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DISCIPLINING THE FINANCIAL FAILURE: AN EXPLORATION OF BANKRUPTCY LAW AS AN ACTIVE DISCOURSE IN MARKET CAPITALISM

*Linda E. Coco**

“The law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this social world which first creates law.”¹

“A ‘political anatomy’, which was also a ‘mechanics of power’, was being born; it defined how one may have a hold over others’ bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, ‘docile’ bodies. Discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience).”²

* Associate Professor of Law, Barry University. The author thanks Laura Nader, Troy Duster, G. Ray Warner, Anthony G. Matricciani, M.K. Matricciani, and Ashley Aidee. The author thanks Dean Leticia Diaz for the grant support necessary to research and write this article. The research and interviews relied upon in this article result from four years (2004–2008) of ethnographic research in the Bankruptcy Legal Field: Department of Justice, Office of the United States Trustee, U.S. Bankruptcy Courts, Chapter 13 Trustee’s Office and private law firms.

¹ Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 834 (1987).

² MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 138 (1979).

INTRODUCTION

United States bankruptcy law and court procedures provide a coherent identity for the individual fiscal failure,³ the “debtor.”⁴ In the legal bankruptcy field,⁵ a “debtor” is a category in the Bankruptcy Code (“Code”),⁶ and an identity in bankruptcy legal practice. The role of a debtor is associated with particular beliefs and activities within the legal field.⁷ To assume the identity of a debtor under the Code, an individual must subject himself to controlling and transforming forces of the Code and bankruptcy court. The process of transformation from fiscal failure to “debtor” involves rendering the previously unruly, disorganized, and sometimes messy financial life of an individual into a distinct, coherent, organized, recognizable, linear, and legally comprehensible identity. This coherency of the individual’s identity through the Code and process allows him or her to enter the bankruptcy legal field and obtain desired results from the practices found in that field.⁸

In *The Force of Law: Toward a Sociology of the Juridical Field*, Bourdieu writes about the structure of the American legal field,⁹ discussing its attributes, features, and powers.¹⁰ One feature he discusses at length is entry into the legal field.¹¹ He writes that entry into the legal field is regulated by “legal institutions and legal agents [that] control [who enters] . . . into the legal field.”¹² In order to gain access to the legal field, an individual’s presentation and actions must be shrouded by and constituted properly through accepted legal discourse, engage legal constructs, and make legal arguments.¹³ By adopting the attributes and features found in the discursive practices of the field, the individual invokes the power

³ This is a term coined by the author. It is defined below and is used throughout the paper. It is interchangeable with other descriptive phrases in the paper such as: financially distressed individual.

⁴ 11 U.S.C. § 101(13). The term “debtor” means person or municipality concerning which a case under this title has been commenced. Person is defined as “includes individual, partnership, and corporations but does not include governmental unit.” 11 U.S.C. § 101(41).

⁵ Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge’s Non-Article III Status*, 16 MICH. J. RACE & L. 181 (2011) (discussing the manner in which the bankruptcy field occupies a distinct space in the legal field).

⁶ 11 U.S.C. § 101(13). The term “debtor” means person or municipality concerning which a case under this title has been commenced.

⁷ *Stigma*, *supra* note 5, at 206.

⁸ The preamble to the United States Bankruptcy Code. Collier Edition, 2014

⁹ Bourdieu & Terdiman, *supra* note 1, at 834–35.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

of the legal field.¹⁴ Once the power of the legal field is invoked, the individual is able to obtain the benefits.¹⁵ As Bourdieu explains, legal structures, processes, and institutions “produce their own problems and their own solutions” according to their own logic.¹⁶

In the bankruptcy context, the process works similarly. A financially distressed individual experiences an economic challenge (*e.g.*, job loss, illness, over-indebtedness) that results in a legal conflict (*e.g.*, a wage garnishment, car repossession, lawsuit, or foreclosure sale). At the point of legal conflict, the individual enters the legal field according to its standards, and thus is forced to engage the field on predetermined terms. Typically, when the financial distress is too great, the individual will turn to bankruptcy law and courts for a particular form of relief. The identity of the distressed is transformed from fiscal failure to debtor when he or she enters the bankruptcy legal field.

This article considers the legal categories, structures, processes, and institutions of the bankruptcy legal field as they transform the incoherent fiscal failure into a coherent legal debtor. Part one discusses the definition of a fiscal identity (rational action) and fiscal failure (non-rational action) in American society and culture using theoretical tools from anthropology, sociology, and philosophy.¹⁷ Part two uses the theory of Michel Foucault to describe the disciplinary techniques of bankruptcy law and courts as they work to organize the fiscal failure and realign the fiscal failure with the demands of market utility, efficiency, and productivity.¹⁸ Part three reflects on the results of these practices in the creation of docile bodies for capitalism through the disciplining process found in the Code and bankruptcy court.¹⁹ Part four discusses observations and conclusions about the transformative process.

I. FISCAL IDENTITY AND INDIVIDUALITY IN THE UNITED STATES

The intellectual movements of the Enlightenment caused the emergence of an individuated fiscal identity in America.²⁰ The development of the notion of the individual and pervasive individualism in America is traceable to Enlightenment themes and attitudes. John Locke applied Enlightenment notions to social policy,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See infra* p. I.

¹⁸ *See infra* p. II.

¹⁹ *See infra* p. III.

²⁰ The Enlightenment is best known as an intellectual movement that spread from Germany to England and then the United States. The central tenets and attitudes resulting from this movement are still pervasive: belief in science and the scientific method, the use of reason, and ideas about the identity of the individual.

generating reform in institutions and law.²¹ Contrary to medieval thought, which emphasized divine right and the denial of the individual, Locke believed that all individuals had natural rights based on natural laws.²² He wrote that each individual is able, through reason, to discover the natural laws of life, liberty, and property.²³ Through the application of reason, the individual can reflect on his rights and position in the world and work to improve his position.²⁴ Reason ensures both individual and social progress.²⁵ Thus, the application of reason to human collectives continued the development of rational social institutions.²⁶

Anthropologist Bill Maurer explains that this transformation of the European worldview from the Renaissance to the Enlightenment profoundly affected perceptions of the individual and the individual in society.²⁷ The organization of the world as part of the “great chain of being,” with elites and commoners knowing their place and bound together by rights and duties, gave way to a view of the world centered on individualism.²⁸ Locke wrote that the rational individual would choose to contract with the government to protect himself in exchange for his obedience and support for the social collective.²⁹ He promoted the notion of rational individualism.³⁰ In this view, the collective does not determine the place of the individual in a ranked status structure. Rather, the individual has the power to create his position in the world based on personal abilities.³¹ The group no longer defines the individual and his position; instead, the social whole is defined as a collective of individuals. The individual is no longer assigned a place in the social ranking system, but rather becomes master and creator of his own life. As a result, the individual and his actions become the focus of social policy and structure.

In 1831, Alexis de Tocqueville observed this epistemological shift from the collective to the individual in the new American Republic during his tour of the American prison system. He wrote that the citizens of the New Republic believed

²¹ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 4–30 (Dutton 1947) (1690).

²² LOCKE, *supra* note 21, at 23.

²³ *Id.*

²⁴ *Id.*

²⁵ LOCKE, *supra* note 21, at 24.

²⁶ LOCKE, *supra* note 21.

²⁷ See BILL MAURER, RECHARTING THE CARIBBEAN: LAND, LAW, AND CITIZENSHIP IN THE BRITISH VIRGIN ISLANDS (2000).

²⁸ LOCKE, *supra* note 21.

²⁹ *Id.*

³⁰ *Id.*

³¹ MAURER, *supra* note 27.

that “their whole destiny is in their own hands.”³² The individual is severed from the collective. De Tocqueville described this newfound individualism³³ as

a novel expression, to which a novel idea has given birth Individualism is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and his friends, so that he has thus formed a little circle of his own, he willingly leaves society at large to itself.³⁴

Individualism for de Tocqueville was a novel idea allowing the individual to experience himself and separate from his family, friends, and the social world.³⁵

For de Tocqueville, American democracy not only represented a change in the formation and structure of the government, but also a change in the identity of the citizen. He wrote, “individualism is of democratic origin.”³⁶ As an aristocrat and a lawyer in France, de Tocqueville rejected this new approach as unnatural. De Tocqueville found disturbing the intense individualism and the severing of ties between the individual and the group, the group and the current generation, and the current generation and the next generation. He wrote, “The woof of time is every instant broken and the track of generations effaced. Those who went before are soon forgotten; of those who will come after, no one has any idea: the interest of man is confined to those in close propinquity to himself.”³⁷

De Tocqueville’s view of American individualism and its break with the past differed from the view of the citizens of the New Republic.³⁸ They considered the creation of a new democracy as a moment of clearing away the past, a break from the traditions and structures of England and the Old World, and an opportunity for creating a new self.³⁹ De Tocqueville wrote of the philosophical method of the Americans that “the operation of the mind of each American appeals only to the individual effort of his own understanding.”⁴⁰ He believed that Americans enacted the very tenets, principles, and attitudes of the Enlightenment, stating

³² ALEXIS DE TOCQUEVILLE, 2 *DEMOCRACY IN AMERICA* 80–100 (Vintage Books 1990) (1840).

³³ Alexis de Tocqueville describes this as “untrammelled individualism.” DE TOCQUEVILLE, *supra* note 32, at 98.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 99.

³⁸ DE TOCQUEVILLE, *supra* note 32.

³⁹ *Id.*

⁴⁰ *Id.*

that “America is therefore one of the countries where the precepts of Descartes are least studied and are best applied. Nor is this surprising. The Americans . . . follow [Descartes] maxims, because this . . . social condition [of democracy] naturally disposes their minds to adopt them.”⁴¹

This epistemological change afforded by the American Revolution was an important shift in consciousness for the founders of the new country who believed that individualism and the break with medieval thought was necessary for the development of a democracy. The break from the past marks what Kant⁴² would call the “way out” found in the enlightened self.⁴³ This involves release from the status of *immaturity*—defined as a state of will that makes an individual accept someone else’s authority to lead rather than trusting the individual’s own reason—to a status of *maturity*, or a state of will in which the individual must dare to use his own reason to acquire courage and knowledge for himself.⁴⁴ It is this application of practical reason to how the individual lives and how the individual acts that creates the mature, dignified social actor.⁴⁵

Benjamin Franklin, a leading public figure in Philadelphia, provides an example of Kant’s notions of the autonomous courageous individual thinking, acting, and behaving for himself in society.⁴⁶ Franklin was a model man of the Enlightenment.⁴⁷ He believed in deliberately shaping his character and worldly achievements. *The Autobiography of Benjamin Franklin*⁴⁸ is an example of the maxim from *Poor Richard’s Almanac* that states, “He that can compose himself, is wiser than he that composes books.”⁴⁹ Franklin’s life goal and autobiographical goal was to create an accurate portrait of an enlightened public figure.⁵⁰ He

⁴¹ *Id.* at 3–4.

⁴² Kant is one of the central philosophers of the Enlightenment. That said, I do not wish to characterize him or his work as the embodiment of the events and process—political, social, religious, and economic—that occurred at the end of the eighteenth century. His work is used to indicate a general shift in thinking that occurred during the Enlightenment. See STEPHAN KORNER, KANT (Basic Book 1999) (1955).

⁴³ MICHEL FOUCAULT, THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT, 1954–1984 (Paul Rabinow & Nikolas Rose eds., 2003).

⁴⁴ FOUCAULT, *supra* note 43, at 45.

⁴⁵ KORNER, *supra* note 42.

⁴⁶ Franklin is selected as an example because of his instructional financial writings. Several founders of the United States could have been selected. See BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (Leonard W. Labaree et al. eds., 1964)

⁴⁷ FRANKLIN, *supra* note 46.

⁴⁸ Franklin was the first person to write about his life using the term *autobiography* to describe what was previously called *memoirs*. This again indicates his intention to break with the past and create a new self and a new representation of the self. See FRANKLIN, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ *Id.*

was a self-made man.⁵¹ Historian Scott Sandage describes Franklin's life as a life set in movable type.⁵² Franklin understood that to rise in social stature and political power, one must create a good story of oneself, and that such creation is always subject to revision and correction.⁵³ Sandage notes Franklin's words, "failures were like typographical errors . . . forget small ones and revise 'great Errata' in 'a second Edition.'"⁵⁴

Sociologist Max Weber writes that Franklin secularizes the religious notion of a calling to serve God.⁵⁵ He explains that Franklin's character and writings represent the spirit of capitalism,⁵⁶ and the resultant rationalization of conduct in the social world with a classical purity.⁵⁷ For Weber, Franklin and the Protestantism found in his writings create a kind of worldly asceticism in which all work in the world is done in God's service.⁵⁸ Service to God in this manner creates God's favor.⁵⁹ This implies that laboring diligently so that one gets ahead in the material world could be an indication of God's approval.⁶⁰ Paired with the notion of hard work to earn God's favor is the idea that the individual must be frugal.⁶¹ As can be seen from Franklin's writings and Weber's discussion of Franklin's writings, if the individual spends money freely and indulges desires, then he likely will lose God's favor and therefore be materially unsuccessful.⁶²

Weber reflects on Franklin's advice that a merchant or tradesman must make rational decisions to work hard, be frugal, and save.⁶³ The merchant or capitalist represented in Franklin's writing, which Weber employs throughout *The*

⁵¹ *Id.*

⁵² SCOTT A. SANDAGE, *BORN LOSERS: A HISTORY OF FAILURE IN AMERICA* 51 (2005).

⁵³ *Id.* at 53.

⁵⁴ *Id.* at 105.

⁵⁵ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1930).

⁵⁶ *Id.* at 48.

⁵⁷ McNeill refers to the work of A. Hyman and H. M. Robertson. Some religious scholars reject the view of Max Weber in his association of Protestantism and capitalism. Their criticisms appear targeted at the effects of capitalism (i.e., wealth accumulation and its impact on the poor) rather than the spirit of early American capitalism (i.e., worldly labor, rationalizations, spend thriftiness, and saving). Weber is not addressing usury and speculation familiar to the American upper class, nor is he addressing the Protestant charity characteristic in the history of the church's attitudes toward the poor. Weber's analysis is subtle and touches on the "spirit" of the energy of capitalism at its inception. I think Weber would not disagree with his critics' analysis of the impact of capitalism and the creation of class differentiation. JOHN T. MCNEILL, *THE HISTORY AND CHARACTER OF CALVINISM* 419 (1954).

⁵⁸ WEBER, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Protestant Ethic, is dedicated to rational calculation.⁶⁴ The individual must be able to defer rewards. Self-discipline is key to the development of the spirit of capitalism in America.⁶⁵ Finally, Weber ties the notions found in Franklin's writings to Kant's notion of the enlightened man,⁶⁶ writing, "many of [Kant's] formulations are closely related to ideas of ascetic of Protestantism."⁶⁷

De Tocqueville, Kant, Franklin, and Weber provide the theoretical insights necessary to chart the emergence of a particular part of the contemporary model for the American fiscal identity in debt relations. It is an individualized identity, not perceived as shared with a group. Fiscal identity is shaped by reason and a notion of individual responsible action. The citizens of the New Republic believed their destinies could be created by an act of personal will. In this model, each person becomes responsible for shaping and managing his position in the social world. Rational engagement and personal responsibility, in this view, generate the social world.

Contemporary fiscal identity⁶⁸ extends beyond what Franklin envisioned when he told the young tradesman to protect his reputation in the marketplace and pay his debt. A successful or failed fiscal identity in contemporary society serves as an evaluation of an individual's character and conduct in the marketplace, and that evaluation then characterizes the essential nature of the individual as a moral actor. This process of evaluation and categorization of the individual is most apparent when the individual fails. Sandage explains this contemporary identity in his discussion of the transformation of the meaning of the word "failure" during the 1800s and 1900s in the U.S.⁶⁹ According to Sandage's analysis, the social meaning associated with "failure" broadened from an incident in commercial life (*i.e.*, a failed business venture or attempt) to an identity (*i.e.*, a ruinous life without purpose).⁷⁰ Therefore, the commercial success or failure of the individual in free-market capitalism defines the identity of the individual for the social world.

⁶⁴ *Id.* at 150–56.

⁶⁵ *Id.* at 154.

⁶⁶ WEBER, *supra* note 55.

⁶⁷ *Id.* at 270 n.58.

⁶⁸ This model of human identity and behavior rejects the classic man found in Western literature—A man subject to his passions and emotions. The character is found in classical tragedy. Reason is assumed to prevent human suffering. The expectation is that the agent can avoid suffering by calculation and reflection before acting. Emotions are to be subject to reason. An emotional individual does not engage the world in a practical and strategic manner. Rational instrumentalism rejects emotions. WEBER, *supra* note 55.

⁶⁹ SANDAGE, *supra* note 52.

⁷⁰ *Id.* at 260–62.

The cultural and intellectual theories of Western modernity and post-modernity explain the development and characteristics of individual identity in the modern world.⁷¹ In modernity, identity is constructed in terms of self-creation, self-recognition, identification, and reflective recognition.⁷² Individual identity emerges through enacting various social roles: teacher, merchant, man, woman, parent, American, or foreigner. And individual identity reflects through social values or norms: responsible, reliable, caring, and thoughtful. Therefore, an individual's identity emerges as part of a collective process and experience, but it is felt individually and becomes internalized and personal. This modern view of individual identity is essential, static, and unitary, yet simultaneously has the potential for change. As philosopher Douglas Kellner explains, "in modernity, the problem of identity consist[s] in how we constitute, perceive, interpret and present our self to ourselves and to others."⁷³

The theories of post-modernity expand the modern construction of the self by adding a component of uncertainty to identity.⁷⁴ Post-modern theorists discuss individual identity as increasingly unstable.⁷⁵ Identity in post-modern capitalist structure is constructed through a myriad of images and texts found in popular cultures, as well as from the roles and norms enacted in an individual's life.⁷⁶ A post-modern identity lacks unity and consistency, and is more subject to revision than was the modern identity. Using the perspective of identity found both in modernity and post-modernity, a particular model for the well-ordered contemporary fiscal identity emerges.

Modern capitalism has adopted and worked to shape these dominant discourses creating categories of thought for fiscal matters and fiscal identity. These categories of thought create a model against which individuals evaluate their own and others' monetary and financial behavior and practices. This model works to construct a particular fiscal identity gauging the individual's success or failure. A key aspect of this model identity is individualism. Participants in modern capitalism come to view themselves and others as autonomous financial actors in financial matters. It is from this space of separation and isolation that individuals assume responsibility for their financial status.

⁷¹ See generally Douglas Kellner, *Popular culture and the construction of postmodern identities*, in MODERNITY & IDENTITY 143 (Scott Lash & Jonathon Friedman eds., 1992).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 145–47.

This model for the American fiscal identity is hegemonic in that it improperly locates the causes of the boom and bust cycles of free-market capitalist systems in individuals.⁷⁷ In so doing, the larger social and economic forces are personalized. Individuals are taught to take responsibility for their location in the economic order rather than viewing themselves as part of the cycles of the larger capitalist structure of power and wealth. The individual's financial success or failure is a direct result of the individual's attitudes, conduct, and behavior, rather than particular sets of economic relations, historical processes, class structure, and legal order generating an individual's success or failure.

The fiscal identity locates that instability of the free-market capitalist economy in individuals.⁷⁸ Anthropologist Brett Williams locates the debtor, the fiscal failure, as part of a wealth structure that relies on credit-debt relations for profit creation.⁷⁹ As discussed above, this fiscal individualism model is built on notions of personal responsibility, rationality, and individual control.⁸⁰ When individuals in the U.S. find themselves in a sea of debt, it is considered an individual debt problem.⁸¹

As discussed above, the model for the American fiscal identity attributes free will and choice to social agents. Consequently, an individual having *problem debt* is held responsible for that debt. Similarly, in bankruptcy the individual has failed

⁷⁷ The best example is the recent home mortgage crisis. Individuals received home mortgages from banks and other financial institutions that have variable interest rates (known as Adjustable Rate Mortgages) that eventually became financially unmanageable. The decisions of lending institutions impacted thousands of individuals and substantially affected the health of the economy. The full results of this top down blunder for the individual consumers are not yet known.

⁷⁸ BRETT WILLIAMS, *DEBT FOR SALE: A SOCIAL HISTORY OF THE CREDIT TRAP* (2004). Williams questions the naturalization of this model of fiscal identity by pointing to the larger economic forces that limit and shape the possibilities for and decisions of the individual. She asks, "In the face of this rude exploitation [i.e., employment insecurity, marketing and advertising of the culture of lack in every part of social life, the rising costs of education and healthcare, and the organized credit industry—target marketing, easy credit, and increasing opportunities to use credit in daily life] why aren't we angry at banks? Why instead do we blame debtors?" *Id.* at 51.

⁷⁹ Williams traces the development of credit and debt relations from the Revolutionary War to the present. She explains that Americans have long relied on credit and gone into debt during hard times. Williams focuses her analysis on the emergence of the banking industry's systematic marketing of credit cards to individuals beginning in the 1950s and through the greatest marketing campaigns of the 1970s. *Id.*

⁸⁰ *Id.* Williams asks the reader to "abandon individualized, distorted, privatist myths of individual responsibility and reaffirm our social responsibility to tighten the labor market, make wages and incomes more equal, and provide a safety net for people who are vulnerable." *Id.* at 130.

⁸¹ A debt is defined as "that which is owed or due, as anything (money, goods, or services) which one person is under obligation to pay or render to another." OXFORD ENGLISH DICTIONARY, *Debt* n.1 (2d ed. 1989). That which is owed or due; anything (as money, goods, or service) which one person is under obligation to pay or render to another: a. a sum of money or a material thing. b. a thing immaterial. c. that which one is bound or ought to do; (one's) duty. 2. a. liability or obligation to pay or render something; the condition of being under such obligation. *Id.*

to measure up to the model for fiscal success. In these situations, the individual is viewed as unable to regulate his conduct and return what was given to him in the social order.⁸²

Debtors in bankruptcy are not people who have debts and are paying them. Rather, they are those social agents who are not paying back the money they owe. Debtors are burdened with *problem debt*. They are *insolvent*. Debtors failed to exercise the restraint and self-control to save their financial resources for the future. They fail to see that they may have problems in the future that require them to have resources to protect themselves. And most significantly, their social failure to align their conduct with a larger social entity is believed to strain the entire social chain of interdependence. Debtors are viewed as having socially failed, and as needing organization, regulation, realignment, and discharge of debt.

In the bankruptcy process, Enlightenment ideas of individualism are infused with Christian notions. A structure of sin, atonement, and forgiveness are mapped with individual responsibility. The process of bankruptcy for seeking a discharge of debts is similar to the Christian process for seeking forgiveness from God for sins.⁸³ The fiscal failure is in financial discord and disharmony with creditors and the marketplace. Thus, a debtor in bankruptcy must recognize his failure, accept responsibility for his failure, confess the actions causing the failure, and ask for forgiveness from the federal government. It is through these notions that the secularized bankruptcy process regulates, punishes, and forgives the fiscal failure. Christianity, along with Enlightenment notions, becomes normalizing discourse in bankruptcy.

Karen Gross, a leading bankruptcy expert, asserts, “the solution to the problem of nonpaying debtors is forgiveness.”⁸⁴ Gross explains, citing the Old Testament and a biblical tale about God’s treatment of a debtor, that forgiveness is appropriate if certain preconditions are met: there must be a wrong committed (not paying debts), the wrong must harm another (those owed are not paid), the wronged party resents what occurred (creditors must pay), and the wrongdoer acknowledges the wrong done and takes steps to rectify it (debtor goes to the legal system to admit failure).⁸⁵ The legal system requires that the debtor’s wrong become public record, and the debtor is submitted to judicial scrutiny.⁸⁶

The individual in bankruptcy can be forgiven, provided the individual appropriately engages and is aligned in the bankruptcy process. In filing a

⁸² NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (E. Jephcott trans., Blackwell 2000) (1939).

⁸³ KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* (1997).

⁸⁴ *Id.* at 93.

⁸⁵ GROSS, *supra* note 83.

⁸⁶ *Id.* at 93–94.

bankruptcy petition, the individual reveals his financial identity and admits his failure. The petition provides bankruptcy professionals and the public with a complete financial picture of the individual for the last six years.⁸⁷ The disclosures of information reveal to the creditors and bankruptcy professionals the debtor's assets, debts, and reason for the individual's financial failure. The debtor is then publicly examined at the meeting of creditors by the trustee in the case and by any creditors.⁸⁸

The bankruptcy trustee, standing in for the creditors, questions and examines the financial body of the debtor. The trustee attempts to locate the reason for the failure. Once located, the trustee evaluates the reason for the debtor's failure and determines if the reason falls within the category of an "honest, but unfortunate" individual, or if the reason falls outside the category as a "dishonest, fraudulent" individual.⁸⁹ The focus of these inquiries is on assigning degrees of fault, establishing responsibility, and granting forgiveness as part of the disciplining process of dominant discourses.

II. DISCIPLINING DISCOURSE:⁹⁰

FOUCAULT AND THE TECHNIQUES OF POWER IN THE BANKRUPTCY COURTS

French theorist Michel Foucault explains in *Discipline and Punish: The Birth of the Prison* that the transition from the classical period to the modern period in Western civilization was marked by a particular type of embodied human identity and autonomy. Distinct from the ownership of the body found with

⁸⁷ See a bankruptcy petition, *Bankruptcy Forms*, <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx> (last visited Mar. 27, 2015).

⁸⁸ The United States Trustee's Office oversees the meeting of creditors, examination of the debtor, and appoints a trustee in each case.

⁸⁹ See *generally* *Local Loan v. Hunt*, 292 U.S. 234 (1934) (discussing the notion that only the honest but unfortunate debtor should receive relief from his or her debts).

⁹⁰ Foucault describes dominant cultural discourses as disciplining in that they require a normative and naturalized code of human conduct. Foucault writes that the "discourse of discipline is about a rule: not a juridical rule derived from sovereignty, but a discourse about a natural rule, or in other words about a norm . . . a code of normalization." MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975-1976* 38 (2003). That code of conduct is not explicitly codified in legal doctrines, rather it is enacted through the "normalizing technologies" in legal processes. JANE F. COLLIER ET AL., *2 SANCTIONED IDENTITIES: LEGAL CONSTRUCTIONS OF MODERN PERSONHOOD. IDENTITIES: GLOBAL STUDIES IN CULTURE AND POWER* 1-29, 2 (1995). Merry writes, "every discourse contains a more or less coherent set of categories and theories of action: a vocabulary for naming events and persons and a theory for explaining actions and relationships. . . . Discourses are rooted in particular institutions and embody their culture. Actors operate within one or another available discourses" SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 110 (1990).

institutions of slavery, disciplinary techniques dispensed with slavery's costly and violent requirement to appropriate the body of the individual as a form of governing to make individuals productive.⁹¹ Rather than exerting a violent hold over the body, the modern disciplinary approach governs from the inside out. The mechanics of power develop and, with extreme intrusiveness, manage the individual to become in daily practice mentally and behaviorally docile and compliant with the dominant discourses. The goal of disciplinary techniques of the modern world is an internally self-regulating individual aligned with the demands of utility, efficiency, and productivity—an individual in sync with the rhythms of the marketplace.

Foucault writes, “the first of the great operations of discipline is the constitution of ‘*tableaux vivants*,’ which transforms the confused, useless or dangerous multitudes into ordered multiplicities.”⁹² This involves the generation of an identity and a coherency that then casts the role and activities of that identity in social space.⁹³ This transformation process is part of a larger project of modernity to regulate and create docile bodies:

To sum up, it might be said that discipline creates out of bodies . . . an individuality that is endowed with four characteristics: it is cellular (by the play of spatial distribution), it is organic (by the coding of activities), it is genetic (by the accumulation of time), it is combinatory (by the composition of forces).⁹⁴

Disciplinary techniques exercise a normalizing power through space and time and over human bodies. The body is disciplined to create a standardized or normalized identity. It is initially made submissive, docile and coherent.⁹⁵ Then, it is made into a productive entity. Docility of the body, paired with the mandate for productivity, manifests the structures of discipline.

Foucault's *Discipline and Punish* provides a framework for understanding how the dominant normalizing discourses of disciplinary techniques work in the

⁹¹ Foucault discusses slavery as “a relation of appropriation of bodies.” MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 137 (1979). The modern approach to governing is distinct in that it changes the behaviors of the individual through discipline.

⁹² *Id.* at 148.

⁹³ The next steps include: (2) *the control of activity*; (3) *the organization of geneses*; and (4) *the composition of forces*, which will be discussed below. *Id.*

⁹⁴ *Id.* at 167.

⁹⁵ *Id.* at 137–38. (“The historical moment when an art of human body was born, which was directed not only at the growth of its skills, nor at the intensification of its subjection, but at the formation of a relation that in the mechanisms itself makes it more obedient as it becomes more useful, and conversely.”).

legal field.⁹⁶ In this book, Foucault describes the monastic, military, and penal orders as they impose structures and processes onto human bodies.⁹⁷ He explains that the coherent and rigid structures of these orders generate a particular type of individuality, identity, and docility towards economic production.⁹⁸ Similarly, the process of rendering the fiscal failure into a debtor in the bankruptcy field assumes disciplining experiences and processes analogous to those Foucault attributes to the penal process. Although the identity and role of a debtor is distinct from the identity and role of an inmate, the identity of the debtor is historically a quasi-criminal category that only recently became a civil category.⁹⁹

The transformation of a fiscal failure into a coherent debtor occurs through several steps within the bankruptcy legal field. Foucault discusses similar transformative steps in the *art of distributions*¹⁰⁰ involving the creation of a standardized identity in social space and time: *enclosure*,¹⁰¹ *partitioning*,¹⁰² and

⁹⁶ Foucault's objective in *Discipline and Punish: The Birth of the Prison* is to write a history of the present. He traces a trajectory of past structures to explain present social phenomena. Using the example of prisons and torture, Foucault considers the history of the shift in criminal codes and accepted punishment forms *i.e.*, from direct bodily torture to the less barbaric form of prison terms. Foucault argues the shift did not occur due to an evolution of thought practices. Rather, torture was simply embedded in the monarchical order and rule. In early modern society, as the logic of order shifted to one based on middle class or bourgeois rule, different power is used to achieve a distinct social agenda. *Id.*

⁹⁷ The soldier "had to learn the profession of arms little by little—generally in actual fighting—movements like marching and attitudes like the bearing of the head belonged for the most part to a bodily rhetoric of honour." *Id.* at 135.

⁹⁸ "A 'political anatomy', which was also a 'mechanics of power', was being born; it defined how one may have a hold over others' bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, 'docile' bodies. Discipline increases the forces of the body (in economic terms of utility) and diminishes there same forces (in political terms of obedience)." *Id.* at 138.

⁹⁹ See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995).

¹⁰⁰ DISCIPLINE AND PUNISH, *supra* note 91, at 141.

¹⁰¹ Enclosure techniques of discipline are discussed as "the specification of a place heterogeneous to all others and closed in upon itself. It is the protected place of disciplinary monotony. . . . the monastic model." In other words, it is to enclose and fix in space populations. The masses must be relegated to particular spaces that are controlled and regulated. The goal is to organize, differentiate and master the masses to prevent rebellion. *Id.*

¹⁰² Partitioning space as techniques of discipline is discussed as "the principle of elementary locationEach individual has his own place; and each place its individual. Avoid distributions in groups ; break up collective dispositions. . . . Disciplinary space tends to be divided into as many sections as there are bodies of elements to be distributed." In other words, groups are not allowed to stay together. Individuals are kept separate from other individuals so groups do not form. *Id.* at 143.

functionality.¹⁰³ The transformation of a fiscal failure into a debtor¹⁰⁴ begins when the individual is drawn into the bankruptcy process through the initial paper filings with the bankruptcy court. Next, Foucault discusses the *control of the activity* of the body in order that the individual may be brought into line with the dominant discourses of the market economy to make him or her productive.¹⁰⁵ Finally, Foucault discusses the result of this transformation as a representation of the manifestation of the evolutionary progress of the individual—the *organization of geneses*. The individual is again normalized within the bankruptcy process, emerging as a more fiscally responsible individual.

Enclosure is defined as “the specification of a place heterogeneous to all others and closed in upon itself. It is the protected place of disciplinary monotony. . . . the monastic model. In other words, it is to enclose and fix in space populations.”¹⁰⁶ The masses must be relegated into a particular order in a determined space that is highly controlled and regulated. The goal of enclosure is to organize large groups of individuals, differentiate each individual from the other, and master and conform their behaviors to prevent rebellion.

The Code sets the parameters for entry into bankruptcy spaces, processes, and practices. The individual fiscal failure is brought within the confines of the debtor’s identity by a definition found in the Code. A debtor is as any person for which “a case under this title has been commenced.”¹⁰⁷ The individual commences a case by conforming to the requirements of the Code. The Code states that the individual enters the space of bankruptcy by filing a bankruptcy petition, providing the bankruptcy court with particular information, and agreeing to follow the mandates of the Code and the bankruptcy court. If the individual performs according to the mandates found in the Code and follows the rules of the court, then the individual is transformed into a recognizable debtor. If the individual ignores the mandates or the rules of the court, or disregards or lacks appropriate knowledge of the precise mandates and rules, the individual

¹⁰³ *Id.* at 148.

¹⁰⁴ The debtors included in this research: Otis, a 77-year-old single African-American male; Mr. Cox a 56-year-old single white male; Grace, a 45-year-old recently widowed Filipino female; Heather and Dawn, a late 30s white lesbian couple; Linda and John, an early-40s white married couple with two children; Matt a 26-year-old single white male; Carrie, a 31-year-old single African-American female; Dari and Eric, a 32-year-old white female and 35-year-old African-American male couple married with two children; Tracy, a 35-year-old single white woman with one child; Charles, a 46-year-old single white gay male; Jesse, a 29-year-old single white female; Eric, a 27-year-old single white male; Ingrede, a 28-year-old single white female. The subjects’ names and identifying details are changed to preserve identity.

¹⁰⁵ DISCIPLINE AND PUNISH, *supra* note 91, at 141–50.

¹⁰⁶ *Id.* at 141.

¹⁰⁷ 11 U.S.C. § 101(13). The term “debtor” means person or municipality concerning which a case under this title has been commenced. Person is defined as “includes individual, partnership, and corporations but does not include governmental unit.” 11 U.S.C. § 101(41).

is not transformed into a recognizable debtor and is removed from the space of bankruptcy. Considering each step along the transformative path reveals the manner by which it works.

First, the bankruptcy process organizes the fiscal failure. During the initial consultation, a potential client discusses what happened in his or her fiscal life—lost a job, became ill, or some other event that reduced or eliminated his or her income. Usually, the potential client has experienced serious financial difficulties. He or she feels helpless, and as a result no longer opens the mail or answers the phone. A potential client often arrives at an attorney's office with a bag full of unopened bills. The case of Mr. Cox¹⁰⁸ provides an excellent example of a client who arrives at a bankruptcy attorney's office with an unopened trash bag of bills—credit cards, mortuary bills, medical bills, tax debts, and parking tickets. The bankruptcy process requires organization and coding of this information.

Initially, in an intake interview, it is important for a bankruptcy attorney to determine what property an individual owns and the value of that property. Next, it is important to ascertain the amount and types of debts an individual is carrying and compare those amounts with the individual's income. An example interview illustrates this.

LC: You do own a house or a car?

Cox: Yes. I own a car, a 1992 Buick. I do not own a house.

LC: Are you employed? And what is your annual income?

Cox: Yes, I am employed. I am employed as a security guard at TTY Security for six months. I make about \$40,000 a year.

LC: Good, that is below the median income for this state. What was your job before this one? Was it security?

Cox: Yes, for the last six years. Before that I worked at US Airlines for 14 years. I was in middle management. The company moved headquarters back east six years ago, and I could have gone, but my father was ill. I am the only son, so I had to stay here and take care of him. My dad just died. That is why I owe that \$6,800 to the mortuary I listed (he pauses and looks around nervously). I know that is horrible. It is my dad. I feel really bad. I should pay for it, but I really have nothing. I don't know what has happened to my life since that time (referring to when he had a good job).

¹⁰⁸ Mr. Cox is a six-foot, 59-year old, single white male wearing a torn grey t-shirt and blue jeans. Field notes, dissertation research, 2004 (on file with author). The subject's name and identifying details are changed to preserve his identity.

- LC: Ok. Do not worry. Let's see what we can do. How many credit cards do you have?
- Cox: Four. The Capital One cards I do not know why I got them. I could not afford them even when I had the US Air Job. That is when I got them. I thought I would get a raise. I never did. That debt is really old. It is about \$1300. I think it is still around that amount or more. I feel really guilty about not paying them back. But I have paid the minimum balance for six years. I still feel responsible. It is so un-American.
- LC: Not paying your debts.
- Cox: Yes. I should pay my debts. It is just something you do. That is what my dad taught me. (He looks out the window at the lake.)
- LC: Yes. It is something you do when you have the money. Your income is about \$1600 a month and your expenses are about two hundred more than that. Of course you are in debt.
- Cox: I also have hospital debts from my heart problems in February this year. I owe them \$3000, and the hospital is collecting against my paycheck. They want to take \$200.00 a month. I cannot afford that. I had a heart attack when I had just started this job. I was working less than three months, so I did not have health coverage yet. As an employee you get it after the trial three-month period. I got stuck with the payments. I thought I was covered. (He pauses and sighs.) I guess I should have checked. But how do you check in an ambulance?
- LC: (I pause.) Have you used your credit cards in the last 6 months? It looks like you have just been making payments. Is that correct?
- Cox: I stopped using them a few years ago. I just have been making payments.
- LC: Do you owe any money to the FTB or the IRS?
- Cox: No, thankfully.
- LC: Mr. Cox, your debts are all unsecured, and they equal about \$12,000 in total. I think that you could qualify for a Chapter 7 liquidation plan. That would discharge the debts completely.
- Cox: (He begins to look less weighed down.) Really? That is great. I am so relieved. Somehow I thought that I would have to pay everything. I was so worried. It took me so long to talk to someone about my problems. I am so grateful.

LC: Ok. That is good. I am going to make copies of the bills, and give you a packet of papers to take home and fill out. Then, you bring them back with a check for the full attorney fee and filing fee, and then we will be set to go.¹⁰⁹

Next, the bankruptcy process codes the fiscal failure's financial life onto forms that are comprehensible to the bankruptcy legal field. Regardless of chapter, the individual files a bankruptcy petition consisting of a set of nationally uniform bankruptcy forms created by Congress.¹¹⁰ An official bankruptcy petition consists of a particular set forms: schedules A–J,¹¹¹ the means test, and statement of financial affairs.¹¹² The first part of a bankruptcy petition reflects the current economic status of the individual through a list of schedules: income, expenses, secured and unsecured creditors, real property, and personal property. The second part of a bankruptcy petition is the Statement of Financial Affairs (“SOFA”).¹¹³ The SOFA is a historical summary of the debtor's financial life, and it gives the Bankruptcy court an idea of the debtor's path to bankruptcy. The SOFA requires identification of the following: past employment and income for the two years prior to the filing of the petition; any payment made to a creditor within 90 days prior to filing; lawsuit judgments, garnishments, and attachments against the debtor in the year prior to the filing of the petition; repossession and foreclosures in the year prior to the filing of the petition; assignments or receiverships in the 120 days prior to the filing of the petition; gifts and losses prior to the filing of

¹⁰⁹ Field notes, Oakland California. Ph.D. dissertation at UC Berkeley (August 2004) (on file with author).

¹¹⁰ Bankruptcy Petition and the Official Forms are found at United States Courts, *Bankruptcy Forms*, <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.asp> (last visited Feb. 17, 2015).

¹¹¹ Schedule A: the debtor's real property (*i.e.*, real estate interests) and all liens against it; Schedule B: the debtor's personal property and its value. Schedule C: Property Exemptions; Schedule D: creditors who hold secured claims against the debtor's property, including consensual liens (*e.g.*, mortgages and car loans) and statutory liens (*e.g.*, property tax liens); Schedule E: the debtor's unsecured debts that have priority over other unsecured debts. Such debts include taxes, fines, and support payments; Schedule F: all other unsecured debts such as credit cards, personal loans, phone bills, and other service bills; Schedule G: unexpired leases or contracts to which the debtor is a party; Schedule H: co-debtors on loans or contracts; Schedule I: the debtor's income sources and any automatic deductions from the debtor's income such as health and life insurance, union dues, retirement payments, and support payments. Also required are the debtor's marital status and number of dependents; Schedule J: the debtor's current monthly expenses, including mortgage or rent, utilities, home maintenance, food, clothing, laundry, dry cleaning, medical and dental expenses, transportation, recreation, charitable contributions, insurance, taxes, installment payments (automobile, school tuition), support payments, and business expenses. At the bottom of Schedule J is an entry for monthly income less monthly expenses.

¹¹² This is a list of forms for the average bankruptcy petition. Individual cases may require additional forms and information.

¹¹³ Bankruptcy Petition and the Official forms are found at United States Courts, *Bankruptcy Forms*, <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx> (last visited Feb. 17, 2015).

the petition; payments for debt counseling or to a bankruptcy attorney; closed accounts, stock transfers, and safe deposit boxes; prior addresses during the two years prior to the filing of the petition; and businesses and business holdings.¹¹⁴

Next, under the 2005 amendments to the Code, an individual debtor must also complete the means test, on form B22A, with current financial information.¹¹⁵ This test addresses the current monthly income of a debtor, less the debtor's allowed monthly expenses and debt obligations. If the remaining amount after the debtor pays all of his or her obligations exceeds a particular threshold,¹¹⁶ the debtor is ineligible to file a Chapter 7 case. If the individual debtor is ineligible, then the debtor must complete the B22C form that provides a statement of the disposable income of a debtor.¹¹⁷ The disposable income is what the Code requires a debtor to propose for a repayment plan.¹¹⁸ Once the individual signs the petition, the individual becomes "the debtor" and is assigned a coded bankruptcy case number.

The petition and the means test are renderings of the individual's financial life onto forms. They form a coherent representation of an individual debtor's finances. This process represents a transformation of otherwise disorganized information into an organized representation of an individual and his or her financial circumstances. An example illustrates this process of how the fiscal failure's disorderly financial life is transformed and represented in a coherent manner.

The Stagnois couple's situation provides an excellent example.¹¹⁹ The Stagnois first contacted their attorney because their residence was being foreclosed. Anthony and Sonia Stagnois are an Italian-American couple living in San Francisco with two children. Anthony had been unemployed for several months and Sonia was disabled, preventing her from working outside the home. During the previous six months, the couple could not pay the mortgage on either their residence or on a rental property. The income from the rental had paid basic living expenses such as food and utilities. Anthony had begun a new business and he thought eventually it would generate enough income for the family. They wanted to keep their residence and rental property.

¹¹⁴ Bankruptcy Official Forms found at United States Courts District of Idaho, *United States District & Bankruptcy Court*, <https://www.id.uscourts.gov/forms-bk> (last visited Feb. 17, 2015).

¹¹⁵ Means Test form is found at United States Courts District of Idaho, *Means Test Current Forms*, https://www.id.uscourts.gov/bankruptcy/forms_fees_rules/Forms.cfm (last visited Feb. 17, 2015).

¹¹⁶ 11 U.S.C. § 707(b).

¹¹⁷ Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income form is found at http://www.id.uscourts.gov/forms-bk/B_22C_1210.pdf.

¹¹⁸ Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income is found at http://www.id.uscourts.gov/forms-bk/B_22C_1210.pdf.

¹¹⁹ Field notes, Oakland, Ca. Ph.D. dissertation research of author from 2008 (July-Aug. 2004) (on file with author).

During the 1990s, Anthony and Sonia had owned restaurants in San Francisco. Over the years, each had closed. Now, Anthony was attempting to obtain financial backing to open another restaurant. Sonia had been a ballet dancer, had performed in Phantom of the Opera, and for the President of the United States. After many years of dancing, Sonia's feet became deformed. She is unable to dance and has difficulty walking. She cannot teach ballet because her feet scare children. Although she is physically disabled, Sonia cannot obtain disability payments for her feet.

The couple's residence is located in San Francisco, and the rental property is located south of San Francisco in Daly City. The combined value of the two properties is about \$1.5 million, and the secured debt against the two properties is about \$762,362.00. The couple owes about \$81,000 in unsecured debt. Anthony and Sonia's bankruptcy petition reflects their financial identity in the following manner:

Schedule A Real Property: jointly owned residence that has a fair market value of \$970,000.00 The claim held by the bank against the property is \$395,421.00. The rental property is also jointly owned. It has a fair market value of \$470,000.00 and a secured bank claim [mortgage] against it for \$285,000.00.

Schedule B Personal Property: cash on hand—\$200.00; checking account—\$4,765.98; household goods—\$6,000.00; wearing apparel—\$800.00; furs, jewelry—\$800.00; stock or shares—\$2,100.00; automobiles—1967 Skylark \$5,000.00, 1997 Olds Bravada \$4,500.00, 1964 Chris Craft Constellation 40' \$15,000.00; office equipment—\$500.00.

Schedule C Exemptions: real property—residence exemption of \$75,000.00; checking account—\$4,275.00; household goods—\$6,000.00; wearing apparel—\$800.00; furs and jewelry—\$800.00; automobile—\$2,300.00 for the Olds Bravada; and office equipment—\$500.00.

Schedule D Creditors Holding Secured Claims Against Real Property: Litton Loan Servicing (1st and 2nd loan) for \$385,000.00 against the residence; Monterey Bay Resources for \$285,000.00 against the rental; and the City of San Francisco's statutory tax lien on the residence for \$2,800.00.

Schedule E Creditors Holding Unsecured Priority Claims: California Franchise Tax Board back payroll taxes for \$470.00; and Internal Revenue Service 1998 Taxes for \$285.00.

Schedule F Creditors Holding Unsecured Non-Priority Claims: Alarm One—\$136.78; Alliance One—\$1,505.34; American Express—\$92.00; AT&T Wireless—\$335.67; Bob Jr. Towing—\$1,830.00; California Check Cashing—\$1,565.45; Capital One—\$800.00; Capital One—\$601.00; Chevron—\$432.00; Discover—\$2,500.00; Fire Insurance—\$218.00; National Bank of Marin—\$555.90; First USA—\$60.00; Kinko's—\$86.98; Macy's—\$452.98; Orchard Bank—\$3567.32; SBC—\$675.32; Sears—\$727.00; Sunset Scavenger—\$304.40; and West America Bank—\$935.34. Most likely, these unsecured creditors will be paid a portion of the money owed them based on the amount of equity the debtors have in their real property.

Schedule I Income: Anthony Stagnoi is self-employed and makes \$4,600.00 per month from the rental and his business. Sonia Stagnoi is self-employed and makes \$2,600.00 a month.

Schedule J Expenses: mortgage—\$2773.15; utilities—\$150.00; Cable—\$105.00; home maintenance—\$100.00; food—\$480.00; clothing—\$50.00; medical and dental—\$50.00; transportation—\$250.00; health insurance—\$600.00; auto insurance—\$100.00; school tuition—\$500.00.¹²⁰

The bankruptcy petition codes the Stagnois' financial life according to a legal and procedural logic found in the bankruptcy legal world. The Stagnois' financial lives and their identities are properly rendered into a recognizable pattern. Their information is fixed within the grid of the schedules and organized over time in the Statement of Financial Affairs. Their financial life is organized and controlled. It becomes legible in two-dimensional space. It is clearly analyzed and rendered for and in the bankruptcy process.

This coding marks the entrance into the bankruptcy field that occurs at filing of the petition with the clerk of the bankruptcy court. The official debtor identity emerges simultaneously with the point of filing the petition with the court. The individual's identity is now clearly dissected, organized, and legible. The debtor's identity also becomes fixed and public. Once the debtor identity is established, he or she belongs in the spaces of the bankruptcy process. One informant describes this process and experience as follows:

The clerk who processed my papers asked for my signature page, then my schedules, and my statement of financial affairs. I waited as she typed the information into the court computer. I thought

¹²⁰ Field notes, Oakland, Ca. Ph.D. dissertation research of author from 2008 (July-Aug. 2004) (on file with author).

about all the information in the schedules about my personal finances. Every detail on my financial life is there for everyone to see. The credit card debt, the student fees, and my car and my worthless dog. I felt exposed in some way, my life made public. I think about how my mother thinks that filing bankruptcy was low class. I did have a well paying job when I first got the credit cards. I can no longer pay them, I guess that is low class.

The clerk reviews everything. The clerk asked me questions about my “pro se” status and the petition. She and I modified my creditor matrix to remove my social security number. The clerk reviews the schedules to make sure they are completed properly with the correct information and in the correct order. She looks to see if the statement of financial affairs is attached and properly completed.

She finished the computer information and gave me a copy of a time-stamped record of filing. I was filed. I felt different. Something had changed. It took 20 minutes, but I felt relief. I could go home and work on other things. I knew that I was now a debtor in bankruptcy.¹²¹

Filing the petition assigns the debtor a particular identity and place in the bankruptcy process. The petition creates a case. A case is assigned a number, a trustee and a judge. It is catalogued along with thousands of other bankruptcy cases. The case is in numeric order indicating the year and the location of filing. This process is defined by Foucault as partitioning, which is a “principle of elementary location Each individual has his own place; and each place its individual. Avoid distributions in groups; break up collective dispositions Disciplinary space tends to be divided into as many sections as there are bodies of elements to be distributed.”¹²² In other words, debtors are kept separate and marked as distinct from other debtors.

Debtors, identified and coded, move about spaces within the bankruptcy legal field. Foucault explains that a specific function is assigned to physical spaces for particular uses and purposes.¹²³ Space works to generate functionality defined as the coding of spaces “that [are] architecture generally left at the disposal of several different uses.”¹²⁴ It is within these functional spaces that the control of activity begins by applying a normalizing judgment to debtors.

¹²¹ Field notes from dissertation research. RS 2002 (on file with author).

¹²² DISCIPLINE AND PUNISH, *supra* note 91, at 143.

¹²³ *Id.*

¹²⁴ *Id.*

The meeting of creditors is such a functional coded space. In the meeting of creditors, normalizing discourses discipline debtors. Foucault explains that a normalization process is intended to find fault, seek omissions of guilt, impose humiliation, punish, and generate correction. In the context of bankruptcy, the meeting of creditors is a forum for the examination of a debtor.¹²⁵ The debtor is examined by a trustee and any creditors present at the meeting.¹²⁶ The trustee asks the debtor to take an oath to tell the truth, the debtor is questioned about why he or she suffered financial difficulty, and the debtor is asked about his or her financial life (*e.g.*, to explain certain sales of assets, a reduction in income, the reason for particular expenses). The debtor is required to give the value of all his or her assets and explain debts. If a debtor does not comply with the disciplinary process, he or she is punished either by a continuance of the hearing, a request by the trustee for a Bankruptcy Rule 2004 examination,¹²⁷ or a trustee motion to deny the offending debtor a discharge of debts.¹²⁸ A usual meeting of creditors proceeds in the following manner: a trustee calls all the debtors names and case numbers, and the debtors come from the waiting room and sit in the meeting of creditors.

Trustee: Good morning. I am your Chapter 7 trustee appointed to oversee the collection and distribution of the assets in your case. Many of you have already received information from me. This is the time set for your meeting of creditors. When I call your name, please come forward. Have your social security card and photos IDs out. I will check your IDs. Then please have a seat to my right behind the nameplate which says “debtor.” If there are any creditors, when I call you, please sit to my left behind the nameplate which says “creditor.”

Trustee: Troy Wilson please come forward and show me your social security card and photo ID. The debtor has shown me a social security card and a photo ID and the name on the card matches the name on the photo ID.

Trustee: Please have a seat in the seat by the debtor nameplate. Thank you. Please raise your right hand and repeat after me:

Do you solemnly swear or affirm that the information you are about to provide is the whole truth and nothing but the truth?

Debtor: I do.

¹²⁵ 11 U.S.C. § 341(a) (“Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors. The meeting occurs in the offices of the United States Trustee, which is part of the U.S. Department of Justice.”).

¹²⁶ *Id.*

¹²⁷ FED. R. BANKR. P. 2004.

¹²⁸ 11 U.S.C. § 727 (Denial of Discharge).

Trustee: Did you read the information sheet in the waiting room? (The information sheet explains the difference between a Chapter 7 and Chapter 13, the role of the trustee, and the debtor's duty to provide information to the trustee and the United States Trustee.)

Debtor: Yes.

Trustee: Did you understand the information on the sheet?

Debtor: Yes.

Trustee: The following questions relate to the information provided in your schedules and statement of financial affairs. Please state your name for the record.

Debtor: My name is Troy Wilson. I live at 4568 Lambard Avenue, Oakland California 95481. My telephone number is (510)123-4567.

Trustee: Did you read the petition before you signed it?

Debtor: Yes.

Trustee: Did you sign the petition?

Debtor: Yes.

Trustee: Are you familiar with the information in the documents?

Debtor: Yes.

Trustee: Are there any changes that you would like to make to the petition?

Debtor: No.

Trustee: Have you ever filed bankruptcy before?

Debtor: Never.

Trustee: Do you own any real property?

Debtor: No.

Trustee: Are you keeping the car?

Debtor: Yes.

Trustee: Is the insurance and the payments current?

Debtor: Yes.

Trustee: Are there any creditors who like to question the debtor? No. Okay. You are free to go.

Debtor: Thank you.

The body of the debtor in the meeting of creditors is transformed. The debtor is forced to attend the meeting, sit in the waiting room until called into the meeting room, and wait again until the trustee calls the debtor's name. Once called, the debtor must walk to the front of the room and sit behind the sign marked "debtor." The debtor must prove her identity to the trustee and take an oath. If the debtor lies, she can go to jail for perjury. Foucault describes this process as a "body manipulated by authority" to generate a new form of individuality.¹²⁹

The control of the meeting of creditors imposes a general framework on debtor activity and body. One debtor describes her experience:

Linda Coco: Discuss the meeting of creditors experience.

Ingrede: I felt okay. I drove there alone. It was a four-hour trip, and I actually felt like it was a rite of passage. Just that it was the preparation to go to a new status in my life. There was a build up and I was actually preparing myself for it. I felt that I was in a liminal stage. It was a liminal stage. When I got there, I did not feel that I was in my body at all. I did feel like I was ready to put up a fight if somebody was going to fight with me. I felt that if somebody was going to disrespect me or something, I went there with folders. I went there with every document that they had even suggested that I bring—credit card statements, tax returns for three years, pay check stubs. I had them in chronological order. I was ready to go. Of course I did not need any of it.

LC: Sitting in the meeting of creditors room, what did you notice?

Ingrede: I was trying to see what the official script was that the trustee was saying, what questions the trustee was asking. I noticed after watching three cases that he had a set of questions and a desired response. I was also noticing what kinds of answers made him divert from the script. I was trying to plan as best as I could what my answers would be. And what I noticed from the people was

¹²⁹ DISCIPLINE AND PUNISH, *supra* note 91, at 155.

how much they were deferring to their lawyers. I tried to see if creditors were there and what types of questions they were asking of the people.

I wanted to figure out if I should just say yes or no, or if I should try to answer the question. What I noticed was that the more people actually tried to explain themselves, it seemed like the more annoyed the judge [trustee] got. I noticed that he liked quick answers which were usually one word. I decided that I was just going to say “yes” or “no.”

Another thing was that I was paying attention to what the lawyers were saying to the creditors. The only creditor that did show up was this one guy who was an employee of a local company where people rented furniture from. Three of the people there had actually leased furniture from this company.

I was looking around the room to figure out who the creditors were. It was funny, I could tell who the lawyers were because they had suits on and they had a briefcase. They had all the documentation. The other people looked scared as shit. They were slouched in their seats. They were crossing and uncrossing their legs. They all sat in the aisle as if they wanted to make a fast get away.

I was torn because I did not know who I identified with. I knew I was a debtor. But after I went through the mental transformation about why I was doing it, I felt justified in being there and I did not identify with anyone equally.

I had a conversation with one woman out front. She was talking about how terrible it was going to be, and that they could just decide not to do this on a whim. I asked her if she had a lawyer, and she said “yeah.” I was like, “Okay, I do not think that this is going to happen, so I do not think that you have to worry so much.” I thought that it was interesting that the people with the lawyers really saw this as something to be worried about or think about and be nervous about it. I wondered how much of that is the lawyer creating a need for his services.

LC: Tell me what happened when they called your name?

Ingrede: I felt like god had pointed down at me from the sky over the loud speaker and said “You.” The trustee calling my name made it real. I was a debtor in this room. I was being called to answer for my debts. This is probably what started that transitional phase where I

did not feel like I was in my body. I was floating down to my seat marked “debtor.” It was embarrassing. People were watching me.

LC: When you moved toward the desk, what did you do?

Ingrede: I brought my folders with all my bills and statements with me to let them know that I meant business. I put them on the table, and I sat down. I remained silent. I had seen that the more silent people were, the faster the process went. I felt really vulnerable. My back was to the room where my creditors may be.

The trustee asked me the questions on the sheet. Oh, before I sat down I showed him my photo ID and SSI number. He did not even look up at me or write it down. He just glanced at it. That made me feel better, because he was not really seeing me for me at all. He just saw me as some case he needed to get through to finish the day, and I thought “good.” I did not want to be recognized.

The impersonal nature of the process was helpful, because I did not feel that this was a personal indictment of me. This was something that I can learn the process of and get through. I do not think that the normal debtor could get through this the same way.

LC: How was your body in the chair?

Ingrede: I was sitting up very straight because I felt the need to level myself with them, because they [the trustee and his staff] are up higher. I did notice that there were people sitting in the chair who were slouching as if they were criminals or they had something to be guilty of. I thought that I did not want to do that. I sat up very straight and spoke very clearly.

LC: When the trustee asked if there were any creditors in the room, did you turn your head?

Ingrede: No.

LC: Why?

Ingrede: I do not know.

LC: What did you feel when he asked that question?

Ingrede: I felt like eww, maybe one was going to sneak in . . . I was scared. To be honest, I did feel more scared about dealing with the creditors than with the judge [trustee] because of all the conflicting feelings

about these being the people that I owe the money to. That I had made a contract with these people, and I was breaking it. If there was anyone who could call me a criminal it would be these people, and they could make a case for it. I was hoping they would not show up.

LC: What happened when it was dead silent in the room?

Ingrede: And it was dead silent because there was no one left in the room. When this happened, I totally relaxed. Then, I sat back in the chair and thought that all I have to do was say “yes” or “no” to the next five questions and I can be out of here. So he asked them, I answered, and he concluded the meeting.

Then the judge [trustee] says his closing remarks, he turns off the microphone, and I am just getting up from the table and he starts talking to me. He said that he noticed on my forms that I lived in Highland, Wisconsin and that is where he went to graduate school. He said it was an interesting place, and he wanted to know if I liked it. I did not want to talk to him. I did not want to talk to him at all. I said, “Yeah, it is a really nice place.” I just wanted to get out of there, and I remember he was trying to break the separation between us by changing the dialogue.

LC: So you felt you were following a script and he was changing it?

Ingrede: Yeah. And he started to come down from his high level, and I was thinking, “I do not want to talk to you.” So I thanked them and I left. I just wanted to get outside. So I went outside and called Tom and said, “It is over, and I can start saving money.”

LC: When you walked out the front door, how did you feel?

Ingrede: I felt so good. And I felt that I wanted to get out of the room. When the judge [trustee] said that he closed it as a no asset case, I did not feel anything. It was only when I got out of the room did I feel better. I thought, “I never have to come to this building again.” I went to the fountain outside, and I felt so much better.

And since then, life has been so much better. I sleep better. I really do not think about it like I thought that I would if I declared bankruptcy. Then they sent me the letter, and I put the letter in a file, and I do not feel an ounce of guilt. I don't feel an ounce of shame. I do not feel s – – t. I just feel better. Like I did the most

responsible thing that I could have done for myself, which is face the fears and move on.¹³⁰

Debtors are uncertain about bankruptcy practices and processes. They feel anxiety, fear, confusion, defensiveness, and they are scared of being arrested. The woman with whom Ingrede interacted prior to the meeting of creditors reflected such anxiety when she expressed fear that the trustee can just deny a debtor a discharge on a whim. This fear is often reflected in debtors' movements. They fidget in their chairs. One informant describes his experience as follows:

Linda Coco: What was it like the morning you had to go to the debtor examination?

Terry: I did not want to go. I did not want to drive there. I did not want to go in that room. I went to the building entrance and my heart was racing and I was shaking. I forced myself to go. Man, when I found my lawyer and I went into the room, I wanted to leave so bad. I was looking around the room for the doors and exits. I was wondering where the police were. I felt criminal. There was so many people in the room, I thought that they were there for me.

LC: Tell me about sitting in the audience and when they called your name.

Terry: Oh man, I heard the judge say Terry. And just shot up straight in my chair [He moves his body into an erect position in his seat.] I felt I had entered another zone. Everyone was looking at me. I stood up shaking, and I walked shaking to the front of the room. I handed the judge [trustee] my ID and social security card. (Terry mimes this by putting out his hand and it is shaking).

LC: So what happened when you sat in the debtor's chair?

Terry: Oh god it was horrible. I felt so scared. I felt that I was sitting on peach nuts. I was moving around, looking around, . . . I was looking for the nearest exit so I could leave. I was waiting for the handcuffs.

LC: What did you expect?

Terry: My attorney had told me that they were going to question me about a few things and then let me go. But I really did not believe him. I was expecting to be taken away to jail.

¹³⁰ Field notes from dissertation research, RS (2002) (on file with author).

- LC: How did you sit in the chair and respond to the trustee?
- Terry: I sat upright, and I was shaking like I was sitting on peach nuts. I answered his questions. I would look at him and look out into the audience expecting someone to come forward and say that I was lying and really get me. I thought that judge [trustee] was going to accuse me of lying.
- LC: What happened when the trustee asked if there were any creditors in the room?
- Terry: That was the worst experience I ever felt. I have never been so scared in my life. I just look around.
- LC: Was it silent?
- Terry: Yeah, it was dead silent, but I was looking for the door. But nothing happened.
- LC: So how did you feel when they said you are free to go?
- Terry: Well, I really could not feel anything at that point. I just wanted to get out of the room. My attorney said something. I did not hear him. I wanted out of the room. So I headed for the door. I was still in a zone or something. I got to my car, and all I could do was think about it and think about it. I was so upset.¹³¹

Like Ingrede, Terry experienced the examination in a state of fear and uncertainty. He forced himself to appear and submit to the practices and processes of the bankruptcy field. Neither Ingrede nor Terry understood enough about bankruptcy law to feel certain that they would receive a discharge of their debts, and both felt as if something they were doing was criminal, like they were getting away with something, and someone was going to punish them.

Ingrede stated that a few months after the meeting of creditors she received a letter from the Bankruptcy Court indicating that she had received her discharge. A discharge is the final stage of a Chapter 7 bankruptcy. After the meeting of creditors, when the Chapter 7 trustee files a report with the Bankruptcy court declaring that the case was a “no asset case,” the case remains open for sixty to ninety days, depending on the jurisdiction, to allow creditors or other interested parties the opportunity to object to the debtor’s discharge. If no objection is filed, the court grants the debtor a discharge. Then, the Bankruptcy court mails the debtor a letter indicating the court has discharged the debtor.

¹³¹ Field notes from dissertation research, T (2002) (on file with author).

III. BANKRUPTCY PROCESS AND DOCILE BODIES FOR CAPITALISM

In United States society and economy, individuals must be economically useful and productive in the market economy to be valued in the social world. During the early history of the United States, an individual's morality of economic utility became imbued with Christian and Enlightenment discourses. As Weber explained in *The Protestant Ethic and the Spirit of Capitalism*, American capitalism flourished due to Protestant beliefs in God's favor being gained by self-denial, and proven by material success.¹³² Fitting well with Enlightenment notions of individual responsibility, the Protestant Ethic assigns to the individual the ability, through economic utility, to earn divine grace and prosper.¹³³ When the individual does not economically prosper and fails, the individual is viewed as lacking strength of character and self-restraint.¹³⁴

These belief structures generate a normalizing force in American social and cultural life. The internalization by disciplinary techniques of these dominant discourses results in the collective *doxa*¹³⁵ of a group in which "more and more people must attune their conduct to that of others, the web of actions must be organized more and more strictly and accurately, if each individual action is to fill its social function. Individuals are compelled to regulate their conduct in an increasingly differentiated, more even and more stable manner."¹³⁶ Therefore, discourses of economic utility and individual responsibility create the standards by which individuals compare themselves to each other, the manner in which individuals distinguish themselves, the way that individuals rank and measure each other, generate ideas of good and bad, and ultimately decide what is normal and abnormal behavior.

The social group views individuals experiencing over-indebtedness and financial distress as aberrant. Financial failures are people who have not mastered the requirements of economic productivity and utility. According to the economic utility models, individuals experiencing financial difficulty are believed to be unable to exercise restraint and self-control. An individual in financial distress is in financial disarray. Aspects of an individual's financial life may be in crisis: wage garnishment, car repossession, lawsuit, foreclosure sale, or other creditor collections actions. At this point, legal structures are invoked to generate order.

¹³² WEBER, *supra* note 55.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Doxa is a set of unspeakable cognitive and evaluative presuppositions whose acceptance is implied by membership itself. Included in this definition is intra-field debates or polemic positions which share a common back drop of meanings which are often defined in relation to each other. PIERRE BOURDIEU, *PRACTICAL REASONS* 23 (1998).

¹³⁶ NORBERT, *supra* note 82, at 367.

The legal system provides coherent categories and processes for the reorganization of the individual's identity and financial life.

Within the bankruptcy context, a financial failure is rendered a debtor for and by bankruptcy laws, processes, and institutions. A fiscal failure must become a debtor, an entity recognizable to the activities, practices, and processes of the bankruptcy field. It is both a process of constriction and control, and a process of emergence and becoming. For normalization and standardization to proceed, a financial failure must surrender to, believe in, and enact the category and identity of debtor. If the transformation process is successful, then a bankruptcy court liberates a debtor by discharging debt. The bankruptcy agent that facilitates the transformation is the debtor's attorney. The attorney is endowed with the knowledge of the mandates, knows how to impose the Code and orders, and is familiar with rendering a failure's financial crisis into the organized patterns required by the bankruptcy laws, rules, procedures, and practices.

CONCLUSION

Describing Foucault's concepts of discipline, Nikolas Rose writes that "life was taken in charge by the interplay between technologies of discipline focused on the individual body and the technologies of bio-politics, which acted on those bodies *en masse*, intervening in the making of life, the manner of living and in how to live."¹³⁷ In *The Force of Law: Toward a Sociology of the Judicial Field*, Bourdieu writes: "legal institutions and legal agents control entry into the legal field."¹³⁸ The individual debtor and his financial life, with the help of his legal professional, are controlled and disciplined into orderly and recognizable sets of forms and formal processes. These make the individual debtor comprehensible to the bankruptcy system. Because the legal institutions and processes transform the individual debtor into a legally recognizable entity, the debtor receives a discharge of his debts. As Bourdieu explains, legal institutions "produce their own problems and their own solutions" according to their own logic, which is unavailable to lay people.¹³⁹

¹³⁷ NIKOLAS ROSE, POWERS OF FREEDOM 23 (1999).

¹³⁸ Bourdieu & Terdiman, *supra* note 1, at 834–35.

¹³⁹ *Id.*