already have a high failure rate.¹³⁹

III. BANKRUPTCY'S ROLE IN THE PUBLIC ASSISTANCE SYSTEM

Because the ability to file for bankruptcy has never been a guaranteed right,¹⁴⁰ it is not surprising that critics are troubled by the recent dramatic increase in bankruptcy filings and by the Code's apparent inability to curb the increase. Moreover, because the Code theoretically allows debtors to discharge their debts even though they may have income available to pay those debts, it is not surprising the critics feel that the Code gives debtors the right to force others (i.e., their creditors) to provide economic support.¹⁴¹ Similarly, given the recent assault on entitlement politics, it is not surprising that critics of the Code feel that it has caused debtors to lose their sense of personal and social responsibility and to engage in bankruptcy opportunism. Given the shift in the philosophical views toward entitlement programs, the ability to discharge debts in bankruptcy will not be construed as an entitlement. Since, however, discharging debts provides an economic benefit to debtors, the bankruptcy system should be treated as one that provides public assistance benefits.

Though recent means-testing proposals may have made unrealistic economic assumptions,¹⁴² implementing a means-test that prospectively assesses

¹³⁸See Braucher, *supra* note 4, at 3-6 (noting that debtors with high debt-income ratios are filing for bankruptcy); REPORT, *supra* note 98, at 90 (discussing testimony that use of means-testing "would fall hardest on families already financially pressed past the breaking point, with little provable benefit").

¹³⁹See Braucher, *supra* note 4, at 11 (citing Commission's finding that the failure rate for Chapter 13 plans "exceeds 60 percent"); Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 AM. BANKR. INST. L. REV. 293, 322 (1997) (observing that due to the "substantial commitment" required by a Chapter 13 plan, the debtor must enter the plan voluntarily or it will have "little chance of success"). See also *In re Attanasio*, 218 B.R. 180, 195 (Bankr. N.D. Ala. 1998) (noting that debtors fail to complete Chapter 13 plan payments because "[l]ife is full of surprises. Unanticipated expenses are the rule rather than the exception.").

¹⁴⁰See *United States v. Kras*, 409 U.S. 434, 446-47 (1973) (holding that there is no constitutional or statutory right to bankruptcy relief). But cf. Rendleman, *supra* note 119, at 1231-35 (suggesting that reformers explore welfare analogies because of similarities between bankruptcy and other welfare programs); Samuelson, *supra* note 94, at A17 (characterizing bankruptcy as "an informal welfare program for the lower middle class.").

¹⁴¹See Consumer Bankruptcy Subcommittee of the Committee on Consumer Financial Services (ABA), *Report and Recommendations*, 2 N. ILL. U. L. REV. 239, 259 (1982) ("[B]ankruptcy relief is not something which should be available for the asking. Instead, it is a form of equitable relief which should be justified by the exigencies of the consumer's financial condition."); Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 U.C.L.A. L. REV. 953, 977 (1981) ("[A] bankruptcy discharge should not be available merely upon request. There would be obvious disincentives to perform contracts. In theory at least, our law has never endorsed such a lenient rule. Debtors are always asked to sacrifice something, to pay what they reasonably can.").

¹⁴²See, e.g., Braucher, *supra* note 4, at 1 (characterizing means-testing proposals as unrealistic and unde-

whether a debtor's household income is sufficient to help him repay his bills is consistent with means-tests imposed in other nonentitlement federal assistance programs. That is, a properly crafted means-test would prevent all undeserving debtors from discharging their debts just as TANF appears to have prevented nondeserving mothers from receiving welfare benefits.¹⁴³ Moreover, imposing a means test would signal that bankruptcy relief (like welfare relief) is not an entitlement. Finally, means-testing is consistent with the principle of reciprocity because it would impose on debtors the burden of making financial sacrifices and relying on other economic sources (including their own future income) to repay their debts in return for receiving the benefit of discharging debts they lack the means to repay.

Just as welfare reforms sought to ensure that public assistance programs both awarded benefits and helped rehabilitate benefit recipients, a means-tested bankruptcy system should do more than just make it more burdensome to discharge debts. To make bankruptcy an effective means-tested system that imposes burdens designed to rehabilitate the benefit recipient, it must help debtors avoid a future financial crisis. Current bankruptcy laws do not, and are not designed to, reform or modify debtors' behavior. For example, people who discharge their debts are not required to participate in any consumer budgeting classes (and the system would not pay for such classes even if a debtor wanted to attend them). Likewise, the bankruptcy system does not mandate that debtors be told that they should consider consulting organizations outside the bankruptcy system to help them understand why they ended up deeply in debt. Current reforms condition bankruptcy relief on a debtor's willingness to obtain prepetition or postpetition credit counseling.¹⁴⁴

veloped); Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999) (characterizing assumptions as overly optimistic and unrealistic).

¹⁴³While ending welfare as we knew it caused welfare caseloads to decline, it does not appear to have ensured that poor mothers have become economically self-sufficient. See Alissa J. Rubin, 'Make Work Pay,' *And Kids Benefit; Study: Children Showed Improvements in School, Health and Behavior When Their Working Parents Received Cash Supplements, Welfare-Reform Report Says*, LOS ANGELES TIMES, Jan. 23, 2001, at A10 (discussing a report that suggests that if lawmakers want welfare to do more than reduce the amount of money government spends on the poor and move people into low-wage jobs, it must make a concerted effort to help augment poor families' incomes); Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 607 (1999) (citing research that indicates that a large percentage of welfare recipients who have left the TANF rolls are not employed); GAO report, *supra* note 44, at 96 (admitting there is a lack of consensus about the extent to which economic growth and state welfare reforms caused the decline in welfare caseloads); Bill Archer, Op-Ed, *Welfare Reform's Unprecedented Success*, WASH. POST, Aug. 10, 1998, at A17 (citing changes in values and expectations as well as finding work as reasons for the decline in the welfare rolls).

¹⁴⁴See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, § 106, 107th Cong. (2001). While virtually everyone supports the concept of debtor education, it is unclear who is best qualified to educate debtors or what type of education should be provided. A report on debtor

Even if bankruptcy critics are correct in their belief that debtors need to radically alter their general philosophy about the importance of repaying their debts, however, debtors need to be told more than the necessity of budgeting or using credit cards responsibly because they become economically disabled for a number of reasons.

Means-tested bankruptcy relief will be virtually useless unless the reformed bankruptcy system provides meaningful credit and noncredit assistance to working poor debtors.¹⁴⁵ At a bare minimum, debtors should be taught how to use credit responsibly and should be warned of the dangers associated with using credit cards. Meaningful bankruptcy reform must mandate that debtors participate in programs (educational or otherwise) that explain why they should not accept the twelfth credit card offer they receive that month, should never carry a credit card balance, should never apply for a credit card that charges an annual fee, should ignore credit card machines in casinos, should not purchase expensive shoes marketed by famous athletes, should never take out a high interest "cash advance" loan, etc.

Given the dire financial straits some debtors face, it is questionable whether they would accept this "lifestyle" advice even if it is presented to them. Moreover, it may be impossible to teach people to avoid overspending, given the bombardment of daily advertising to spend, spend, spend that the typical citizen sees in both the print and broadcast media, and increasingly in nontraditional mediums like the internet. Moreover, it is virtually guaranteed that the credit card lobby will prevent any educational reform that encourages people to significantly reduce their credit card use.¹⁴⁶ One

education submitted to the Commission noted that "it is hard to be against debtor education—it would be like being against apple pie." REPORT, *supra* note 98, (statement of Professor Karen Gross), Appendix G-3.a, at 2. Indeed, the same issues involving the need for debtor education expressed recently have been discussed numerous times during past bankruptcy reforms. See, e.g., Howard, *supra* note 85, at 1060 (discussing recent 1984 amendments to the Code and noting that "budget counseling should be provided in an effort to counter the 'mismanagement, ineptitude, and extravagance' at the root of most consumer bankruptcies") (citation omitted).

¹⁴⁵Though I generally agree that debtor education is worthwhile, I argue in another context that education that focuses narrowly on budgeting ultimately will fail to cure the perceived bankruptcy "problem." See A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945 (1999).

¹⁴⁶While the credit industry supports debtor education that tells debtors that they should attempt to repay their debts, it has defeated all attempts to force credit card issuers to clearly explain how much it will actually cost a borrower if the borrower pays only the minimum monthly payment on her credit card bill. See Editorial, *Bad Bill for a Real Problem*, BUFFALO NEWS, Oct. 19, 2000, at 4B (discussing industry's successful attempt to prevent requiring credit card issuers to explain how long it would take a debtor to repay a bill if she only paid the minimum monthly payment). This is not surprising, as it actually is not in the industry's self-interest to give debtors a candid assessment of the pitfalls of making full use of a credit card. That is, the credit industry profits when consumers behave somewhat recklessly given the exorbitant interest rates some credit card issuers charge and the substantial profit they make when consumers charge a lot then pay only the minimum monthly payments. See Nelson D. Schwartz & Scott Medintz, *Credit Check*, SMARTMONEY, Feb. 1, 1997, Vol. IV, No. II, at 110 (citing the "onerous" 19.2% interest

indication of the profits the industry potentially stands to lose if consumers decided, *en masse*, to charge only what they can afford to pay each month is the recent threat by some credit card issuers to impose a monthly fee on the accounts of credit card holders who fail to carry a monthly balance.¹⁴⁷

As using credit irresponsibly is not the only reason people resort to filing for bankruptcy, having a greater understanding of the importance of debt repayment will not help all debtors and will not necessarily prevent them from misusing credit in the future. Debtors who find themselves unable to pay their bills because they are unable to collect court-ordered child support or cannot find jobs that pay them wages sufficient to support their families may in fact use credit rationally, even though they know that they cannot afford to pay those debts. That is, debtors who understand the importance of paying their bills may at times choose to incur credit card bills they know they cannot repay if they conclude that medical or divorce expenses, or a loss of income due to under- or unemployment give them no other viable economic options. Imposing a means-test that merely prevents some debtors from discharging their debts will not solve the bankruptcy crisis (assuming one exists) unless the means-tested system also provides noncredit focused assistance, like how to get a better job or one that provides health insurance, how to collect child support payments, why you should resist the lure of credit card advertising, etc.¹⁴⁸ While TANF allows states to provide child

rate of BJ's Wholesale Club MasterCard); Kerry Capell et al., *Dunned if You Do, Dunned if You Don't*, BUS. WK., Sep. 23, 1996, at 130 (noting that sixty-four percent of credit card users carry a balance). See also Albert B. Crenshaw, *Ending a Free Ride: Credit Card Firm Plans Fee if Balance is Paid Monthly*, WASH. POST., Sep. 11, 1996, at F1 (reporting one company's claims that credit cardholders who pay their balances in full cost the company \$30 annually whereas the company earns \$318 annually on customers who carry a balance).

¹⁴⁷See Jennifer Babson, *Credit-Card Debt Not a Liability in This Market*, BOSTON GLOBE, Apr. 4, 1999, at F1 (noting that credit-card companies refer to card holders who do not carry monthly balances as "deadbeats" and "in some cases have slapped annual fees on those who refuse to revolve their debt."); Patrick Lee, *GE to Tack on \$25 Fee to Cardholders Who Pay Off Their Balances Promptly*, LOS ANGELES TIMES, Sep. 11, 1996 (Business; Financial Desk), at D1 (reporting that GE Capital Services' Rewards MasterCard will affix a \$25 annual charge to customer accounts that don't carry a balance from month to month or incur less than \$25 in annual charges); Cf. Carol Frey, *Banks Put Squeeze on Prompt Card-Holders*, NEWS & OBSERVER (Raleigh, NC), June 12, 1999, at D1 (discussing other methods credit-card firms use to turn "unprofitable, zero-balance customers into finance-charge payers").

Indeed, it appears that credit card companies intentionally seek customers who they know will spend more than their means because those customers are optimal customers. See REPORT, *supra* note 98, at 94 (discussing study which found debtors who previously filed for bankruptcy "are attractive to some credit issuers because they have shown they will take on credit and, by law, they cannot seek a bankruptcy discharge for another six years."); *In re Hernandez*, 208 B.R. 872, 879 (Bankr. W.D. Tex. 1997) ("[T]he same industry that seeks customers who will spend more than their means requests that discharge be denied to these customers because of an implied promise (which courts must infer) not to spend more than their means.").

¹⁴⁸But cf. Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L. J. 461, 466, 477-82 (1997) (proposing bankruptcy system that removes perverse incentives for irresponsible lending and shift penalties to credit industry).

care and transportation assistance to benefit recipients,¹⁴⁹ none of the current or proposed debtor education programs are designed to help debtors obtain more marketable job skills, health insurance, or help them collect child support payments.¹⁵⁰

Even if Congress mandated that debtors receive this "lifestyle counseling," it is unclear who should give this counseling. As one commentator argued over twenty years ago in response to debtor counseling programs, it probably makes "scant economic sense to substitute a useless counselor for a lawyer."¹⁵¹ Moreover, paying outside credit counselors to advise debtors, hiring employment specialists to provide job training services, helping debtors secure adequate health insurance, or helping the debtor collect child support payments will be expensive.¹⁵² However, unless and until the bankruptcy system addresses the underlying causes for the economic plight facing the modern debtor, adopting a quick fix like means-testing will solve only the immediate problem of increased consumer filings. It will do nothing to solve debtors' chronic financial difficulties or to prevent them from needing to file for bankruptcy again in the future.

CONCLUSION

Making bankruptcy a means-tested public assistance program is not, in principle, an irrational idea. Imposing a means-test that restricts bankruptcy relief to those who can document a financial need is consistent with the types of restrictions Congress imposes on the recipients of nonentitlement public assistance benefits. Similarly, using a means-test to stigmatize debtors and force them to modify their behavior is consistent with the role stigma played during welfare reform debates. A reasonable means-test can prevent truly undeserving poor debtors from discharging their debts, just as means-testing prevents the undeserving poor from receiving certain welfare benefits. Moreover, if bankruptcy is means-tested, then in return for providing an indirect cash benefit, this system reasonably can impose this country's economic values on the benefit recipients. In short, means-testing bankruptcy certainly

¹⁴⁹See 42 U.S.C. §§ 603(a)(1) and 618(a).

¹⁵⁰For example, while the planning skills component of one Chapter 13 debtor education program covers career as well as financial planning and the communication skills component introduces techniques to help solve personal, family, and career problems, the program does not help debtors get a better job, improve their educational level, etc. REPORT, *supra* note 98, at Appendix G-3.b.

¹⁵¹Rendleman, *supra* note 119, at 1232.

¹⁵²See, e.g., Statement of the Hon. William H. Brown: At a Hearing on H.R. 833 Before the Subcommittee on Commercial & Administrative Law House Committee on the Judiciary, March 17, 1999 (statement on behalf of the American Bankruptcy Institute) (visited Aug. 5, 1999) <<http://www.abiworld.org/legis/testimony/brown.html>> (commenting that required credit counseling "would add to the cost of bankruptcy relief" and that "[e]xisting counseling services would be burdened by the need to brief and counsel individuals who have no likelihood of being able to pay their debts through a voluntary repayment plan.").

can be justified as being consistent with the treatment Congress has given other recipients of nonentitlement federal assistance.

Though bankruptcy is not called a public assistance program, it nonetheless has served (and hopefully will continue to serve) as a social safety net for overburdened debtors. Supporters of the current bankruptcy reforms suggest that the net is being removed from greedy debtors, but that it will remain in place for needy debtors. Unfortunately, removing that safety net by telling all debtors that they should repay their debts, and by making it hard for all debtors to discharge any debts, inevitably will harm some needy debtors. Moreover, at least with respect to debtors who file for bankruptcy relief because of income shocks caused by unexpected life changes, the proposed reforms will neither necessarily decrease the number of those filings nor cause those types of debtors to repay more of their bills. If debtors truly lack the ability to consistently pay their debts due to medical expenses, divorce expenses or expenses created by a job termination or restructure, telling them that they should try to repay their debts will not then cause those debts to be repaid. Instead, imposing a means test that prevents truly needy debtors from discharging debts will serve the goal of decreasing the number of filings but will do nothing to decrease the need to file. Since Congress is determined to make bankruptcy a means-tested system, if it really wants to decrease the need to file, the reformed system must also give debtors the skills needed to avoid the economic crises that caused them to seek to discharge their debts in the first place.