



School of Law  
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia  
School of Law

---

Scholarly Works

Faculty Scholarship

---

1-1-2021

## Debt's Emotional Encumbrances

Pamela Foohey

Professor of Law *University of Georgia School of Law*, [pamela.foohey@uga.edu](mailto:pamela.foohey@uga.edu)



---

### Repository Citation

Rooney, Pamela. "Debt's Emotional Encumbrances." In *Research Handbook on Law and Emotion*, edited by Susan A. Bandes, Jody Lynsee Madeira, Kathryn Temple and Emily Kidd, 215-228. Northampton, MA: Edward Elgar, 2021.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

## Debt's Emotional Encumbrances

for inclusion in: *Edward Elgar Research Handbook on Law and Emotions*

Pamela Foohey\*

### ABSTRACT

This chapter focuses on the role of emotions in the theory and practice of commercial and consumer credit laws, including bankruptcy, in the United States. It assesses knowledge about people's emotions regarding personal and business financial problems, and evaluates how "money law" systems account for these emotions. This assessment finds that emotions surrounding taking on and being able to pay back debt differ between business leaders and people who shoulder household debt. These differences are traceable in large part to historical understandings of the respectability of incurring debt. This history has shaped the development of bankruptcy, commercial, and consumer credit laws in ways that make it easier for businesses than for households to access and navigate these legal systems. The result is that people dealing with stigmatizing money troubles face additional emotional encumbrances brought by "money law" systems, which impacts access to justice and the effectiveness of these laws. In contrast, business debt comes with less stigma and a relatively hospitable legal system, creating an opportunity for heightened risk taking. The chapter ends by considering the economic and social ramifications of business and consumer debt's differing emotional encumbrances.

In finance and law, the term "encumbrance" refers to a claim asserted against an asset, such as a mortgage on a house.<sup>1</sup> For the people or principles of businesses who owe these claims, the term "encumbrance" has additional, different meanings. People and businesses may take on debt, such as student loans and startup capital, to aid them on their paths to financial or life success. Conversely, their need to take on debt may arise from unexpected expenses, such as from medical bills or equipment repairs. The people and principals of businesses that owe the debt, creditors, and the general public will have differing views and feelings about the appropriateness and morality of that debt. And these views and feelings may shift as debtors successfully pay off the debt or as debtors fall further into overindebtedness that they have no realistic prospect of paying.

This chapter surveys the state of knowledge about people's emotions regarding personal and business financial problems, and evaluates how bankruptcy, commercial, and consumer credit laws in the United States account for these emotions. The survey finds that emotions surrounding taking on and being unable to pay back debt differ between business leaders and people who shoulder what they view as household debt. The differences in these two groups' emotional lives are traceable, in part, to historical understandings of the respectability of taking on debt. The chapter begins with this

---

\* Associate Professor, Indiana University Maurer School of Law. My thanks to Jody Madeira for useful comments and skillful editing.

<sup>1</sup> *Black's Law Dictionary*, Thomas Reuters, 10th ed. 2014, available at Westlaw BLACKS.

history, as explored through the evolution of debates about bankruptcy laws in America. This history has shaped the development of bankruptcy, commercial, and consumer credit laws in ways that make it easier for businesses than for households to access and navigate these “money law” systems. The result is that people with financial troubles face more emotional encumbrances brought by the legal system, which in turn impacts access to justice and the effectiveness of these laws. The chapter ends by considering the economic and societal ramifications of debt’s emotional encumbrances.

## I. The Evolution of Debt’s Emotions

Debt comes in two basic flavors—business and household.<sup>2</sup> Businesses of all sizes borrow funds from banks, financial institutions, and other lenders to facilitate their operations. They also may owe others for mishaps stemming from business operations, such as warranty claims or slip and falls in stores. Businesses’ leaders and management may consider the latter types of debt “involuntary” in that they did not agree to owe creditors money in these instances. But they recognize that those liabilities are necessary consequences of running businesses.<sup>3</sup>

People likewise borrow money from banks and other financial institutions to fund their lives and smooth their consumption. Credit cards, car loans, mortgages, and student loans are a few examples. People also may become debtors due to unforeseen or unwanted events, such as getting divorced and owing alimony or child support, falling ill and being unable to pay doctors’ and hospitals’ bills in full, or needing to immediately repair a broken-down car. In some instances, people may turn to less reputable companies to cover these bills—payday lenders, pawn shops, and auto title loan outfits.<sup>4</sup>

The potential differences in how people may feel about incurring business and personal debt are evident in these descriptions of how businesses and individuals become debtors, as are the possible differences in how creditors and the public react emotionally to outstanding debt remaining unpaid. Throughout history, incurring debt has been inescapable. Nonetheless, throughout history,

---

<sup>2</sup> Bankruptcy and secured transactions laws make this distinction, defining “consumer debt” and a “consumer transaction” as dealing with an obligation incurred primarily for personal, family, or household purposes. Elizabeth Warren, *Bankruptcy and Article 9: 2018 Statutory Supplement*, (New York: Wolters Kluwer, 2018), 55, 272.

<sup>3</sup> The robust insurance markets for all businesses shows that business leaders plan for these possibilities.

<sup>4</sup> For discussions of consumer lending in America, see e.g., Mehrsa Baradaran, *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy*, (Cambridge: Harvard University Press, 2015); Lendol Calder, *Financing the American Dream: A Cultural History of Consumer Credit*, (Princeton: Princeton University Press, 1999); Louis Hyman, *Debtor Nation: The History of America in Red Ink* (Princeton: Princeton University Press, 2011); Gary Rivlin, *Broke, USA: From Pawnshops to Poverty, Inc.—How the Working Poor Became Big Business* (New York: Harper, 2010).

particularly in earlier centuries, being in debt was considered shameful and morally reprehensible. For people, indebtedness likely came with the sense of complete failure that results from violating community standards. It also likely brought guilt and remorse simply for having taken out the debt to begin with, emotions that lead people to attribute to themselves responsibility for their debt predicaments.<sup>5</sup> Indeed, the words “debt” and “guilt” derive from the same etymology.<sup>6</sup> Across world history, debtors have been subjected to punishment, including prison sentences, indentured servitude, and public shaming, and creditors’ rage over unpaid debt has been taken for granted.<sup>7</sup>

For example, in the United States, in the days of the Republic, every colony allowed imprisonment for failure to pay one’s debt, and most colonies provided that creditors could bind debtors to service, typically for up to seven years. The law made no distinction between personal and business debt. Businessmen and heads of households alike were jailed.<sup>8</sup> Regardless of circumstances, failure—particularly that linked with “Lady Credit”—was gendered, with insolvency said to leave businessmen “weak, dependent, and thus, as they said themselves, ‘unman’d’.”<sup>9</sup>

As the economy of the Republic (and then America) grew, debt became redefined to distinguish “people who trafficked in credit” from “those who merely purchased on it”—that is, entrepreneurs from households.<sup>10</sup> To advance this distinction, “American ideals” continued to attach immorality to taking out debt for personal consumption, while casting entrepreneurs (often termed “merchants”) as rightfully engaging in economic risk.<sup>11</sup> For instance, when Father Abraham, Ben Franklin’s alter ego, wrote about the evils of debt, he focused on the purchase of “superfluities” fueled by credit, not commercial debt.<sup>12</sup> Defaulting on commercial debt, though unfortunate, was less frequently cast as a moral failure, but, rather, a necessary vulnerability of participating in the market.

---

<sup>5</sup> See Pamela Foohey, “A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy,” *Boston College Law Review* 60 (forthcoming 2019), <https://ssrn.com/abstract=3341473> (discussing emotions).

<sup>6</sup> For a history of debt, see David Graeber, *Debt: The First 5,000 Years*, (Brooklyn: Melville House, 2011).

<sup>7</sup> For a synthesis of this history, see Michael D. Sousa, “Bankruptcy Stigma: A Socio-Legal Study,” *American Bankruptcy Law Journal*, 87:4 (2013): 445-50 and Rafael Efrat, “The Evolution of Bankruptcy Stigma,” *Theoretical Inquiries in Law*, 7:2 (2006): 367-74.

<sup>8</sup> See Bruce A. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence*, (Cambridge: Harvard University Press, 2002): 78-85. For a discussion of the English laws that Republic states drew from, see Charles Jordan Tabb, “The Historical Evolution of the Bankruptcy Discharge,” *American Bankruptcy Law Journal*, 65:3 (1991): 326-44.

<sup>9</sup> Mann, *supra* note 8, at 120-21.

<sup>10</sup> *Id.* at 82-83.

<sup>11</sup> *Id.*; see also David M. Tucker, *The Decline of Thrift in America: Our Cultural Shift from Saving to Spending*, (New York: Praeger, 1991) (overviewing how America was founded on notions of individualism and self-reliance that eschewed debt, and tracing the evolution of that ideal through the 1980s).

<sup>12</sup> Mann, *supra* note 8, at 56 (quoting Benjamin Franklin’s *Poor Richard’s Almanack*).

This notion that certain forms of debt were immoral likewise influenced the development of America's bankruptcy laws. Although the Constitution provides for the establishment of "uniform laws on the subject of bankruptcy," the bankruptcy clause remained unused through financial panics in the 1790s. It was not until 1800 that the United States enacted its first federal bankruptcy law.<sup>13</sup> True to the distinction between entrepreneurs and consumers, this law's terms evidenced the notion that taking on any debt that remained unpaid was shameful. It provided that only merchants were eligible for the debt discharge, and only allowed for involuntary bankruptcy petitions filed by merchants' creditors.<sup>14</sup> This law was quickly repealed, replaced 38 years later with the first true bankruptcy law—the Bankruptcy Act of 1841. The 1841 Act allowed merchants and consumers to file voluntary petitions, which set off a "firestorm of controversy," particularly about the propriety of allowing non-merchants to be eligible for debt relief.<sup>15</sup> As shown by commentary around that time, it was increasingly accepted that "most men soon or later [go] bankrupt and fail in their business undertakings; not merely merchants and tradesmen, but even farmers, and those of all occupations."<sup>16</sup>

Following the 1841 Act, along with the United States' increasingly credit-driven economy and recognition of the inescapability of risk in a market society, bankruptcy laws evolved to include provisions for corporations, ways to allow both businesses and individuals to pay creditors in part over time, and fewer reasons for denying a debtor the discharge—all of which made it easier for the "honest but unfortunate" debtor to discharge debt.<sup>17</sup> Across these evolutions, the transformation of insolvency from a moral failure to a byproduct of economic risk was largely complete for commercial debtors.<sup>18</sup>

The shame accompanying consumer debt, in contrast, remained embedded in the American psyche. Culturally, incurring debt for personal purposes was (and continues to be) viewed as "a matter of self-indulgence."<sup>19</sup> Although America's bankruptcy laws increasingly included protections for consumer debtors, particularly in the Bankruptcy Reform Act of 1978, now known as the

---

<sup>13</sup> United States Constitution, Art. 1, § 8; Tabb, *supra* note 8, at 344-45.

<sup>14</sup> Mann, *supra* note 8, at 256; Tabb, *supra* note 8, at 345-49.

<sup>15</sup> Tabb, *supra* note 8, at 345-50.

<sup>16</sup> Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001): 3 (quoting a contributor to *Hunt's Merchants' Magazine* from 1860).

<sup>17</sup> Tabb, *supra* note 8, 353-69.

<sup>18</sup> See Mann, *supra* note 8, at 259-63.

<sup>19</sup> Graeber, *supra* note 6, at 379.

Bankruptcy Code, the backlash against providing a discharge to consumers that accompanied the 1841 Act continued unabated through the decades. Relatively soon after the 1978 Act's passage, creditors began a public campaign against the Code, lobbying for harsher treatment for debtors.<sup>20</sup> The general public likewise remained skeptical of households' use of bankruptcy and debt, in part because consumer bankruptcy filings rose sharply in the 1980s and 1990s.<sup>21</sup> The prevailing sentiment about the type of people who filed bankruptcy is summed up by Professor Mechele Dickerson in her description of the prototypical "bankruptcy queen": "the owner of a multi-million dollar exempt mansion, charges lavish trinkets on a Visa card (or takes a cash advance from the credit card to fund a gambling trip to Reno), then cavalierly files for bankruptcy rather than selling the exempt assets, curtailing spending habits, or working to repay the credit card debt."<sup>22</sup>

Contrary to this portrayal, empirical research based on data from the Consumer Bankruptcy Project (CBP), launched in the 1980s by now Senator Elizabeth Warren, Professor Jay Westbrook, and Professor Teresa Sullivan, consistently has shown that the rise in households seeking refuge in the bankruptcy system links to debt associated with growing healthcare costs, divorce, and changes in employment, including wage stagnation and job loss.<sup>23</sup> These drivers of consumer bankruptcy filings highlight a fundamental and concerning change in how American families meet their everyday expenses—such as housing, transportation, child care, and healthcare—in the face of increasing costs, wage stagnation, and a shrinking social safety net.<sup>24</sup> They gradually take on debt to pay for the necessities that their incomes and savings generally covered in prior decades.<sup>25</sup> In the three decades between 1970 and 2000, Americans took on so much debt that nonmortgage consumer credit

---

<sup>20</sup> See generally A. Mechele Dickerson, "Regulating Bankruptcy: Public Choice, Ideology, & Beyond," *Washington University Law Review* 84:1 (2006); see also Michael D. Sousa, "The Persistence of Bankruptcy Stigma," *American Bankruptcy Institute Law Review* 26:2 (2018): 220-23.

<sup>21</sup> See Efrat, *supra* note 7, at 376-77.

<sup>22</sup> A. Mechele Dickerson, "America's Uneasy Relationship with the Working Poor," *Hastings Law Journal* 51:1 (1999), 48-49.

<sup>23</sup> Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, "Life in the Sweatbox," *Notre Dame Law Review*, 94:4 (2018): 223, n. 19, 231. The CBP is a multi-researcher effort that investigates the people who file bankruptcy. I am a current co-investigator on the CBP, along with Professor Robert Lawless and Dr. Deborah Thorne. For details about the CBP, see *id.* at 232-34.

<sup>24</sup> See generally Jacob S. Hacker, *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream* (Oxford: Oxford University Press, 2006).

<sup>25</sup> See generally Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents Are Going Broke* (New York: Basic Books, 2004) (overviewing how American families' expenses have changed during the 20th century); Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, "Graying of U.S. Bankruptcy: Fallout From Life in a Risk Society," working paper (Nov. 8, 2018), <https://ssrn.com/abstract=3226574> (discussing the drivers of a decades-long increase in older Americans filing bankruptcy).

outstanding increased almost 1,225%, from \$119 billion to \$1,456 billion (in inflation-adjusted dollars).<sup>26</sup> At the end of 2017, American household debt reached an all-time (as of then) high of \$13.15 trillion, which, including home mortgages, amounted to the average American household holding a bit under \$136,000 in outstanding debt.<sup>27</sup>

In contrast to the reality that many people simply do not make enough money to make ends meet, throughout the late 20th century, descriptions of American households' consumption fixated on painting a picture of an unbridled consumer spending culture, similar to the idea of a "bankruptcy queen."<sup>28</sup> These descriptions brought condemnation of the presumed profligate spending on new gadgets, expensive meals out, and piles of clothing, and called for a return to America's supposed puritan, frugal roots.<sup>29</sup> This tension between how people actually spent money and how the media portrayed people's use of credit shaped the way in which Americans, including legislators, currently think about consumer debt. It also shaped how bankruptcy, commercial, and consumer credit laws have evolved to deal with American households' increasing reliance on debt.

## II. Debt's Emotions in Modern Times

Research regarding the emotions surrounding taking on debt, overindebtedness, and filing bankruptcy is sparse. Because the incurrence of and defaulting on business debt has assumed a largely utilitarian function,<sup>30</sup> almost all empirical research about debt's emotions focuses on consumer debt. The most robust research relates to continuing debates over what is the proper extent of household's access to bankruptcy. This research has fixated on the stigma of filing bankruptcy because proponents of bankruptcy law reforms have contended that bankruptcy's stigma has decreased so much from the 1970s onward that people feel no shame in racking up debt, with

---

<sup>26</sup> Thomas A. Durkin, "Credit Cards: Use and Consumer Attitudes, 1970–2000," *Federal Reserve Board* (September 2000), <https://www.federalreserve.gov/Pubs/Bulletin/2000/0900lead.pdf>.

<sup>27</sup> "Quarterly Report on Household Debt and Credit, 2017:Q4," *Federal Reserve Bank of New York*, (February 2018), [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc\\_2017q4.pdf](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2017q4.pdf); Claire Tsosie & Erin El Issa, "2018 American Household Credit Card Debt Study," *NerdWallet* (December 10, 2018), <https://www.nerdwallet.com/blog/average-credit-card-debt-household/>.

<sup>28</sup> Compare Calder, *supra* note 4, with Hyman, *supra* note 4.

<sup>29</sup> See Calder, *supra* note 4, at 37–38 (discussing America's cultural ideals of thrift, frugality, and delayed gratification); Foohey et al., *supra* note 23, at 231–32 (discussing debates about consumer bankruptcy laws).

<sup>30</sup> Donald Trump's remarks during 2016 presidential debates about placing four of his corporations into bankruptcy demonstrate that defaulting on business debt now largely is viewed as an inevitable consequence of a capitalistic society. See The Motley Fool, "Donald Trump, Harry Truman, and how bankruptcy has changed," *USA Today* (November 20, 2015), <https://www.usatoday.com/story/money/personalfinance/2015/11/20/donald-trump-harry-truman-and-how-bankruptcy-has-changed/76129568/>.

the idea that they will use the bankruptcy system to obtain a quick discharge.<sup>31</sup> Contrary to these contentions, comparing levels of consumer debt to the number of consumer bankruptcy filings during the last few decades suggests that bankruptcy's stigma may have increased.<sup>32</sup>

Recent surveys of the people who file bankruptcy support this conclusion.<sup>33</sup> As part of the CBP's latest iteration, my collaborators and I surveyed 910 households that filed bankruptcy between 2013 and 2016.<sup>34</sup> Of those households, 68% stated that they felt shame upon filing.<sup>35</sup> Similarly, a sample of people who filed bankruptcy in 2007, 2008, and 2010 generally stated during interviews that they felt shame and embarrassment and had experienced stigma over filing.<sup>36</sup> Additionally, Professor Michael Sousa's analysis of the biannual General Social Survey (GSS)'s question—"Do you think a person has the right to end his or her own life if this person has gone bankrupt?"—found that similar percentages of respondents from the 1970s through 2016 have answered affirmatively, likewise evidencing that filing bankruptcy has been and remains stigmatized and shameful. As with other research, this analysis suggests that, as consumer bankruptcy filing increased over time, the stigma associated with filing increased as well.<sup>37</sup>

There also is some, though less, systematic research into the emotions that accompany people's debt and overindebtedness absent filing bankruptcy. The relative dearth of research in this area most likely is attributable to difficulties in identifying and accessing groups of indebted individuals who have not filed bankruptcy. Nonetheless, data from the CBP show that two-thirds of debtors struggle to pay their debt for two or more years before they file bankruptcy, and that one-third of debtors struggle for five or more years before turning to the bankruptcy system for help.<sup>38</sup> During those years, people who eventually file bankruptcy report going without necessities, such as food and utilities, skipping doctors' visits, foregoing medication, selling their property to pay debt, trying to find additional work, and dealing with repeated calls from debt collectors.<sup>39</sup> Based on these reports, people's lengthy financial struggles almost certainly bring a host of emotions beyond the shame,

---

<sup>31</sup> See Foohey et al., *supra* note 23, at 231.

<sup>32</sup> Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, "Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings," *Stanford Law Review* 59:2 (2006): 233–41 (refuting the declining stigma hypothesis).

<sup>33</sup> For an overview of prior empirical inquiries into bankruptcy's stigma, see Sousa, "The Persistence of Bankruptcy Stigma" (2018), *supra* note 20, at 223–31.

<sup>34</sup> See *supra* note 23.

<sup>35</sup> Foohey et al., *supra* note 23, at 249.

<sup>36</sup> Sousa (2013), *supra* note 7.

<sup>37</sup> Sousa (2018), "The Persistence of Bankruptcy Stigma" *supra* note 20, at 232–38. See also *supra* note 32.

<sup>38</sup> Foohey et al., *supra* note 23, at 235–36.

<sup>39</sup> *Id.* at 241–46.

guilt, and embarrassment that leads them to delay filing bankruptcy.<sup>40</sup> These struggles may elicit anger at the actions of creditors and debt collectors, hopelessness in the face of mounting debt, and sadness about how their lives have been changed and consumed by their debt problems.<sup>41</sup>

Apart from bankruptcy, the existence of support groups organized under the name “Debtors Anonymous,” designed to help people control their spending, confirms that people experience fear, unhappiness, and shame because of their indebtedness.<sup>42</sup> Debtors Anonymous’ mission and messaging corroborates that there is an enduring public perception that incurring unsecured debt for personal consumption is a “spiritual sickness” that convinces people to “give into it by buying what [they] cannot afford.”<sup>43</sup> Through interviews with forty-six members of Debtors Anonymous, Professor Terrell Hayes concluded that the program relies on “shame rituals” to help members offset the shame they feel because they incurred unmanageable debt.<sup>44</sup>

In addition, Professor Michael Sousa also relied on people’s responses to the GSS question about the acceptability of suicide upon going bankrupt to test whether people’s views of debt’s stigma varies by social class. He found that perceptions of indebtedness’s stigma increased with social class, as measured by education, income, and occupational prestige. The higher an individual’s social class, the more likely they were to agree with the acceptability of committing suicide upon “going bankrupt.”<sup>45</sup> Combined with the Debtors Anonymous study, these results provide some of the first systematic evidence that shame accompanies unmanageable debt.

Another source of data about people’s emotional experiences with debt is the complaint database maintained by the Consumer Financial Protection Bureau (CFPB). Since June 2015, the CFPB has published consumers’ submitted complaints, along with consumers’ narratives about the problems they are facing with consumer financial products and services within the CFPB’s statutory purview.<sup>46</sup> The narratives, in particular, provide a rich source of data about how people express their debt problems. I analyzed a random sample of 6,000 narratives to investigate the role of the

---

<sup>40</sup> See Pamela Foohey, “Access to Consumer Bankruptcy,” *Emory Bankruptcy Developments Journal* 34:2 (2018): 347 (noting that attorneys term consumer debtors’ propensity to delay filing the “ostrich defense”). See also *supra* note 5 and accompanying text for a discussion of these emotions.

<sup>41</sup> See Foohey, “A New Deal for Debtors,” *supra* note 5 (discussing emotions and debt).

<sup>42</sup> These emotions are extrapolated from Debtors Anonymous’ webpage, “Is D.A. for You?,” *Debtors Anonymous*, <https://debtorsanonymous.org/getting-started/da/>.

<sup>43</sup> “Debtors Anonymous,” *Debt.org*, <https://www.debt.org/faqs/debtors-anonymous/> (quoting member).

<sup>44</sup> Terrell A. Hayes, “Stigmatizing Indebtedness: Implications for Labeling Theory,” *Symbolic Interaction* 23:1 (2000): 42-45.

<sup>45</sup> See generally Michael D Sousa, “Debt Stigma and Social Class,” *Seattle University Law Review* 41:3 (2018).

<sup>46</sup> For an overview of the complaint process, see Foohey, “Calling on the CFPB for Help: Telling Stories and Consumer Protection,” *Law & Contemporary Problems* 80:3 (2017): 181-84.

complaint mechanism in helping people voice, solve, and come to terms with their problems with financial goods and services providers. This analysis involved using qualitative content analysis to identify the emotions people used when discussing their problems.

Focusing on anger, disgust, sadness, fear, shame, and guilt,<sup>47</sup> I found that people's narratives most often evidenced anger and the frustration associated with anger. Sadness and fear also came through in a noticeable minority of the narratives. When people wrote with anger and frustration, they commonly called upon companies to remedy the situations or asked the CFPB for help with reigning in companies' practices because they had been unable to make any headway with their pleas to companies for assistance. When people wrote with sadness and fear, their stories typically included discussions of how credit issues and disputes negatively impacted their personal well-being and harmed loved ones. People expressed fear about their health, living situations, food scarcity, and ability to take care of children and ailing parents.<sup>48</sup> In contrast to the sense of ability to change their situations that comes through the narratives when people express anger and frustration, people's narratives filled with sadness and fear evidence vulnerability, desperation, and powerlessness to escape the effects for their indebtedness.

For the purposes of this chapter, what my analysis of the narratives shows is that debt can come with burdensome emotions. Based on people's discussions of this subset of financial problems, these emotions take a toll on their lives beyond that attributed to financial instability generally. These findings align with research about people who file bankruptcy, which shows that while people struggle to pay their debt before filing, they endure sleepless nights and argue with their spouses about how to deal with their financial situations.<sup>49</sup> They also support studies that connect homeowners' tendency to act against their financial interests to save houses on which they owe much more than the houses' value—that is, the houses are severely underwater—to fear, shame, and guilt about their debt situations.<sup>50</sup>

In short, for people dealing with their personal, household expenses, their struggles with paying the debt they take on to meet their expenses often comes with guilt and shame, as well as likely

---

<sup>47</sup> For a discussion of why I chose these emotions, see *id.* at 189-90.

<sup>48</sup> *Id.* at 193-99.

<sup>49</sup> Katherine Porter, "The Pretend Solution: An Empirical Study of Bankruptcy Outcomes," *Texas Law Review* 90:1 (2011): 142-44; Deborah Thorne, "Women's Work, Women's Worry?: Debt Management in Financially Distressed Families" in *Broke: How Debt Bankrupts the Middle Class* (Stanford: Stanford University Press, 2012): 136-51. See Foohey et al., *supra* note 23, at 255-57 (discussing "the costs of financial misery").

<sup>50</sup> Brett T. White, "Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis," *Wake Forest Law Review* 45:4 (2010).

other disheartening emotions, such as fear, sadness, and hopelessness. In addition, my study of people's narratives submitted via the CFPB highlights the need to fill the significant gap in research about emotions accompanying debt. Whatever the exact emotions, they impel people to try to pay back their debt long beyond the point when it makes sense to admit defeat. During that time, the lengths that people go to survive seem to be destructive to their health and well-being.

Finally, my interviews with pastors and other leaders who filed bankruptcy on behalf of their small churches provide limited data about how small business owners handle overindebtedness. Like the people who file bankruptcy, leaders (and congregants) are apt to delay filing past when resorting to bankruptcy makes financial sense, in part, because of the stigma and shame of bankruptcy. They become attached to particular buildings and do not want to part with their "spiritual homes." Part of their decisions to file bankruptcy involves sorting out the disappointment and resentment of their churches' overindebtedness.<sup>51</sup>

Owners of small businesses—such as mom and pop stores—also may experience their overindebtedness in ways similar to people taking on consumer debt. Like church leaders and heads of households, small business owners may view their businesses' financial failure as their own moral failure and put off filing bankruptcy in favor of trying to live up to American ideals of self-reliance.

In contrast, literature about managerial behavioral around debt used to fund larger businesses often focuses on the risk-taking nature of executives. That this literature responds to this behavior by critiquing legislation designed to reign in questionable business practices and a tendency to waste money to prop up failing businesses implies that the restraint and shame accompanying consumer debt differs from the emotions accompanying larger business debt.<sup>52</sup> Overall, research suggests that people's view of consumer and small business debt continue to differ from their assessment of business debt in ways that should dramatically shape their emotional experiences of incurring and paying back debt.

### **III. "Money Law" Mismatch with Debt's Emotions**

The differences in how people continue to experience incurring and being unable to pay debt most likely stem from the American veneration of self-reliance and individualism that shaped the evolution of bankruptcy laws. Consistent with this theory, current laws dealing with consumer credit

---

<sup>51</sup> Pamela Foohey, "When Churches Reorganize," *American Bankruptcy Law Journal* 88:3 (2014); Pamela Foohey, "When Faith Falls Short: Bankruptcy Decisions of Churches," *Ohio State Law Journal* 76:6 (2015).

<sup>52</sup> See generally A. Mechele Dickerson, "Behavioral Approach to Analyzing Corporate Failures," *Wake Forest Law Review* 38:1 (2003).

and finance still principally are premised on the idea that people should try to pay their debt as much and as hard as possible before law helps them. In comparison, laws dealing with business debt are premised on the idea that the legal system should promote the entrepreneurship gamble. To this end, consumer credit and bankruptcy laws effectively force people to look outside the legal system to deal with their financial problems, while business finance and bankruptcy laws welcome people into the legal system. Bankruptcy laws again illustrate this dichotomy.

The last time that the United States substantially overhauled its bankruptcy laws was in 2005. As regards consumer debt, the debate leading up to the 2005 amendments (termed “BAPCPA”) reflected fundamental disagreements about when and why people file bankruptcy that had continued since the passage of the 1978 Bankruptcy Act, as discussed above. The tenor of amendment supporters’ arguments replicated many of the assumptions about consumer debt that seem to inform people’s emotions surrounding taking on and not being able to pay back debt. Those who favored changes to bankruptcy laws argued that the people who filed bankruptcy largely used credit to fund frivolous expenses that they later sought to discharge.

Despite empirical evidence directly contradicting these assumptions, the debates resulted in the passage of amendments that made it harder and more expensive for people to file bankruptcy.<sup>53</sup> BAPCPA increased paperwork, mandated pre-filing credit counseling, and added an obligatory post-filing financial management course. Its most significant change was the addition of the “means test.” This test is designed to identify those households deemed to have too much income relative to prescribed necessary expenses and debt outstanding to be eligible for the quick discharge of chapter 7. It forces such households to file chapter 13, which requires them to pay a portion of their outstanding debt over a three-to-five year period via a repayment plan. This repayment plan necessarily means that these households will pay more to creditors than if they had filed chapter 7.<sup>54</sup>

When BAPCPA was passed, proponents’ assumption was that the means test would require more households to file chapter 13, shifting the relative percentage of chapter 7 and 13 consumer bankruptcy filings to reflect proponents’ view that many people who filed bankruptcy could pay their creditors more and were cheating by asking for a quick discharge through chapter 7. More than ten years after BAPCPA’s enactment, data from the CBP show that the relative percentage of

---

<sup>53</sup> See Foohey et al., *supra* note 23, at 231-32 (discussing debates about consumer bankruptcy laws).

<sup>54</sup> See *id.* at 228 (discussing the means test).

chapter 7 versus 13 filings has remained constant. Instead of recalibrating which chapter consumer file, BAPCPA presses people to wait even longer to file.<sup>55</sup>

This outcome makes sense. People have so few assets, particularly compared to debt, and so little income when they file that the means test sorts very few households into chapter 13.<sup>56</sup> And people have so little when they file because they try hard to pay their debt for years before turning to bankruptcy for help.<sup>57</sup> Perversely, the very shame of overindebtedness and filing bankruptcy that BAPCPA's proponents assumed had dissipated still pushes households to delay filing bankruptcy until long after it first made economic sense to do so. And BAPCPA's added filing hurdles only add months to people's delay in filing, which, as I and my co-authors have argued, leaves struggling households with less of what they need to make effective use of bankruptcy's fresh start.<sup>58</sup>

In contrast, BAPCPA largely left business bankruptcy law untouched.<sup>59</sup> It is difficult for creditors to force businesses into involuntary bankruptcy, while businesses have an effectively unfettered ability to file bankruptcy either to liquidate or to reorganize. Leaders and managers do not need to prove that their businesses are insolvent at the time of filing. The same is true for people who seek to discharge primarily business debt. The means test does not apply to them. Regardless of income, expenses, and debt, these debtors presumptively are eligible for chapter 7. For both businesses and people with predominately business debt, judges have the discretion to dismiss their bankruptcy cases based on a determination that they were filed in "bad faith."<sup>60</sup>

The logic behind this easy access to bankruptcy is two-fold. Businesses' leaders are presumed to be in the best position to assess when their businesses are struggling such that value can be preserved through bankruptcy. To encourage leaders to file once they make this determination, access is relatively unconstrained. Also, harkening back to ideas that the entrepreneurship gamble depends on access to credit, bankruptcy helps mitigate the risk of default that necessarily accompanies this gamble. Without bankruptcy, it is presumed that business formation would be less

---

<sup>55</sup> See generally Robert M. Lawless, et al., "Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors," *American Bankruptcy Law Journal* 82:3 (2008).

<sup>56</sup> Foohey et al., *supra* note 23, at 228, 239-40.

<sup>57</sup> See *supra* notes 38-40 and accompanying text.

<sup>58</sup> Foohey et al., *supra* note 23, at 258-60.

<sup>59</sup> With the exception that BAPCPA added special provisions for small businesses. See Elizabeth Warren et al., *The Law of Debtors and Creditors: Text, Cases, and Problems* (New York: Wolters Kluwer, 7th ed., 2014): \_\_\_\_.

<sup>60</sup> See *id.* at \_\_\_\_.

robust, which would hamper economic development. Business bankruptcy serves as an economic development tool by spreading financial failure.<sup>61</sup>

Non-bankruptcy credit laws likewise are harsher on people with consumer debt as compared to business debt. For instance, debt collections and related laws, which chiefly affect consumers, provide wide latitude for creditors' collection efforts, including that consumer debt can effectively continue forever absent the debtor's filing bankruptcy.<sup>62</sup> Similarly, the importance of consumers' credit data and scores, combined with the severely limited legal avenues by which people can protect their data and ensure their scores' accuracy, recently prompted the Congressional Research Service to issue a report about consumer credit data policy issues.<sup>63</sup> And more than half a century after the passage of the Fair Housing Act, which includes provisions making redlining and other racial discrimination in housing illegal, research shows that such discriminatory practices continue.<sup>64</sup> Nonetheless, an oft-told account of what caused the 2008 financial crisis implicates low-income households' borrowing choices.<sup>65</sup> The advent of the CFPB following the financial crisis, designed to "make consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers," demonstrates the apparent necessity to strengthen laws in favor of consumers.<sup>66</sup>

Again, in contrast, corporate and business association laws generally insulate directors, owners, and managers from liability for their companies' failures, absent a successful argument for piercing the corporate veil. If the people who own and run a business are not personally accountable for their business's debt beyond their monetary investment or continued employment, they should be incentivized to take more risk, an outcome which again is theorized to encourage entrepreneurship, investment, and economic development.<sup>67</sup> As with business bankruptcy laws, limited liability comes

---

<sup>61</sup> See "Chapter 2: Business Bankruptcy – Introduction," *Report of the National Bankruptcy Review Commission* (October 20, 1997), <http://govinfo.library.unt.edu/nbrc/report/09amass.html>.

<sup>62</sup> See generally Dalié Jiménez, "Ending Perpetual Debts," *Houston Law Review* 55:3 (2018).

<sup>63</sup> See generally "Consumer Credit Reporting, Credit Bureaus, Credit Scoring, and Related Policy Issues," *Congressional Research Service* (March 28, 2019), <https://fas.org/sgp/crs/misc/R44125.pdf>.

<sup>64</sup> See Tracy Jan, "Redlining was banned 50 years ago. It's still hurting minorities today," *The Washington Post* (March 28, 2018), <https://www.washingtonpost.com/news/work/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/>.

<sup>65</sup> See Max Ehrenfreund, "It's time to stop blaming poor people for the financial crisis," *The Washington Post* (June 15, 2017), <https://www.washingtonpost.com/news/work/wp/2017/06/15/its-time-to-stop-blaming-poor-people-for-the-financial-crisis/>.

<sup>66</sup> "Consumer Financial Protection Bureau Strategic Plan FY 2013 - FY 2017," *Consumer Financial Protection Bureau* (April 2013), <https://files.consumerfinance.gov/f/strategic-plan.pdf>.

<sup>67</sup> See Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study," *Cornell Law Review* 76(5) (1991): 1039-43 (discussing piercing the corporate veil).

with reduced blame for owners, directors, and managers when their companies experience financial problems. Indeed, failing banks and other financial institutions received a trillion dollar bailout during the financial crisis. And although their directors and managers were called out for their reckless behavior, they faced few lasting social consequences.<sup>68</sup>

The dichotomy between how law, government, and society treated households versus banks in the wake of the financial crisis provides a paradigm for the logic underlying laws regulating business and consumer credit. Both sets of laws proceed from the assumption that all people chiefly think about debt in utilitarian terms. Consumers should file bankruptcy at the first hint of financial troubles that make seeking a discharge economically practicable. Businesses' managers and leaders should file bankruptcy on behalf of businesses when doing so will provide greater returns to creditors and investors. Similarly, both consumers and businesses will take on an economically sound level of debt. And they will default on that debt when paying no longer makes financial sense.

Layered on top of this utilitarian reasoning is the history of how society (and thereby lawmakers) thinks about the taking on of consumer and business debt. Consumers' incurrence of debt traditionally brought suspicion (though less so currently). Now, the notion that consumers who take on debt are worthy of condemnation has turned into a presumption that people will take advantage of expanded access to debt. In comparison, though the incurrence of business debt historically also brought suspicion, its necessity was recognized early, and the presumption now is that business owners and managers will act in their best financial interests, which also reflect the economy's best interests. Thus, society penalizes consumers by making the laws to help with their debt problems relatively inaccessible, while helping businesses by providing rather easy access to legal systems and laws designed to insulate managers, directors, and owners personally from the consequences of the decisions they make on behalf of businesses.

But the balance struck by society and its laws does not reflect the emotional reality of American consumers and business leaders. People who take on consumer debt have internalized the stigma still associated with being unable to pay their debt. They already push themselves beyond their financial limits to try to make good on their debt obligations. Once they realize they need help, encountering laws that presume they intend to exploit the legal system only doubles the damaging emotions accompanying their debt. Contradictorily, business debt comes with little emotional

---

<sup>68</sup> Almost no executives faced jail time; instead, some received bonuses. Louis Story & Eric Dash, "Bankers Reaped Lavish Bonuses During Bailout," *The New York Times* (July 30, 2009), <https://www.nytimes.com/2009/07/31/business/31pay.html>.

baggage, which ostensibly makes those dealing with this debt more confident when thinking about using law to address financial problems—and when they do, they find a relatively hospitable legal system. Stated succinctly, the United States’ bankruptcy, commercial and consumer credit laws disregard the relevant emotional experiences of consumer and business debt. Notably, people face two sets of emotional encumbrances regarding their household debt—social and legal.

\* \* \*

That the American legal system largely overlooks what is known about the debt’s emotional experiences means that the law of debt on the ground diverges from the law of debt on the books. This mismatch brings economic and social ramifications. As to business debt, insulating owners and managers may lead to increased risk taking, as most evident through the 2008 financial crisis. As to consumer debt, people’s money troubles are more likely to go unaddressed by the laws designed to help smooth the financial risks of their lives and to foster more robust lending, which may harm families and negatively impact the broader economy. The task for researchers, lawmakers, and society now is to focus more on the emotions that accompany debt and take seriously how debt’s emotional encumbrances impact access to and the effectiveness of the legal system.

## REFERENCES

- Balleisen, Edward J. *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America*. Chapel Hill: University of North Carolina Press, 2001.
- Baradaran, Mehrsa. *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy*. Cambridge: Harvard University Press, 2015.
- Black’s Law Dictionary*. Thomas Reuters, 10th ed. 2014.
- Calder, Lendol. *Financing the American Dream: A Cultural History of Consumer Credit*. Princeton: Princeton University Press, 1999.
- “Chapter 2: Business Bankruptcy – Introduction.” *Report of the National Bankruptcy Review Commission* (October 20, 1997), <http://govinfo.library.unt.edu/nbrc/report/09amass.html>.
- “Consumer Credit Reporting, Credit Bureaus, Credit Scoring, and Related Policy Issues.” *Congressional Research Service* (March 28, 2019), <https://fas.org/sgp/crs/misc/R44125.pdf>.
- “Consumer Financial Protection Bureau Strategic Plan FY 2013 - FY 2017.” *Consumer Financial Protection Bureau* (April 2013), <https://files.consumerfinance.gov/f/strategic-plan.pdf>.
- Debtors Anonymous, <https://debtorsanonymous.org/>.
- “Debtors Anonymous,” Debt.org, <https://www.debt.org/faqs/debtors-anonymous/>.
- Dickerson, A. Mechele. “America’s Uneasy Relationship with the Working Poor.” *Hastings Law Journal* 51:1 (1999): 17-71.

- Dickerson, A. Mechele. "Behavioral Approach to Analyzing Corporate Failures." *Wake Forest Law Review* 38:1 (2003): 1-54.
- Dickerson, A. Mechele. "Regulating Bankruptcy: Public Choice, Ideology, & Beyond." *Washington University Law Review* 84:7 (2006): 1861-1905.
- Durkin, Thomas A. "Credit Cards: Use and Consumer Attitudes, 1970–2000." *Federal Reserve Board*. September 2000, <https://www.federalreserve.gov/Pubs/Bulletin/2000/0900lead.pdf>.
- Efrat, Rafael. "The Evolution of Bankruptcy Stigma." *Theoretical Inquiries in Law* 7:2 (2006): 365-93.
- Ehrenfreund, Max. "It's time to stop blaming poor people for the financial crisis." *The Washington Post* (June 15, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/06/15/its-time-to-stop-blaming-poor-people-for-the-financial-crisis/>.
- Foohy, Pamela. "A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy." *Boston College Law Review* 60 (forthcoming 2019), <https://ssrn.com/abstract=3341473>.
- Foohy, Pamela. "Access to Consumer Bankruptcy." *Emory Bankruptcy Developments Journal* 34:2 (2018): 341-64.
- Foohy, Pamela. "Calling on the CFPB for Help: Telling Stories and Consumer Protection." *Law & Contemporary Problems* 80:3 (2017): 177-209.
- Foohy, Pamela. "When Churches Reorganize." *American Bankruptcy Law Journal* 88:3 (2014): 277-305.
- Foohy, Pamela. "When Faith Falls Short: Bankruptcy Decisions of Churches." *Ohio State Law Journal* 76:6 (2015): 1319-1365.
- Foohy, Pamela, Robert M. Lawless, Katherine Porter & Deborah Thorne. "Life in the Sweatbox." *Notre Dame Law Review* 94:4 (2018): 219-261.
- Graeber, David. *Debt: The First 5,000 Years*. Brooklyn: Melville House, 2011.
- Hacker, Jacob S. *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream*. Oxford: Oxford University Press, 2006.
- Hayes, Terrell A. "Stigmatizing Indebtedness: Implications for Labeling Theory." *Symbolic Interaction* 23:1 (2000): 29-46.
- "Household Debt and Credit Report (Q4 2018)." *Federal Reserve Bank of New York*, <https://www.newyorkfed.org/microeconomics/hhdc.html>.
- Hyman, Louis. *Debtor Nation: The History of America in Red Ink*. Princeton: Princeton University Press, 2011.
- Jan, Tracy. "Redlining was banned 50 years ago. It's still hurting minorities today." *The Washington Post* (March 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/>.
- Jiménez, Dalié. "Ending Perpetual Debts." *Houston Law Review* 55:3 (2018): 609-58.
- Lawless, Robert M., et al. "Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors." *American Bankruptcy Law Journal* 82:3 (2008): 349-406.
- Mann, Bruce H. *Republic of Debtors: Bankruptcy in the Age of American Independence*. Cambridge: Harvard University Press, 2002.

- Porter, Katherine. "The Pretend Solution: An Empirical Study of Bankruptcy Outcomes." *Texas Law Review* 90:1 (2011): 103-62.
- "Quarterly Report on Household Debt and Credit, 2017:Q4." *Federal Reserve Bank of New York*. February 2018, [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc\\_2017q4.pdf](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2017q4.pdf).
- Rivlin, Gary. *Broke, USA: From Pawnshops to Poverty, Inc.—How the Working Poor Became Big Business*. New York: Harper, 2010.
- Sousa, Michael D. "Bankruptcy Stigma: A Socio-Legal Study." *American Bankruptcy Law Journal* 87:4 (2013): 435-82.
- Sousa, Michael D. "Debt Stigma and Social Class." *Seattle University Law Review* 41:3 (2018): 965-1002.
- Sousa, Michael D. "The Persistence of Bankruptcy Stigma." *American Bankruptcy Institute Law Review* 26:2 (2018): 217-41.
- Story, Louis & Eric Dash. "Bankers Reaped Lavish Bonuses During Bailout." *The New York Times* (July 30, 2009), <https://www.nytimes.com/2009/07/31/business/31pay.html>.
- Sullivan, Teresa A., Elizabeth Warren & Jay Lawrence Westbrook. "Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings." *Stanford Law Review* 59:2 (2006): 213-256.
- Tabb, Charles Jordan. "The Historical Evolution of the Bankruptcy Discharge." *American Bankruptcy Law Journal* 65:3 (1991): 325-71.
- The Motley Fool. "Donald Trump, Harry Truman, and how bankruptcy has changed." *USA Today*. November 20, 2015, <https://www.usatoday.com/story/money/personalfinance/2015/11/20/donald-trump-harry-truman-and-how-bankruptcy-has-changed/76129568/>
- Thompson, Robert B. "Piercing the Corporate Veil: An Empirical Study." *Cornell Law Review* 76(5) (1991): 1036-74.
- Thorne, Deborah. "Women's Work, Women's Worry?: Debt Management in Financially Distressed Families." *Broke: How Debt Bankrupts the Middle Class*. Stanford: Stanford University Press, 2012: 136-151.
- Thorne, Deborah, Pamela Foohey, Robert M. Lawless & Katherine Porter. "Graying of U.S. Bankruptcy: Fallout From Life in a Risk Society." working paper (Nov. 8, 2018), <https://ssrn.com/abstract=3226574>.
- Tsosie, Claire & Erin El Issa. "2018 American Household Credit Card Debt Study." *NerdWallet*. December 10, 2018, <https://www.nerdwallet.com/blog/average-credit-card-debt-household/>.
- Tucker, David M. *The Decline of Thrift in America: Our Cultural Shift from Saving to Spending*. New York: Praeger, 1991.
- Warren, Elizabeth. *Bankruptcy and Article 9: 2018 Statutory Supplement*. New York: Wolters Kluwer, 2018.

Warren, Elizabeth, et al. *The Law of Debtors and Creditors: Text, Cases, and Problems*. New York: Wolters Kluwer, 7th ed., 2014.

Warren, Elizabeth & Amelia Warren Tyagi. *The Two-Income Trap: Why Middle-Class Parents Are Going Broke*. New York: Basic Books, 2004.

White, Brent T. "Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis." *Wake Forest Law Review* 45:4 (2010): 971-1023.