

MUST WE BANKRUPT THE SPIRIT ALSO?:
THE BENEFITS OF INCORPORATING
THERAPEUTIC JURISPRUDENCE
INTO LAW SCHOOL BANKRUPTCY
ASSISTANCE PROGRAMS

MICHAEL L. STINES

bankrupt, adj. *Indebted beyond the means of payment; insolvent.* n. *a person who cannot meet current financial obligations; an insolvent person.*¹

*“Bankrupt. The single word is a body blow, like ‘Dead’.”*²

When most individuals in America today see or hear the word, it probably conjures up descriptions of people who lack self-control and who don't have the capacity or discipline to manage the financial aspects of their own life. It causes society to treat people who are using, or have used bankruptcy in the past differently because they are labeled as “debtors.” This, along with the actual process that must be experienced in order to obtain financial relief, can, and often does, produce psychologically harmful effects in the minds of people using the system. For generations, there has been a stigma attached to bankruptcy. The bankruptcy stigma is not a positive one. It can cause severe mental deterioration in the minds of those seeking relief under the system. It labels people as immoral or dishonest or even evil. And, generally, there is no escaping it, at least for the persons who are the focus of this paper, namely, ordinary, honest citizens who, for whatever reason, have found themselves in a serious financial mess and who decide to turn to bankruptcy for assistance. So the question becomes what do we do about these people who, on one hand, may be forced to seek the protections that bankruptcy provides but on the other, must face the almost certain negative psychological consequences that are almost always attributed to the process?

This paper will examine the psychological effects associated with filing for consumer bankruptcy and techniques that can be learned by law

1. BLACK'S LAW DICTIONARY 141 (7th ed. 1999).

2. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 3 (Beard Books 1989).

students and young lawyers to help soften the blow for those who will inevitably experience those effects. First, the progression of bankruptcy will be discussed, tracking changes from its origins to modern times and the effect those changes may have had on those attempting to take advantage of the system's benefits. Second, the actual process of filing for bankruptcy will be examined, pointing out the aspects that cause damage to an individual's mental health. Third, this paper will analyze the labeling issue presented when society becomes aware of the fiscal troubles of individuals, focusing on the changes that occur to both the way society perceives these individuals and the way the individuals view themselves. Finally, the crux of the article will explore the importance of lawyers' ability to deal with their bankruptcy clients in a therapeutically beneficial way and how law school bankruptcy assistance programs or clinics can be used to implant the requisite mentality into the lawyers of tomorrow in order that they develop a more compassionate approach to the way they conduct the counseling aspect of their practices.

"The word 'bankruptcy' has its origin in the commercial practices of early Italian merchants, traders, and moneylenders, who transacted their business from benches in central town markets. When a merchant was unable to pay his debts, it was common practice for his creditors to break his bench as a symbol of financial failure. This practice led to the phrase 'banca rotta,' which is derived from the Italian *banca* (bench) and *rotta* (break). English merchants became familiar with the Italian practice and changed 'banca rotta' to the English 'bankrupt.'"³ As first conceived, bankruptcy was meant as a way for creditors to regain loans that had been defaulted on and to punish those who had defaulted. "The earliest English bankruptcy laws, from which American law was derived, were creditors' remedies only and were quite punitive."⁴

Over the last century and culminating with the Bankruptcy Act of 1978, however, bankruptcy has experienced a shift in its philosophy. Rather than remaining solely as a method for creditors to redress, its modern intended purpose has become a way to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . ." ⁵ The Bankruptcy Act of 1978, more commonly known as the Bankruptcy Code, is viewed as highly favorable to debtors.⁶ First and foremost, there are no provisions suggesting that it is morally wrong to file

3. MARTIN A. FREY, WARREN L. MCCONNICO & PHYLLIS HURLEY FREY, AN INTRODUCTION TO BANKRUPTCY LAW 2 (1997).

4. *Id.*

5. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

6. FREY, MCCONNICO & FREY, *supra* note 3, at 7.

for bankruptcy. Also, the Bankruptcy Code left out any requirement that the debtor had to be insolvent to file a voluntary petition in bankruptcy. These two omissions are significant because, by doing so, Congress sent the message that it is inevitable that some honest people will find themselves in a fiscal jam and that the bankruptcy laws are meant to help these people get back on their feet.

With this mind-set in place, the act of filing for consumer bankruptcy should properly be viewed as the long awaited upturn in an individual's cycle of descending financial fortune as a result of the recognition that the process is quite possibly the sole method to prevent an increasingly problematic monetary situation. It provides relief, acting as the, "economic and social safety valve that permits debtors to function in an economic system even after their financial collapse."⁷ Without the opportunity to take advantage of the protections offered by bankruptcy, many honest and ordinary citizens may be 'shut out' of society for all intents and purposes. In this sense, there is no denying that consumer bankruptcy and its effects are actually quite consistent with the pillars of Therapeutic Jurisprudence.

But consumer bankruptcy can be seen as a double-edged sword because there is little doubt that filing for bankruptcy generates a stigmatizing effect that can have grave psychological consequences on individuals using the system. And, in order to obtain the remarkable liberation offered by the discharge function of bankruptcy, one must struggle with these consequences. That said, although Congress engaged in proactive measures in 1978 to alleviate the effects of the persisting stigma that accompanies utilization of the bankruptcy system, such as by referring to people as "debtors" instead of "bankrupts," there remain aspects inherent in the system that are anti-therapeutic.⁸ As one author described, "[t]he abolition of imprisonment did not remove from the debtors all restraint and bondage. Without the *tabula rasa* of the system of bankruptcy laws, earning capacity is taken away, the faculty of usefulness and aptitude is paralyzed and hope is extinguished."⁹ To pinpoint these negative aspects, it is helpful to briefly discuss the bankruptcy process—from the initial meeting between potential debtor and attorney to the granting of a discharge.

By the time he is entering a bankruptcy attorney's office for the first time to attend the initial interview, it is likely that the potential debtor is

7. SULLIVAN, WARREN & WESTBROOK, *supra* note 2, at 9.

8. FREY, MCCONNICO & FREY, *supra* note 3, at 5.

9. F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 168 (Princeton Univ. Press 1919).

filled with overwhelming feelings of anxiety. In most cases, the potential debtor has probably been experiencing money problems for a significant period of time, all the while, harboring feelings that he is losing control of his life. He has probably been trying to conjure up solutions to this problem that have resulted in a worsening of his situation. So, before a potential debtor even begins the bankruptcy process, he has already experienced negative psychological effects resulting from pressures placed on him by society and by simply thinking about the prospect of bankruptcy. This anxiety may increase during the initial meeting between the potential debtor and the lawyer. One reason for this is that by actually taking the steps necessary to obtain bankruptcy relief, the potential debtor is openly admitting that he is in financial trouble, as opposed to a prior time when he could more effectively conceal his financial difficulties from others. For instance, during the initial interview, the lawyer will ask questions relating to, among other things, personal finances and employment situation. Having to reveal the answers to these types of questions may cause the potential debtor to become embarrassed or feel a sense of failure where, for instance, he owes \$50,000 in credit card debt but only makes \$12,000 per year. Further, this information will be filled out on schedules for third parties such as the judge or creditors to examine.

Unfortunately, this aspect of bankruptcy is virtually unavoidable. Without disclosing the details of one's personal financial situation (which is usually afforded an utmost degree of privacy in this country), it is impossible for the potential debtor to obtain relief. No attorney can choose the best course of action without discovering every detail of a client's case. The bankruptcy client may suffer another psychological blow at the meeting of creditors, more commonly known as a "341 meeting." The bankruptcy client is required to appear at this meeting to answer questions under oath. The focus of the examination is any matter that may affect the bankruptcy client's right to a discharge.¹⁰ The client will again have to respond openly to questions regarding the past financial affairs that placed him in his current situation. In many cases, this may be a degrading experience for the client, having significant adverse effects on many aspects of his own psyche. Beyond this, but before a discharge is granted, the bankruptcy client may have to face several public hearings in a courtroom where the topic of discussion will be his financial mishaps, which may also prove to be psychologically unsettling. Once underway in bankruptcy, however, something with the potential to create much more devastating consequences occurs.

10. FREY, MCCONNICO & FREY, *supra* note 3, at 298.

The law often uses labels to characterize people. Examples of the more vivid terms used as labels are “violent sexual predator” or “incompetent to stand trial.” One does not have to ponder for very long before understanding the potentially injurious psychological effects these sorts of labels may produce. Writing in the context of incompetency labeling, Professor Bruce Winick explains, “when the law applies an incompetency label to individuals it brands them in ways that often impose serious social disadvantages, adversely affecting the way others regard and treat them.”¹¹ He goes on to illustrate that labels may have a negative impact on the light in which people carrying the label perceive themselves. “Not only may [the labeled individual] be stigmatized and discredited in the eyes of others, but also their own self-esteem and self-concept may be affected in ways that have a major impact on motivation and functioning.”¹²

Although most commonly dealt with in the areas of criminal and mental health law, the labeling model can also be applied to the general focus of this paper . . . consumer bankruptcy. An individual may become so overwhelmed by financial burdens and pressures that filing a bankruptcy petition appears to be the best, and possibly only way out of trouble. When the decision is finally made to seek bankruptcy relief and the necessary documents are filed, the individual becomes known as a “debtor” for purposes of the legal proceedings. In most cases, the instant this label attaches, it alters the manner in which American society perceives the individual. By being labeled a debtor or bankrupt, society may identify the individual as one who is attempting to slide there way out of obligations to pay debts. Society generally frowns upon debtors, perceiving them to be failures, cheats, and thieves trying to take the easy way out at the expense of others.

There are two dimensions to the negativity with which American society views debtors. First, there is the financial aspect.

Non-debtors commonly comment on the unfairness of the bankruptcy system. Their lament is well known: ‘Why should I work so hard to pay my bills when others can simply access the bankruptcy system to obtain debt relief?’ It is as if non-debtors have assumed that the bankruptcy costs them (the non-debtors) money. In other words, non-debtors are seemingly worried about the redistributive effects of bankruptcy.¹³

11. Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL’Y & L. 6, 8 (1995).

12. *See id.*

13. Karen Gross, Comment, *Demonizing Debtors: A Response to the Honsberger-Ziegel Debate*, 37 OSGOODE HALL L.J. 263, 270 (1999). Although some organizations have argued that

But even more significantly, there is a moral dimension that can help account for the maintenance of the stigma attached to bankruptcy. As one author describes, “bankruptcy is [not] merely a legal consequence of economic facts.”¹⁴ History tells us that bankruptcy has long been viewed as more than a mere failure to manage one’s finances. For example, authors of the sixteenth and seventeenth centuries describe the declaration of bankruptcy as the single most scandalous phenomenon in commercial society.¹⁵ It was seen as ghastly evil and a species of theft to allow honorable people to extend one credit and then to not pay them back. Individuals in these earlier times who lacked moral conviction (in the sense that they did not keep promises) were shamefully punished and humiliated for their moral ineptitude. For example, to obtain *cessio bonorum*¹⁶ in sixteenth century Italy, one was required to appear naked in a public piazza and bang his rear-end on a rock or column while shouting, “I DECLARE BANKRUPTCY.”¹⁷ Tales such as this can help account for the criminal-esque perception of those who have decided to utilize bankruptcy for whatever reason in today’s society. The notion that bankrupts are immoral characters has persevered with time even though the legal sanctions have become less penal in nature.

Whether the animosity toward debtors stems from moral beliefs, financial concerns, or both, it remains clear that Americans do not view them in high regard. Non-debtors may treat debtors in ways that further the overall general public assessment of them. Labeling people as debtors creates the negative effect of discrediting individuals and excluding them from social activities and opportunities that would otherwise be available to them.¹⁸ For instance, a person who has been through the bankruptcy process may face difficulty in convincing a loan officer to extend new credit in order to purchase a home or automobile. The reasons why that person ended up in bankruptcy are not going to be of concern to that loan officer. All that matters is that the individual has been through bankruptcy in the past and because of that, he or she must lack fiscal discipline and/or high moral standards and cannot be trusted to pay back a loan. Likewise, a

bankruptcy costs every American \$400 per year, their positions have been highly criticized by scholars who are skeptical that bankruptcy losses filter down in this way.

14. Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 130 (1989).

15. James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1871 (1996).

16. *Id.* at 1872. *Cessio Bonorum* was a way for debtors to avoid imprisonment by publicly relieving themselves of all of their possessions.

17. *Id.*

18. Winick, *supra* note 11, at 10.

past trip through the bankruptcy process will affect third-party perception in a way that may lead to treatment bordering on discrimination and that has little to do with their credit-worthiness. For example, a person carrying the label of debtor may experience trouble gaining or maintaining employment. No matter how honorable or trustworthy a potential or current employee is, the fact that he or she has filed for consumer bankruptcy will give rise to an aura of skepticism in the mind of the evaluator. Similarly, even the Boy Scouts have refused to let persons who have filed for bankruptcy serve as scoutmasters.¹⁹ Although section 525 of the Bankruptcy Code seeks to outlaw this sort of discriminatory treatment, it rarely succeeds in doing so because it requires proof that the adverse action occurred 'solely' because of the bankruptcy,²⁰ a rather insurmountable standard to say the least.

Not much is done by anyone to alleviate the harshness of this stigma that continues to accompany the act of filing for bankruptcy. As Winick suggests, maybe it is because people have become expendable in today's complex and rapidly expanding world.²¹ On the other hand, maybe it also has to do with the insecurities of the members of our population. Is it possible that debtors must live with the stigma that modern culture has chosen to place upon them because they live in a society that increasingly emphasizes the importance of material objects, the loss of which frightens it more than anything else? As one author illustrates,

We go out of our way, perhaps at some deep unconscious level, to define debtors in a way that ensures that we cannot be them. We are unsympathetic to debtors because we fear them; they bring us too close to the possibility that we could become them. And, the more that the empirical data demonstrate that debtors are more or less like the rest of us, the more we struggle to differentiate ourselves from them. The more it looks like debtors are just ordinary people who hit one or more bumps in life's road, the more we wax eloquent about personal responsibility, proper planning, or bad morals.²²

What gives more force to this suggestion is the fact that it can readily be applied to other areas of the law. For example, society often chastises the mentally ill. One possible explanation may be that individuals in today's culture are so scared of the possible loss of lucid thought and by

19. DAVID G. EPSTEIN, *BANKRUPTCY AND RELATED LAW IN A NUTSHELL* 366-377 (6th ed., West Group 2002).

20. 11 U.S.C. § 525 (1978).

21. Winick, *supra* note 11, at 9.

22. Gross, *supra* note 13, at 271-72.

being overcome by some other mental corrosion, that they treat those with mental illness badly.²³ It is feasible that this is modern society's version of a defense mechanism. By acting this way, people hope to avoid association with something they believe is morally reprehensible. It is a species of coping style and can be illustrated by two concepts developed by Freud known in the realm of psychology as 'devaluation' and 'projection.'

Use of the devaluation mechanism occurs when an individual or subset of individuals deals with emotional conflict or internal or external stressors by attributing exaggerated negative qualities to self or *others*.²⁴ Similarly, society's negative behavior toward debtors may be a form of projection in which the individual or subset of individuals deals with emotional conflict or internal or external stressors by falsely attributing to another their own unacceptable feelings, impulses, or thoughts.²⁵ Applied to the general psyche of today's society, both of these psychological phenomena may be helpful in explaining the stigma that persons taking advantage of the bankruptcy process must cope with.

A fascinating article by Harold A. Herzog, Jr. is of use to provide another perspective on labels and how they are used to make judgments about people.²⁶ He tells a story about mice. The University of Tennessee's Walters Life Sciences Building is a reputable animal facility that houses roughly 15,000 mice over the course of a typical year. Of those 15,000, most give their lives for the advancement of science. These mice are known as "good" mice. Because of their status, "good" mice are afforded the protection of an animal-care committee. From time to time, however, some mice escape and run free. They are considered pests because they may compromise the integrity of the experiments being conducted at the center due to pathogens they may carry. These mice are known as "bad" mice and must be captured and destroyed as soon as possible. This is accomplished through the use of what are coined "sticky" traps, a cardboard square coated with a mouse-attracting adhesive. The mice become increasingly stuck once they step on it and eventually perish. According to Herzog, the real point of this tale is that the labels we put on things can skew our moral responses to them. Within the parameters of this story for instance, using sticky traps (or any other less humane method of extermination) would be declared unacceptable for good mice. However, to kill the bad mice requires no prior authorization from the

23. *Id.* at 271-72.

24. DIAGNOSTIC AND STATISTICAL MANUAL 755 (4th. ed. 1994) (emphasis added).

25. *See id.*

26. Harold A. Herzog, Jr., *The Moral Status of Mice*, 43 AM. PSYCH. 473-74 (June 1988).

animal-care committee. As Herzog explains, “once a research animal hits the floor and becomes an escapee, its moral standing is instantly diminished.”

This scenario may be telling of the way today’s society treats debtors. The entrapped mouse, when placed in the uncomfortable and pressure-filled environment of the cage, takes the risk of trying to escape. Once out, instead of finding itself in a better position than it was in while ensnared, the mouse is now considered a pest and nuisance. It is now perceived as “bad” instead of “good.” To analogize, society’s rapidly expanding emphasis on material possessions, caused in great part by the manipulative nature of product marketing, places a great deal of pressure on ordinary citizens. In a way, it forces them to take financial risks in order to remain a part of the “norm” of today’s culture. However, when they get into a situation, for instance, where the interest payment on a credit card exceeds their entire monthly disposable income, there is nobody there to help. Instead, creditors attack the individual with badgering calls and letters, and maybe even through legal avenues such as the execution of a lien. In essence, society has created an environment inducing individuals to spend, but then abandons them when they falter as a result of that inducement. They are now perceived as drains on society instead of decent, morally sound individuals. Like the scientist to the mouse, society turns on the debtor, labeling him as “bad” and treating him in harmful ways.

The mouse may be similar to the debtor in another respect also. Once the mouse breaks free and finds itself in trouble, there is no hope for its return to the cage to live on as a “good” mouse. As explained above, once it escapes, it is considered tainted or contaminated and a legitimate threat to the integrity of the experiments in the laboratory. Similarly, the debtor, once labeled, may never be looked at in the same light. Even if he has redeemed himself by successfully completing a Chapter 13 payment schedule and proving increased skill in managing his finances, the label may never completely go away. While participating in transactions, skepticism regarding his past bankruptcy is likely to become an issue, even if it occurred years before.

The social response received by debtors as a result of their filing for bankruptcy can have a serious effect on how the debtor views himself as well. As stated by one author, “an individual hopelessly in debt is overwhelmed by the attendant pressures, which is often the psychological equivalent of a debtor’s psychological prison.”²⁷ It is likely that the stigma

27. Lawrence M. Ginsburg & Sybil A. Ginsburg, *Some Clinical and Psychobiographical Aspects of Personal Bankruptcy: A Psychoanalytic Inquest*, 11 J. of PSYCH. & L. 19-28 (Spring

associated with bankruptcy will generate extreme and consistent negative reactions on the part of others. After prolonged exposure to such derogative treatment, the debtor may incorporate the stigma as part of the self. Although the bankruptcy stigma is not a physical trait that is noticeable upon initial contact, it nevertheless draws a similar reaction from others when discovered. Like the person initially encountering an individual with some sort of controllable physical imperfection, non-debtors may also question the debtor's worth and self-discipline. These outside reactions from others prompt an altering of the manner in which a debtor will view himself. Also, because the bankruptcy stigma is an acquired one (as opposed to one that you are born with), the stigmatized individual may experience a more negative reaction to the self when the label attaches because, in most cases, "they have not had a previous self as a point of comparison."²⁸

"That [bankruptcy] has psychological consequences [in terms of one's own self-image] is a certainty although just how and in what ways it produces specific psychological damages, character traits and personality styles is much less clear. Since large numbers of [debtors] do not all have the same personality, the effects are obviously not uniform."²⁹ In other words, every individual is likely to internalize social responses in a different sort of way. But, it seems fairly easy to pinpoint some of the effects that may be reasonably expected to accompany the bankruptcy stigma generally.

The first, and maybe most obvious feeling that may result from a trip through bankruptcy may be embarrassment to one's self and family. As mentioned above, today's society, through the use of stigma, looks negatively upon a person having to use the bankruptcy system to bail out of their obligations, regardless of the circumstances in each individual case. This sort of environment is what gives rise to feelings of embarrassment. In a way, by utilizing the bankruptcy system, the debtor may believe that he is admitting either that he does not have the capacity to earn a decent wage, or that he does not have the discipline to manage the money that he does earn. Because of the nature of today's society and its psyche regarding debtors, embarrassment is a feeling almost certain to arise in the mind of a person having to file for bankruptcy. A poll conducted by the Gallop Organization in the late 1960's regarding people's attitudes toward

1983).

28. EDWARD E. JONES ET AL., *SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS* 125 (1984).

29. Eugene L. Lowenkopf, M.D., *Poverty and Psychopathology*, in *MONEY AND MIND* 41 (Sheila Klebanow & Eugene L. Lowenkopf eds., 1991).

bankruptcy supports this contention. Over 1,500 people in a national probability sample were asked: "Suppose you, yourself, got into a very difficult financial situation—how would you feel about going bankrupt?" Fifteen percent of those polled responded, "don't know." But the rest of the sample, roughly nine out of every ten people, said something to the effect that they "would go bankrupt only as a last resort;" would "rather die" than go bankrupt; would feel "terrible" or "disgraced," etcetera.³⁰

The bankruptcy stigma will also directly alter one's self-esteem. "Most of the empirical work on self-esteem suggests it to be a relatively stable or enduring quality of the self that refers to the individual's beliefs about himself or herself as a capable, significant, or worthy person."³¹ When one files for bankruptcy, it is probable that that person will feel that there has been a deterioration of these personal qualities. The debtor will not simply view himself as a poor manager of personal finances. Rather, the stigma's effect on self-esteem may be more global. As described by one author, "It is not just that one is fat or gay or blind or alcoholic, but rather that one is, therefore, fundamentally flawed as a person—sick, weak, immoral, or evil."³² The debtor may link the bankruptcy with overall failure. For example, as the effects of the bankruptcy stigma become more and more apparent to the debtor, he may begin feeling that achievements in other aspects of his life, such as his career or relationships, are not that significant after all. If the debtor does not learn to cope with his stigmatization, it is possible that he may become stuck in a vacuum of negativity that may eventually lead to severe depression.

The debtor's self-concept will also be affected. "Traditionally, the self-concept has been thought to be a complex of physical traits (tall, brow-eyed, blonde), attributes that summarize one's behavior (aggressive, compulsive, or outgoing), demographic characteristics (age, sex, family status), and roles (student, scientist, grandfather)."³³ This is different from self-esteem in that it is more concerned with the way one views his own attributes or the way one might describe himself, where self-esteem has to do with good or bad feelings about one's self that are brought on by social reactions received.³⁴ The bankruptcy stigma may impact the self-concept by causing a change in the debtor's behavior patterns. For instance, before bankruptcy, the debtor may have been extremely comfortable and confident

30. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM*, 230-31 (The Brookings Inst. 1971).

31. Jones, *supra* note 28, at 131.

32. *Id.* at 132.

33. *Id.* at 137.

34. *Id.*

in his interactions with others. But, the bankruptcy stigma may influence the debtor's behavior in a way that lessens these positive attributes. For example, the debtor may try to limit his social interaction with others in order to avoid negative reactions should someone happen to become aware of his circumstances.

The stigma may also cause a conforming characteristic to the manner by which a debtor carries himself. As Winick expresses in his article on incompetency labeling, "the mental illness labels lock the individuals into behavior patterns that result from the way others perceive and respond to them and the way the label alters their view of themselves."³⁵ The same can be said to be true of debtors. After experiencing the harshness of society's attitude towards bankrupts for a stretch of time, the debtor may gradually begin to lose hope of clearing his good name. What is his incentive to keep spending (no pun intended) his energy in an attempt to redeem himself as a moral and trustworthy citizen when he is not being treated as such? Over an unascertainable amount of time, that incentive is likely to evaporate and the once good-intentioned individual may begin to act in accordance with the label placed on him by society. This concept is commonly described as the "self-fulfilling prophecy effect."³⁶ As illustrated by Winick and applied in the bankruptcy context, labeling debtors as such "may set in motion forces that lead them to behave in ways that fulfill the assigned deviant image."³⁷

Obviously, it is in nobody's best interest to allow these mental alterations caused by the stigma to take hold. So what can be done to alleviate the attendant mental effects of bankruptcy? For a bankruptcy practitioner, it may be easy to overlook or lose sight of the often severe emotional problems being experienced by clients seeking financial help. It is also possible that many experienced bankruptcy practitioners with substantial caseloads could become somewhat immune to the emotions of their clients simply because they have represented seemingly countless individuals dealing with the same sorts of issues over their career. But, if bankruptcy practitioners are to fulfill their duty not only to represent their clients with diligence, but also to pursue their best interests, it is imperative that they keep in mind that the client is not just another number. Lawyers must actively delve into the emotional aspects of clients' lives that are in need of attention and attempt to discover the true source of the problems that they are experiencing. Failure to tend to this aspect of the job is akin

35. Winick, *supra* note 11, at 10.

36. *Id.*

37. *Id.* at 11.

to cheating in the sense that one is taking the shorter and easier route to fulfill personal interests. "Being only a consultant restricts the extent of his personal involvement with clients who, considering their extreme circumstances, could be expected to be highly emotional and demanding, and it restricted the extent to which he would have to be in on the often inevitable demise of their business ventures."³⁸ It may be tempting for the bankruptcy practitioner to simply file necessary documents and attend the requisite hearings necessary to promulgate a client's successful trip through bankruptcy while attempting to stay out of personal matters that are of more significant concern to the client. But this is simply unsatisfactory in terms of both providing the highest quality representation and assuring a more comfortable jaunt through the situation for the client. Attorneys must not only execute a thorough job on the technical portions of the representation, but also must realize and become conscientious to the fact that compassion is essential, especially in the bankruptcy context, in order to achieve the most advantageous outcome for all parties involved. As one author/lawyer stated,

Because of my sympathies to a more therapeutic approach, . . . I learned in my legal practice to rely on psychological skills to improve my effectiveness as a lawyer. What I found was that when I ignored the emotional dimensions of a case, I was not only less effective, but in some cases, incompetent.³⁹

By undertaking a more holistic approach to lawyering and by considering the non-legal consequences that will undoubtedly accompany legal measures involving a client's livelihood, attorneys will place themselves in a better position to fully represent a client's best interests.⁴⁰

Use of bankruptcy assistance programs or clinics in law schools can instill within next-generation attorneys the sorts of skills needed to help provide clients with a mentally healthy journey towards a discharge. The sort of practical experience being provided by these programs is all too often a forgotten necessity of a more fulfilling law school experience. Bankruptcy assistance clinics allow students the opportunity to interact with real individuals who have either opted or have been forced to seek the protections offered by the bankruptcy system. They are exposed to the

38. Ginsburg & Ginsburg, *supra* note 27, at 21.

39. Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 419, 421 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 2000).

40. Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 69, 70 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 2000).

types of persons who are most vulnerable to experiencing the negative mental effects of serious financial trouble. This exposure allows burgeoning attorneys to develop a familiarity with the attendant feelings and emotions that might be manifested by a typical Chapter 13 petitioner throughout the period that relief is being requested, from initial contact through successful completion of a judge-approved plan and discharge of remaining outstanding debts.

These bankruptcy clinics are crucial in demonstrating to the eager law student that as the initial contact upon making the decision to seek financial relief, the bankruptcy attorney is in the best and most immediate position to counsel and assist the client in alleviating concerns that could (or already have) lead to psychological demise. The initial client interview is a critical stage in determining whether or not the client's mental health will be stabilized and maintained through the upcoming period of financial repair. The initial interview presents the therapeutically-wary attorney with an opportunity to push the client off on the right foot in terms of gaining fiscal and mental solidity. For this opportunity to be effectively seized upon, the attending attorney needs to engage in several specific inquiries which can be mastered through the client contact opportunities tendered by bankruptcy assistance clinics.

First, to truly succeed in her role as 'counselor,' the attorney will have to determine more than simply when to file for bankruptcy or what method of bankruptcy should be utilized on behalf of the client. Rather, as a preliminary matter, the attorney needs to establish whether or not filing for bankruptcy, any kind of bankruptcy, is the correct choice in order to serve the individual client's needs in a most therapeutically beneficial manner. Aside from examining the client's financial situation, the attorney will need to effectively listen to questions and concerns a client may have about filing for bankruptcy. This must include a look at any trepidation the client may have about the effect of bankruptcy on the client's reputation, feelings of self-worth, pride, confidence, dignity, and other similar aspects of his or her psyche. The attorney must then, together with the client, weigh the client's interests (on the one hand, financial liberation) with his apprehensions (potential mental degradation on the other) to reach a conclusion as to the best course of action. These interests and apprehensions will differ with every client and, thus, so will the strategy.

This process of determining what will be important to the client in terms of outcome can be described, at least in part, as identifying what are known as psycholegal soft spots. Recognizing psycholegal soft spots comes more naturally only with experience in dealing with clients on a

more interpersonal level, which bankruptcy assistance clinics can provide. Winick describes psycholegal soft spots as, “the way[s] in which certain legal issues, procedures, or interventions may produce (or reduce) anxiety, distress, anger, depression, hard or hurt feelings, and other dimensions of law-related psychological well-being.”⁴¹ This idea of recognizing and dealing with psycholegal soft spots before they manifest themselves as negative pressures on the client’s mental well-being is a preventive law concept, focused on locating traits that at sometime during the course of a legal proceeding may cause undesirable psychological effects on the client. Until evaluating the client’s way of thinking and thoughts on his present situation, a lawyer will not be able to focus in on the psycholegal soft spots of a particular client, which is necessary in order to select the best future course of action.

Once an attorney is able to identify any psycholegal soft spots (which may, when dealing with serious financial issues, include one or more of the above mentioned characteristics), she and the client will be able to tailor a plan that maximizes the outcome for the client, both financially and mentally. For instance, an attorney may be able to develop a strategy through bankruptcy that may allow a client to discharge 100% of his debts and leave his creditors with no method of recourse. This may be an optimal outcome for some clients. However, to an honest, hard working individual who has always believed in repaying his just debts, this seemingly most favorable result may instead give rise to feelings of inadequacy, distrust, and loss of pride. Thus, it is important to discover the client’s thoughts, feelings, beliefs, and goals before embarking on a trip through bankruptcy because in the pride-filled individual’s case, his interests may have been better served by the attorney’s working with creditors and helping to formulate a rigorous repayment plan outside the bankruptcy realm. But, the lawyer cannot know what is best for the individual without first identifying these psycholegal soft spots.

If and when a decision has been reached by attorney and client to file for bankruptcy, the attorney must then address the fact that her client will have to deal with the persisting stigma and embarrassment associated with bankruptcy. A procedure for coping with the stigma will have to be developed and the more contact with real individuals utilizing bankruptcy through a bankruptcy clinic that a law student or young lawyer has had, the

41. Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 327, 330 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 2000).

better-equipped she will be to develop such a plan. How the procedure is designed will depend on the psycholegal soft spots attributable to each individual client. This is because the stigma of bankruptcy will operate with varying degrees of severity on each client, depending on the character traits of that client.

Take for instance the middle-aged client, a professional who works in the business world, who because of a few, relatively minor mishaps financially, has erroneously convinced himself that bankruptcy is not only his best, but his only option out of fiscal disarray. Even though this may not necessarily be true, it may be the case that this client will not feel the psychological sting of bankruptcy as others would. As a businessman, it is possible that this client, due, for instance, to increasing filing rates or the current feelings on the topic of bankruptcy among his peers, will view bankruptcy as more of a formality or business strategy than would others. By contrast, take for example, the older, married couple who have been struggling with severe financial problems for a considerable period of time and who vehemently refuse even the thought of filing for bankruptcy due to the damage their reputation and status may suffer. This couple may be more vulnerable to the negative effects of the stigma because they place more value in moral intangibles such as trust, dignity, and pride. The attorney, in her role as counselor, will have to consider the facts, feelings, and goals of her clients and decide how the client should handle and cope with the situation to minimize any embarrassing feelings and any other stigmatizing effect that may arise. In the case of the elder couple for instance, the attorney may find it advantageous to counsel the clients to keep the fact that they have filed for bankruptcy private where possible.

As mentioned above, it is the case that the effects of the stigma, to a substantial degree, come about as a result of external reactions from other people once the filing of bankruptcy becomes publicly known. Thus, advising the couple to keep their current situation under wraps will assist in reducing the psychological negativity accompanying bankruptcy. Similarly, “[t]he attorney should explain the attorney-client privilege and the cloak of confidentiality that covers communications occurring within the professional relationship.”⁴² This will further the idea that no one needs to know about the seriousness of their fiscal problems and unless they themselves tell someone, it is unlikely that anyone will even find out,

42. Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 309, 319 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 2000) [hereinafter *Therapeutic Jurisprudence*].

producing a reassuring feeling in the minds of the clients.

The lawyer should also counsel the couple that the bankruptcy stigma, for the most part, is unfounded. They should be reminded that the entire system is centered around the idea of providing honest people, such as themselves, with relief from unfortunate monetary difficulties because society has an intense interest in preventing citizens from experiencing economic hardship. In fact, it is so strong that society has developed a system which allows this interest to override just debts. The couple should be made to understand that their misfortunes are not a result of any failure on their part, but rather, it is generally understood that some will inevitably encounter economic obstacles and that society, through bankruptcy, is intent on helping. In any event, bankruptcy assistance programs help law students focus on developing the skills to effectively counsel both the young professional and the elderly couple as to whether to file for bankruptcy and, if so, how that client can best cope with the attendant pressures of bankruptcy. In all cases, “the attorney needs to be sensitive to the client’s psychological state, be supportive and non-judgmental, and convey empathy” in order to soften the blow of the stigma.⁴³

It is true that the great majority of potential clients arriving at the doorsteps of bankruptcy lawyers are first-timers. As such, chances are they know virtually nothing about bankruptcy other than that people use it to get out of financial trouble. One study concluded that debtors know “very little about bankruptcy when they appear for a first interview and do not know the difference between the two chapters [7 and 13].”⁴⁴ So another easy and effective way to help a client cope with the attendant emotional distress is to sit with the client and actually explain what is going to occur during the bankruptcy process and why. The interactive opportunities offered by bankruptcy assistance clinics will prove to be very valuable in this respect. As students progress in these sorts of clinics, they will come to understand the importance of providing their clients with a strong sense of involvement and an understanding of how each one is going to reach their goal of becoming debt-free. Simply understanding how their goal will be met provides a sense of comfort and hope in the mind of the debtor.

By using some similarly simple techniques, the attorney will also have an opportunity to avert some of the psychological effects potentially stemming from the 341 meeting. First, the attorney must assume that all creditors will be present at this meeting and must be adequately prepared to

43. *Id.* at 319.

44. John Patrick Boyl & Steven L. Johnson, *Section 110 and the Problem of Petition Preparers*, 1997 ABI JNL. LEXIS 119, 12 (1997).

answer questions on behalf of the client and, where necessary, raise objections to any questionable inquiry creditors' counsel may attempt to make. Writing in the context of role of counsel in litigation, Winick explains, "[w]hether intended or even recognized by attorneys, the way they act in the presence of their clients has an inevitable psychological or therapeutic impact."⁴⁵ The attorney needs to appear to the client as a true advocate who is intensely concerned with the client's best interests. In order to achieve such an appearance, the attorney, as mentioned, must not only prepare himself for the 341 meeting properly, but must also inform the client of what is to be expected at the meeting. This will help to relieve stress and anxiety not only by reassuring the client that he is being effectively represented, but also by instilling a feeling that he is participating in the process that will determine his own destiny. By providing a means by which the client can participate in the process, the attorney provides "an important measure of informational control."⁴⁶ The simple act of furnishing information to the client as to what is going to happen during the various stages of the proceeding has been shown to be a significant factor in reducing stress.⁴⁷

Winick also mentions that it may be therapeutically beneficial for the attorney to arrange to sit right next to the client during proceedings such as a 341 meeting.⁴⁸ This will remind opposing counsel that he is not only talking to the debtor, but also to debtor's counsel. "This technique can be reassuring to clients, making them feel that they are never alone, unrepresented, or unprotected during the stressful questioning that occurs at the [meeting]."⁴⁹

Another preventive law concept, termed the legal check-up, could potentially be an extremely effective tool in the practitioner's bag of tricks, in terms of helping clients avert any post-bankruptcy financial problems that might create negative psychological effects.⁵⁰ As the saying goes, the best laid plans of mice and men go oft astray. Even with a superior plan to get back on track monetarily, it may be difficult for a particular individual who has been through bankruptcy to execute that plan. So, it may be

45. *Therapeutic Jurisprudence*, *supra* note 42, at 311.

46. *Id.* at 313.

47. *Id.*

48. *Id.* at 315.

49. *Id.*

50. Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward B. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 5, 6 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 2000).

helpful to bankruptcy clients to have a third party who has their best interests in mind keeping an eye out to assure they remain steadfast on the road to attaining or regaining economic stability. Once a client has received a discharge, the lawyer should remain assertive in obtaining periodic information regarding the financial and, more importantly, mental condition of the client. "By receiving updates on a client's life events (not limited to disputes), the lawyer can then assist the client to improve decision making and planning to prevent problems, reduce conflict, and increase life opportunities."⁵¹ This is especially important where, as in most cases, the client has received little or no guidance or education from the system on how to become a more skillful manager of money. If the lawyer keeps in contact and is aware of what his client is doing, he can assist in making important choices so that the client does not find himself in a desperate position once again.

To conclude, it is true that bankruptcy and all its attendant advantages should be seen as the primary step in a financial rehabilitation effort. But more needs to be done in order to effectuate an optimal outcome in terms of not only financial security, but also the mental effects caused by the act of obtaining that security. It seems quite apparent that efforts to ease the psychological impacts (most notably, the stigma) of bankruptcy will be most effective if focused primarily on the debtor. Instead of attempting to eliminate the stigma itself, the better strategy is to instruct and allow law students to assist debtors in dealing with the stigma by counseling them in a more compassionate manner and through the use of creative problem solving. This can be accomplished by implementing more and more bankruptcy assistance programs. However, although the measures taught and learned by students in such programs will assist to combat these anti-therapeutic occurrences, it is imperative to re-enforce the notion that debtors are in control of their lives and that the key to their fiscal recovery lies predominantly within themselves, not solely within the discretion of a bankruptcy judge or attorney. Only when a debtor is able to grasp within his mind this idea will he be able to regain confidence and be on his way to again becoming the productive and valuable member of society he once was.

51. *See id.*