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BANKRUPTCY STIGMA AND VULNERABILITY: QUESTIONING AUTONOMY AND STRUCTURING RESILIENCE

ABSTRACT

Stigma is an enduring byproduct of bankruptcy, both as felt by the debtor and as perceived by society. The stigma exists even though some have declared its demise, and is certainly present after the BAPCPA amendments aimed at action intended to revive the stigmatic effect of filing for bankruptcy. Bankruptcy stigma may be a useful tool when it prompts individuals to make wiser fiscal decisions, but for debtors who face uncontrollable financial circumstances, this same stigma is burdensome and does not provide a social benefit. Even worse, ineffective stigma exacerbates debtor vulnerability when bankruptcy could provide tools for debtor resilience and “fresh start.”

This Comment examines how stigma operates in bankruptcy, the emphasis on stigma in bankruptcy law changes, and stigma’s relation to vulnerability analysis. The conclusion proposes revisions to the Bankruptcy Code that take into account debtor vulnerability and provide debtor resilience. In support of this conclusion, this Comment examines the pervasiveness of stigma and autonomy in the bankruptcy context and how these were especially seen in the discussion preceding BAPCPA. The means test and prepetition credit counseling requirements reinforce the Bankruptcy Code’s structured autonomy, which is required for effective application of behavioral stigma. Vulnerability theory provides an important counterpoint to the Code’s imposition of stigma on debtors by critiquing radical autonomy and arguing for responsive, rather than stigmatizing, structures. Applying vulnerability theory, three levels of remedies emerge that address the problem of ineffective, autonomy-based stigma: Code changes that remove stigmatizing provisions, structural Code changes that separately treat uncontrollable debt, and extra-bankruptcy structures that support individual resilience and decrease the need for bankruptcy filing altogether.

INTRODUCTION

“Happy families are all alike; every unhappy family is unhappy in its own way.”¹ Although Tolstoy’s famous quote dealt primarily with the infelicities of intra-family relationships, it provides surprising insight into the plight of debtors seeking bankruptcy relief. Happy, financially secure families are alike in one vital sense: they are apparently independent. This supposed autonomy forms a buffer from the gradations of financial dependency that may lead to the stigma of bankruptcy. But, the path from resource rich resiliency is broad and contains many branches. Each unhappy family comes to bankruptcy with its own unique story to tell: job loss, debilitating illness, lack of adequate insurance, divorce, or death.² Dependency may be direct, as a major illness that requires time off from work;³ or indirect, as the caregiver for a terminally ill family member.⁴ Though these families are unhappy in their own way, as they approach bankruptcy, they are made alike through stigma.⁵

Stigma affects debtors before filing by weighing on their moral conscience that they should repay their debts. It also operates through societal disapproval and shaming after filing, especially if society perceives they were responsible for the decisions that led to this situation.⁶ This notion of fault is based on a

¹ LEO TOLSTOY, ANNA KARENINA 3 (Constance Garnett trans. 1901).

² Recent studies show that a majority of individual bankruptcy filers are in financial peril because of medical-related costs. High costs for medical care and prescriptions, insufficient insurance, and loss of caregiver income, among other costs, make medical bankruptcies increasingly common in the United States. See David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED., Aug. 2009, at 741; see also David U. Himmelstein et al., *Medical Bankruptcy in Massachusetts: Has Health Reform Made a Difference?*, 124 AM. J. MED., Mar. 2011 at 224.

³ This is known as “inevitable dependency,” because it recognizes that illness, as well as aging, is an “unavoidable and inescapable dependency.” MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 35 (2004).

⁴ Derivative dependency is distinct from inevitable dependency and “arises when a person assumes . . . responsibility for the care of an inevitably dependent person.” *Id.* at 35–36. Fineman further notes, “[T]hose who care for others are themselves dependent on resources in order to undertake that care.” *Id.* at 36.

⁵ Often supported and directed by the law, stigma operates on a more foundational level of social punishment and shaming. Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, REPUTATION* 68, 73 (Saul Levmore & Martha C. Nussbaum eds., 2010) (“Shame justice is justice by the mob: the dominant group are asked to take delight in the discomfort of the excluded and stigmatized.”).

⁶ Stigma can be used for a host of socially constructed deviancies, with some based on identity and some based on fault. In the bankruptcy context, it makes most sense to think about stigma based on behavior and fault. See *infra* text accompanying notes 17–19.

presumption of fundamental autonomy⁷ and individual agency that not only runs through the Bankruptcy Code (the “Code”),⁸ but also through the American legal system as a whole.⁹ The once clear notion of individual autonomy and fault in bankruptcy has become murky in recent years, especially in the continuing wake of the subprime mortgage crisis that surfaced after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), which amended the Code. While stigma may be applied and perceived in all bankruptcies, it has little effect on decision-making at the moment immediately before filing. Stigma can only work to change behavior if an alternative course of action is possible, and therefore its effectiveness for prospectively molding action depends on when it is imposed. Imposing stigma when there is only one viable action—for instance, upon someone’s last-resort bankruptcy—serves only to punish, not to shape behavior. On the other hand, stigma may function to shape behavior in line with social norms when it is imposed at a point when alternate decisions are available. Structures that recognize vulnerability and support individual resilience can address the issues at the heart of an individual’s financial difficulties. These supports would proactively take into consideration, and attempt to alleviate, circumstances that lead to the stigmatizing of debtors, instead of reactively imposing stigma only at the point of bankruptcy.

This Comment will analyze the interrelated concepts of stigma, autonomy, and vulnerability in the context of bankruptcy. The Comment concludes that debtors will come closer to receiving a fresh start through social structures that create resiliency. Part I explores how stigma has and continues to operate in society. This Part explores the interrelatedness of behavioral stigma, autonomy, and legislative action in United States bankruptcy history. Part II discusses the structure of the Code, and how provisions like the voluntary filing provision, prepetition credit counseling, and the means test perpetuate and reinforce behavioral stigma. Part III expounds the vulnerability paradigm:

⁷ Fundamental, or radical, autonomy refers to the sense of individual self-sufficiency, in contrast to a notion of mutual interdependency, an alternative way of thinking about autonomy. See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 3, at 20, 28–29.

⁸ The ability to voluntarily file is the most obvious example in the Code. See 11 U.S.C. § 301 (2006).

⁹ See generally FINEMAN, *THE AUTONOMY MYTH*, *supra* note 3, at 20–21 (explaining that the American legal system is based upon and idealizes the economically self-sufficient individual and family, in its independence from state and government support). “Autonomy is the term we use when describing the relationship between the individual and the state . . . [W]e think of an economically self-sufficient individual as autonomous in relation to society and its institutions.” *Id.*

an alternative framework that questions autonomy and agency, and instead posits the enduring vulnerability of all legal subjects.¹⁰ Part IV uses this vulnerability paradigm to propose remedies to bankruptcy provisions designed to stigmatize debtors, focusing on the previously discussed means test and prepetition credit counseling requirement. It also considers other structures, within and beyond bankruptcy, which would provide resilience in areas known to be the source of uncontrollable debt for vulnerable subjects.

I. STIGMA DEFINED AND ITS RELATION TO THE BANKRUPTCY CODE

Stigma operates in bankruptcy as a product of competing social and economic norms and finite resources. Social norms dictate that individuals keep promises and pay back debts; yet, society emphasizes consumption¹¹ and makes credit readily available for those borrowing beyond their means.¹² The tension between these norms fluctuates with the health of the economy and with shifts in how society perceives debtor stigma. Because stigma grows and shifts over time, both in bankruptcy and in other areas, Part I examines stigma's general mechanics. After defining stigma, this Part explores two reasons for shifting stigma: societal reevaluation of norms and reconsideration of individual control over behaviors and circumstances. It then provides a brief history of U.S. bankruptcy law focusing on stigma's role in that history.

A. *Stigma Defined*

The ancient Greeks defined stigma as a “system of markings typically burned . . . onto the bodies of criminals, traitors, and prostitutes as a way of

¹⁰ See, e.g., LORNA FOX O'MAHONEY, HOME EQUITY AND AGEING OWNERS: BETWEEN RISK AND REGULATION 187 (2012); Martha Alberston Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010); Martha Alberston Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Ani B. Satz, *Overcoming Fragmentation in Disability and Health Law*, 60 EMORY L.J. 277 (2010).

¹¹ In a press conference on December 20, 2006, then President George W. Bush told Americans that the year 2007 would “require difficult choices and additional sacrifices,” and to keep the economy growing, he encouraged Americans to “go shopping more.” Amanda Terkel, *With Recession Looming Bush Tells America to ‘Go Shopping More,’* THINK PROGRESS (Dec. 20, 2006, 12:56 PM), <http://thinkprogress.org/politics/2006/12/20/9281/bush-shopping/>; see also Amy Novotney, *What's Behind American Consumerism?*, 39 MONITOR ON PSYCHOLOGY, July 2008 at 40, available at <http://www.apa.org/monitor/2008/07-08/consumerism.aspx>.

¹² David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 332–33 (1999) (remarking about the lending practices of the 1980s: “[I]nterest-rate deregulation and falling inflation made it increasingly profitable for consumer lenders to reach deeper into the income distribution for borrowers”).

identifying them as people ‘to be discredited, scorned, and avoided.’”¹³ Even though physical markings are largely gone, social stigma still remains in legal punishment, primarily upon criminals.¹⁴ Stigma allows society to express its moral disapproval; those who engage in sexual behaviors that deviate from social norms especially feel these sanctions.¹⁵ Stigma devalues individuals that make up a particular group based on their failure to conform to societal norms.¹⁶

Stigma requires both a social norm and a deviation from the norm. Stigma can be based on identities (like race, ethnicity, or gender) or on behaviors (like spending habits or sexual orientation).¹⁷ This Comment focuses on behavioral stigmas. Behavioral stigmas, including bankruptcy, are based largely on society’s presumption that the stigmatized individual has control of the stigmatized behavior.¹⁸ When an individual is in control of the stigma-inducing, norm-deviant behavior, greater social stigma will apply than when

¹³ R.A. Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803, 814 (2004) (citing Steven L. Neuberger et al., *Why People Stigmatize: Toward a Biocultural Framework*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 31, 31 (Todd F. Heatherton et al. eds., 2000)).

¹⁴ See Roberto Galbiati & Nuno Garoupa, *Keeping Stigma Out of Administrative Law: An Explanation of Consistent Beliefs*, 15 SUP. CT. ECON. REV. 273, 273 (2007) (“It is widely accepted that a criminal conviction generates more stigma for the convicted party than an administrative penalty. . . . [H]igher stigma associated with criminal convictions is justified on the grounds that a criminal conviction conveys more reliable information about guilt than an administrative one.” (footnote omitted)); see also W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In Re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 155 (2011) (noting that Justice Stevens’ dissent in *Allen v. Illinois*, 478 U.S. 364 (1986), stated that a sex offender registry “law was criminal because it restricted liberty and imposed ‘severe stigma’”).

¹⁵ See Joy Baskin, *School Law*, 74 TEX. B.J. 40, 40 (2011) (noting that the stigma attached to sex offender registries has prompted the Texas Legislature “to consider creating a lesser offense that would criminalize and punish sexting.”); Amalia Lucia Cabezas, *Legal Challenges to and by Sex Workers/Prostitutes*, 48 CLEV. ST. L. REV. 79, 88 (2000) (quoting Jo Bindman, *Redefining Prostitution as Sex Work on the International Agenda*, 1997 ANTI-SLAVERY INT’L 111) (“[S]tigma and criminal charges [are] widely attached to sex work.”); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 384 (1996) (“[B]ecause of the prejudice, stigma, and suspicion that attaches to the victim of a sex crime, the jury may be unwilling to accept the testimony of the victim for the ironic reason that she is in fact, or at least purports to be, a victim of a sex crime.”).

¹⁶ Stigma is defined as “the social devaluation of a person who is deviant from or contrary to a social unit’s norm.” Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 483 (2006).

¹⁷ See, e.g., Jo C. Phelan et al., *Stigma and Prejudice: One Animal or Two?*, 67 SOCIAL SCIENCE & MEDICINE 358, 362 fig. 1 (2008) (representing the behavioral and motivational factors involved in the functions of stigma and prejudice); Lenhardt, *supra* note 13 (addressing racial stigma).

¹⁸ Wendy P. Heath et al., *Yes, I Did It, But Don’t Blame Me: Perceptions of Excuse Defenses*, 31 J. PSYCHIATRY & L., 187, 189 (2003) (“If a behavior or event is perceived as controllable, the actor is perceived as responsible; uncontrollable actions do not elicit perceptions of responsibility.”).

there is a perceived lack of control over the behavior.¹⁹ For instance, society has a norm against talking in a movie theater: social stigma attaches more strongly to the adult who freely chooses to have a cell phone conversation during the movie than a crying child or an adult overcome with a fit of coughing, due to an actual or perceived lack of control. Behavioral stigma can shift in two ways: changing social norms or information that the stigmatized individual has a lack of control over her actions.²⁰ Thus, the norm against theater-talking may subside altogether if cell phone conversations during movies become commonplace, and the norm may cease to apply to an individual if more information indicates that her outbursts are involuntary. Either of these shifts changes the way stigma attaches to a particular individual in a particular situation. For socially-deviant behavior, controllable and uncontrollable stigma can operate concurrently, leading to the complicated perception of the individual as both deviant (in that the behavior was controllable) and disadvantaged (in that the status that led to the behavior was uncontrollable). These conflicting perceptions provoke simultaneous societal responses of antipathy and compassion.²¹

Because social norms and public perception of what constitutes a willful violation of the norm shift over time, behavioral stigmas are very difficult to gauge.²² Social pressures and stigmas against filing for bankruptcy remain, even as penal sanctions have subsided, because bankruptcy is increasingly public and reputationally harmful.²³ In contemporary American society, bankruptcy stigma still makes debtors reluctant to file voluntary petitions, even under extreme circumstances.²⁴ The stigma of bankruptcy occurs regardless of

¹⁹ IRWIN KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS 4 (1981) (“[C]haracterological stigmas, entailing known or alleged violations of moral norms, would no doubt tend to be viewed (at least on a conscious level) as more voluntary than the tribal and bodily stigmas.”).

²⁰ Efrat, *Bankruptcy Stigma*, *supra* note 16, at 483–85.

²¹ KATZ, *supra* note 19, at 5.

²² See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQ. L. 365 (2006).

²³ Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 242–44 (2006) (noting that nearly 85% of families filing for bankruptcy in 2001 said they would be embarrassed if others knew of their bankruptcy filing, but bankruptcy filings are publicly available on the Internet); see also Volkmar Gessner et al., *Three Functions of Bankruptcy Law: The West German Case*, 12 LAW & SOC’Y REV., 499, 531–32 (1978) (noting that voluntary bankruptcy was introduced in medieval Italy to allow debtors to avoid the penal sanctions of involuntary bankruptcy, though moral stigma and social sanctions remained despite the changes).

²⁴ Sullivan et al., *supra* note 23, at 242 (“[F]amilies may be more reluctant to file for bankruptcy than ever before.”).

whether the debtor's financial situation is within her control²⁵ or not,²⁶ and regardless of whether the petition is filed voluntarily²⁷ or involuntarily.²⁸ Similarly, when lawmakers and policymakers intend to shift the level of stigma in bankruptcy, they do not focus only on those behaviors perceived as within the individual actor's control.²⁹ However, laws cannot affect decisions of individuals who are unable to freely make them, and an individual's choices are motivated by factors other than laws.

Stigma's pervasiveness in bankruptcy has negative psychological effects on the debtor. The debtor knows that people could find out about her bankruptcy filing, and most people are concerned about their reputation in their community.³⁰ Lawyers have used the psychologically stigmatizing effect of bankruptcy in legal arguments outside the bankruptcy context, drawing attention to community perceptions.³¹ Aware of the possible prejudice against

²⁵ See e.g., *In re Crink*, 402 B.R. 159 (Bankr. M.D.N.C. 2009) (holding that allowing debtors to continue in chapter 7 would be an abuse because debtors passed the means test only because of their excessive budget due to unreasonable housing expenses). While *Crink* does not mention stigma, the presumption of abuse based on high, unnecessary expenditures in the face of job loss and current ability to pay is behavior deemed highly deserving of stigma in the Code, and a reason for creating the presumption of abuse in the means test.

²⁶ In *Fantozzi v. Board of Fire & Police Commissioners of Villa Park*, the debtor was suspended from his job as a police officer because of his bankruptcy filing, even though most of his non-real estate debt he accrued was for his wife's numerous medical operations over the course of five and a half years. 27 Ill. 2d 357, 359 (1963).

²⁷ See, e.g., *id.* at 359 (local police board viewed voluntary bankruptcy as indicative of the individual's instability and reputational harm to the department); *In re Gold Standard Baking, Inc.*, 179 B.R. 98, 103 (Bankr. N.D. Ill. 1995) ("Any negative impact on the Debtor's business and perceived stigma attached thereto, was self-created when the Debtor voluntarily filed this Chapter 11 case.")

²⁸ *In re Hope Commc'ns, Inc.*, 59 B.R. 939, 943 (Bankr. W.D. La. 1986) (remarking the policy behind excluding disputed claims in involuntary bankruptcy's "to preclude creditors from dragging debtors into the stigma of an involuntary bankruptcy, when in fact the claim is subject to a valid, legitimate dispute").

²⁹ See H.R. REP. NO. 109-31, pt. 1 at 598 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 218. The minority view expressed by Representative Robert C. Scott of Virginia, before the passage of BAPCPA. He critiqued the bill for not differentiating between those who abused the system and those who did not, noting that the law affects behavior only of those who have control over their circumstances: "People who feel they have nothing left to lose often lack any incentive to be a productive member of society, and this can also create a potential danger to society. . . . [T]his legislation does not differentiate between those who abuse the system and those who truly need the aid it provides." *Id.*

³⁰ Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 371, 377 (2001) (noting status loss is a common psychological effect of stigma; other elements of stigma include: labeling, stereotyping, separation and discrimination, and all five are secured by the operation of power).

³¹ See, e.g., Plaintiffs' Memorandum in Support of Motion in Limine to Exclude Evidence of Prior Bankruptcy Filing By Mr. Walser and Mrs. Walser at 5, *Willow Wind Organic Farms, Inc. v. Kenyon Zero Storage, Inc.*, No. CV-04-155-FVS (E.D. Wash. Feb. 24, 2006) (moving to exclude character evidence that would be unduly prejudicial to the client witness in a contract dispute).

his clients, one lawyer moved to exclude from evidence his clients' previous bankruptcy filing and asserted:

[T]he filing of a bankruptcy has a common stigma that the person filing did not intend to pay their debts, was trying to get something past their creditors, or otherwise was not taking responsibility for their actions. . . . [S]tigma of the former bankruptcy filing has no bearing on [client's] character for truthfulness and the societal stigma attached to bankruptcy would cause undue prejudice.³²

Because of this damning effect, this lawyer attempted to decouple stigma from bankruptcy, stating that bankruptcy is irrelevant character evidence.³³ However, the presence of this discussion about bankruptcy stigma (in this otherwise unrelated case) demonstrates the lawyer's recognition that stigma causes fact finders tend to see bankruptcy as indicative of a character of untruthfulness.

Stigma's ability to harm reputations may lead creditors to use involuntary bankruptcy against small town debtors whose reputation they wish to tarnish. In one bankruptcy case, a local radio station was a debtor to several of its former employee salespeople, who earned unpaid commissions.³⁴ These unpaid commissions made them the radio station's creditors. Several of these former employees were working at a competitor radio station and had a financial interest in putting their debtor former employer out of business.³⁵ The court noted that bankruptcy stigma was likely an impetus for these creditors pushing for involuntary bankruptcy and that policy dictates against allowing creditors seeking a debtor's reputational harm to file involuntary bankruptcies.³⁶

Bankruptcy stigma can be used as a weapon against debtors or as a factor to evoke sympathy, depending on the debtor's perceived culpability. One court, on appeal, examined whether an involuntary case should be dismissed in the best interests of the creditors and debtor.³⁷ The reviewing court noted that the bankruptcy court's finding of generalized stigma was not sufficiently specific

³² *Id.*

³³ *Id.*

³⁴ *In re Hope Commc'ns, Inc.*, 59 B.R. 939, 940–41 (Bankr. W.D. La. 1986) (disputing the debt of these commissions).

³⁵ *Id.*

³⁶ *Id.* at 941, 943.

³⁷ *ProFutures Special Equities Fund, L.P. v. Spade (In re Spade)*, 255 B.R. 329 (D. Colo. 2000).

to determine that dismissal was in the best interest of the parties.³⁸ On the contrary, the appellate court held that the debtor's culpability for his company's financial distress justified the general stigma attendant to bankruptcy.³⁹ Likewise, another court reinforced that actions, not stigma, were of higher importance when considering whether to dismiss the case.⁴⁰ That court noted that the effects of stigma on the debtor were unclear, but any stigma that would attach would be deserved because of the debtor's actions.⁴¹ Arguments drawing attention to the stigma of bankruptcy therefore can influence judges, though judges will also consider the culpability of the debtor's behavior. There is some stigma attendant to bankruptcy, but it seems deserved when the bankruptcy is a result of freely chosen action.

B. *Stigma in the Code*

Lawmakers have modified U.S. bankruptcy law according to shifting perceptions of debtor irresponsibility and the appropriateness of imposing stigma.⁴² This Subpart describes how Congress has changed the Code in response to stigma, and also how Congress has attempted to force changes in social perceptions of stigma. Lawmakers both reactively respond to evolving views and also attempt to guide their evolution through proactive legislative changes.⁴³

In colonial America, before the first federal bankruptcy law, stigma operated on debtors locally.⁴⁴ Informal, or privately imposed, stigma included physical markings on debtors like a tattoo of "T" for thief, cutting off debtors' ears,⁴⁵ and cutting debtors' hair.⁴⁶ Stigma was also imposed through

³⁸ *Id.* at 332.

³⁹ *Id.* ("The 'stigma' in this case . . . is paled by the fact that Spade had brought his company to the point of insolvency.")

⁴⁰ *In re Gold Standard Baking, Inc.*, 179 B.R. 98, 103 (Bankr. N.D. Ill. 1995) (noting that any adverse impact was not supported by particular facts, and the debtor deserved any stigma upon his business because of the voluntary chapter 11 filing).

⁴¹ *Id.*

⁴² See Volkmar Gessner et al., *supra* note 23, at 530 (examining the preventative function of bankruptcy by focusing on "to what extent the norms, roles, and procedures of bankruptcy provide guidance (norm orientation) for the activities of the people concerned and give normative direction to economic behavior so as to facilitate trouble free interaction, especially through the avoidance of insolvencies").

⁴³ Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 375–78.

⁴⁴ *Id.* at 374–75.

⁴⁵ *Id.* at 375 (citing Joseph S. Pomykala, *Bankruptcy Laws: The Need for Reform*, in LEGAL ENV'T OF BUS. 178, 180 (Kurt Stanberry ed., 2000)).

imprisonment and flogging.⁴⁷ The Constitution provides for the development of federal bankruptcy law.⁴⁸ In the 1800s, Congress had several short-lived attempts at establishing a bankruptcy law.⁴⁹ These early attempts responded to public sentiment regarding the need for bankruptcy relief that took into account popular attitudes about debtors; the 1874 Act was repealed in 1878 because it was too harsh on debtors for public sentiment.⁵⁰

The first long-standing bankruptcy law, the 1898 Nelson Act,⁵¹ indicated legislators' concern with bankruptcy stigma and the social perception of debtor culpability. In the wake of the repeated bankruptcy repeals throughout the 1800s, populists⁵² swayed public sentiment toward federal bankruptcy provisions, which prompted Congress to respond with the 1898 Nelson Act.⁵³ In this act, Congress responded to the astounding number of business failures⁵⁴ and the honest but unfortunate debtor.⁵⁵ Throughout the 1800s, bankruptcy stigma remained high,⁵⁶ and the perception of the bankrupt as a criminal remained even as debtors' prisons were decreasingly common.⁵⁷ Concern for bankruptcy stigma was explicit in the rationale for the voluntary provision.

⁴⁶ Joe Pomykala, *Bankruptcy's Origins in Debtor Perpetuated Crime* 2 n.2 (Mar. 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=222377.

⁴⁷ Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 374 (“The only consistency among debt laws in the 18th century was that every colony, and later every state, permitted imprisonment for debt.” (quoting BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 79 (2002))).

⁴⁸ U.S. CONST. art. 1, § 8, cl. 4 (Congress shall have the power “to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”).

⁴⁹ See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12–23 (1995) (outlining the progression and various iterations of bankruptcy law up through the permanent legislation in 1898).

⁵⁰ *In re Gibraltar Amusements*, 291 F.2d 22, 27 (1961) (Friendly, J., dissenting).

⁵¹ Nelson Act (Bankruptcy Act of 1898), ch. 541, 30 Stat. 544 (1898) (repealed 1978).

⁵² Populists especially sought fresh start for honest debtors. *In re Gibraltar Amusements*, 291 F.2d at 27 (Friendly, J., dissenting).

⁵³ *Id.* at 28 (noting that there was a conflict between those who supported a creditors right to recover debts and those who wanted to protect the debtor from creditor harassment).

⁵⁴ Approximately 200,000 businesses failed between the 1878 repeal of the Bankruptcy Act and the 1898 Act. *Id.* at 27.

⁵⁵ *Id.* (“Voluntary bankruptcy is the means of redemption of the unsuccessful and fallen debtor. Involuntary bankruptcy is a weapon in the hands of the creditor to press collections of debt harshly, to intimidate, and to destroy.” (quoting Representative Lewis in the congressional debates)).

⁵⁶ See *id.* (stating that under the 1898 Act, “[b]ankruptcy was viewed as a stigma difficult to erase; it was one thing to allow a hopelessly burdened debtor to choose this disagreeable alternative as preferable to eternal debt, but quite another to permit blood-thirsty creditors, with only their own interests at heart to plunge an unwilling debtor into disgrace”).

⁵⁷ Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 375.

One lawmaker clearly distinguished mistaken and culpable debtors from those who were honest but unfortunate: “There have been two unfortunate periods or conditions in the country which have tended to destroy the business interests and to bankrupt business men. One period perhaps was owing to misjudgment of the people, and the other was in no sense their fault but was their misfortune.”⁵⁸

The conflicting perceptions of stigma and the increased consumer spending in the 1920s⁵⁹ prompted lawmakers to create bankruptcy law that calibrated stigma based on a debtor’s ability to repay creditors. Consumer credit expanded greatly;⁶⁰ bankruptcy filings increased.⁶¹ Some observers linked the two.⁶² U.S. Solicitor General Thomas D. Thatcher blamed the increased filings on the declining social stigma associated with bankruptcy and suggested that filers were dishonest and fraudulent.⁶³ To provide incentives for non-fraudulent filers, Solicitor General Thatcher recommended a separate bankruptcy option that would allow wage-earning debtors to repay debts.⁶⁴ This option would incentivize wage-earning debtors to file bankruptcy and create a plan to repay their debts, but suffer less stigma. Lessened stigma for these debtors would, by comparison, increase the relative stigma for non-wage-earning or liquidation debtors. Following the Solicitor General’s recommendation to decrease stigma for wage-earning debtors, Congress passed

⁵⁸ Representative Case Broderick of Kansas, speaking in support of voluntary bankruptcy during debate on the 1898 Bankruptcy Act, *quoted in* CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 141 (De Capo Press, Inc. 1972) (1935).

⁵⁹ Joseph A. Schumpeter, *The Decade of the Twenties*, 36 *AM ECONOMIC REV.* 1 (1946).

⁶⁰ Expanding over 10% each year of the decade from 1920–1929, reaching an inflation-adjusted \$7.1 billion in 1929 alone. Moss & Johnson, *supra* note 12, at 315.

⁶¹ In 1931, Rolf Nugent noted that the rate of consumer bankruptcy had doubled every five years since 1920 and appeared to be increasing. He predicted that by 1940 one in fifteen wage-earning families would be in the beginning stages or within six years of bankruptcy. *Id.* at 316–17 (citing Rolf Nugent, *Why Wage Earners Go Bankrupt*, *AM. BANKERS ASSOC.*, July 1931, at 9).

⁶² *Id.* (citing Rolf Nugent, *Why Wage Earners Go Bankrupt*, *AM. BANKERS ASSOC.*, July 1931, at 9) (noting the correlation between the increase in consumer bankruptcies during the last ten years and the increase in the use of consumer credit).

⁶³ *Id.* (citing Thomas D. Thatcher, *Administration of the Bankruptcy Act*, *REPORT OF THE FIFTY-THIRD ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT CHICAGO, IL, AUG. 20, 21 AND 22, 1930*, at 251, 253, 255 (1930)).

⁶⁴ S. REP. NO. 95-989, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5799 (stating that repayment plans provide “great self-satisfaction and pride to those debtors who complete them and at the same time effect a maximum return to creditors”).

the Chandler Act in 1938.⁶⁵ The Act included a wage-earner plan that eventually evolved into chapter 13.⁶⁶

Bankruptcy stigma received little attention through the Great Depression and World War II, and there were few changes to the bankruptcy provisions following the Chandler Act. By the early 1960s, consumer credit expanded again, like it had in the 1920s.⁶⁷ Also like in the 1920s, an increase in consumer bankruptcy filings accompanied the increase in available consumer credit.⁶⁸ Commentators suggested that what stigma remained to filing bankruptcy was diminishing, premised on the evidence of increased filings.⁶⁹ The Supreme Court complicated this suggestion by noting that although filing under the repayment chapter XIII allowed a debtor to avoid stigmatizing bankruptcy adjudication, stigma remained for those adjudged bankrupt.⁷⁰ Responding to the conflicting perceptions of bankruptcy's stigma, Congress proposed a committee to study the existing bankruptcy laws in 1970.⁷¹ At the study's conclusion in 1973, the Committee provided Congress a formal report that declared, "[T]he preponderant majority of debtors desire some means of paying their debts in preference to incurring the stigma and other consequences of bankruptcy."⁷² In other words, stigma's presence in bankruptcy made repayment a more attractive option for debtors than liquidation because of the distinct psychological difference between discharge in chapters 7 and 13.⁷³

⁶⁵ Moss & Johnson, *supra* note 12, at 319.

⁶⁶ *Id.*

⁶⁷ *Id.* at 328 (noting the "explosion of consumer credit and consumer bankruptcies since World War II").

⁶⁸ *Id.* at 316 (noting that this is the second credit crisis—the first of which was in the 1930s when there was also a discussion of the lack of stigma associated with bankruptcy).

⁶⁹ Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 376–77 n.56 ("[W]hile one may become somewhat stigmatized as a result of bearing the label of a bankrupt, this stigma is becoming of diminishing social importance." (quoting G. Stanley Joslin, *The Philosophy of Bankruptcy—A Re-Examination*, 17 U. FLA. L. REV. 189, 192 (1964))).

⁷⁰ *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1965) ("In [bankruptcy under the 1898 Act] proceedings, everyone lost—the creditors by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt.").

⁷¹ Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

⁷² REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R.DOC. No. 93-137, pt. 1, at 157 (1973).

⁷³ Sheila Driscoll, *Consumer Bankruptcy and Gender*, 83 GEO. L. J. 525, 542 (1994) ("[W]omen operating under the ethic-of-care mentality may be more comfortable reorganizing their debts under Chapter 13 rather than leaving their creditors out in the cold under Chapter 7.").

In the 1978 Bankruptcy Code, Congress acted to ameliorate debtor's attitudes about bankruptcy and society's attitudes about debtors.⁷⁴ First, Congress addressed a filer's psychological stigma, incentivizing wage-earners to file in the new chapter 13 repayment chapter.⁷⁵ Because even partial debt repayment is in line with the social norms of keeping one's promises, chapter 13 decreased stigma. Chapter 13 allowed wage-earning debtors to pay their debts over time instead of discharging them immediately.⁷⁶ Many debtors and congressional advisors saw repayment and "com[ing] to an accord with [one's] creditors"⁷⁷ as a preferable alternative to bankruptcy's stigma.⁷⁸ Second, Congress addressed social perceptions of individuals filing bankruptcy. Congress changed the term for filers from "bankrupt" to "debtor" throughout the Code.⁷⁹ Because "debtor" is descriptive and neutral, it is less stigmatizing than "bankrupt," which carries negative connotations.⁸⁰

Through the 1980s and 1990s, increased credit lending to poorer individuals created a new norm that changed social perception of debtor responsibility for their bankruptcy more than Code changes. In these decades, credit lending expanded again, but this expansion was novel because it reached poorer and poorer individuals.⁸¹ The necessary outcomes of such lending are that the number of debtors increases, the debt-income ratio increases, or some combination of the two.⁸² The actual result was a combination: consumer debt

⁷⁴ See Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 377–78.

⁷⁵ H.R. REP. NO. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6078–79.

⁷⁶ *In re Paulson*, 170 B.R. 496, 499 (Bankr. D. Conn. 1994) ("One of the major reasons, if not the major reason, for Congress having enacted the provisions of Chapter 13 was to provide flexible relief to wage earners who voluntarily sought a means of repaying their debts without incurring the stigma and other consequences of straight liquidation bankruptcy."); *see also* Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 378.

⁷⁷ *In re Scher*, 12 B.R. 258, 262 (Bankr. S.D.N.Y. 1981).

⁷⁸ *Id.*

⁷⁹ *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 97th Cong., 40–42 (1981) (statement of Jonathan Landers, Professor, University of Illinois Law School) (contending that the 1978 Bankruptcy Act reduced the stigma associated with filing for bankruptcy by changing the name of filers from "bankrupts" to "debtors."); *see also* David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Courts and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 179 (2000).

⁸⁰ Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177, 219–20 (1999) (claiming that the replacement of "bankrupt" with "debtor" contributed to the loss of bankruptcy stigma)

⁸¹ Moss & Johnson, *supra* note 12, at 332.

⁸² Moss and Johnson provide an example assuming creditors fixed lending of ten billion. Initially ten billion was lent to one million households (ten thousand per household) and the household average income was one hundred thousand (debt-income ratio: 10%). Moving down the income distribution, the lender would

was concentrated in increasingly lower income households—meaning more households that were less able to pay back their debt.⁸³ Although the cause of increased bankruptcy filings can be difficult to ascertain and multi-faceted, this expanded credit lending and subsequent debt would alone be sufficient to result in increased filings.⁸⁴ For debtors that could repay some or most of their debt, a bankruptcy court could rule that liquidation was abuse and dismiss the case.⁸⁵

Several decades later, leading up to BAPCPA, filings continued to increase, but there were again conflicting perceptions as to whether stigma's prevalence affected filers.⁸⁶ Well-known financial expert Alan Greenspan, who was Chairman of the Federal Reserve from 1987–2006, noted that stigma was waning: “[P]ersonal bankruptcies are soaring because Americans have lost their sense of shame.”⁸⁷ In contrast, empirical evidence did not demonstrate stigma's decline with as much confidence as Chairman Greenspan.⁸⁸ Nevertheless, BAPCPA implemented structural changes to the Code to respond to the perceived drop in bankruptcy stigma⁸⁹ and to shape societal

either have to increase the number of borrowers ten-fold, and lend 10% less to the lower income families, to maintain the same debt-income ratio, or lend to the same number of families, but now with a 100% debt-income ratio, or they could do both, increasing simultaneously the number of debtors and the debt-income ratio. *Id.*

⁸³ *Id.* at 333 (“[H]ouseholds with 45 percent of national income carried 42 percent of consumer debt in 1983, whereas households with only 36 percent of national income carried 56 percent of consumer debt in 1992.”).

⁸⁴ Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 264 (1997) (“Thus, an increase in the profitability of issuing credit cards should be expected to lead to an increase in actual defaults and actual bankruptcies.”).

⁸⁵ 11 U.S.C. § 707(b) (1984) (“After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.”). In *In re Edwards*, the Bankruptcy Court for the Southern District of New York interpreted Congress's intent: “Congress intended the courts to apply Code § 707(b) as a type of motion to dismiss for failure to state a claim for relief. It is to be used to deny Chapter 7 relief to those persons who . . . fail to reflect a need for the relief being sought because . . . the debtor is [not] now suffering [n]or will suffer in the near future from any meaningful economic hardship.” *Edwards*, 50 B.R. 933, 936 (Bankr. S.D.N.Y. 1985).

⁸⁶ Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 380.

⁸⁷ Moss & Johnson, *supra* note 12, at 311.

⁸⁸ Efrat, *The Evolution of Bankruptcy Stigma*, *supra* note 22, at 365, 380, 385 (citing Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANK. DEV. J. 425, 453 (2001) (book review)).

⁸⁹ See generally Rafael Efrat, *Attribution Theory Bias and Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL'Y 205, 206 (2003).

attitudes regarding consumer discharge.⁹⁰ This congressional motivation is in sharp contrast with the populist motivations that sought decreased bankruptcy stigma ahead of the Chandler Act.⁹¹

Lawmakers' and public perception of stigma's effect on debtors in bankruptcy have both been major driving forces for bankruptcy legislation throughout American history. Whether lawmakers intend to reflect changing norms⁹² or drive social perceptions,⁹³ social and moral norms connected to stigma remain at the forefront of statutory changes. This ever-present perception of stigma and the assumption that it shapes behavior is part of the very structural makeup of the Code.

II. STIGMA AND AGENCY IN CHAPTER 7 FILINGS

The Code is premised on the ideal of financial self-sufficiency⁹⁴ and individual agency. A presumption about debtor agency pervades the Code and legislative responses to debtor behaviors throughout its development. Lawmakers depend on individual agency—the idea that actors have the freedom to choose between several options and that law fundamentally shapes the process by which actors decide on an option.⁹⁵ Part II.A discusses two central Code features—prepetition voluntary filing and post-discharge fresh start—and demonstrates how they presume autonomy before and after bankruptcy. Part II.B discusses two BAPCPA-introduced administrative changes—the means test and the prepetition credit counseling requirements—that reinforce the presumption of autonomy inherent in the structure of the

⁹⁰ Press Release, White House, President Bush signs Bankruptcy Abuse Prevention and Consumer Protection Act (Apr. 20, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html>.

⁹¹ See *supra* text accompanying notes 51–54.

⁹² See, e.g., *supra* note 79 and accompanying text (discussing the switch from “bankrupt” to “debtor”).

⁹³ See, e.g., *supra* notes 59–66 and accompanying text (discussing the purpose of the Chandler Act).

⁹⁴ Professor Fineman noted that these ideals are exemplified in society at large, saying that American culture espouses a “particularized and superficial type of autonomy [that] has become the standard applied in judging societal institutions Economic independence and self-sufficiency are set up as transcendent values, attainable for all . . . members of society.” FINEMAN, AUTONOMY MYTH, *supra* note 3, at 28.

⁹⁵ Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 529 (1992) (noting that laws set up structures whose “function seeks, however obliquely, to shape people’s thoughts and acts in an area of life in which freedom is widely and properly prized”). *But see* Moss & Johnson, *supra* note 12, at 331 (noting that the inexplicable rise in filings even after the pro-creditor bankruptcy reforms of 1984 may indicate that “consumer debtors are simply not as sensitive to changes in the bankruptcy law as some analyses have suggested”).

Code and work to increase stigma for consumer debtors trying to file chapter 7 petitions.⁹⁶

A. Two Structural Presumptions of Autonomy in the Code

1. Prepetition Structured Autonomy: Voluntary Filing

Voluntary filing first became part of U.S. bankruptcy law in 1841.⁹⁷ As indicated in the brief bankruptcy history above, voluntary bankruptcy filing was a rallying cry for populists seeking bankruptcy protection for debtors.⁹⁸ Policymakers sought to protect the honest but unfortunate debtor,⁹⁹ since they recognized that stigma should not apply when someone is deserving of bankruptcy protections.¹⁰⁰

Of course, the honest but unfortunate debtor was not the only type of debtor to use the voluntary bankruptcy filing provision. Voluntary filing, or the “autonomy to file,”¹⁰¹ is accessible to all. Thus, voluntary filing has been subject to criticism because dishonest and fraudulent debtors can also use it.¹⁰² All individuals eligible to be debtors under chapter 7 are eligible under § 301 to file a voluntary petition.¹⁰³

⁹⁶ Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 411, 435 (2002) (arguing credit counseling and means testing make chapter 7 more cumbersome, expensive, and inaccessible). In addition, the legislative intention of the means test was to get tougher on debtors by changing language from “abuse” to “substantial abuse.” *Id.*

⁹⁷ Kennedy & Clift, *Historical Analysis of Insolvency*, *supra* note 79, at 171 (stating that in addition to opening eligibility requirements to all classes of debtors, the 1841 Act also “introduc[ed] a novel concept—voluntary cases”).

⁹⁸ Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 ALB. L. REV. 467, 518 (1998) (“The Act of 1800, like the English law, was conceived in the view that the bankrupt was dishonest; while the act of 1841 and the later acts proceeded upon the assumption that he might be honest but unfortunate.” (quoting *Cont’l Ill. Nat’l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 670 (1935))); *see also* discussion *supra* Part I.B.

⁹⁹ WARREN, *supra* note 58, at 141.

¹⁰⁰ In 1898, supporters of the return of voluntary filing provisions precisely argued that there are circumstances outside the debtor’s control and that these misfortunes should not be categorized as the debtor’s fault. *See id.* at 141–42.

¹⁰¹ Coulson, *supra* note 98, at 541 (“[A]utonomy to file when the debtor cannot or feels she should not pay”).

¹⁰² Those who introduced voluntary filing led its repeal only a year and half after its passage. One of these legislators, Senator Thomas Benton, said, “[The Act] has expunged the State insolvent laws and has met the universal condemnation of the country.” WARREN, *supra* note 58, at 84.

¹⁰³ Section 301 applies to filing under any chapter, but this Comment discusses only chapter 7 filings.

Under chapter 7, an individual is eligible to become a debtor¹⁰⁴ if the U.S. has jurisdiction over her.¹⁰⁵ Because of this low bar and lack of external requirements for qualifying as a debtor in chapter 7 bankruptcy,¹⁰⁶ the public perceives filing for bankruptcy to be within the debtor's control or agency. Therefore, the debtor is susceptible to the heightened social stigma that attends freely-chosen, yet socially-deviant, behavior.¹⁰⁷

2. *Postpetition Structured Autonomy: "Fresh Start"*

Fresh start is central to bankruptcy because it allows debtors the "opportunity to put misfortune or irresponsibility behind them and to begin life anew."¹⁰⁸ The discharge of debts is crucial to a debtor's personal and financial freedom, allowing her to move beyond indebtedness.¹⁰⁹ As the Supreme Court stated in 1934:

The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as if not more than it is a property right. . . . The new opportunity in life and the clear field for future effort, which it is the purpose of the Bankruptcy Act to afford the emancipated debtor, would be of little value to the wage-earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.¹¹⁰

¹⁰⁴ 11 U.S.C. § 109(a)–(b) (2006).

¹⁰⁵ *Id.* The U.S. has jurisdiction if the individual is a U.S. domicile or resident, or owns property or a business in the U.S., among other factors. *Id.*

¹⁰⁶ BAPCPA imposes some non-jurisdictional-based requirements to be a debtor, including a means test and mandatory credit counseling. *See infra* Part II.B.2–3 (discussing the effects of these requirements on autonomy and stigma).

¹⁰⁷ Of course, involuntary creditor-initiated bankruptcy can also lead to stigma based on the debtor's actions before filing, but the nature of voluntary filing makes the connection between autonomy and stigma much more direct.

¹⁰⁸ ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 116 (6th ed. 2009).

¹⁰⁹ Moss & Johnson, *supra* note 12, at 329 (discussing H.R. REP. NO. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078–79 "The 1977 House Report explained: 'the premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under chapter 13 . . . and finally . . . bankruptcy relief should be effective, and should provide the debtor with a fresh start.'").

¹¹⁰ *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

Discharge allows future earnings to pay for future purchases instead of enslaving the debtor to a neverending cycle of paying off growing prior debts. A debtor's fresh start post-bankruptcy is one of three foundational U.S. bankruptcy policies, along with equitable distribution to creditors and economical administration of the bankruptcy process.¹¹¹ As these latter two policies do not relate directly to the debtor, the fresh start is the debtor's primary motivation for filing bankruptcy to begin again after discharge, more or less debt-free.¹¹²

Fresh start is statutorily and judicially reinforced by prohibiting borrowers from contracting around bankruptcy.¹¹³ Some scholars argue in support of the economic benefits of allowing sophisticated parties the freedom to waive their privilege to file bankruptcy when contracting.¹¹⁴ As other scholars have noted, this position has only been supported in the business bankruptcies; no one has suggested that individual consumers be able to contract around bankruptcy.¹¹⁵ An ability to rehabilitate should not require prospective knowledge of its need.

The importance of the fresh start comes from an American philosophy and attendant morality premised on the primacy of the individual and free market forces, not social protections or subsidy.¹¹⁶ As Richard Coulson noted:

The fresh start notion has close connections with individualism and a market philosophy. It reflects a basic decision that the costs and benefits of discharge should be—and safely can be—left to the individual debtor. The system rests on a free market philosophy that

¹¹¹ Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 542 (1999).

¹¹² This excepts those debtors who may choose to reaffirm discharged debts or who may have particular debts that are non-dischargeable.

¹¹³ *In re Demeter*, 478 B.R. 281, 292 (Bankr. E.D. Mich. 2012) (citing *In re W.R. Grace & Co.*, No. 11-199, 2012 WL 2130981, at *72 (D. Del. June 11, 2012)) (noting that the strong federal interest in providing debtors a fresh start overrides state interests like those under contract law).

¹¹⁴ See generally Steven L. Schwarcz, *supra* note 111, at 515 (indicating circumstances amongst sophisticated parties where there may be an ability to contract around bankruptcy, or waive the automatic stay); see also Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 117 (1992); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1850-51 (1998).

¹¹⁵ Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1199 n.3 (2005).

¹¹⁶ See FINEMAN, AUTONOMY MYTH, *supra* note 3, at 9 ("Autonomy is the absence of economic dependence on outsiders, particularly on the government.").

throws the social and economic risks of credit on creditors and debtors, rather than on society at large.¹¹⁷

Bankruptcy in the U.S. is therefore centered on the individual free market participant and bankruptcy exists for her fresh start. This foundation accords with other legal bases in the U.S., including the social contract¹¹⁸ and the concept of a contract more generally.¹¹⁹ Autonomy focuses on the individual since it is defined as “the absence of economic dependence on outsiders, particularly on the government.”¹²⁰ Autonomy is presumed both prepetition in allowing for debtor agency and voluntary filing, and postpetition in the goal of debtor fresh start.

B. Autonomy and the Rationale for BAPCPA

BAPCPA reinforced the structural presumptions of autonomy in the Code, apparent in the legislative debates and history, and newly imposed requirements on debtors. The amendments were explicitly intended to increase debtor stigma.¹²¹

1. Congressional Analyses of the Code’s Shortcomings: 1994–2005

BAPCPA’s legislative history indicates a high level of congressional agreement about the low level of debtor stigma and the problems that the new amendment should address. Legislators’ statements concerning the need for Code revision in the period leading up to BAPCPA indicate a widespread perception that individuals’ lack of personal financial responsibility was the primary cause of consumer bankruptcy.¹²² Both BAPCPA supporters and

¹¹⁷ Coulson, *supra* note 98, at 540.

¹¹⁸ FINEMAN, AUTONOMY MYTH, *supra* note 3, at 218 (noting that the Constitution’s “We the people” bases the legitimacy of governance on the consent of the governed and protects inalienable rights of the self-governed individual subject).

¹¹⁹ *Id.* at 219 (“[T]he concept of contract is one of the primary devices for understanding individual and institutional relationships.”). This concept “imagines autonomous adults, capable and equal individuals engaged in a process employing wit, knowledge, and skill, rightly held to the terms they hash out in the process.” *Id.*

¹²⁰ *Id.* at 9.

¹²¹ This includes an increased waiting period between chapter 7 filings, from six years under the Pre-BAPCPA statute to eight years under 11 U.S.C. § 727(a)(8)(2006).

¹²² See H.R. REP. NO. 107-3, pt. 1, at 6 (2001) (“[T]his legislation responds to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system.” (footnote omitted)).

opponents concurred about specific problems that should be addressed, including serial filings, an increase in consumer filings, decreased financial accountability, and the absence of effective oversight.¹²³ This agreement about the need for legislation and the diagnosis of the inherent problems in the financial system underscores that the structure of the Code presumes debtor autonomy.

Legislators on both sides of the issue agreed that the U.S. bankruptcy system allowed for gamesmanship and should be corrected.¹²⁴ In the years leading up to the passage of BAPCPA, including its precursor legislation the Bankruptcy Reform Act of 1998,¹²⁵ there was bipartisan agreement about the problems with US bankruptcy. Legislators on both sides noted that high amounts of consumer debt and high numbers of bankruptcy filings indicated a national problem.¹²⁶ However, there was disagreement about whether a causal connection between high consumer debt and high bankruptcy filings existed. While opponents of BAPCPA noted that there was merely a correlation, not causation,¹²⁷ supporters described causation: that the high number of filings was a result of consumers abusing the credit they were offered.¹²⁸

These floor statements were directly connected to stigma when repackaged for a media audience. Senator John Kerry noted on PBS NewsHour, “[T]here has been a decline, as we all know, in the stigma of filing for personal

¹²³ *Id.*; A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1873–74 (2006).

¹²⁴ 150 CONG. REC. H149 (daily ed. Jan. 28, 2004) (statement of Rep. James Sensenbrenner) (in support: “[D]ebtors are obtaining credit cards despite having little or no income, incurring huge debts, paying those debts with worthless checks, and then filing for bankruptcy relief.”); 149 CONG. REC. H1996 (daily ed. Mar. 19, 2003) (statement of Rep. Melvin Watt) (opposed: “A number of us were willing to sit down and roll up our sleeves and try to deal with the fact that people were gaming the bankruptcy system.”).

¹²⁵ Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 496 (2005) (noting that the 1998 Act “became the foundation for bankruptcy reform as ultimately reflected in BAPCPA”).

¹²⁶ 144 CONG. REC. H8448 (daily ed. May 7, 1998) (statement of Rep. Shelia Jackson-Lee) (opposed to the legislation: “[A]bout 1.4 million families will file for consumer bankruptcy . . . the rise in bankruptcies follows equally sharp rises in the amount of consumer debt per household”); 151 CONG. REC. S1842 (daily ed. Mar. 1, 2005) (statement of Sen. Orrin Hatch) (in support of the legislation: “In 2004 alone, there were 1.6 million more bankruptcies than during the entire Great Depression. . . . Certainly one of the critical reasons behind the rising tide of filings . . . are the actions of those who flagrantly abuse our generous bankruptcy laws.”).

¹²⁷ See 144 CONG. REC. H8448–49 (daily ed. May 7, 1998) (statement of Rep. Shelia Jackson-Lee) (discussing filing statistics and research).

¹²⁸ See 151 CONG. REC. S1842 (daily ed. Mar. 1, 2005) (statement of Sen. Orrin Hatch).

bankruptcy, and certainly we would agree that appropriate changes are necessary in order to ensure that bankruptcy not be considered a lifestyle choice.”¹²⁹ By characterizing bankruptcy as a lifestyle choice, Senator Kerry blamed consumers’ assumption of more debt on decreased stigma, resulting in higher numbers of bankruptcy filings.

Academics also theorized about the causes behind increased consumer bankruptcy filings. A 1998 study indicated that economic predictors, like unemployment and poverty, which were expected to correlate with increased filings,¹³⁰ did not explain the increased filings through the Reagan recovery nor the filings peak in conjunction with the 1991 recession.¹³¹ The study’s authors concluded that the most likely explanation for this filings jump was not economic, but rather a shift in social norms from heightened bankruptcy stigma to a more tolerant stance regarding debt discharge.¹³²

Statements about decreased stigma, abuse, and the brokenness of the bankruptcy system were premised on the individual consumer making an autonomous and rational decision to enter bankruptcy. Whether lawmakers noted only correlation or imputed causation between the increased indebtedness and increased bankruptcy filings,¹³³ there was a unifying focus on the actions and motivations of the debtor, rather than the causes for her debt.¹³⁴ Prior to BAPCPA’s enactment, many lawmakers identified the decrease in debtor stigma as a problem.¹³⁵ This focus on stigma indicates that lawmakers presumed individuals are, at their root, autonomous actors.¹³⁶

¹²⁹ *PBS Newshour: Bankruptcy* (PBS television broadcast Mar. 15, 2001) (transcript available at http://www.pbs.org/newshour/bb/economy/jan-june01/bankruptcy_03-15.html#).

¹³⁰ F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 200 (1998).

¹³¹ *See id.* at 187.

¹³² *Id.* at 206 (“Nature does not make jumps. . . . But it may make a jump on a change in social norms, such as one has observed in recent years. The skeptic who thinks otherwise will have a very difficult time accounting for recent changes in illegitimacy rates or in consumer bankruptcy filing rates.”).

¹³³ *See supra* notes 124–28 and accompanying text.

¹³⁴ 144 CONG. REC. S10471 (daily ed. Sept. 17, 1998) (statement of Sen. Orrin Hatch) (“Mr. President, the explosion in bankruptcy filings has less to do with causes and more to do with motivations. The stigma of bankruptcy is all but gone.”).

¹³⁵ *See* Efrat, *Bankruptcy Stigma*, *supra* note 16, at 486 (“Bankruptcy should be difficult, and the moral stigma that used to be associated with bankruptcy ought to be resurrected.” (quoting 144 CONG. REC. S10635, S10650 (daily ed. Sept. 21, 1998) (statement of Sen. Chuck Grassley))); 144 CONG. REC. H4333, H4367 (daily ed. June 10, 1998) (statement of Rep. Ellen Tauscher) (“The stigma that was once attached to bankruptcy has disappeared.”); *Bankruptcy Reform: Balancing the Interests of Debtors and Creditors*, CONG. DIG., Dec. 1998, at 289, 311 (“Today nobody cares about morality anymore. There is no moral stigma. Therefore, people go bankrupt.” (quoting Rep. Jerrold Nadler)); *House and Senate Committees Meet to Consider Bankruptcy*

At the press conference that accompanied BAPCPA's signing, President George W. Bush also used an autonomy rationale, stating that America "is a nation of personal responsibility where people are expected to meet their obligations."¹³⁷ President Bush reinforced the presumption of abuse and fraud that BAPCPA was enacted to address. However, this presumption echoed by lawmakers', judges', and academics' sweeping statements hide the fact that there was a dearth of evidence to support such widespread abuse.¹³⁸ Public perception and rhetoric preceding BAPCPA did not match the evidence, which indicated that bankruptcy abuse was overemphasized.¹³⁹ Indications like the increased number of filings¹⁴⁰ and the ability of some chapter 7 debtors to pay a substantial amount of their debt do not mean that this was due to decreased stigma.¹⁴¹ Subsequent studies questioned these earlier studies' assumptions and

Reform, 8 CONSUMER BANKR. NEWS (Apr. 8, 1999) (quoting Senator Christopher Dodd's advocacy of bankruptcy reform because the social stigma of bankruptcy is gone).

¹³⁶ However, the expansion of lending to lower income populations means that they are less likely to be able to pay back their debt. See Braucher, *supra* note 96, at 425–26 (citing Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L. J. 5673 (1998)).

¹³⁷ Press Release, White House, President Bush signs Bankruptcy Abuse Prevention and Consumer Protection Act (Apr. 20, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html>.

¹³⁸ *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 20 (1997) (prepared statement of Ian Domowitz, Professor of Economics, Northwestern University) ("Like the vast majority of researchers in the area of consumer bankruptcy, I fail to find any evidence of substantial Chapter 7 abuse.").

¹³⁹ Diann Carol Vennink Moorman, *Consumer Bankruptcy: Are Allegations of Abuse Well Founded?*, 22–25 (2006) (unpublished Ph.D dissertation, Iowa State University) (available on ProQuest UMI Microform 3229108) (finding that filing bankruptcy was not the first choice for bankrupt households; on the contrary, for many households it was the last choice).

¹⁴⁰ A study by Visa Inc. attributed the rise in filings to an increase in consumer exploitation tendencies and a decrease in stigma for younger populations. See VISA U.S.A. INC. CONSUMER BANKRUPTCY REPORTS, CONSUMER BANKRUPTCY: CAUSES AND IMPLICATIONS 14, 22 (1996), <http://www.govinfo.library.unt.edu/nbr/report/g2a.pdf>.

¹⁴¹ See CREDIT RESEARCH CTR., PURDUE UNIV., CONSUMER BANKRUPTCY STUDY, VOL. I, CONSUMERS' RIGHT TO BANKRUPTCY: ORIGINS AND EFFECTS 88–91 (1982).

methodology,¹⁴² especially since the earlier studies were either poorly done or funded by the credit industry.¹⁴³

In spite of the studies' lack of credibility, congressional perceptions and rhetoric about declining bankruptcy stigma drove BAPCPA.¹⁴⁴ Lawmakers connected lack of stigma to wage-earning debtors' abuse of the bankruptcy system and attributed fault to voluntary filers.¹⁴⁵ Accordingly, lawmakers provided several remedies to address these perceived problems: the means testing requirement, which limits a debtor's ability to voluntarily file for chapter 7 liquidation and her ability to receive a fresh start;¹⁴⁶ and the prepetition credit counseling requirement, which provides an additional hurdle to a debtor's ability to voluntarily file for bankruptcy.¹⁴⁷

2. Means Test: Increasing Stigma for Debtors

Section 707 codifies the means test. It presumes bankruptcy abuse for over-median-income debtors who file for chapter 7 liquidation, unless they demonstrate an inability to pay 25% of their debt to general unsecured creditors over the course of sixty monthly payments.¹⁴⁸ An individual filing for bankruptcy must complete Form 22A, which calculates the filer's income and debt, and determine whether the court must presume abuse.¹⁴⁹ Form 22A

¹⁴² See Teresa A. Sullivan et al, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1145 (reviewing the Credit Research Center study, *supra* note 141, and noting, "As a scientific study it is deeply flawed. [It] lacks crucial expertise, is designed incorrectly, asks a series of inartful questions, gathers its data improperly, misanalyzes the statistical data and draws erroneous and biased inferences from the data analysis."); see also Efrat, *Attribution Theory Bias*, *supra* note 89, at 209–13 (2003) (describing sources critical of these studies and their supporting evidence).

¹⁴³ *Id.* at 210–11 (2003); see, e.g., CREDIT RESEARCH CTR., *supra* note 141, at 88–91 (1982) (sponsored by the Credit Research Center, which was founded at Purdue University in 1974 and is funded by credit industry executives); VISA, *supra* note 140, at 14, 22.

¹⁴⁴ Sullivan et al., *supra* note 23, at 214 (noting that BAPCPA was justified primarily because of the attribution of increased filings to decreased stigma).

¹⁴⁵ Dickerson, *supra* note 123, at 1891–92.

¹⁴⁶ The success rate of chapter 13 filings, allowing discharge and therefore fresh start as the alternative to filing chapter 7 liquidation, depends on good administration and reasonable living expenses, which are not always reality. See Braucher, *supra* note 96, at 410.

¹⁴⁷ Credit counseling is required for filings regardless of the reason for financial indebtedness. See *infra* Part II.B.3.

¹⁴⁸ 11 U.S.C. § 707(b) (2006).

¹⁴⁹ CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION, OFFICIAL BANKRUPTCY FORM 22A (12/10), available at http://www.U.S.C.courts.gov/U.S.C.courts/RulesAndPolicies/rules/BK%20Forms%201210/B_22A_1210.pdf.

requires non-exempt debtors who have a greater than average income for a similarly sized family in their state to subtract their actual debts and undertake the calculation required in §707 (b)(2).¹⁵⁰ This calculation means judges must presume abuse for debtors above the line, while debtors below it may be allowed to file chapter 7.¹⁵¹

The means test was heavily discussed prior to its passage in BAPCPA. In 1994, ahead of the years-long debate over BAPCPA, Congress appointed the National Bankruptcy Review Commission to review, improve and update the Code, but “not disturb the fundamental tenets and balance of current law.”¹⁵² In 1994, Congress did not believe that there was a problem of consumer bankruptcy abuse.¹⁵³ When the report was released in 1997, five of the nine commission members affirmed this assessment and proposed only minor revisions.¹⁵⁴ However, the four dissenters on this commission were vocal about the need for structural revisions like the means test.¹⁵⁵ These commission members stated that without the means test, bankruptcy relief was “too easy to obtain,” and was a first instead of last resort for “people who can’t keep up with their bills,” and that the “moral stigma once attached to bankruptcy has eroded.”¹⁵⁶ Based on these rationales and the support of the consumer credit

¹⁵⁰ Form 22A allows exemptions for some military and non-consumer debtors. It then calculates the debtor’s income over the past six months to determine whether the income is greater than the median income for an equally sized family in the debtor’s state of domicile. If so, the form requires the presumption of abuse according to the formula stated in 11 U.S.C. § 707(b)(2). *Id.*

¹⁵¹ 11 U.S.C. § 707(b)(2)(A)(i)(I)–(II) (“[I]f the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of (I) 25 percent of the debtor’s non-priority unsecured claims in the case, or \$7025, whichever is greater; or (II) \$11,725.”) Here is an example to see how this test operates: a three-person family living in Georgia, where the median income for a family of three is \$55,711 (\$27,855.50 over six months). The family’s income over the past six months is \$28,000, and their allowable expenses (including housing, food, taxes, etc.) are \$4,510 per month. In addition, they have unsecured debt (such as medical and credit card debt) of \$38,000. Their income is above the state median for a family of three, so they must go through the means test. Their disposable income is \$156.67 per month (\$9400.20 when multiplied by the sixty month over the five years of repayment in chapter 13). This is less than \$10,000, so the final step of the analysis is to see if this amount is also less than 25% of the debtor’s total unsecured debt (\$9,500 in this case). Because the family’s disposable income (\$9,400) is also less than 25% of the general unsecured debt (\$9,500), this family passes the means test and is able to file for chapter 7 (liquidation).

¹⁵² H.R. Rep. No. 103-835, at 59 (1994).

¹⁵³ Dickerson, *supra* note 123, at 1864.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1865.

¹⁵⁶ *Id.* (citing Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, in REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION (1997), available at <http://govinfo.library.unt.edu/nbrcreport/24commvi08.html>).

lobby,¹⁵⁷ the commission's dissenters revived the initially failed means test, providing the groundwork for the version that became law in BAPCPA.¹⁵⁸

In the subsequent debate over BAPCPA, law professors argued that it was detrimental¹⁵⁹ because the means test was a solution to a non-existent problem.¹⁶⁰ For instance, Professor Braucher stated, “[T]he [pre-BAPCPA] system already effectively screens out most of those who don’t belong in it Most individual debtors in bankruptcy do not have non-exempt assets and receive little or no income in excess of their reasonable expenses.”¹⁶¹ The additional administrative requirements to the voluntary filing provisions, like the means test, did not solve a real problem in the system, and even worse, added expense to the entire bankruptcy system, making it less accessible for those needing it most.¹⁶²

3. Credit Counseling Requirement: Presuming Autonomy

BAPCPA added a new prepetition requirement for individual debtors: credit counseling.¹⁶³ Lawmakers assumed that the debtor had autonomy over her financial situation to the extent that recognition of the causes of her financial distress would prevent its recurrence.¹⁶⁴ The credit-counseling requirement states that subject to certain exemptions for extreme

¹⁵⁷ Dickerson, *supra* note 123, at 1865 n. 19 (citing Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANK. L.J. 483, 496 (1997)) (describing the consumer credit industry’s lobbying efforts before the Commission).

¹⁵⁸ Dickerson, *supra* note 123, at 1865–66.

¹⁵⁹ Braucher, *supra* note 96, at 407 (2002) (noting that decreased access to bankruptcy through the means test is likely to lead to more indebtedness, not increased payments to creditors).

¹⁶⁰ *Id.* at 407; see also TERESA A. SULLIVAN, ELIZABETH WARREN & JAW LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 239–40 (1989); 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) (finding that under 1998 version of legislation, means testing would force 3.6% of sample Chapter 7 debtors to pay something).

¹⁶¹ Braucher, *supra* note 96, at 407.

¹⁶² *Id.* at 408.

¹⁶³ 11 U.S.C. § 109(h)(1) (2006).

¹⁶⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-203, BANKRUPTCY REFORM: VALUE OF CREDIT COUNSELING REQUIREMENT IS NOT CLEAR, at 19–20 (2007), available at <http://www.gao.gov/new.items/d07203.pdf> (“The act requires that [the credit counseling] session include an analysis of a client’s current financial condition and the factors that caused this condition and help develop a plan to respond to the client’s problems that would not involve incurring additional debt.”).

inconvenience and other mitigating factors,¹⁶⁵ individuals must undergo credit counseling from an approved agency in the 180 days ahead of bankruptcy filing.¹⁶⁶

This prepetition credit-counseling requirement presumes that the debtor has choices to avoid her current financial difficulties, and that she would benefit from budget tweaking and education about options. However, the content required in the counseling sessions is unclear.¹⁶⁷ According to a 2007 Government Accountability Office Survey that examined the efficacy of this program, this prepetition credit counseling takes an average sixty to ninety minutes and consists of a discussion of “the client’s financial goals and potential opportunities for reducing spending and paying off debt.”¹⁶⁸ The debtor then leaves credit counseling with a personalized budget and options for moving forward.¹⁶⁹ The prepetition counseling requirement assumes that a debtor’s indebtedness to the point of insolvency is primarily a consequence of poor fiscal choices and financial management; it assumes that bankruptcies can be avoided with last minute budgeting.¹⁷⁰

Since the efficacy of the prepetition counseling depends on debtors having the type of debt that can be addressed by better financial management, the requirement’s exceptions should relate to those types of debt that are not

¹⁶⁵ 11 U.S.C. § 109(h)(2)–(4) (exempting debtors who live in districts where the trustee determines no approved nonprofit budgetary credit counseling agencies provide reasonably adequate services, and waiving the requirement under specific exigent circumstances at the discretion of the court, including those debtors “impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities”).

¹⁶⁶ *Id.* at § 109(h)(1) (“An individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111 (a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.”).

¹⁶⁷ Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Prepetition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 561 (2005) (“The problem is that BAPCPA fails explicitly to define the goals of either mandate. The statute is vague as to the content, indeed, the very goals, of both the pre- and post-filing requirements. As such, it is unclear what is intended to occur in these sessions.”).

¹⁶⁸ GOV’T ACCOUNTABILITY OFFICE, *supra* note 164, at 20.

¹⁶⁹ *Id.*

¹⁷⁰ See Press Release, National Association of Consumer Bankruptcy Attorneys, Study: Controversial Bankruptcy Law Reforms Not Working—97 Percent Unable to Repay Debts, Most Pushed to Brine by Crisis (Feb. 22, 2006), available at <http://www.nacba.org/News/NACBANews/tabid/87/articleType/ArticleView/articleId/10/REPORT-Bankruptcy-Law-Reforms-Not-Working.aspx>.

susceptible to better budgeting. On the contrary, the exemptions only cover various types of debtor incapacity or inaccessibility: physical, mental and geographic.¹⁷¹ The exemptions therefore predominately address debtors who deviate from the norm of autonomy presumed in the Code, not directly for the reasons for indebtedness.¹⁷²

The Code's failure to allow exceptions from the counseling based on the debt's source is astounding in light of the studies that show most indebtedness stems from uncontrollable circumstances rather than poor budgeting.¹⁷³ In a multi-part study examining the sources of consumer debt, Teresa Sullivan, Elizabeth Warren, and Jay Westbrook discovered five major reasons for individual bankruptcy: (1) national economic turmoil and job loss, (2) high medical costs/lack of health insurance, (3) divorce, (4) maintaining unaffordable homeownership, and (5) high interest rates on increasingly high consumer debt.¹⁷⁴ In the same year, these researchers followed up on the high medical debt response and collected data on consumer bankruptcies.¹⁷⁵ The survey focused on medical causes for bankruptcy and demonstrated that at least 45.6% of individuals filing for bankruptcy in 1999 cited either medical reasons or substantial medical debt as the cause of their bankruptcy filing, and 20.9% stated that no one in their household had health insurance.¹⁷⁶

¹⁷¹ 11 U.S.C. § 109(h)(4) (allowing exemptions for mentally and physically disabled, and those debtors who are on active military duty in a military combat zone); *see also supra* note 165.

¹⁷² *Id.* at § 109(h)(2)–(3) (there is a catchall exemption for “exigent circumstances” “satisfactory to the court,” but it doesn’t specifically state the nature of the debt as an acceptable waiver of the credit-counseling).

¹⁷³ NAT’L ASSOC. OF CONSUMER BANKR. ATTORNEYS, BANKRUPTCY REFORM’S IMPACT: WHERE ARE ALL THE “DEADBEATS”?, at 2, 5–6 (2006), *available at* http://web.archive.org/web/20070511203046/http://nacba.com/files/main_page/022206NACBAbankruptcyreformstudy.pdf (stating that nearly 80% of consumers are suffering from debt that is “caused by circumstances beyond their control”). These uncontrollable circumstances may include, for example, loss of a job, medical expenses, death, divorce or other change in marital status, increased minimum payments on credit cards and predatory lending. *Medical Debt is Not Created by Deadbeats*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (Feb. 27, 2006), http://www.pnhp.org/news/2006/february/medical_debt_is_not_php (last visited Sept. 27, 2012).

¹⁷⁴ SULLIVAN, WARREN & WESTBROOK, *supra* note 160, at 17–20 (reporting the first two phases of the Consumer Bankruptcy Project, which collected data on the reasons families file for bankruptcy); THERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000).

¹⁷⁵ The researchers surveyed 1974 debtors in six bankruptcy districts. The data, methods, and survey used to collect the data can be found in Appendix 1 and 2 of Melissa B. Jacoby, et al., *Rethinking the Debates Over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001).

¹⁷⁶ Melissa B. Jacoby et al., *Medical Problems and Bankruptcy Filings*, NORTON’S BANKR. L. ADVISER, fig. 2 (2000).

The medical debt problem continued to grow through the 2000s. A 2007 American Journal of Medicine study indicated that medical bankruptcies made up 62.1% of bankruptcies.¹⁷⁷ Because high credit balances or other borrowing may disguise medical debt and other related costs like caretaking and illness-related loss of income, this figure could be an underestimate.¹⁷⁸ Patients and their caretakers commonly resort to expensive credit because of the prevalence of insufficient insurance.¹⁷⁹ For individuals facing insurmountable debt resulting from uncontrollable circumstances, prepetition credit counseling is an unnecessary and time-consuming administrative expense.¹⁸⁰

Because the most common causes of consumer bankruptcy are uncontrollable, most individuals seeking bankruptcy protection are not in a position to benefit from prepetition credit counseling.¹⁸¹ Rather, credit counseling agencies indicate that the type of debt that has led to a debtor's precarious financial situation is most often something outside of her control and for which she could not have adequately planned:¹⁸² 79% of debtors stated that their debt was caused by "circumstances beyond their control."¹⁸³ The cause of the debt and its controllability shapes societal perceptions and stigma. Society is likely to view individuals perceived to be in control of their deviant behavior with antipathy.¹⁸⁴ However, when society perceives an individual is

¹⁷⁷ Himmelstein et al., *Medical Bankruptcy in the United States*, *supra* note 2, at 743. Medical bankruptcies are defined as medical bills are reason for the bankruptcy, medical bills are greater than \$5000 or more than 10% of the annual family income; the family home was mortgaged to pay medical bills; the debtor or spouse lost at least 2 weeks of income due to illness, complete disability or care for an ill family member; the medical problem of self, spouse or other family member was the reason for bankruptcy. *Id.* at 743 tbl.2.

¹⁷⁸ *Id.* at 745 (noting that their study only confirmed through court records that medical debt owed directly to hospitals and doctors, and that debtors who financed their debt through credit cards or other borrowing were not included).

¹⁷⁹ *Id.* at 743.

¹⁸⁰ *Id.* at 745 ("The number of under-insured increased from 15.6 million in 2003 to 25.2 million in 2007. Of low- and middle-income households with credit card balances, 29% use credit card borrowing to pay off medical expenses over time.").

¹⁸¹ See *supra* text accompanying note 174. All of these causes are uncontrollable, perhaps except maintenance of unsupportable homeownership.

¹⁸² Even if the debt was foreseeable and the debtor exercised poor financial management, a debtor ready to file for bankruptcy is likely beyond the point where budgeting would be helpful and needs powerful bankruptcy protections like the automatic stay. See *supra* Part IV.B.

¹⁸³ Jeffrey D. Eaton, Note, *Locked Out: The Unwary Debtor and BAPCPA's Pre-File Credit Counseling Requirement*, 32 T. JEFFERSON L. REV. 261, 266 (2010) (citing NAT'L ASSOC. OF CONSUMER BANKR. ATTORNEYS, *supra* note 173, at 2, 5-6 (2006)).

¹⁸⁴ KATZ, *supra* note 19, at 4-5.

disadvantaged and unable to control the stigmatized behavior, society is more likely to show a greater degree of compassion.¹⁸⁵

Stigma is greatest when society perceives that the target's freely chosen deviant behavior merits it. Control over circumstances and behavior is strongly presumed throughout bankruptcy law. BAPCPA solidified these presumptions of autonomy, as it created new provisions explicitly intended to stigmatize debtors. However, there is clearly a gap between the perception and reality of autonomy, highlighting the need for alternatives that better address the realities for chapter 7 debtors.

III. AUTONOMY AND VULNERABILITY

This Part suggests an alternative conception of the individual as fundamentally vulnerable, not autonomous.¹⁸⁶ Recent scholarship questions the presumption of radical individualism, rationality, and autonomy inherent in legal structures and replaces it with a presumption of vulnerability. A vulnerability presumption provides a fruitful framework upon which to ground bankruptcy, especially in relation to stigma.

A vulnerability paradigm questions the radical autonomy of individuals in relation to societal and economic institutions like bankruptcy.¹⁸⁷ Presumptions about norms subconsciously shape even rational human decisions to undercut the foundational presumption of autonomy.¹⁸⁸ This Part responds to the flawed presumption of autonomy by expounding an alternative legal framework based on vulnerability. Because behavioral stigma is based on autonomous action, the efficacy of bankruptcy stigma diminishes when debtor autonomy is called into question.

¹⁸⁵ *Id.*

¹⁸⁶ Vulnerability is defined as “[A] universal aspect of the human condition, arising from our embodiment and our location within society and its institutions. On the individual level, vulnerability refers to the ever-present possibility of harm, injury or biological impairment or limitation . . . [V]ulnerability also is generative and presents opportunities for innovation and growth, creativity and fulfillment.” *Vulnerability and the Human Condition Initiative, Definitions*, EMORY UNIV. LAW, <http://web.gs.emory.edu/vulnerability/about/definitions.html> (last visited Oct. 7 2012).

¹⁸⁷ *Id.* (noting at the same time that human-made institutions like bankruptcy “also are vulnerable to capture, cooptation and corruption”).

¹⁸⁸ Schneider, *supra* note 95, at 98–99.

A. Questioning Autonomy

To analyze autonomy in bankruptcy, we must first examine what true financial autonomy would look like. A financially free individual is one who can “plan for future spending decisions, or can make reasonable predictions about their future ability to spend money or make purchases.”¹⁸⁹ This definition indicates the financially free individual is able to plan and predict and economically capable to spend or save. While external factors always operate to affect decisions, when they prohibit individuals from being able to control their spending decisions, they are not financially free.¹⁹⁰

Financial institutions and individuals have differing abilities to conform to the “rational actor” paradigm, since rational decision-making presumes perfect information.¹⁹¹ Institutions, with greater access to knowledge of legal provisions and resources, are more likely to be able to make rational decisions than individuals, many of whom face knowledge, resource and willpower constraints on their behavior and choices.¹⁹² Individual debtors, to a greater extent than corporate debtors, face clear constraints on resources, and often cannot sufficiently plan for major debts like medical costs.¹⁹³ In addition to resource constraints, individuals face disparities in knowledge and in willpower that impair their ability to behave as a “rational actor.”¹⁹⁴

Part of the individual’s inability to behave in an economically rational manner has to do with the “channeling functions” of social institutions. Professor Schneider, in his 1992 article, *The Channeling Function in Family Law*, explored the effect of this phenomenon on family law.¹⁹⁵ Social and economic institutions operate on an unconscious level such that “their very

¹⁸⁹ Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1079, 1083 (2010).

¹⁹⁰ *Id.*

¹⁹¹ Braucher, *supra* note 96, at 426 (citing Cass Sunstein et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS, 14–16 (Cass Sunstein ed., 2000)); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (questioning rational choice theory and providing a more nuanced view of human behavior as relates to economic decision-making).

¹⁹² See generally Korobkin & Ulen, *supra* note 191 (exploring the limits of rational choice theory in legal analysis, especially those circumstances and contexts that prompt individuals to deviate from the rational impulses of self-interest and maximizing utility).

¹⁹³ Eaton, *supra* note 183, at 267 (citing NAT’L ASS’N OF CONSUMER BANKR. ATTORNEYS, *supra* note 171, at 5–6).

¹⁹⁴ Sunstein et al., *supra* note 191, at 15.

¹⁹⁵ Schneider, *supra* note 95, at 498.

presence, the social currency they have, and the governmental support they receive . . . combine to make it seem reasonable and even natural for people to use them.”¹⁹⁶ Professor Schneider noted that the channeling function is in itself neutral, but can be bent to serve various purposes.¹⁹⁷ This principle is also relevant to other institutions that shape individual behavior, like bankruptcy.¹⁹⁸ Under this lens, the functions BAPCPA was designed to achieve were to increase debtor stigma¹⁹⁹ and simultaneously provide consumption insurance.²⁰⁰ These two purposes work on an unconscious level to shape the behavior of individuals inside and outside bankruptcy.

Two types of constraints upon an individual’s financial freedom problematize systemically-presumed agency and show that individuals are not fundamentally autonomous: internal and external. Individual debtors are internally constrained because their resources, knowledge, and willpower are limited by the realities of human embodiment. Social and economic institutions provide external constraints that operate on an unconscious level to channel behaviors into socially normative expressions. This critique of the basically rational actor indicates a need for an alternative conception of social and economic decision-making that is based on vulnerability.

B. *The Vulnerability Paradigm*

Vulnerability goes beyond recognizing the problem of parties’ disparate contracting capability in an otherwise objective and fundamentally just market.²⁰¹ It questions the very reality of radically independent and autonomous actors in a moral, social, and economic sense.²⁰² Vulnerability is

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 500.

¹⁹⁸ *Id.* at 499 (connecting behavior and norming aspects of institutions through business and social examples: “Any institution will have both normative and behavioral aspects, and behavior within institutions will rarely live up to the institution’s normative aspirations.”).

¹⁹⁹ Dickerson, *supra* note 123, at 1891–92 (noting that the legislative history for BAPCPA was replete with discussion of debtor morality and the lack of debtor shame, and stating that the bankruptcy process should be a difficult, stigmatizing one).

²⁰⁰ See Michelle J. White, *Bankruptcy Reform and Credit Cards*, 21 J. ECON. PERSP. 175, 189–91 (2007). (noting that U.S. bankruptcy law provides a sort of consumption insurance that must be more robust than in countries that provide a generous social safety net).

²⁰¹ See MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 41–42 (1999) (listing ten functional capabilities that democracies should protect, and make accessible to all individuals, irrespective of age and disability).

²⁰² See Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 8; Barry Hoffmaster, *What Does Vulnerability Mean?*, HASTINGS CTR. RPT., Mar.–Apr. 2006, at 38, 44 (noting

“a *conditio humana* which affects us all,”²⁰³ or, alternatively, a “universal, inevitable, enduring aspect of the human condition.”²⁰⁴ Because it is a fundamental condition of being human, arising out of embodiment,²⁰⁵ vulnerability is not episodic, pertaining to particular periods of existence like childhood or old age, nor is it temporary or remediable, like some illnesses or disabilities.²⁰⁶ Vulnerability means that for humans, dependency is always a possibility.²⁰⁷ Vulnerabilities extend to individual social and economic relationships and can be shaped by social institutions that “mediate, compensate, and lessen our vulnerability through programs, institutions and structures.”²⁰⁸

Professor Martha Fineman has examined the meaning of a change of presumption from the liberal legal subject, who is an independent, autonomous and self-sufficient actor, to a vulnerable legal subject in the context of the American statutory framework, especially in regard to equality and discrimination.²⁰⁹ The vulnerable subject speaks directly to the liberal presumption of autonomy discussed as a foundation of bankruptcy law.

Assuming a core vulnerability of legal actors²¹⁰ problematizes an individual’s agency and rejects that dependency can be entirely avoided.²¹¹ Vulnerability and the actualization of dependency are especially relevant when

that vulnerabilities are of singular importance, so morality is deficient when linked exclusively to rationality, and moral agency is deficient when linked with rational agency).

²⁰³ Michael H. Kottow, *Vulnerability: What Kind of Principle Is It?*, 7 MED., HEALTH CARE & PHIL., 281, 282 (2004).

²⁰⁴ Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 8.

²⁰⁵ *Id.* at 9.

²⁰⁶ Michael Kottow calls these episodic and temporary periods “susceptibility,” while maintaining a fundamental sense of human vulnerability. Kottow, *supra* note 203, at 283 (“If vulnerability is a substantial feature of being human, it can hardly be the appropriate description of accidental anomalies like a physical defect, disease or some sort of deprivation . . . Injury displaces those affected from the realm of vulnerability and into being vulnerated.”). Fineman terms these the episodic periods of dependency. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 9.

²⁰⁷ *Id.* at 9. (noting that embodiment “carries with it the ever-constant possibility of dependency as a result of disease, epidemics, resistant viruses, or other biologically-based catastrophes”).

²⁰⁸ *Id.* at 10. It is important to note, however, that whatever their remedial function, social institutions are incapable of completely eradicating vulnerability, as it is fundamental to humanity. *Id.*

²⁰⁹ *See id.* at 8.

²¹⁰ Fineman notes that vulnerability extends to organizations, corporations, and states as well as individuals. *Id.* at 12.

²¹¹ Though access to resources and institutions that provide resilience may certainly ameliorate episodes of dependency.

examining the bankruptcy system, which is premised on individual autonomy through provisions like “fresh start.” When the legal system privileges this autonomous and independent subject, it perceives vulnerability as episodic and deviant from social norms (and fundamental presumptions) of autonomy, individualism, and liberal independence. In this model, vulnerability is something to fear; vulnerability is dealt with mainly by suppression, disengagement and denial.²¹² “Individualism seeks and requires self-sufficiency and insulation from the risks that vulnerability poses. Respect for autonomy is, in large measure, a moral proxy for that individualistic ideal.”²¹³

Because vulnerability is a universal and enduring aspect of the human experience, it provides a stronger basis for regulatory structures like bankruptcy than the accidental and fleeting autonomous and independent liberal subject. Vulnerability theory is particularly useful for analyzing stigma and behavior perceived as deserving stigma, because of the terms’ close linguistic correlation. While vulnerability has been used as a synonym for stigma,²¹⁴ recognition of universal vulnerability can minimize the effect of stigma on particular populations.²¹⁵ For instance, in disability law, recognition of universal vulnerability would suggest universal access to “a set of protections of benefit to all individuals.”²¹⁶ Universal access may also “change negative social attitudes about funding and receiving state support, as such support would be premised on the recognition of universal vulnerability to disability and illness.”²¹⁷

C. *Vulnerability and the Code*

The structural assumptions of autonomy seen throughout the Code hold up individualism and invulnerability as an ideal. By assuming individualism,

²¹² See Hoffmaster, *supra* note 202, at 42.

²¹³ *Id.*

²¹⁴ See Kerry Boyne, Note, *UN Women: Jumping the Hurdles to Overcoming Gender Inequality, or Falling Short of Expectations?*, 17 *CARDOZO J. L. & GENDER* 683, 692 (2011) (citing J.M. Spectar, *The Hydra Hath but One Head: The Socio-Cultural Dimensions of the AIDS Epidemic & Women’s Right to Health*, 21 *B.C. THIRD WORLD L.J.* 1, 27 (2001)) (reading together stigma and vulnerability: “[P]olitical leaders fail to openly discuss the pandemic and break ‘the stigma, shame, and vulnerability suffered by women and girls around the world’”).

²¹⁵ Mark C. Weber, *Disability Rights, Welfare Law*, 32 *CARDOZO L. REV.* 2483, 2524 (2011) (quoting Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 *WASH. L. REV.* 513, 530–31 (2008)).

²¹⁶ Satz, *supra* note 10, at 314.

²¹⁷ *Id.* at 315.

autonomy, and agency as ideals, the Code and its creators stigmatize those debtors who fail to live up to self-sufficient ideals that favor wage-earners. The Code's function as remedial of the failure to be financially self-sufficient seems contrary to the assumed interdependence of vulnerability theory, though it also recognizes inherent vulnerability by providing for entrepreneurial risk-taking, allowing liquidation and promoting a debtor's fresh start.²¹⁸ At its best, bankruptcy is a protective safety net providing resilience and relief for vulnerable individuals in financial distress.

Unfortunately, the Code is foundationally based on the myth of the autonomous debtor, requiring remedial support to reclaim self-sufficiency during moments of dependency.²¹⁹ This myth is the polar opposite of the assumption that vulnerability is universal.²²⁰ Universal vulnerability requires various types of assets to compensate and ameliorate vulnerability.²²¹ Combined, these physical, social and human assets create resilience for inherent vulnerability.²²² Individuals have differing abilities when it comes to accessing these resiliency-producing assets, and thus, differing abilities to shield themselves from many of the most debilitating consequences of dependency.²²³ Recognizing core vulnerability encourages an analysis of the Code's structure that calls into question its inherent presumptions of autonomy, individuality and self-sufficiency.

Vulnerability theory provides a better framework for understanding bankruptcy than do assumptions of autonomy. In line with vulnerability theory, the primary causes for debtors' chapter 7 filings are connected to human

²¹⁸ Coulson, *supra* note 98, at 541.

²¹⁹ As Fineman noted, "[A]utonomy is . . . ascendant . . . [T]here is little or no room for an affirmative reconciliation of this understanding of individual autonomy with concepts such as dependence or vulnerability." Fineman, *The Vulnerable Subject and The Responsive State*, *supra* note 10, at 259. She hypothesized that this standard leads to stigmatization of dependency as a failure of the ascendant ideal of autonomy. *Id.*

²²⁰ Fineman, *The Vulnerable Subject Anchoring Equality in the Human Condition*, *supra* note 10, at 8 (noting that vulnerability has potential to describe "a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility").

²²¹ *Id.* at 13–15 (defining three categories of assets: physical—including monetary and property goods, human—including individual capability, and social—including familial and cultural groups).

²²² *Id.*

²²³ This move is the foundational paradigm shift offered by vulnerability analysis and will be unpacked throughout this Part.

embodiment:²²⁴ major medical emergency, interdependence and social relationships, divorce, economic fragility, and job loss.²²⁵ These common triggers for consumer liquidation petitions underscore the multiplicity of factors at play in a debtor's decision to file bankruptcy. However, none of these major factors include intentional debtor abuse of the bankruptcy system. Having the legal capacity to enter into contracts and file for bankruptcy does not shelter the debtor from vulnerability or endow her with absolute autonomy.²²⁶ Calling into question the conditions of autonomy and the controllability of financial situations requires a rethinking of bankruptcy stigma as it relates to the debtor.²²⁷ Legal capacity does not necessarily mean that an individual is in a position to make a choice that would result in fair financial transactions.²²⁸ Furthermore, making complex financial decisions under conditions of financial pressure²²⁹ weakens the idea of the autonomous subject. As discussed above, the Code's position as the gatekeeper to the benefits of fresh start and discharge has been manipulated to increase the dependency of debtors by increasing stigma.²³⁰ The Code is also in a position to help debtors become resilient because it is an asset-conferring entity.²³¹ Part IV explores three ways in which the Code can shift from focusing on stigmatizing a vulnerable individual to providing the institutional means for debtor resilience in response to circumstances beyond the debtor's control.

²²⁴ Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 9 (“Vulnerability initially should be understood as arising from our embodiment”).

²²⁵ See *In re Elmendorf*, 345 B.R. 486, 494 (Bankr. S.D.N.Y. 2006) (stating the most common triggers for consumer chapter 7 liquidation), *rev'd sub nom. In re Zarnel*, 619 F.3d 156, 172 (2d Cir. 2010); Jean M. Lown, & Barbara R. Rowe, *A Profile of Utah Consumer Bankruptcy Petitioners*, 5 J. L. FAM. STUD. 113, 116–17 (2003) (citing SULLIVAN, WARREN & WESTBROOK, *supra* note 160; SULLIVAN, WARREN & WESTBROOK, *THE FRAGILE MIDDLE CLASS*, *supra* note 174); *supra* text accompanying note 174.

²²⁶ O'MAHONEY, *supra* note 10, at 187 (noting the corresponding responsibility of the other contracting party).

²²⁷ Braucher, *supra* note 96, at 428 (“[W]ith creditors encouraged to lend more under the proposed legislation, we would likely end up with more consumer debt and more consumer over-indebtedness, a phenomenon that is broader than bankruptcy.”).

²²⁸ O'MAHONEY, *supra* note 10, at 184 (determining an individual's capacity implies autonomy but ignores that the general population is unable to have the level of capacity needed for high-risk financial transactions).

²²⁹ *Id.* at 173.

²³⁰ See *supra* Part II.

²³¹ Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 15 (“As asset-conferring entities, these institutions distribute significant societal goods and should be more specifically regulated; normatively, this state involvement requires that the state be vigilant in ensuring that the distribution of such assets is equitable and fair.”).

IV. DECREASING STIGMA AND PROMOTING RESILIENCE IN THE CODE

“[U]niversal, inevitable, [and] enduring.”²³² the recognition of vulnerability as such is a call for responsive institutions that will provide resilience for individual vulnerability, while remaining cognizant that these institutions themselves are also susceptible to vulnerability.²³³ Shifting the Code’s goals to provide resilience requires decreasing stigma and the perception thereof to those it is intended to help. Doing so requires an alternative structure to reflect the root causes of indebtedness. Congress should identify areas that most often cause indebtedness for vulnerable individuals and create structures that better support resilience in these areas and in so doing will decrease the need for such a high volume of bankruptcy filings.

A. *Reinstating a Pre-BAPCPA Approach to Debtor Stigma*

To incorporate an understanding of universal vulnerability and to counteract the myth of radical autonomy,²³⁴ the next revisions to the Code must begin by rolling back the BAPCPA requirements that stigmatize and presume debtor abuse.²³⁵ Removing the means test’s bright line presumption of abuse allows for greater flexibility for debtors, most of whom were not abusing the system, and puts the burden for proving abuse back onto creditors. Removing the credit counseling requirement would also help a majority of debtors, those who are not responsible for the circumstances that led to their bankruptcy. Because examining the cause of indebtedness does little to assist individuals who were surprised by uncontrollable events, the credit counseling requirement is of little use in changing debtor behavior and decreasing the number of bankruptcy filings. Though there are other stigmatizing provisions in the Code that create administrative barriers to debtor relief,²³⁶ these two provisions most strongly implicate ineffective stigma and should be removed.

²³² *Id.* at 8.

²³³ *Id.* at 12.

²³⁴ See *supra* note 8–10 and accompanying text. Radical or root autonomy should be distinguished from relational autonomy. Relational autonomy carries with it “social and reciprocal duties to others” and “responsibilities that extend beyond satisfying one’s own individual and familial needs.” Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 10, at 261.

²³⁵ See *supra* Part II.B.2–3.

²³⁶ For instance, the time required between chapter 7 filings increased from six to eight years in BAPCPA. 11 U.S.C. § 727(a)(8) (2006) (stating that a debtor may not be granted a discharge if a chapter 7 case was filed in the past eight years, but nonetheless keeping intact the requirement that at least 70% of the unsecured debt was repaid in six years).

The Code needs to allow for flexibility to take into account the source of individual debt and the constraints attendant on individual decision-making, especially because constrained decision-making is the reality for most individuals filing bankruptcy.

Removing the intentionally stigma-inducing provisions in the Code is a small but crucial start to creating a Code that creates resiliency. Negotiating the fine line between protectionism and paternalism will remain a concern for all proposals concerning stigma in bankruptcy, especially considering that paternalism may perpetuate and reinforce stigma for debtors.²³⁷ Even while maintaining the overall structure of the Code, Congress could address needless stigma by considering changes in areas that assume radical autonomy. By allowing greater judicial discretion in these areas, the Code would emphasize relational autonomy and the interconnectedness of individuals.²³⁸ By paying attention to the particular needs of debtors in the midst of bankruptcy filing, the process would not presume abuse by mere income-to-debt ratio; treating cases on their individual merits will create a more personalized system that would be less stigmatizing.²³⁹

B. Structuring the Code Around Causes of Indebtedness

Merely rolling back the stigma-promoting policies of BAPCPA will not fully address bankruptcy stigma because fundamental presumption of autonomy has always been present in bankruptcy law. It would also not address the positive function of stigma in those instances where debtors do abuse the system—such abuse could be dissuaded through social blame. As discussed above, individuals are often in the position of needing bankruptcy relief following circumstances they could not control nor adequately plan to address.²⁴⁰ The Code does not distinguish between debtors who are in unavoidable financial situations and debtors who arguably could control their

²³⁷ See generally GEOFFREY NELSON ET AL., *SHIFTING THE PARADIGM IN COMMUNITY MENTAL HEALTH: TOWARDS EMPOWERMENT AND COMMUNITY* (2001) (linking segregation, paternalism, passivity, dependency, low expectations, stagnation, stigma, and hopelessness).

²³⁸ See generally *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY AND THE SOCIAL SELF* (Catriona MacKenzie & Natalie Stoljar eds., 2000); Martha A. Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (2000).

²³⁹ O'MAHONEY, *supra* note 10, at 178–84 (explaining situationally-based factors that make abuse more likely in elderly and therefore require attention to the particular circumstances of vulnerable individual).

²⁴⁰ See *supra* Part II.B.3.

indebtedness and may be abusing the system. Because both types of debtors encounter stigma merely for filing chapter 7, stigma is not properly calibrated to deter socially unacceptable bankruptcy abuse while protecting the debtors who are not abusing the system.

The motivations and vulnerabilities of debtors who face financial difficulty triggered by events outside their control²⁴¹ are fundamentally different than debtors who can better control their over-indebtedness. The needs of the two types of individual debtors would be best served by filing under separate chapters of the Code. In the current Code, the stigma-inducing policies of chapter 7 apply to all debtors, even if they are only effective at channeling the behavior of those actually abusing the system. The means test presumes abuse if income and debt thresholds are met, and credit counseling requirements suggest that better budgeting would obviate the need for bankruptcy. These policies seek to address abuse and may be effective by stigmatizing debtors who are actually abusing the bankruptcy system. However, these same policies impose unproductive and vulnerability-exacerbating stigma on debtors who are seeking relief from uncontrollable debts.

Alternative to removing the BAPCPA provisions, Congress could create a chapter that is only available to individuals whose debts are primarily the product of uncontrollable circumstances.²⁴² This chapter would identify kinds of uncontrollable debt,²⁴³ like medical debt that would make a debtor eligible under this chapter, and would have different requirements for discharge than chapter 7. Because the source of debt was not a result of debtor

²⁴¹ Events outside the debtor's control can be foreseeable as well as unforeseeable. For individuals without access to structures that mitigate vulnerability and provide resilience, even foreseeable events like illness can be outside their control. One concrete example is the availability and cost of health insurance for all Americans. Individuals unable to pay for insurance, perhaps because of the high cost when not purchased through an employer (and sometimes even when purchased through an employer), will face additional costs for the foreseeable event of sickness. Therefore, determining the triggering event of bankruptcy may require stepping back, past just the current expense—for instance medical bills—to determine the individual's access to structures that provide resilience.

²⁴² As indicated in the previous footnote, debt can be uncontrollable even if the circumstances that bring it about are foreseeable. Foreseeable circumstances (like illness, job loss etc.) are bound to affect the least resilient individuals most severely. When there is a lack of proactive social supports (to assist pre-bankruptcy and provide resilience), there should be greater reactive support in remedial structures like the Code, not greater stigma.

²⁴³ Because foreseeable debts can lead to uncontrollable financial situations, this would also require the availability of access to physical and structural institutions that can provide resilience. The determination of whether the debt was uncontrollable may therefore appear similar to the means test, though its purpose would be to channel debtors into a low stigma chapter if their debts were determined to be primarily uncontrollable.

mismanagement or abuse, or was not within the debtor's control, there would be no need for credit counseling and likely no need for passing a means test threshold. This chapter should be procedurally straightforward, allowing debtors to file without assistance of counsel and should discharge debts very quickly.²⁴⁴ Similar to chapter 7, creditors or the trustee would be able to move to have the case reconsidered under a different chapter or dismissed.

This structural change has precedent in two previous bankruptcy revisions: the 1938 Chandler Act's repayment chapter designed to mitigate the stigma of liquidation²⁴⁵ and 1986's repayment chapter for family farmers.²⁴⁶ The 1938 Act created a repayment chapter that allowed debtors with income to repay debt in order to avoid the stigma of liquidation. Instead of distinguishing primarily based on outcome for debtors—repayment versus liquidation before discharge—this proposal would focus on the cause of debt.

Similarly, chapter 12 provides precedent for the proposed change because it distinguishes debtors based on their status as family farmers and the source of their debt.²⁴⁷ This chapter was incorporated into the Code in 1986 to address the unique problem of debt reorganization of family farmers, not sufficiently addressed through the chapter 13 reorganization for individuals with income.²⁴⁸ The eligibility for chapter 12 is based on the debtor's identity as a family farmer or family fisherman,²⁴⁹ a debt limit,²⁵⁰ and the source of the debt.²⁵¹ While chapter 13 provided a model for the chapter 12 provisions, the two chapters are not identical; chapter 12 addresses the unique situation of an individual whose debt and income meet specific requirements, whereas chapter 13 has no such requirements.²⁵² The Code does not provide adequate relief for

²⁴⁴ For suggested revisions to the Code, see Ronald Mann, Op-Ed., *A New Chapter for Bankruptcy*, N.Y. TIMES, Mar. 12, 2010, at A27.

²⁴⁵ See *supra* note 66 and accompanying text.

²⁴⁶ 4 COLLIER BANKRUPTCY MANUAL ¶ 1200.01 (3d ed., rev. 2012) (citing H.R. REP. NO. 958, at 45 (1986) (Conf. Rep.)) (“Congress believed that such emergency legislation was necessary because the existing provisions of the Bankruptcy Code were not effective in providing debt relief to family farmers”).

²⁴⁷ 11 U.S.C. § 1201 (2006).

²⁴⁸ See *supra* note 246 and accompanying text.

²⁴⁹ 11 U.S.C. § 101(18)(a) ([T]o qualify as a family farmer, the debtor must be an “individual or individual and spouse engaged in a farming operation”).

²⁵⁰ *Id.* ([T]he debt limit in the most recent Code is “\$3,237,000 and not less than 50 percent of aggregate noncontingent, liquidated debts. . .”).

²⁵¹ *Id.* (The debt must “arise out of a farming operation owned or operated by such individual.”).

²⁵² COLLIER BANKRUPTCY MANUAL, *supra* note 246, ¶ 1200.01.

individuals who experience uncontrollable costly circumstances because its policies create stigma irrespective of their efficacy to modify debtor behavior.

By distinguishing between debtors based on the source of their indebtedness, the Code would begin to address vulnerability by recognizing that the primary events triggering bankruptcy for many consumer debtors are uncontrollable. It would also provide flexibility for these debtors instead of more onerous and expensive procedures.²⁵³ For instance, because there is little need for credit counseling when the source of the debt was uncontrollable—like medical debt—this requirement could be removed in the uncontrollable bankruptcy chapter. On the other hand, this provision may be quite helpful for those debtors who are more directly culpable for their financial distress, and requiring it for these debtors may provide the needed remedy of greater financial education and sophistication.²⁵⁴

C. Creating Structures Supporting Resiliency in Areas Particularly Prone to Vulnerability and Indebtedness

Reconceiving vulnerability as the basic paradigm of our legal system requires a fundamental shift in the structures that provide resilience for inherent vulnerabilities. One purpose of vulnerability theory is to “imagine responsive structures whereby state involvement actually empowers a vulnerable subject.”²⁵⁵ Law functions both retrospectively and prospectively by providing remedies and channeling, respectively.²⁵⁶ State-shaped institutions like bankruptcy can function in both these capacities. Creating chapters of the Code based on the primary cause of individual indebtedness remedies current gaps in an individual’s access to resilience. The proposed new chapter would allow the Code to properly calibrate stigma and identify the other state-shaped institutions that exacerbate universal vulnerability. Undertaking prospective analysis to better assist in addressing vulnerability and providing resilience is

²⁵³ Fineman, *supra* note 10, at 268 (using vulnerability as an organizing principle for policy decisions can help to alleviate social and economic, institutionally-based harms and the perpetuation of vulnerability); *see also* Mann, *supra* note 244, at A27 (suggesting that the current system is too complicated and debt relief should be easier to come by for people that need it most).

²⁵⁴ *See supra* Part II.B.3.; *see also* Michelle Singletary, *What Deadbeats?*, WASH. POST, Feb. 26, 2006, at F01.

²⁵⁵ Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 19.

²⁵⁶ Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. ECON. REV. 227, 227 (2002) (“It is evident that both law and morality serve to channel our behavior. Law accomplishes this primarily through the threat of sanctions if we disobey legal rules”).

more difficult because it requires a clear view of “structures and arrangements that . . . invisibly produce or exacerbate existing inequality.”²⁵⁷

Structures that support resilience ahead of the crisis point of bankruptcy are necessarily external to the Code, though they would have a significant impact on outcomes in bankruptcy.²⁵⁸ Reconceiving bankruptcy alone is insufficient for addressing the vulnerability that leads to bankruptcy. As noted in the introduction, many Americans find themselves in financial trouble due to costly healthcare.²⁵⁹ Debtors facing insurmountable health care costs would be eligible for the new “uncontrollable circumstance” chapter because it would include medical debt, and this will alleviate the perceived and Code-imposed stigma upon these debtors. This immediate relief from the stigma of bankruptcy would not address the broader problem of deficient medical insurance,²⁶⁰ which will continue to bring individuals to bankruptcy unless proactive structures are in place to address the problem. One such structure could be a system that provides sufficient and universal health care coverage for unexpected and uncontrollable events like medical emergencies. Also, because medical debts are not limited to the costs of procedures, we should have structures in place to support caretaking for those suffering from medical strain.

There are other areas where uncontrollable circumstances lead debtors to require the support of bankruptcy, such as job loss, unfair credit lending practices, and lack of affordable housing or food, or the death of the household’s primary earner. As there are more “uncontrollable chapter” filings, academics could use data from these to conduct studies that will inform Congress about new or revised structures to benefit those most vulnerable

²⁵⁷ Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 21.

²⁵⁸ It is beyond the scope of this Comment to provide an exhaustive catalogue of missing or deficient structures that exacerbate vulnerability in the context of bankruptcy. This project will take a great deal more analysis. I will mention briefly one area of particular current interest, mentioned in the introduction: medical debt.

²⁵⁹ *Supra* note 2 and accompanying text.

²⁶⁰ Robin A. Cohen & Michael E. Martinez, *Health Insurance Coverage: Early Release of Health Insurance Estimates Based on Data from the 2012 National Health Interview Survey, January–March 2012*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 2012), available at <http://www.inflpro.com/nchs/data/nhis/earlyrelease/insur201209.pdf>. Highlighting that in the first 3 months of 2012, over forty-seven million individuals in the US were uninsured when interviewed, and nearly sixty million were uninsured at some time in the year prior to being interviewed. In the first three months of 2012, nearly 30% of people under sixty-five who had private health insurance were enrolled in a high deductible plan. *Id.*

individuals. By providing resilience through restructuring of those institutions, we may prospectively decrease the need for bankruptcy filings.

CONCLUSION

BAPCPA's abuse prevention goals as highlighted by its name—the Bankruptcy Abuse Prevention and Consumer Protection Act—solidified and increased bankruptcy stigma. Because stigma is systematic within the Code, structural Code changes are needed to de-stigmatize those debtors toward whom stigma is ineffective and unwarranted. Additionally, the Code should be the site of structural debtor protections because fresh start is a foundational value within American bankruptcy policy.

As studies in the wake of BAPCPA attest, the circumstances that necessitate most voluntary consumer bankruptcy filings do not suggest abuse, but rather a fundamental vulnerability to circumstances outside the debtor's control. Imposition of stigma in these cases is counterproductive because it does not prompt debtors to undertake behaviors like financial responsibility that are more in line with social norms. Instead, it provides social punishment to the (typically) honest and unfortunate debtor. Because of pervasive stigma, the fresh start promise of bankruptcy is really only a fresh start in name, providing little social or financial fresh start.²⁶¹

The vulnerability paradigm's assumption of "universal, inevitable, [and] enduring" vulnerability²⁶² provides a promise for debtors entering the U.S. bankruptcy system. The Code needs structural changes to roll back the most debtor-stigmatizing provisions of BAPCPA. Bankruptcy judges should not be forced to presume abuse because of an arbitrary means to debt ration, but instead should have the ability to consider cases individually, examining the circumstances of a debtor's indebtedness. Arbitrary lines can put those debtors

²⁶¹ ADMIN. OFFICE OF THE U.S. COURTS, 2010 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 63 (2011), *available at* <http://www.USCourts.gov/USCourts/Statistics/BankruptcyBankruptcyStatistics/BAPCPA/2010/Table6.aspx> (This noted that at the end of 2010 206,984 cases closed, 177,858 were dismissed and 86,382 of these were for failure to make payments under the plan. Of the dismissed cases, 17,614 cases were refilled after dismissal. Only 28,142 plans were completed, 3609 of which with at least one modification.). If a debtor's means test required that she convert to a chapter 13 filing, the plan completion rate was quite low. Many of these debtors have additional uncontrollable circumstances that result in missed payments, dismissal of the case and lack of discharge.

²⁶² Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 8.

just missing the cutoff into an unnecessarily vulnerable position of being unable to file a chapter 7 claim and simultaneously unable to discharge debt in chapter 13.²⁶³ In addition, credit counseling should be based on the circumstances of a debtor's debt instead of being based merely on the bankruptcy filing.²⁶⁴ Financial advice is most effective when timely and when the circumstances are within the advisee's ability to control. While judicial discretion can mean imperfect application of laws and additional time per case, the reduction in administrative costs of these additional steps can lead to much needed discharge for debtors who may be deterred from the sometimes high cost of bankruptcy.

Resilience to one's inherent vulnerability comes through present assets accumulated over time and through the processes and legal structures that respond to periods of dependency. When structures are set in place to promptly provide assets and address dependency, the need for reactive stigmatizing structures like bankruptcy will diminish. These proactive structures must be in place to address the most common sources of debt and dependency to help vulnerable subjects. With an amended Code and other structures in place to support resilience for vulnerability, the number of filings could drop, and the need for stigma on debtors will be appropriately minimized. With this accomplished, debtors would receive a fresh start in more than name alone.

YVANA L.B.H. MOLS*

²⁶³ Eighty-five percent of chapter 13 cases closed in 2010 were dismissed, and nearly half of these were because of failure to make payments, a likely situation for those forced into chapter 13 by dint of the means test. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 261, at 16.

²⁶⁴ Counseling on budgeting is likely ineffective since at the point of filing bankruptcy, bankruptcy is typically the best course of action typically is bankruptcy. *See supra* notes 181–85. Or, there was little the debtor could have done even at an earlier stage depending on the circumstances of the debt. *See supra* notes 170–72 and accompanying text.

* Executive Symposium Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2013); M.A., The Institute for Christian Studies (2007); B.A., Trinity Christian College (2004). Recognizing that no thought is thought nor no word written in a vacuum, I am pleased to acknowledge with warmest thanks those who came alongside me in dialogue on this project. Professor Martha Fineman, for her inspirational work and insights along the way; Professor Katie Oliviero, for helping me think broadly about stigma; Melissa Davey for grounding me in the real world of bankruptcy practice; Sari Bourne, for her unflagging enthusiasm, encouragement and helpful revisions; Danny Nolan for his support, though all the while assuring me this would never get published; and Alla Raykin and her editing team, who have labored over every thing from an italicized period to finding the perfect case. I am blessed for all of your time and attention. Finally, I must thank my friends, family and most of all, my partner, Michael Mols, for brilliance in eleventh hour editing discussions, and constant nutritional and emotional sustenance over this long process.