Volume 59, Issue 2 Page 213

Stanford Law Review

LESS STIGMA OR MORE FINANCIAL DISTRESS: AN EMPIRICAL ANALYSIS OF THE EXTRAORDINARY INCREASE IN BANKRUPTCY FILINGS

Teresa A. Sullivan
Elizabeth Warren
Jay Lawrence Westbrook

LESS STIGMA OR MORE FINANCIAL DISTRESS: AN EMPIRICAL ANALYSIS OF THE EXTRAORDINARY INCREASE IN BANKRUPTCY FILINGS

Teresa A. Sullivan,* Elizabeth Warren,** and

Jay Lawrence Westbrook***

INTRODUCTION

The passage of the 2005 amendments to the Bankruptcy Code represents the turning of a page in the long history of personal bankruptcy in the United States.[1] At the very moment that European countries are liberalizing their

* Provost and Executive Vice President for Academic Affairs, University of Michigan.

** Leo Gottlieb Professor of Law, Harvard Law School.

*** Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. We thank Puja Seam, Harvard Law Class of 2005, Tracey Kyckelhahn, Ph.D. Candidate 2005, The University of Texas at Austin, Eric Van Horn, Texas Law 2005, and Jonathon Hammer, Texas Law 2006, for their help with research and statistical analysis.

treatment of individual debtors,[2] the U.S. Congress has embraced changes intended to make bankruptcy difficult or impossible for many financially troubled Americans. The primary justification for this wholesale revision of the accessibility of the consumer bankruptcy system has been the repeated claim that the extraordinary increase in bankruptcy filings is the consequence of declining stigma. In effect, the argument is that a growing moral slackness causes people who can repay their debts to seek the too-easy protection of bankruptcy. This Article reports the third of three comparable empirical observations of individual bankruptcy spread over twenty years.[3] It establishes a baseline against which the effects of the new amendments can be examined. The data we present are not consistent with the claim that declining bankruptcy stigma has fueled an increase in bankruptcy filings. Instead, the data are far

---

Their professionalism and willingness to work long hours to make sure the data reported here are correct serve as a strong reminder that good empirical work is nearly always a team effort. Deborah Thorne and John Pottow offered helpful comments on earlier versions of this paper, and we appreciate their help. We also appreciate the comments we received from participants at the University of Texas Center for Law, Business & Economics Workshop Series, the Conference on Global Trends in Personal Bankruptcy of the Cegla Institute at Tel Aviv University, and the Harvard Law School faculty colloquium.

The data cited in this article come from three original studies. Consumer Bankruptcy Project I of 1981 and Consumer Bankruptcy Project II of 1991 were the work of the current authors. Consumer Bankruptcy Project III of 2001 was the work of the current authors, joined by Professors David Himmelstein, Katherine Porter, John Pottow, Deborah Thorne, Susan Wachter, Steffie Woolhandler, then-Professor and now-Judge Bruce Markell, and then-Professor and now-Dean Michael Schill, all of whom shared in the design and development of the database. Alexander Warren designed and managed all of the coding databases. We are grateful for the contributions of each of these people in creating a database that permits analysis from so many different perspectives.

The Consumer Bankruptcy Project III was funded through grants from the Ford Foundation, the Annie E. Casey Foundation, Harvard Law School, The University of Texas School of Law, and New York University Law School. The enthusiastic support and assistance of many bankruptcy judges, bankruptcy clerks, Chapter 7 and Chapter 13 trustees, and attorneys also contributed significantly to this work. We express our gratitude to the organizations that provided financial support and to each of the judges, clerks, trustees, and lawyers who made this research possible.

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

2. *See, e.g.*, Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L L. & BUS. 257 (2004); Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 OSGOODE HALL L.J. 473 (1999); Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25 (1998). *See generally* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE (Johanna Niemi-Kiesiläinen et al. eds., 2003) [hereinafter GLOBAL PERSPECTIVE].

3. The two earlier studies were reported in Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121 (1994), and Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 AM. BANKR. L.J. 293 (1986).

more consistent with the hypothesis that increased filings result from increased financial distress, and they hint that, despite loud claims to the contrary, the stigma of bankruptcy may actually be increasing.

Historically, official declarations of bankruptcy incorporated overt stigma. In European countries in the sixteenth and seventeenth centuries, a person declaring bankruptcy was required to engage in humiliating public behavior. The law in Padua is illustrative. The bankrupt was required to appear naked or nearly naked in the "vast Paduan Palace of Justice" and to slap his buttocks three times against "The Rock of Shame" while loudly proclaiming, "I DECLARE BANKRUPTCY."[4] It appears the reason for this requirement was a concern that bankruptcy might otherwise involve too little stigma. The traditional notion in many societies is that bankruptcy is, and should be, shameful and that stigma plays a critical deterrence role.[5]

Whether stigma has played an adequate role in deterring bankruptcy in the United States has been called into question. Over the past two decades, families declaring themselves busted, unable to make it to the next payday, have tumbled into bankruptcy in record numbers. In 1981, there were about 3.6 non-business bankruptcy filings for every thousand households in the United States,[6] for a total of 315,832. If the filing rate per household prevalent in 1981 had remained steady, the number of bankruptcy filings in 2004, the last full year before the bankruptcy laws were changed, would have been roughly 429,000.[7] In fact, by 2004 the rate of filings had surged to fourteen per thousand households, for a total of 1,563,145 families in bankruptcy—a new bankruptcy case every twenty seconds.[8]

---

4. James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1873 nn.114-16 (1996) (citing an Italian lawyer of the sixteenth century).

5. Similarly, the concern about abuse of bankruptcy by individuals is found in many different countries. *See, e.g.*, Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L.J. 81 (2002) [hereinafter Efrat, *Global Trends*] (reporting variance in personal bankruptcy policy and usage in a number of countries); Rafi Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 BANKR. DEV. J. 351, 390 (2004) (reporting views of three regional heads of the Official Receiver in Israel); Westbrook, *supra* note 2. *See generally* GLOBAL PERSPECTIVE, *supra* note 2.

6. To be more precise, the filing proportion was 0.0038342. Calculations by authors using bankruptcy data from ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS A-78 (1981), and household data from U.S. Census Bureau, Average Number of People per Household, by Race and Hispanic Origin, Marital Status, Age, and Education of Householder: 2004 (June 29, 2005), http://www.census.gov/population/socdemo/hh-fam/cps2004/tabAVG1.csv.

7. Calculations by authors. *See supra* note 6.

8. *See* Figure 8 *infra*. In the calendar year 2004, there were 1,563,145 non-business bankruptcy filings. Admin. Office of the U.S. Courts, Table F2: Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the Twelve Month Period Ended December 31, 2004, *available at* http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_dec2004.pdf. If those filings were spread around the clock, this would mean one filing every 20.17 seconds. Many of these filings were joint cases filed

As they pressed for a change in bankruptcy laws, credit card issuers asserted that declining stigma caused the extraordinary run up in bankruptcy filings.[9] Their ideas were quickly echoed in the popular media[10] and were enthusiastically taken up by moral critics who loudly proclaimed that bankruptcy had lost its stigma.[11] Congressional leaders joined in the chorus, adding a rare bipartisan voice as they denounced their own constituents as morally deficient. Democratic Senator Patti Murray (D-Wash.) claimed that the Senate should make it a priority "to recapture the stigma associated with a bankruptcy filing,"[12] while Republican Senator Bill Frist (R-Tenn.) asserted that "[b]ankruptcy has become so common that it has lost the stigma it had even a short generation ago."[13] Federal Reserve Bank Chairman Alan Greenspan made the same assertion: "Personal bankruptcies are soaring because Americans have lost their sense of shame."[14]

Other economists took up the claim as well.[15] Unable to find a strong statistical correlation between bankruptcy and a handful of macroeconomic

---

by a married couple, so the total number of adults filing in 2004 was 2,038,857, which means that filings per person were even more frequent.

9. *See, e.g.*, *Now Pay It Back: Bankruptcy Laws*, ECONOMIST, Mar. 12, 2005, at 36.

10. *See, e.g.*, Charles J. Whalen, *Bankruptcy? So What?*, BUS. WEEK, Feb. 19, 2001, at 28 ("Perhaps 'the scarlet letter associated with bankruptcy is disappearing . . . .'"); *see also* Janet Novack, *Debtors' Vision*, FORBES, June 2, 1997, at 45 (noting that credit card defaults and personal bankruptcies rise under debtor-favorable laws).

11. Judge Edith H. Jones testified before Congress, "At one time in our history, filing bankruptcy was regarded as shameful, and filers suffered social stigma and permanently ruined credit. The shame and stigma are no longer compelling." Kartik Athreya, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK RICHMOND ECON. Q. 1, 2 (2004), *available at* http://www.richmondfed.org/publications/economic_research/economic_quarterly/pdfs/spring2004/athreya.pdf; *see also* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177; Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 863 (2003) (noting that small loan regulation and bankruptcy laws caused decline in stigma since 1898). One author acknowledges the power of stigma by offering a tongue-in-cheek suggestion to revive debtors' prisons (albeit in a modern, subdued form) as a device to return the appropriate stigma to bankruptcy filings. Marcus Cole, *A Modest Proposal for Bankruptcy Reform*, 5 GREEN BAG 2D 269 (2002).

12. 147 CONG. REC. S2343, S2374 (2001) (statement of Sen. Murray). She was joined by Democratic Presidential Candidate Senator John Kerry (D-Mass.): "There has been a decline, as we all know, in the stigma of filing for personal bankruptcy, and certainly we would agree that appropriate changes are necessary in order to ensure that bankruptcy not be considered a lifestyle choice." *NewsHour with Jim Lehrer: Bankruptcy Rules* (PBS television broadcast Mar. 15, 2001) (transcript available at http://www.pbs.org/newshour/bb/economy/jan-june01/bankruptcy_03-15.html).

13. 151 CONG. REC. S1813 (2005) (statement of Sen. Frist).

14. *See* Julie Kosterlitz, *Over the Edge*, 29 NAT'L J. 870, 871 (1997) (quoting Chairman Greenspan).

15. *See, e.g.*, Scott Fay, Erik Hurst & Michelle J. White, *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706, 716-17 (2002) (asserting that as bankruptcy filings rise in a locality, stigma declines and probability of filing increases); David B. Gross & Nicholas S. Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN.

indicators, they attributed the unexplained rise in bankruptcy filings to the unmeasured concept that they conveniently labeled as a reduction in stigma.[16]

STUD. 319 (2002) (concluding that a decline in stigma has increased credit card defaults and bankruptcy filings); Michelle J. White, *Economic Analysis of Corporate and Bankruptcy Law* 69 (Nat'l Bureau of Econ. Research, Working Paper No. 11536, 2005) (explaining the increase in the number of personal bankruptcy filings as "due to a combination of households gradually learning how favorable Chapter 7 is and bankruptcy becoming less stigmatized as filing became more common"); *see also* Efrat, *Global Trends*, *supra* note 5 (hypothesizing a relationship between filing rates and stigma variations in several countries). The argument becomes entirely tautological, with rising filing rates implying decreasing stigma which explains rising filing rates. One scholar, Professor Efrat, has attempted to measure changes in stigma over time by studying the changes in the terms used to describe bankrupt debtors in the pages of the *New York Times*. Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365 (2006), http://www.bepress.com/til/default/vol7/iss2/art4/. Although Efrat believes that he has demonstrated a decline in bankruptcy stigma, he disclaims any assertion that such decline can be connected directly with the rise in bankruptcy filings. *Id.* at 393.

16. *See, e.g.*, White, *supra* note 15; Scott Fay, Erik Hurst & Michelle J. White, *The Bankruptcy Decision: Does Stigma Matter?* (Univ. of Mich. Dep't of Econ., Working Paper No. 98-01, 1998). White and her coauthors claim that stigma could be measured on a state-by-state basis. They identify several measurable economic factors, then claim that any rise in bankruptcy filings that is not explained by those economic factors must be caused by a decline in stigma. For example, they suggest that the people of Tennessee (who have relatively higher bankruptcy filing rates) must feel less shame than the people of Hawaii (who have relatively lower bankruptcy filing rates). *Id.* at 9. In a later paper, the same authors use similar data to show that families who could benefit the most from bankruptcy (that is, the families whose debts are highest relative to their assets and state law exemptions) are most likely to file for bankruptcy, thus proving—at least to these authors—that these families are somehow "strategic" in their use of bankruptcy, which supposedly means they feel no stigma. Fay, Hurst & White, *supra* note 15. In yet another analysis, White and coauthor Wang assert that rich people feel stigma associated with bankruptcy more than poor people. Hung-Jen Wang & Michelle J. White, *An Optimal Personal Bankruptcy Procedure and Proposed Reforms*, 29 J. LEGAL STUD. 255, 260 n.21 (2000) ("The assumption that bankruptcy costs are a constant proportion of wealth is made because the cost of bankruptcy stigma presumably rises with wealth, while filing fees and lawyers' fees are a declining or constant proportion of wealth."). Other analysts take up the analytic tool of declaring whatever they cannot explain to be the consequence of "stigma," explaining as much of the variation in the use of credit cards as possible on the basis of economic factors, and then declaring that families were more likely to file for bankruptcy in 1997 than they had been in 1995 because of a decline in stigma during that two-year period. Gross & Souleles, *supra* note 15. Even one of the economists for the Federal Reserve has taken this approach: "Of course, to the extent that a model is comprehensive in its incorporation of likely determinants of bankruptcy, declining stigma may be left as the most plausible candidate to account for the otherwise unexplained component of rising bankruptcies." Charles A. Luckett, *Personal Bankruptcies*, *in* THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT 69, 89 (Thomas A. Durkin & Michael E. Staten eds., 2002). Other researchers look at social factors as well as economic factors. For example, one study focuses on the role of religion. The study assumes that Catholics have more moral qualms about filing for bankruptcy than, say, Methodists, Jews, or agnostics. F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 201 (1998).

In this Article, we draw on data from three empirical studies of families filing for bankruptcy conducted in 1981, 1991, and 2001 to test the claim that bankruptcies have increased because stigma is on the decline. The data we offer are flatly inconsistent with the declining stigma hypothesis. While no single statistical analysis is dispositive, the data presented here provide strong reason to doubt that the stigma hypothesis correctly explains the rise in consumer bankruptcy filings. In fact, we suggest that these data support an alternative view that the stigma of bankruptcy has actually increased over the twenty-year period we have studied, and that bankruptcy filings may have risen despite increased shame about declaring bankruptcy.

Part I of this Article briefly sketches the demographic profile of American consumer bankruptcy, demonstrating again that bankruptcy is a middle class phenomenon, primarily employed by families near the middle of social and economic life in the United States. This Part also provides basic financial data about Americans who filed for bankruptcy at the beginning of the twenty-first century and compares them with those who sought bankruptcy protection in the last two decades of the twentieth century. It shows that the central characteristic of consumer bankruptcy over two decades has been increasing financial distress, marked by rising levels of debt. Part II uses these data to test the declining stigma hypothesis. Part III explores the possibility that stigma may be rising—a hypothesis consistent with the data presented here. Part IV identifies other data that may help explain a rise in consumer bankruptcy filings.

A. *Prelude: Three Studies*

The Consumer Bankruptcy Study consists of three large studies of natural persons filing for bankruptcy in Chapter 7 or Chapter 13 in 1981, 1991, and 2001. These studies constitute a unique dataset covering nearly the entire period since the complete rewriting of the Bankruptcy Code in 1978. The methodological details we have followed in our three studies are set forth in detail in three books.[17] We coded information on income, assets, and debts from bankruptcy court records in each study. Those data are typically prepared with the help of a lawyer or paralegal, and they are always filed with the courts under penalty of perjury.

In 1981, we supplemented our court-record data by interviewing bankruptcy judges and bankruptcy lawyers. In 1991 and 2001, we collected

17. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 342 (1989) [hereinafter AS WE FORGIVE OUR DEBTORS] (1981 dataset); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 263 (2000) [hereinafter FRAGILE MIDDLE CLASS] (1991 dataset); ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 181-88 (2004) [hereinafter TWO-INCOME TRAP] (2001 dataset).

written questionnaires directly from the debtors.[18] In 2001, we also added telephone interviews with bankrupt debtors. The core financial information reported in this Article comes from the schedules filed with the court, and the written questionnaires used in 1991 and 2001 provide the primary basis for the demographic data reported in this Article, including information concerning gender, education, and occupation.[19] Telephone interview data are not included in this report.[20]

Although these studies were not national in scope, each of them involved a number of federal districts and approximately 1550, 2650, and 2000 bankrupt families, respectively. In 1981, the financial information was collected from all ten federal districts spanning three states—Texas, Illinois, and Pennsylvania. For 1991 cases, we collected financial information from one district in each of those states, plus one district from our other two sample states for that year, California and Tennessee. The 2001 financial data were drawn from the same five districts as in 1991, except that we sampled the Northern District of Texas instead of the Western District.[21] The samples were drawn systematically in each year, reflecting the proportion of Chapter 7 and Chapter 13 cases for each district sampled. In 1981, respondents were sampled systematically from the court's docket for the year. Because debtors could not opt out from being included, the resulting bias was limited to the small likelihood of technical sampling error (or the chance that a different systematic draw of debtors would produce different results). In both 1991 and 2001, we approached debtors at their meeting with the trustee in bankruptcy[22] to obtain their cooperation with

---

18. The questionnaire was modeled in part on the 1990 U.S. Census questionnaire and was available in both English and Spanish language versions. Debtors were advised that completion of the form was voluntary and that their responses would be confidential.

19. In general, we noted in our report of the 1991 data that some of the information may have been affected by the active and effective work of Philadelphia legal services in the Eastern District of Pennsylvania. Unfortunately, spending cutbacks had reduced that source of bankruptcy assistance by 2001, so we believe that this possible bias was eliminated in 2001. *See* FRAGILE MIDDLE CLASS, *supra* note 17, at 277-79.

20. Two of us, with other coauthors, conducted an additional study in 1999, but those data are not reported here. *See* Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 386-91 (2001).

21. The districts sampled in both 1991 and 2001 were Central California, Middle Tennessee, Eastern Pennsylvania, and Northern Illinois. The original ten districts were selected to test intrastate variation within three states with very different sets of state exemption laws as well as differences among the states. In 1991 and 2001, we added Tennessee, a state with a very high filing rate per household, and California, the state with the largest absolute number of filings. *See* FRAGILE MIDDLE CLASS, *supra* note 17, at 265-66. All of our studies have indicated a high level of homogeneity among districts, and the districts chosen represent a large fraction of all bankruptcies filed in the United States. A national sample would be preferable but without the resources to visit every single courthouse in the country, it was impossible. Nonetheless, the consistency we have obtained among districts is reassuring that national data would closely resemble our findings.

22. All debtors are required by law to meet with an assigned trustee at the courthouse.

the study and administered a brief questionnaire. Subsequently, a systematic sample of these questionnaires was drawn to link to the public records. This procedure is subject to response bias, which is the chance that the respondents who spoke to us were systematically different from those who would not speak to us. However, a small study of the financial records of filers who did not agree to complete the questionnaire indicated minimal nonresponse bias in the financial data.[23]

The 1981 data were collected for the whole year. After our analysis revealed no seasonal biases, we gathered data in 1991 and 2001 for the first half of the calendar year. This means that the 2001 questionnaires were collected well before the terrorist attacks of September 11. To make comparison across time periods easier, we have adjusted all the figures in text and tables to constant 2001 dollars.[24]

I. THE RISING BURDEN OF DEBT

When we began our first study in 1981, conventional wisdom held that bankrupts were day laborers and housekeepers, for the most part blue collar or lower.[25] To general surprise, including our own, we found that the debtors were solidly middle class. More than half went into bankruptcy owning their homes, and a large portion had middle-class jobs.[26] We found the same sort of people in bankruptcy court in 1991, but we could expand our demographic profile by using questionnaires to fill in information not available in the courthouse files. Among other things, we found that the debtors also had slightly above average educations, placing them even more squarely in the middle of the American population.[27]

In 2001, a similar picture emerges. Bankrupts' incomes are low at the time of filing, the consequence of about two-thirds of the families reporting a job loss, failure of a small business, a cutback in hours worked, or some other income interruption. But when they are measured by the enduring criteria of education, occupation, and homeownership, about 90% of the debtors qualify as solidly within the middle class.[28]

The purpose of the meeting is to review the bankruptcy petition and to answer questions under oath about the debtor's financial circumstances. The meeting is public, and creditors are permitted to cross-examine the debtor as well.

23. *See* FRAGILE MIDDLE CLASS, *supra* note 17, at 277-79.

24. We used the Consumer Price Index, which is published by the Bureau of Labor Statistics, to adjust for inflation. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Overview of BLS Statistics on Inflation and Consumer Spending, http://www.bls.gov/bls/inflation.htm; *see also infra* note 32.

25. AS WE FORGIVE OUR DEBTORS, *supra* note 17, at 84.

26. *Id.* at 102.

27. *See* FRAGILE MIDDLE CLASS, *supra* note 17, at 52-55.

28. Among the debtors filing for bankruptcy in 2001, 91.8% had been to college, had an occupation in the upper 80% of all occupations (as ranked by prestige), or had bought a

The debate about the ability of bankrupt families to pay their debts has gone on for a long time. We recognize its normative component: how much sacrifice is appropriate in deciding whether a debtor "can" pay? In our earlier writings, we have expressed our views on that point, but we have always laid out the data to permit others to apply different standards. The data standing alone cannot tell us whether someone "can" pay, but they do tell us how deeply in debt the debtors really are, and, critical to this analysis, the data tell us whether their relative financial burdens have changed over time.

We outline the basic financial characteristics of consumer debtors at three points in the past twenty years: 1981, 1991, and 2001. We report the data as to incomes, assets, and debts, noting the changes in each of these financial characteristics over the twenty-year period.[29] When combined, these figures are useful as indicators of ability to pay. That is especially true of the debt-to-income ratio of the debtors, which remains the best overall evidence of their ability to pay.

A. *Income: Still Low*

Income is a likely place to see any important change among the population of those filing for bankruptcy. The income picture for the bankrupt families has been oppressively grim and has worsened over the past twenty years. From 1981 to 1991, median household income of families in bankruptcy dropped by about 14%, after adjusting for inflation. From 1991 to 2001, income remained low, statistically unchanged across the decade.[30] As detailed further in Appendix Table 1, income is now significantly lower in 2001.

---

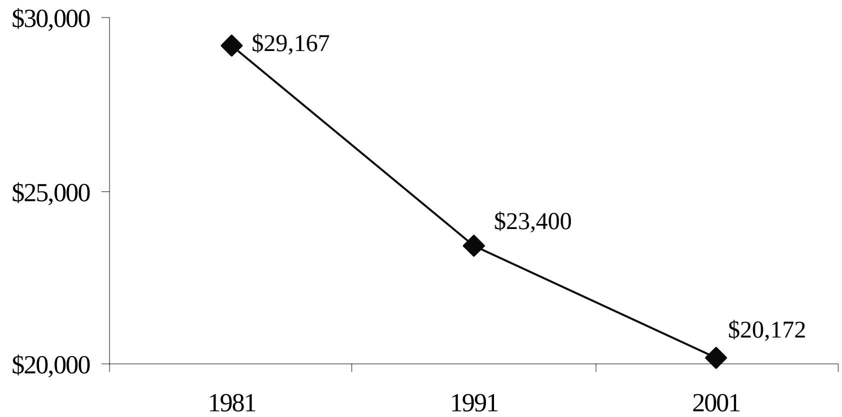
home. "Two-thirds of the cases (66.6 per cent) met two or more criteria, with nearly three in ten (27.4 per cent) meeting all three criteria. The data do not separate the middle class from an elite upper class, but they do suggest that the debtors are not concentrated among the chronically poor." Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 144 (2003).

29. The numbers supporting the figures are reproduced in the Appendix. All of the dollar amounts reported in this Article are adjusted for inflation to 2001 dollars.

30. There is a shift in the measurement tools across the three time periods. In 1981, there was no Schedule I with the family's current annual income. Instead, only Form 7, listing income for the preceding two years, was available. By 1991, Schedule I had been added. Because it is current, Schedule I is likely to be a more accurate and immediate statement of the household's income, so it is the source we use for 1991 and 2001. It is also the case that Schedule I is more likely to be completed in detail. In 1991, none of the 650 court records reviewed were missing information on Schedule I, and in 2001 only 16 of 1250 court records reviewed in the core sample were missing these data. This compares very favorably with 1981 Form 7 data, in which 213 out of 1557 debtors left blank the Form 7 income data. In 2001, Form 7 data were missing in 173 cases.

It is possible that the difference between the 1981 income reports and those that follow are the result of the change in measurement form, switching from Form 7 to Schedule I information. When we compare 1981 Form 7 data to 2001 Form 7 data, however, the same drop in income reappears, suggesting that incomes have remained low across the twenty-year period. Our claim in the text that there was no statistically significant change is

Figure 1. Median Household Income in Bankruptcy, 1981-2001 (2001 Dollars)



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

The debtors in bankruptcy have always had incomes below those of the households in the population generally.[31] The difference is that over the past twenty years, the gap has widened between the median household in bankruptcy and the median household in the United States. In 1981, the difference was relatively modest: the median debtor's household income was about 78.4% of the median in the United States generally, $37,194 across the country compared with $29,167 for those in bankruptcy (all numbers are reported in 2001 dollars).[32] By 2001, median income in the United States was

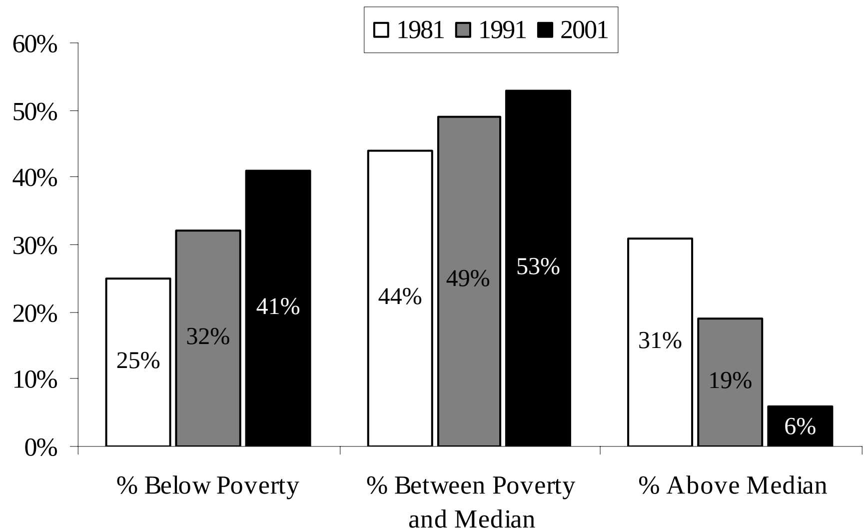
---

supported by the footnotes to our Appendix Table 1, which report the results of tests of significance.

31. *See* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 34 tbl.1 (1999) (showing proportion of debtors in bankruptcy with incomes above the national median); *id.* at 38 tbl.2 (showing weighted proportion of debtors in bankruptcy with incomes below the national median). Culhane and White's income figures are even lower than ours. They did not sample the same districts as we did. The claim of statistical significance in the text is supported by the footnotes to our Appendix Table 1, which report the results of tests of significance.

32. Median household income in the United States in 1981 was $37,194 ($19,074 in nominal dollars); in 1991, it was $39,164 ($30,126 in nominal dollars). In 2001, the median household income was $42,228. U.S. Census Bureau, Race and Hispanic Origin of Householder—Households by Median and Mean Income: 1967 to 2004, http://www.census.gov/hhes/www/income/histinc/h05.html. The data were adjusted to 2001 dollars using the Consumer Price Index (All Urban Consumers), which is available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. We use inflation factors of 1.95 (1981 to 2001 dollars) and 1.30 (1991 to 2001 dollars) for all inflation adjustments in this Article.

Figure 2. Household Income in Bankruptcy Relative to Poverty Line and Median Household Income, 1981-2001



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

$42,228 among all households,[33] while the households in bankruptcy reported a median income of $20,172—about 47.8% of the U.S. median income.[34] As measured by income, the 2001 families in bankruptcy were further behind their counterparts in the population generally than the 1981 bankrupt families.[35]

A useful reference point for low incomes is the poverty line published annually by the U.S. government. Families with incomes below the poverty line are assumed to have a very low standard of living and to be sufficiently needy to qualify for a number of aid programs. About half of all bankrupt debtors were sandwiched between the poverty line and the median income in the United States, and this proportion remained relatively constant over twenty years. But the distribution of the other half of the debtors changed substantially over time, with fewer of them located above the national median income and more of them falling below the poverty line.[36] In 1981, about 25% of debtors

33. U.S. Census Bureau, *supra* note 32.

34. *Id.*

35. Another way to describe this same phenomenon: in 1981, 69% of debtors had incomes below the U.S. median, but by 2001, 94% of those in bankruptcy had incomes under that level.

36. The poverty levels for a family of four with two children under eighteen in 1981 and 2001 in 2001 dollars were $17,975 ($9,218 in nominal dollars) and $17,960, respectively. U.S. Census Bureau, Current Population Survey, Poverty Thresholds by Size of Family and Number of Children, http://www.census.gov/hhes/poverty/threshld.html.

had incomes that placed them below the then-current poverty line. By 2001, 41.2% were below the poverty line at the time of filing, with a corresponding decline in the proportion of debtors above the median.

If the bankrupt debtors are loosely grouped with reference to the national median income and poverty levels, Figure 2 illustrates the shift in distribution toward the lowest income group. The lower incomes of the families at the time they file for bankruptcy are consistent with the picture of middle class families who are filing for bankruptcy after a substantial decline in income. Whether they will someday recover their former economic positions or whether bankruptcy is only a way station in a continued decline is beyond the scope of the data we report here.

B. *Assets: Increasing as Home Values Increase*

Income alone does not peg a family financially. Other things being equal, a family with substantial accumulated assets can withstand an economic blow better than its counterparts with few assets. In the bankruptcy sample, the value of total assets has risen over the past two decades even after adjustment for inflation. Total median assets were about $27,300 in 1981, dropping to $18,300 in 1991, and rising sharply to $37,000 in 2001. As Figure 3 illustrates, when families file for bankruptcy now, they are clearly bringing with them more assets than they brought a generation ago. Measured by the substantial increase in total assets, the families of 2001 appear much better off than the debtors of a decade or two earlier.

But the asset picture in bankruptcy is not one of cash in checking accounts, jewelry, high-priced cars, or fast boats. Instead, the single biggest asset for families in bankruptcy—like the single biggest asset for families not in bankruptcy—is their homes. About half of the families in bankruptcy are homeowners,[37] which means that the distribution of assets is really a two-tiered grouping, with homeowners owning substantially more assets than nonhomeowners.[38] The proportion of bankrupt debtors in 2001 who are

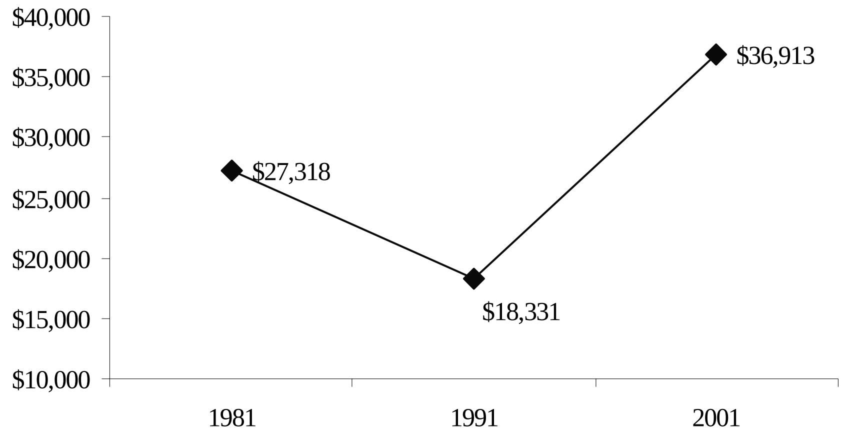
---

Information on the definition of the poverty line is available at U.S. Census Bureau, How the Census Bureau Measures Poverty (Official Measure), http://www.census.gov/hhes/www/poverty/povdef.html.

37. We use court-record data for this analysis because it gives us a consistent source over time. In 2001, however, we were able to supplement those data with telephone surveys, and we learned that substantial numbers of the families in bankruptcy had been homeowners but they had lost their homes before they filed. *See generally* Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, *in* CREDIT MARKETS FOR THE POOR 73 (Patrick Bolton & Howard Rosenthal eds., 2005). By contrast, Culhane and White, *supra* note 31, studying only Chapter 7 debtors, report a much lower rate of homeownership of about 30%. That result is unsurprising because homeowners are disproportionately concentrated in Chapter 13. *See* FRAGILE MIDDLE CLASS, *supra* note 17, at 347 n.26 (finding that 60% of homeowners in the study were Chapter 13 debtors but only about 25% of the nonhomeowners were Chapter 13 debtors).

38. FRAGILE MIDDLE CLASS, *supra* note 17, at 202.

Figure 3. Median Asset Value in Bankruptcy, 1981-2001 (2001 Dollars)



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

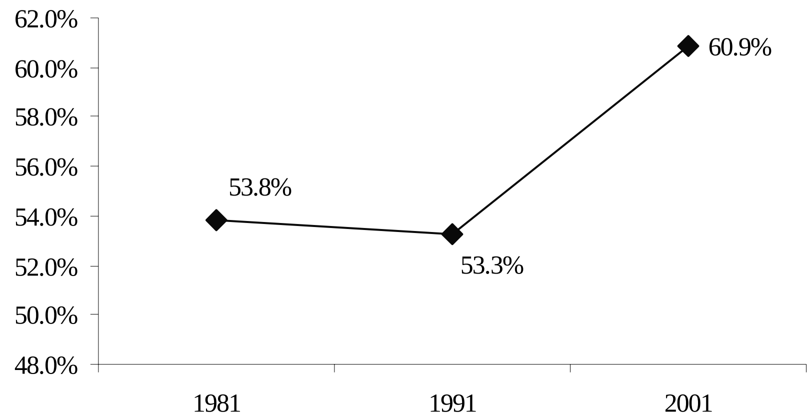
homeowners is about the same as that in 1981.[39] The rise in total asset value is in substantial part the consequence of a rise in the value of homes, both for those in bankruptcy and those not in bankruptcy, coupled with a small rise in the value of other assets for those in bankruptcy.[40]

39. It is possible that the homeownership rates among bankrupt debtors have remained fairly stable over time. Using the court-record data only, we reported an estimated homeownership rate of about 52% for the families filing for bankruptcy in 1981. AS WE FORGIVE OUR DEBTORS, *supra* note 17, at 129. This statistic is remarkably close to the 2001 report of 52.5% homeowners.

As Figure 3 demonstrates, the 1991 data show a drop in homeownership figures. In FRAGILE MIDDLE CLASS, *supra* note 17, we speculated that the reported proportion of homeowners in bankruptcy in 1991 was understated in part because the homeownership rate in one of our sample districts, the Central District of Los Angeles, was quite low. In Los Angeles in 1991, housing prices were quite high, making it likely that families' mortgages were also quite high. Because high mortgages made the debtors ineligible for Chapter 13 to try to work out a payment plan with their lenders, such families, we speculated, might be in Chapter 11 or out of the bankruptcy system altogether. We also had lower asset values in 1991 in Philadelphia, likely because of the presence there of an active pro bono bankruptcy program for poorer debtors. For a more detailed explanation of the 1991 differences among districts, see FRAGILE MIDDLE CLASS, *supra* note 17, at 277, 347-49 nn.24-28. We estimated that actual homeownership rates in 1991 might have been closer to 50%. *Id.* at 204-05.

40. The data on homeownership are too complex and interesting to summarize here, but two exemplary data points are illustrative. Among 2001 bankrupt homeowners as a group, 74% of their assets is the value of their homes. Second, again on an overall basis and after adjusting for inflation, 2001 home values are nearly three times greater (291%) than the home values of the 1981 debtors.

Figure 4. Median Home Value in Bankruptcy as Proportion of U.S. Home Values, 1981-2001



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

The value of the homes owned by bankrupt debtors has shown a marked increase over twenty years. In 2001 dollars, the median, inflation-adjusted value of homes for families in bankruptcy moved from $68,250 in 1981 to a statistically indistinguishable $67,275 in 1991 and then soared to $90,000 in 2001. The increased asset value among the 2001 debtors is statistically significant.[41]

Inflation adjustment is usually a good way to be certain that dollar comparisons across time are meaningful. However, because increases in home values have far outpaced inflation, we compare the median home value of the family in bankruptcy with the median home value in the United States in the same year. In 1981, the median home value of a family in bankruptcy was worth 53.8% of the value of a median home in the United States. In 1991, that proportion was nearly identical at 53.3%. By 2001, the median value of the home of a bankrupt family was worth about 60.9% of the value of a median priced home in the United States, well below the median home value among the general population of homeowners, but relatively higher than the home values of bankrupt families in 1991.[42]

Of course, families own more than their homes. They have cars, furniture, clothes, appliances, cash, pets, and other liquid and illiquid items they might cash out to pay off their debts. In 2001 dollars, families filing for bankruptcy over the past two decades showed a decline in non-real estate assets from 1981

41. We report differences as statistically significant at a probability level of 5% or lower. See the tables in the Appendix for reference to specific statistical tests and findings.

42. The ratio of mortgages to home values in bankruptcy has not changed significantly over the two decades we have studied.

to 1991, from $8375 to $6074. In 2001, median non-home assets rebounded to $9657. The total value of the non-real estate assets of bankrupt families—from cars to kids' shoes—remained below $10,000 throughout the twenty-year period. While there are no directly comparable summary data, the Survey of Consumer Finances reports the median value of cars for American families in 2001 at $13,500 and the median value of checking accounts, savings accounts, stock and other financial assets at $28,000, suggesting that the holdings of the bankrupt families are well below national averages.[43]

We deal with debt in some detail in the next section, but it is worth pausing here to reflect on the combined asset/debt picture. Assets are a family's wealth, but the asset/debt picture explains the family's overall net worth. For families across the United States, the period from 1992 to 2001 was a good one, with total net worth increasing by 40.5%.[44] Here the comparison of median assets to median total debt demonstrates the difficulties facing families in bankruptcy. In 1981, median debt divided by median assets was 1.5. That is, at the median, total debts outstripped total assets by one and a half times. By 2001, the ratio had risen to 1.8, meaning that the rise in assets had been outstripped by an even larger rise in total debt. In earlier work, we concluded that for many home owning debtors, the home is a "cement life raft."[45] That is, the debtors' financial troubles may be related in significant part to their efforts to cling to homes that are weighted down with debt.[46]

---

43. Ana M. Aizcorbe et al., *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances*, 89 FED. RES. BULL. 1, 13 tbl.5B, 19 tbl.8B (2003), *available at* http://www.federalreserve.gov/pubs/oss/oss2/2001/bull0103.pdf. The Survey of Consumer Finances data encompass only families that own an asset of the type listed. For example, only 84.8% of households own a car, so the median number is derived from that car-owning subset. Similarly, 93.1% of households own at least one financial asset.

44. *Id.* at 6.

45. TWO-INCOME TRAP, *supra* note 17, at 123.

46. In 1981, the mean ratio of secured debt to assets was 0.68. That is, a hypothetical average family was likely to have about 68% of its total assets locked up by security interests. In 2001, the mean ratio of secured debt to assets was a statistically indistinguishable 0.69. This measurement is only roughly correct because it does not take the value of each item of collateral and compare it to a particular lien securing it, but it seems that in both years, on a gross measurement, about 32% of the value of the debtors' assets would be available for creditors, if the debtors could be stripped bare. Of course, all states exempt at least some property from seizure by creditors and therefore protect that property in bankruptcy. 14 COLLIER ON BANKRUPTCY, at AL-1 to WY-21 (15th ed. rev. 2006) (listing the state exemptions for all fifty states). Typical examples would be homes (except for mortgages, taxes, and improvement liens), cars, and tools of the debtor's trade subject to various value limitations. Almost all consumer bankruptcies are "no asset" cases, with nothing available to be sold to pay creditors, primarily because of security interests, taxes, and exemptions. Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed in 1984-1987*, 22 U. RICH. L. REV. 303, 310 (1988); *see also* U.S. GEN. ACCOUNTING OFFICE, BANKRUPTCY REFORM ACT OF 1978: A BEFORE AND AFTER LOOK 56-57 (1983) (reporting that 97% of Chapter 7 cases had no assets for distribution to creditors).

On average, assets have risen for the families in bankruptcy, largely because homeowners now come into bankruptcy with more valuable homes. When debts figure into the picture, however, these apparent economic gains are erased. The more valuable homes are saddled with even larger mortgages. Overall, debts increased faster than assets, leaving the debtors as a group highly insolvent.[47]

C. *Debts: Rising Fast*

The third leg to the financial stool is debt. The 2001 data show that, at the time they file for bankruptcy, debtors have substantially larger debt loads than in the previous years. Median total debt loads are up an enormous 55.5% from 1981 in inflation-adjusted dollars. This seems to be a rise that occurred mostly during the 1990s; 1981 and 1991 mean debt loads were statistically indistinguishable from each other, with the astonishing climb occurring between 1991 and 2001.[48]

Of course, total debt figures include a mix of debts—from home mortgages to payday loans. An overall increase can be driven from either side of the secured/unsecured divide. Higher secured debt loads are consistent with greater assets and with the increase in the number of homeowners compared with the 1991 sample. Overall, secured debt totals showed a jump consistent with the increase in total debt loads, increasing 33.7% from the 1981 study to the 2001 study.[49]

Like all other Americans, the debtors who found their way to the bankruptcy courts had also been the recipients of staggering amounts of credit offered on an unsecured basis. Mean unsecured debt leapt 48.9% from 1981 to 2001, although median unsecured debt—held down by those families who owed little to anyone other than their secured debts to a home mortgage company or car lender—increased at a more modest 19.9%.[50] Mean unsecured debt showed a consistent rise throughout the twenty-year period.

---

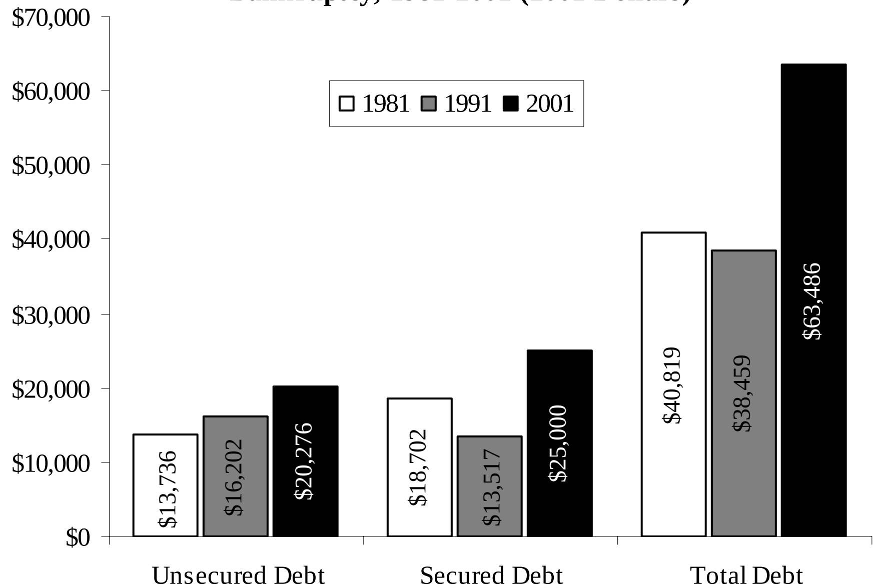
47. The figures can be calculated from Appendix Table 1. In 1981, assets were 76% of total debt; in 1991, 72% of total debt; and in 2001, 77% of total debt.

48. We often cite median values when they seem more reflective of the question being asked, but to determine whether two sets of values differ to a statistically significant extent, determination of course requires a comparison of means. The increase in mean debt (in 2001 dollars) from 1981 to 2001 was 21%. *See infra* Appendix Table 1. We should note that the somewhat odd-appearing relationship between means and medians in Figure 6 is not anomalous. Except in a normal distribution, which rarely describes any distribution of financial data, the mean and median are not necessarily close to each other.

49. The data from 1991 showed a decline from 1981 in the amount of secured debt outstanding—consistent with a decline in the proportion of homeowners in the sample—so that the rebound in secured debt from 1991 to 2001 is even larger: an 85% jump in just ten years. On the other hand, the ratios of secured debt to total assets are constant over the three samples at around 80% of assets, revealing that most of the debtors' assets are tied up by their secured creditors. For the data used in these calculations, see Appendix Table 1.

50. From 1981 to 2001, total consumer debt (nonmortgage debt) in the United States

Figure 5. Median Unsecured, Secured, and Total Debt in Bankruptcy, 1981-2001 (2001 Dollars)



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

D. *Debt-to-Income Ratios: Confirming the Bad News*

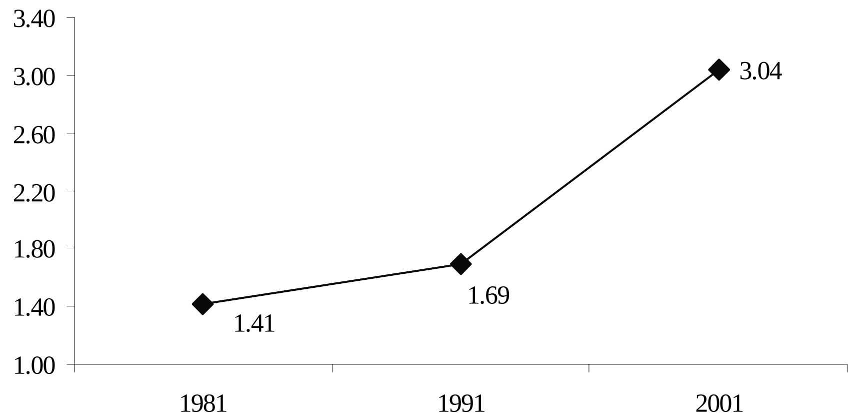
Perhaps the best measure of a typical middle class family's financial distress is its debt-to-income ratio. A family may earn a substantial amount, but if it owes even more, it may be in worse shape than a family with a lower income and less debt.[51] Moreover, the debt-to-income ratio gives some measure of the immediate pressure on families—can they make it month-to-month and week-to-week? If they cannot make the basic payments on their debts, they will slip deeper into debt, increasing the likelihood that they can never dig out.

In order to make the ratio a useful measure of families' relative financial circumstances when they enter bankruptcy, we do not measure total debt of all families against total income of all families. Instead, we measure the debt-to-

more than doubled. This statistic was calculated from *Consumer Installment Credit*, 69 FED. RES. BULL. A42 tbl.1.56 (Feb. 1983); *Consumer Installment Credit*, 79 FED. RES. BULL. A38 tbl.1.55 (Feb. 1993); *Consumer Credit*, 88 FED. RES. BULL. A36 tbl.1.55 (Apr. 2002) and adjusted for inflation.

51. The recent bankruptcies of actor Burt Reynolds, *Penthouse* publisher Bob Guccione, prize-fighter Mike Tyson, and director Peter Bogdanovich exemplify this point. For other up-to-the-minute examples, see Bankruptcy USA, Famous Bankruptcies, http://www.bankruptcy-usa.info/famous-bankruptcies.html.

Figure 6. Median Total Debt-to-Income Ratios for Bankrupt Families, 1981-2001



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

income ratio on a debtor-by-debtor basis and then average the ratios. Once again, we have used the same technique consistently across all three time periods.

The debt-to-income ratio has a statistical quirk of some importance. Because the rules of basic arithmetic apply in bankruptcy just as they do elsewhere, it is not possible to divide by zero. This means that a family with a substantial debt load and no current income has an incalculable debt-to-income ratio. There are two ways to deal with these zero-income families: either impute a low fictional income so that some calculation is mathematically possible or omit them from the analysis. We omitted the families, believing that any imputed income was likely to be wide off the mark in describing that family's circumstances.[52] But by omitting these zero-income families, we necessarily take the families in the very worst economic circumstances out of the calculation. In effect, we make the bankrupt families appear, as a group, more able to pay than they are.

With incomes flat or declining and debt rising among the families in bankruptcy, the change in debt-to-income ratios is predictable. By 2001, the total debt-to-income ratio for the families in bankruptcy is, at the median, 3.04.

52. Zero income and missing income are not the same. In all cases, forms that are missing data are not included in the calculations. So, for example, someone who simply left blank the Schedule I report on income is listed as "missing" on the tables and excluded from all the mean, median, standard deviation, and other calculations. Someone who affirmatively listed "zero" as the amount of income, however, has been included in all income analyses up to this point, but is excluded from the debt-to-income ratio calculations for the reasons explained in the text.

This means that the median family in bankruptcy owes debts slightly greater than three years of income. The mean ratio is an even more staggering 4.35, meaning that the average debts of a bankrupt family are equivalent to more than four years and four months of total family income. This figure contrasts with the equivalent ratio for the populations generally, which in 1998 was reported to be around 0.9.[53]

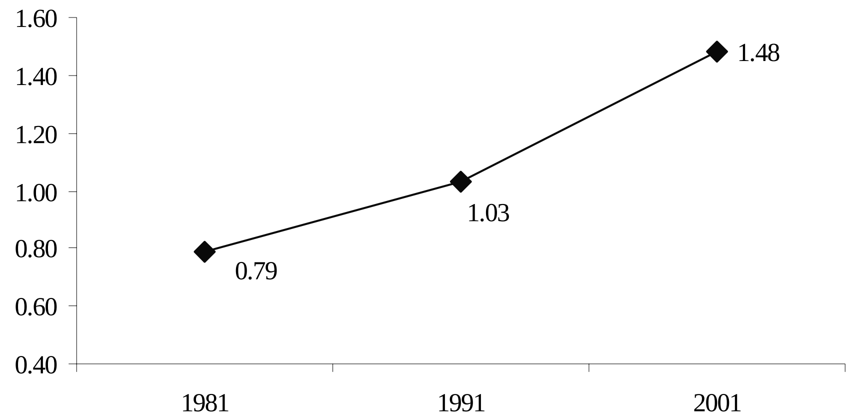
But a total debt-to-income ratio produces its own distortions. The ratio includes all debt. As a result, the past-due doctor's bill, which is due in full right now, and the mortgage debt, which is to be paid out over the next twenty years, are swept into the same calculation. Using this calculation makes the immediacy of the debt irrelevant. Of course, to a family trying to make its regular payments, when the bill is due is highly relevant. To get a truer picture of the immediate pressure on the bankrupt families, we also calculate nonmortgage debt-to-income ratios, excluding all mortgage debt on the theory that mortgages are set up for some longer time payment period and not all due immediately (assuming the family is not in foreclosure). Excluding these long-term debts from the debt-to-income calculation does not remove them from the family's budget. A debtor must still make the monthly payments or face losing the home. Thus, each comparison—total debt as compared to income and nonmortgage debt-to-income—portrays an aspect of the family's financial position, and the two together provide a more complete picture.

The nonmortgage debt-to-income ratio makes clear the urgent problems facing the typical debtor. Nonmortgage debt-to-income ratios for the families in bankruptcy have taken a sharp jump from 1981 to 2001. Median nonmortgage debt in 1981 was 80% of annual income, which meant that the typical bankrupt family owed 9.6 months of income in short-term debt. By 2001, the ratio had ballooned to 1.48, which means that the median family now owed credit cards, car loans, utility bills, and other nonmortgage debts that equaled eighteen months of its total income. To put these figures in perspective, in 2001 it would have taken the median family more than a year to pay off its mostly unsecured, short-term debts, *even if* interest somehow stopped running, fees were not added on, the family applied all of its income to principal payments, and someone else paid its rent and bought its food, gas, and every other necessity.[54]

53. Joanna Stavins, *Credit Card Borrowing, Delinquency, and Personal Bankruptcy*, NEW ENG. ECON. REV., July-Aug. 2000, at 15, 21 tbl.1 (using data from the Survey of Consumer Finances conducted for the Federal Reserve System).

54. Mean short-term debt-to-income ratios, inflated by the wretched circumstances of some of the people most indebted in relation to their incomes, were bad in both time periods, running at more than two years' income for the bankrupt families.

Figure 7. Median Total Nonmortgage Debt-to-Income Ratios for Bankrupt Families, 1981-2001



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

About half of the total nonmortgage debt is identifiable as credit card debt.[55] The remainder is a potpourri of car loans, payday loans, bank overdrafts, hospital bills, past-due utility payments, and other debts. The car loans would be payable over somewhat longer terms, but the terms are highly variable. As to the credit cards, while the credit card companies are usually glad to accept those low, minimum monthly payments, the interest rates are often ruinous for a family with substantial credit card debt, particularly if the family had missed a beat in making on-time payments. The combination of late fees, over-limit fees, default rates of interest, and other charges means that credit cards for families in trouble may easily be running at 24% interest or more.[56]

Credit card debt has become a dominant form of lending in recent years, and it has characteristics that make it quite different from traditional consumer loans.[57] The credit is granted over long periods of time without additional

55. In 2001, the median ratio of credit card debt to total nonmortgage debt on a debtor-by-debtor basis was 0.49, while the mean was a somewhat higher 0.54. *See also* Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Credit Card Debt in Chapter 7 Cases*, 22-10 AM. BANKR. INST. J. 20 (Dec. 2003-Jan. 2004) (reporting median credit card debt of $11,038 and mean credit card debt of $17,738 in Chapter 7 cases filed from 2000 to 2002). That article, like other reports from the Executive Office for United States Trustees, is much appreciated, but it does not provide details of the sample selection, medians, standard deviations, and the like, so we cannot compare it very usefully to our data or to the data from other studies.

56. FRAGILE MIDDLE CLASS, *supra* note 17, at 108-40, 245-50.

57. *Id.*

credit screening, and it is used incrementally rather than borrowed in one sobering moment, offering a chance to go broke one pizza at a time. At the extreme, nearly one in five debtors in 2001 (21.8%) owe more than a year's income in credit card debt alone. In absolute dollar terms, the amounts are remarkable. More than half (56.2%) of all the families owe more than $10,000 in credit card debt at the time they file for bankruptcy. Many owe much more: more than a third (34.6%) owe more than $20,000 in credit card debt. For families with our sample's median income of about $20,000, a credit card debt of $10,000 likely means the family would have to hand over 12% of every paycheck to the credit card companies just to stay even—that is, interest only—without paying down a single dollar of debt.[58] For the third of the debtors who owe $20,000, interest only payments would amount to 24%—or about every fourth paycheck handed over to the credit card companies just to stay even.

The data document that the middle-class families who filed for bankruptcy in 2001 are in even worse financial trouble than their counterparts who filed during the prior twenty years. While the incomes and assets of the newer debtors have increased, these debtors are burdened with far more debt than their predecessors. These data provide a clear answer to the question: has the rise in bankruptcies resulted from less-indebted people filing for bankruptcy? That answer is "no."

With these data in hand, it will be possible to analyze the changes wrought by the 2005 consumer amendments. Will bankruptcy rates decline, as the supporters of the amendments hoped? If so, will it be the best-able-to-pay debtors who cease to file or will exclusion turn on some entirely different factor, such as local legal culture or access to legal services? These are two among many questions that can be addressed with these data as a baseline.

II. THE DECLINING STIGMA HYPOTHESIS

For this Article, we consider that the stigma of bankruptcy means a cost associated with filing for bankruptcy based on injury to reputation or violation of moral standards. Some financially troubled debtors may decide not to seize the benefits of bankruptcy relief because they believe that they will suffer reputational loss (for example, because they will be labeled as "failures" or "deadbeats"), and some will avoid filing because they believe it is morally wrong not to pay their debts no matter the reason.[59] Only the first of these is

---

58. The calculation is based on $1667 a month take-home pay and a 24% annual interest payment to the credit card companies after default, for a monthly interest payment of $200 on $10,000 debt and $400 on $20,000 debt. Typical default rates of interest charged subprime customers are in the 24-39% range, plus monthly over-limit and late-fee charges. As a result of a recent Supreme Court decision, the various charges do not have to be disclosed to consumers as part of the finance charge. *See* Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232 (2004).

59. Aside from the debates we discuss in this Article, there are a number of entirely

really a question of "stigma" based on the perceptions of others, but the public debate has so entwined the two that we refer to stigma as the cost arising from either belief.[60]

The reduced-stigma hypothesis rests on the belief that bankrupt Americans feel less shame today than in the past. The reasons for the decline in shame are rarely articulated. Perhaps modern Americans read about public figures such as Kim Basinger, the rock group TLC, or former Texas Governor John Connally filing for bankruptcy and conclude that filing for bankruptcy is no longer such a despised or wrongful thing to do. Or perhaps the Chapter 11 filings of well-known companies such as K-Mart and United Airlines may further de-stigmatize bankruptcy. Indeed, the credit industry itself seems bent on reducing bankruptcy stigma. The prominent billboard on a main street in Austin, Texas, that said, "BAD DEBT? BANKRUPTCY? NO PROBLEM! Car Loans, call 1-800-***-****," told potential customers—and every other reader—that bankruptcy is not such a terrible event loaded with awful consequences. If bankruptcy is not so bad—in effect, if the stigma is not high—then more people will decide to seek its benefits.

The reports of people who feel little or no shame when they file for bankruptcy are regularly repeated. In a story that was picked up in newspapers across the country, the president of a mortgage company explained, "There is no social stigma to [bankruptcy] any more. . . . They just do it and don't look back, and they're ready to rock and roll and get a bunch of debt again."[61] What might be dismissed as a self-serving industry complaint is made legitimate when national leaders echo similar claims. So, for example, Senator Charles E. Grassley (R-Iowa) described himself as pushing hard for changes in the bankruptcy laws, calling bankruptcy "a moral issue—that people who are gaming the system get off scot-free"[62] and blaming the rise of bankruptcy filings on "bankruptcies of convenience" and the overall decline in stigma.[63]

---

theoretical articles that make arguments about the ill effects of existing consumer bankruptcy law. *See, e.g.*, Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585 (2000) (arguing, inter alia, that lenient bankruptcy laws reduce efficiency by reducing work incentives). We do not address these approaches in this Article, as we await some empirical support for their assertions.

60. Of course, reputational loss may involve moral issues as well, if potential filers believe that others will view their filing for bankruptcy as a moral failure. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963), for the classical analysis of the social effects of stigma. As to bankruptcy, see Leon Anderson & Deborah K. Thorne, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 83 (2006) (showing that some bankrupt debtors delayed filing because of shame; others tried to keep their bankruptcies secret from families, employers, and others).

61. Pamela Yip, *The Bankruptcy Machine Assembly Line Fed by Easy Credit, Eager Lawyers and Life's Misfortunes: As Stigma Lessens for Debtors, Lenders Call for Stiffer Laws*, DALLAS MORNING NEWS, Dec. 12, 2004, at 1D (quoting Craig Jarrell, President of Pulaski Mortgage Co.'s Dallas region).

62. *Id.* (quoting Sen. Charles Grassley (R-Iowa)).

63. *See Bankruptcy Reform: J. Hearing Before the Subcomm. on Commercial and*

Some academics have seized on the same theme, blaming a decline in stigma on the rising bankruptcy rates.[64]

The change in bankruptcy filings over the past generation has been nothing short of extraordinary. As we noted in the Introduction, if the bankruptcy filing rate had remained the same, filings today would be at 403,000. The difference between the projected filing rate based on 1981 filings and the actual filing rate is illustrated in Figure 8.

If changes in stigma alone were to account for the higher rate of bankruptcy filings, then nearly twelve million bankruptcies over the past two decades could be chalked up to changes in moral standards. If just half of the increased filings were the result of changing attitudes, it would represent a sea change in American values in a very short period.

Although the claim of declining stigma is empirical in nature, it has often been repeated as a self-evident fact with no evidence required to back it up.[65] Even the economists who took an empirically based approach had to make a leap of faith: they tried to account for the rise in bankruptcy filings by noting changes in interest rates or unemployment figures, then concluded that whatever portion of the rise in filings that these data would not explain must be the result of a decline in stigma.[66]

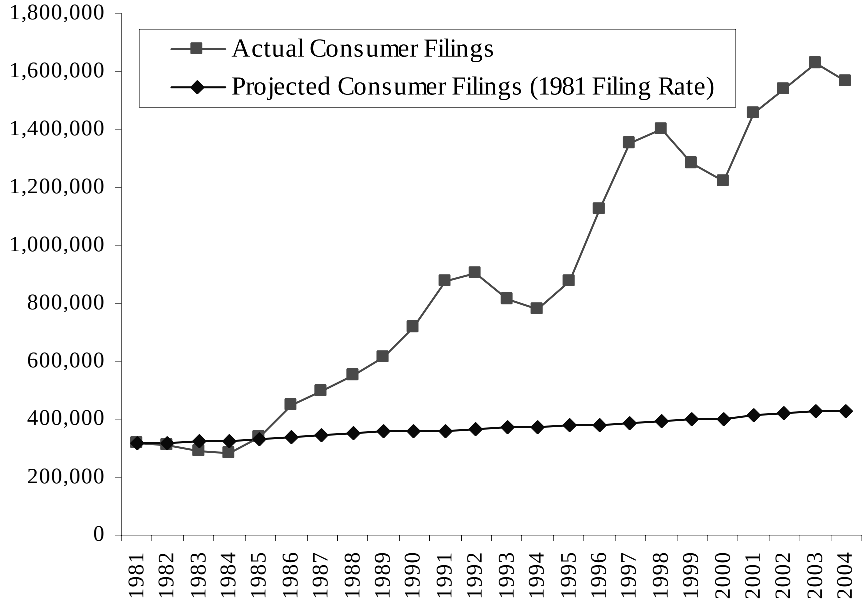
Administrative Law of the H. Comm. on the Judiciary and the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary, 106th Cong. 1-5, 22-23 (1999) (statements of Rep. George Gekas (R-Pa.), Sen. Charles Grassley (R-Iowa) and Rep. Rick Boucher (D-Va.)). Congressman Boucher is one of many who have used this term: "Bankruptcies of convenience are driving this increase [in bankruptcy filings]. Bankruptcy was never meant to be used as a financial planning tool, but it is becoming a first stop rather than a last resort . . . ." *Bankruptcy Revision: Hearing on Bankruptcy Reform and Financial Servs. Issues Before the S. Comm. on Banking*, 106th Cong. 11 (1999) (statement of Rep. Rick Boucher (D-Va.)).

64. *See, e.g.*, Buckley & Brinig, *supra* note 16, at 200-06 (finding that high divorce rates in part show the decline in bankruptcy stigma is indirectly related to the decline of stigma of promise-breaking); Fay, Hurst & White, *supra* note 15, at 716-17 (finding that bankruptcy filings increase based on locality of the debtors rather than adverse events); Jones & Zywicki, *supra* note 11, at 216 n.149 (citing Buckley and Brinig study).

65. Perhaps it was an effort to give some factual gravitas to his argument that caused Senator Grassley to assert that he had seen a private poll showing that most Americans believe stigma has declined. In his floor statement on the Banking Reform Act of 1999, the Senator stated, "According to a poll conducted by the Democratic polling firm of Penn & Schoen on perceptions of bankruptcy, 84 percent of Americans think that bankruptcy is more socially acceptable today than a few years ago." 145 CONG. REC. S13,930, S13,963 (1999). We should note that, as far as we can determine, the poll mentioned by Senator Grassley was proprietary and has never been published. We did not receive a response to emails to the polling firm requesting information.

66. For example, Fay, Hurst, and White, *supra* note 15, collectively offer negative evidence—that is, filings are rising and they did not find another reason, so declining stigma must be the cause. Luckett, *supra* note 16, and Gross and Souleles, *supra* note 15, use different databases but the basic approach is the same. Buckley and Brinig, *supra* note 16, at 201, use a variation on the approach, trying to distinguish bankruptcy filing rates by state based on presumed markers of sensitivity to stigma, such as the presence of different

Figure 8. Actual and Projected Consumer Bankruptcy Filings, 1981-2004



Sources: American Bankruptcy Institute, Annual Business and Non-Business Filings by Year (1981-2005), http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=18753.
U.S. Census Bureau, Households by Size: 1960 to Present (May 25, 2006), http://www.census.gov/population/socdemo/hh-fam/hh4.pdf.

We understand that it is difficult to measure stigma directly, but we decided to test the stigma hypothesis in another way, taking advantage of our unique dataset covering twenty years of bankruptcy filings. If declining stigma accounts for the dramatic increase in the rate of bankruptcy filings, then there should be a noticeable change in the financial circumstances of bankruptcy debtors over the past twenty years. That is, the reduced-stigma hypothesis must postulate that for the numbers of filings to rise so dramatically, some people in financial difficulty who did not file for bankruptcy in 1981 did file in 1991 and that even more such people filed in 2001. The reduced-stigma hypothesis assumes that the people who decided not to file in the earlier years were deterred by the prospect of the reputational loss or moral constraint of stigma. In earlier years, those potential filers must have regarded the cost associated with stigma as exceeding the benefits of bankruptcy relief.[67] If the reduced-

religious groups (e.g., that Catholics feel stigma more acutely than Methodists).

67. It should be noted that there is no reason to think that the benefits of bankruptcy

stigma hypothesis is correct, in more recent years many of the people who would have been stigma-deterred in earlier times would have perceived lower reputational costs and have chosen to file, thus swelling the ranks of bankruptcy filers.

If there were such debtors—stigma-deterred in 1981, but less deterred in 1991 and less still in 2001—they would fall into two categories: those who needed bankruptcy relief and those who arguably did not. The first category would consist of the pool of debtors who shared the economic characteristics of the 1981 and 1991 debtors and who might be less unwilling to file for bankruptcy with each passing year. Their increased willingness to file would help fuel the rise in bankruptcy filings. No one, however, has argued for the existence of this effect of reduced stigma, and presumably there would be little policy support for deterring filing by persons who truly need relief.[68] In short, this is not the group targeted by politicians and moral critics. Instead, the advocates of the reduced-stigma hypothesis blame the decline in stigma for swelling the bankruptcy rolls with debtors who could repay and who, in an earlier time, would have chosen to do so.[69]

The change-over-time test of the lower-stigma hypothesis rests on the premise that it is highly unlikely that the needy debtors would perceive a reduced stigma when the better-off debtors did not. If stigma changes, it changes for everyone. Indeed, as Professor Zywicki notes, "Because the financial benefit of bankruptcy is the largest for high-income and high-wealth debtors, the importance of social norms in restraining bankruptcy filing is also highest for this same group. If those constraints weaken, therefore, the impact at the margin in terms of higher filings will be largest for high-income and high-wealth individuals."[70] Thus Professor Zywicki posits a testable

relief increased from 1981 to 2001. Indeed, if anything, those benefits may have been reduced, especially by the 1984 amendments to the Bankruptcy Code. *See* Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 715-16 (1999).

68. *See, e.g.*, 151 CONG. REC. S1834, S1856 (2005) (statement of Sen. Charles Grassley (R-Iowa)) ("In this way, the bankruptcy reform bill preserves the principle of a fresh start for people who have been overwhelmed by medical debts or sudden, unforeseen emergencies. . . . The bill preserves fair access, then, to bankruptcy for those people who are truly in need."); 151 CONG. REC. H1993, H2068 (2005) (statement of Rep. Eric Cantor (R-Va.)) ("[W]e have before us today a bill that provides a safety net for people who have lost a job, had health problems, or served in the military and cannot repay their debts. It gives them the opportunity for a fresh start while continuing to hold accountable those who are able to repay their debts.").

69. *See supra* notes 15-16 and accompanying text.

70. Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1097 (2005). Professor Zywicki makes the same point elsewhere, alone and in conjunction with Judge Jones. *See* Jones & Zywicki, *supra* note 11, at 220 ("As shame and stigma decline, therefore, the marginal impact will be felt most heavily with respect to upper-income debtors."); Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393, 427 (2001) ("Thus, restraints on opportunism, such as social stigma and individual morality, become increasingly important as income rises.").

hypothesis: if the reduced-stigma hypothesis has explanatory power, then it should be possible to detect the presence of substantially greater numbers of better-off debtors filing for bankruptcy over time.

Our database spans twenty years, encompassing the period in which moral critics have been in full-throated denunciation of debtors who file for bankruptcy. Ideally we would like to have more data points (what empiricist wouldn't want more data points?), but earlier studies give us some confidence that our three studies are not missing some key variables. The economists who studied bankruptcy filing rates and concluded that declining stigma must be to blame have already shown that the influence of inflation, unemployment, boom-and-bust, etc., had little measurable effects on the subsequent bankruptcy filing rates.[71] While data from three points in time may not pick up every possible economic and social variation, they can demonstrate an important trend line.

It should be easy to locate the presence of more can-pay debtors in bankruptcy. The most direct route is through the debt-to-income ratio. If the bankruptcy ranks have been swelled even in part by the presence of significant numbers of can-pay debtors, then the median debt-to-income ratio for the group should fall. The data, however, tell a different story. The ratio has risen sharply from 1.4 to 3.0 for total debt-to-income and similarly from 0.79 to 1.5 for nonmortgage debt-to-income.[72] Other measures, such as changes in income or the debt-to-asset ratio show similar indications that the debtors filing in 2001 were much worse off than their counterparts in 1981.[73]

There remains the possibility that the aggregated numbers and the use of average debt-to-income ratios are masking the presence of a small but growing number of bankrupts who could pay. Alternatively, there could be so many new filers who are even worse off than their predecessors that they make debtors as a whole worse off—even if there were a subset of debtors who were better off. To test those related propositions, we examined the lowest (best-able-to-pay) decile of the 2001 sample for total debt and for nonmortgage debt.[74] We chose 10% in part because the proponents of tougher bankruptcy laws have recently used the 10% figure as an estimate of those who would be forced to pay under the recently adopted amendments.[75] It also represented the outer limit of our

71. *E.g.*, Luckett, *supra* note 16.

72. *See supra* Figures 6 and 7.

73. *See supra* pp. 221-23, 227.

74. To construct this measure, we arrayed all debtors by their debt-to-income ratio and chose the 10% who had the lowest debt-to-income ratio—that is, they had the smallest debt relative to their income. Because their relative debt level is the lowest among the bankrupt sample, we offer them as the most likely to be able to pay their debts. We analyzed the data both for the lowest decile by total debt-to-income ratios and for the lowest decile by nonmortgage debt-to-income ratios. *See supra* Part I.D.

75. Senator Arlen Specter (R-Pa.) stated:

> Unfortunately, at the same time, there are some who use bankruptcy as a means of avoiding debts they have the ability to pay. Some bankruptcy filers have the ability to pay a significant

estimate of the number of 1981 debtors who might be able to pay their debts at a high level of hardship.[76] The results of our investigation of the lowest decile of 2001 debtors best able to pay their total debts are summarized in Figure 9.[77]

Instead of finding more can-pay debtors in bankruptcy, our data suggest that even the most-able-to-pay debtors are in worse shape in 2001 than in 1981. In 1981, the top 10% of bankrupt debtors best able to pay owed an average of 17% of their annual incomes in nonmortgage debt; in 2001 they also owed 17% of a year's income. But the ratio of total debts to annual income got significantly worse: the average total debt-to-income ratio rose from 30% of income to 63%.

These data present one more point at which the data are inconsistent with the declining stigma hypothesis. There is no evidence of a cohort of convenience filers who in 2001 were willing to enter bankruptcy with lighter debt burdens because they were no longer troubled by the stigma imposed by bankruptcy in times past. It would be hard to produce more compelling evidence that the rise in bankruptcy filings cannot be attributed in any significant part to a decline in the stigma associated with bankruptcy. Stigma in 2001 might have been lower than it was in Padua in the sixteenth century, but these data are consistent with the conclusion that it remains quite robust in twenty-first century America.

> portion of their debts, but the current bankruptcy system, which presumes that most people are acting honestly, does not require them to do so. At a recent Judiciary Committee hearing on the bill, the expert testimony was that up to 10 percent of people who file for bankruptcy have the ability to pay for at least part of their debts.

151 CONG. REC. S1726, S1779 (2005). Similarly, Senator Orrin Hatch (R-Utah) stated:

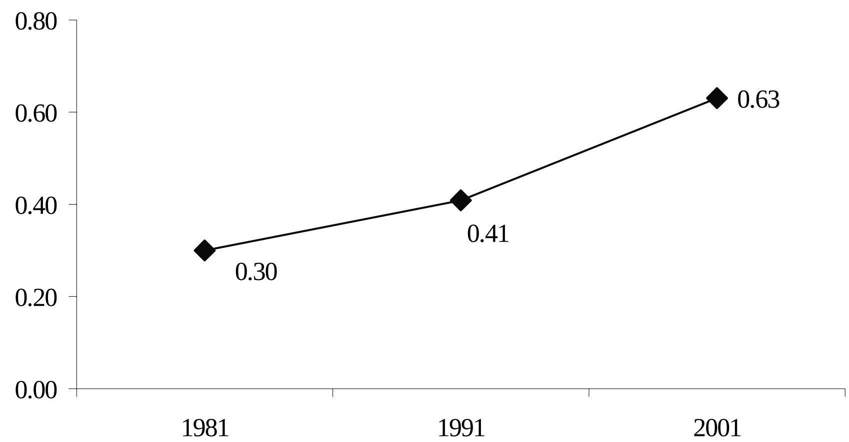
> The problem with this is, according to the FBI, about 10 percent of these chapter 7 filings are fraudulent. . . . One can understand the financial motive of a debtor running up his or her unsecured credit card debt to pay down his or her secured mortgage just before filing chapter 7, even though he or she knows full well the debts will never be paid back.

151 CONG. REC. S1834, S1842 (2005). It turns out that there was no FBI study. *See* Letter from Michael C. Mines, Section Chief, Integrity in Government/Civil Rights Criminal Investigative Division, Federal Bureau of Investigation, to Jeffrey W. Morris, Professor, University of Dayton School of Law (May 12, 2005) (on file with authors).

76. AS WE FORGIVE OUR DEBTORS, *supra* note 17, at 212. Our empirical data from 2001 suggest a much lower percentage who will be directly affected by the means test. In 2001, only 8% of the debtors earned enough income to begin the means test calculation, and presumably some proportion of those would have allowable expenses that would exempt them, suggesting that a much smaller percentage would be screened out. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 161 (5th ed. 2006). This result is broadly consistent with Culhane & White, *supra* note 31, at 31.

77. Note that the two deciles we analyzed consist mostly of different people. For example, in the 2001 sample, only eleven debtors out of 120 were in the lowest (best-able-to-pay) deciles for both total and unsecured debt.

Figure 9. Total Debt-to-Income Ratios for Best-Able-to-Pay Decile of Bankrupt Families, 1981-2001



Source: 1981, 1991, 2001 Consumer Bankruptcy Project

Not all critics of current bankruptcy policy subscribe to the simple model of stigma decline advanced by Congress, the economists, and the credit industry. The Honorable Edith Jones and Professor Todd Zywicki also argue that a combination of more permissive bankruptcy laws and reduced stigma have pushed up bankruptcy filings, but they move the declining stigma effect to an earlier point in the debtors' financial lives. Jones and Zywicki focus their attention not on the moment of filing for bankruptcy, but instead on the time when people first decide whether to incur debts.[78] They claim that the reduced stigma of filing bankruptcy influences people to charge irresponsibly, knowing they can file for bankruptcy to eliminate their debt with a lower reputational cost. With this variant on the hypothesis, Jones and Zywicki hope to neutralize the data showing that debtors file for bankruptcy because they have high debt loads. In effect, according to Jones and Zywicki, the high debt loads are themselves evidence of declining stigma.

Because the Jones-Zywicki claim relates to pre-bankruptcy behavior, it cannot be fully tested with bankruptcy data. But it is undermined by the same logic discussed above with regard to bankruptcy debt. If the reduction in stigma is so substantial that consumers are plotting their bankruptcies as soon as they get that new credit card—and years before they actually file—then that same reduction in stigma should have measurable effects at other points in time. For example, some consumers might delay filing until they have maxed out all their

78. Jones & Zywicki, *supra* note 11, at 209 ("If discharge of debts is easy in bankruptcy, debtors will incur more debt. Conversely, if obtaining bankruptcy relief is difficult, debtors will be more reluctant to incur debts.").

borrowing options, thus driving up the number of high-debt filers that our data identify. But if stigma has been largely erased, there should also be consumers who are lightly burdened and facing aggressive collection pressures, who would decide that a quick and painless bankruptcy filing is more attractive than making even a modest effort to repay. A change in stigma cannot be confined to a target group (shoppers who take on more risk), while it has no effect on others for whom financial problems are more immediate (people facing modest financial pressures). Any real change in the effects of bankruptcy stigma should be reflected in the new mix of filers—more with high debts and more with low debts. But these data show that the latter category is missing, sharply undercutting the debt-incurring hypothesis. The Jones-Zywicki hypothesis has no greater vitality than the simple model offered by Congress and the credit industry.

The larger point to be made about the Jones-Zywicki hypothesis is that it too is sheer speculation, unburdened by evidence. Like the argument that declining stigma has fueled the rise in bankruptcy filings, the argument is circular: filings are up because stigma is down, and we know that stigma is down because filings are up. Until the proponents of the Jones-Zywicki hypothesis or of any other declining stigma hypothesis come forward with some hard facts to support their claims, it is hard to take them seriously.

There are alternatives to the declining stigma hypothesis that have greater empirical support. One possibility, for example, is that the level of stigma has stayed steady but the number of bankrupt families has risen because the number of troubled families has risen. The declining stigma hypothesis, as discussed here, assumes that the current number of families filing for bankruptcy is normatively too high. It does not explicitly consider changes in the number of heavily indebted families in the larger population of heavily indebted families, of which the bankrupt filers are a subset. There is evidence, however, that the United States contains a very large population of families with high debt-to-income ratios who could benefit financially from bankruptcy but who do not file. Economist Michelle White concluded that fully 17% of American families would profit from a bankruptcy filing, but only about 1% of families actually file.[79] It seems that something other than a cool, rational financial calculation keeps these people from filing. Perhaps stigma remains a robust deterrent to filing for bankruptcy.

Finally, there is the surprising possibility that stigma, rather than having declined or remained steady, might even have risen. We turn to this possibility in the following Part.

---

79. Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 702 (1998) (claiming that about 17% of all households in the United States would profit from a bankruptcy filing). By comparison, the bankruptcy filing rate in the United States in 1998 was about 1%. *See* Admin. Office of the U.S. Courts, *supra* note 8.

III. THE INCREASING STIGMA HYPOTHESIS

Any number of people are willing to link rising bankruptcy numbers with the claim that bankruptcy stigma has declined. We offer another interpretation of the data: perhaps stigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while *increasing* stigma may have prevented even more distressed families from filing. In other words, if more families are in financial trouble, it may be that a shrinking—not a growing—proportion of those troubled families are opting for bankruptcy. The rising levels of distress would then produce an increase in bankruptcies, net of the reduction caused by increased stigma.

The data presented here show that bankrupt debtors and their families are in more financial trouble than their counterparts of ten or twenty years ago. The subset of troubled debtors who decide to file for bankruptcy have lower incomes and higher debts than their counterparts from earlier times, and the cohort of can-pay debtors may have shrunk. These data suggest that families may be more reluctant to file for bankruptcy than ever before. One reason might be that the stigma of a bankruptcy filing has actually increased.

How could it be that stigma has increased over the past twenty years? One possibility is the greatly increased likelihood that a bankruptcy filing will become public. Most people want to conceal the fact of their bankruptcy filings from at least some of their families, coworkers, friends, and neighbors.[80] In 2001, 84.3% of families filing for bankruptcy indicated that they "would be 'embarrassed' or 'very embarrassed' if their families, friends, or neighbors learned of their bankruptcy."[81] While these data do not explain whether there has been any change over time in stigma, they do establish that families today hope that no one will learn of their bankruptcy filings. And the odds that someone will learn of the filing have changed over time.

While filing has always been a matter of public record, the fact is that in 1981, most people could file for bankruptcy secure in the knowledge that it would be difficult for a nosy neighbor or concerned family member to learn of the filing. Bankruptcy records were all on paper, typically behind the desk in a federal courthouse. While some local newspapers published local bankruptcy

---

80. Anderson & Thorne, *supra* note 60, at 84-85 (documenting that in interviews in 1999, people were quite fearful of having their bankruptcy filings discovered).

81. TWO-INCOME TRAP, *supra* note 17, at 213 n.13. In this book, Warren and Tyagi cite an interviewee:

> One California woman filed for bankruptcy after she lost her job and was on the brink of losing her home. She got her second chance, but the blow to her sense of self-worth was deeply painful. "I will *never* file for bankruptcy again. I will let them take my home or I will go without health care and food, and die and stand before Jesus before I do it again. It's a matter of self-worth and pride."

Id. at 74-75.

filings, most did not, and debtors could often slip in and out of bankruptcy with their secret safe.

In the age of the Internet, bankruptcy filings have gone public. Today anyone can google the names of the neighbors, coworkers, or the guy dating someone's sister. Bankruptcy filings now pop up along with wedding notices and real estate purchases. Some Internet services advertise that they will assemble a package to tell paying customers about their neighbors—including the fact of their bankruptcies. Anyone in financial trouble in the twenty-first century must consider the much greater likelihood that there are no secrets. For some people, such information could be a substantial deterrent to filing. Only when there was no hope of salvaging their financial lives without bankruptcy would some finally consider bankruptcy an option.

The new and well-publicized availability of free annual credit reports has also offered an opportunity for the credit bureaus to remind consumers of the importance of an individual's credit score.[82] Not only does the score affect whether a consumer gets credit and at what interest rate, but the score is also used by insurance companies to set premiums and by landlords and employers to judge worthiness as a renter or employee.[83] A substantially lowered score as a result of bankruptcy is a tangible type of stigma—not quite a scarlet letter, but a quantitative measure of reputational loss.

Marketplace Ministries may be representative of many employers. The business is one of two companies that provides chaplains to corporations that then offer their services to their employees.[84] It is an evangelical outfit founded on a positive message of forgiveness and redemption. To attract potential ministers to their growing business, Marketplace Ministries advertises online, including warm expressions of their openness to both male and female chaplains and their willingness to consider people with extensive "life experience." The company warns, however, that it will conduct criminal background checks, and that it does not want drinkers or smokers. The one other disqualification: bankruptcy.[85] Forgiveness goes only so far.[86]

---

82. Experian, one of the three major credit reporting services, advises consumers that their credit score can be used by a number of third parties, and Experian offers advice on raising one's score. *See* Experian, Credit Score Basics, http://www.experian.com/credit_score_basics/index.html. Avoiding bankruptcy is a conspicuous piece of advice.

83. Deborah Thorne, Personal Bankruptcy and the Credit Report: Conflicting Mechanisms of Social Mobility (Nov. 2006) (unpublished manuscript, on file with authors).

84. The other is Corporate Chaplains of America.

85. *See* Marketplace Ministries, Inc., Summary of Marketplace Ministries' Chaplain Qualifications, http://www.marketplaceministries.com/chaplains/qual.html.

86. Anecdotes about stigma prove little, except that people are talking about stigma. The tax professors' blog contributes this example:

> Stripper walks into my husband's bankruptcy law office for a consultation. Upon hearing that she has not filed tax returns for 10 years, my husband suggests that bankruptcy might not be the best option. The stripper confesses that she's relieved to hear this, as she was concerned about the stigma of bankruptcy.

Posting of Paul L. Carson to TaxProf Blog, *Strippers, Tax Liabilities, and Bankruptcy*, Stigma might also have increased as a result of the credit industry's relentless public relations campaign over the past decade. Beginning with its introduction of a bankruptcy bill in 1997, the industry has hired multiple public relations firms to drive home the message that deadbeats now populate the bankruptcy courts. Even earlier, a group of creditors had organized an effort to proclaim bankruptcy to be a "ten-year mistake" to remind the consumer that a bankruptcy remains on their credit report for ten years. Consumers who searched the word "bankruptcy" on the Internet would get a brightly colored banner that proclaimed bankruptcy to be a ten-year mistake and offered a web address with details.[87]

In 1981, someone considering bankruptcy was unlikely to have read a single story in a newspaper or magazine about families in bankruptcy because such stories were almost nonexistent. Moreover, such a person would never have seen a full-page advertisement claiming that people filing for bankruptcy cost the rest of us $400 in costs passed along.[88] By 2001, someone considering bankruptcy would have been bombarded with such stories. Many carried the repeated claims of senators and other luminaries that those in bankruptcy are cheaters and charlatans. Of course, many of the stories would have been deeply sympathetic, but even those stories might have given troubled families pause. The stories were so sympathetic—families with dying children and years of joblessness[89]—that someone merely three months behind on the mortgage and carrying a year's worth of short-term debt might have concluded bankruptcy was for people with bigger problems.

No data have been advanced to support the declining stigma hypothesis, beyond the increased number of bankruptcies. In fact, one of the principal

---

http://taxprof.typepad.com/taxprof_blog/2006/03/strippers_tax_l.html (Mar. 10, 2006). So far, we have not discovered any comparative data about how strippers felt about the stigma of bankruptcy twenty years ago.

87. This marketing effort is described at Bankruptcy and Troubled Company News, Battle Begins in the Bankruptcy World (Sept. 6, 1996), http://bankrupt.com/TCR_Public/960906.MBX. Others have also picked up the term "ten-year mistake" in their consumer education. *See, e.g.*, Bellco Credit Union, Bankruptcy Information, http://www.bellco.org/bankruptcy.asp; CBM Credit Education Foundation, Inc., Bankruptcy: A Ten-Year Mistake, http://www.cbmfoundation.org/files/13.doc.

88. *See, e.g.*, Elizabeth Warren, *The Phantom $400*, 13 J. BANKR. L. & PRAC. 77, 77-78 (2004); *see also* Elizabeth Warren, *The Market for Data: The Changing Role of the Social Sciences in Shaping the Law (Fairchild Lecture)*, 2002 WIS. L. REV. 1, 13.

89. Three recent stories in leading newspapers are instructive. *See* Alan Freeman, *American Families Are Sick to Debt*, GLOBE & MAIL, June 11, 2005, at F4 (mother who escaped from an abusive relationship, lost her vision in one eye, was diagnosed with multiple sclerosis, quit her medications to save money, her son quit school to help the family, and the family is now losing its house); Gail Hollenbeck, *As Death Nears, She's Totally at Peace*, ST. PETERSBURG TIMES (Florida), Nov. 19, 2005, at 6 (mother dying, father with diabetes fell seventeen feet at work and suffered brain damage, and family lost insurance); John Leland, *When Even Health Insurance Is No Safeguard*, N.Y. TIMES, Oct. 23, 2005, §1, at 1 (seven-month-old baby diagnosed with rare immune disorder costing the family hundreds of thousands of dollars).

proponents of the hypothesis has inadvertently provided perhaps the best available direct evidence to prove the negative, that bankruptcy has not lost its stigma. Professor Michelle White accomplished a feat that we have never been able to do: adding a question concerning bankruptcy to the famous Panel Study of Income Dynamics (PSID) conducted by the University of Michigan.[90] Because that study represents a national sample thought to be fairly representative of the entire American population, its data are taken especially seriously. White and her coauthors argue that reduced stigma is an important factor in increased bankruptcy filings.[91]

Yet in the data reported from the PSID bankruptcy question, the proportion of respondents in the panel sample who admitted to filing for bankruptcy is about half that of the actual nationwide filing rate.[92] Given that the panel is thought to be a representative sample, it would appear that about half the panel respondents who had filed for bankruptcy lied in order to conceal their bankruptcies from the panel investigators. Many of these respondents were evidently willing to tell interviewers how much they earned each month, who was the natural and/or adoptive father of the children in the household, whether anyone in the household had applied for public assistance (and, if they had, whether they had been forced off public assistance and why), if a spouse or live-in partner had left, how much money they had in the bank, and a host of other personal information.[93] When it came to admitting to a bankruptcy filing, half of them balked.[94] Again, the data White used were collected only once, so they do not reveal any changes over time, but they do suggest that the stigma of bankruptcy was alive and well at the end of the twentieth century.

Additional evidence comes from another national survey that at two points in time measured reluctance to admit to a bankruptcy filing. The highly

---

90. The study describes itself:

> The Panel Study of Income Dynamics (PSID), begun in 1968, is a longitudinal study of a representative sample of U.S. individuals (men, women, and children) and the family units in which they reside. It emphasizes the dynamic aspects of economic and demographic behavior, but its content is broad, including sociological and psychological measures. As a consequence of low attrition rates and the success in following young adults as they form their own families and recontact efforts (of those declining an interview in prior years), the sample size has grown from 4,800 families in 1968 to more than 7,000 families in 2001. At the conclusion of 2003 data collection, the PSID will have collected information about more than 65,000 individuals spanning as much as 36 years of their lives.

Panel Study of Income Dynamics, An Overview of the Panel Study of Income Dynamics, http://psidonline.isr.umich.edu/Guide/Overview.html; *see also* Fay, Hurst & White, *supra* note 15, at 708.

91. Fay, Hurst & White, *supra* note 15, at 710, 716.

92. "[T]he PSID filing rate is only about half as high as the national rate." *Id.* at 711.

93. For the questionnaires, see Panel Study of Income Dynamics, Main Data, Documentation, and Questionnaires, http://psidonline.isr.umich.edu/Data/zipCore.aspx.

94. It is possible, of course, that the PSID respondents concealed other unsavory facts about themselves. The point here, however, is that any stigmatized behavior is likely to be concealed, and it appears that about half of the families concealed their bankruptcy filings suggesting that the families feel substantial stigmatization.

respected National Opinion Research Center (NORC) of the University of Chicago recently released a report comparing negative life events reported by families in 1991 and again in 2004.[95] In both national samples, the interviewers asked if the person had filed for bankruptcy. The positive response rate of 1.2% remained steady from 1991 to 2004, a time when the actual bankruptcy filing rate rose by 70%. This is additional evidence that people may be more reluctant to admit to filing for bankruptcy than they were in a pre-Internet era just thirteen years earlier.[96]

The NORC survey offers other glimpses into the stigma associated with bankruptcy. The survey provides a categorical ranking by respondents from zero to 100 of how serious an event is. Going bankrupt is 83.5. That places it as less serious than death of a child (94.3) or being forced to live on the street or in a shelter (86.7) but more serious than death of a close friend (80.8) or separating from a spouse (82.1).[97] In a separate magnitude evaluation, in which being fired or permanently laid off is worth 200 and a respondent is asked to rank each negative event against that baseline, bankruptcy rated a 532.9.[98] By both measures, and given that none of the events being rated were good, bankruptcy is perceived as a very bad thing. Stigmatized, one might say.

Direct measures of changes in stigma over time are difficult to construct, but three pieces of data line up the same way. The declining fortunes of those who are willing to file for bankruptcy, the significant underreporting of bankruptcy, and the characterization of bankruptcy as a terrible event only slightly less awful than losing a child all point to the possibility that stigma might be increasing even as bankruptcy filings continue to climb.

A research economist for the Federal Reserve Bank of Richmond advances yet another test of stigma. Kartik Athreya developed a model to predict consumer bankruptcy filing rates based on the supply-side insight that if borrowers were more willing to default because of the decline in stigma, then lenders would increase interest rates to offset the increase in risk.[99] He explains that "a price increase should be associated with smaller debt holdings across households," a hypothesis that is flatly contradicted by the data collected by the Federal Reserve.[100] That is, his model would suggest that less credit should be extended if the cost of default has actually risen, whereas in fact more and more

95. TOM W. SMITH, NAT'L OPINION RES. CTR., TROUBLES IN AMERICA: A STUDY OF NEGATIVE LIFE EVENTS ACROSS TIME AND SUBGROUPS 10 (2005), *available at* http://www-news.uchicago.edu/releases/05/051228.troubles.pdf.

96. The 1991 bankruptcy filing rate was 9.25 per thousand households, or 0.925%. The reported rate for 1991 was 1.2%, or less than three tenths of a percent difference. *Id.* at 23 tbl.2. In 2004, the bankruptcy filing rate was 1.4%, while the response rate in the NORC survey remained steady at 1.2%. *Id.* The change from slight overcount to undercount is consistent with a rise in stigma.

97. *Id.* at 32.

98. *Id.*

99. Athreya, *supra* note 11, at 3.

100. *Id.*

credit has been extended (and accepted) as the number of bankruptcy fillings has risen.

IV. ALTERNATIVE EXPLANATIONS

Our claim is modest: the data are consistent with the hypothesis that during a period when bankruptcy reporting became public and the media were filled with exhortation and stories about bankrupt families, the stigma of filing for bankruptcy may have increased. Over time, as more families file, stigma may fall. Or perhaps new events will cause stigma to rise. We cannot say. What we can say is that our data are more consistent with a rise in stigma than the oft-asserted decline.

If there has been a rise in stigma, the increase in filings in the face of that increase might best be explained by an increase in the level of financial hardship. Exploration of that proposition would take much longer than space permits here, but we advance a simple hypothesis with an unexpected twist that we think shows particular promise.

The data are consistent with the proposition that bankruptcy filings have increased because a much larger proportion of American families are in serious financial trouble. Despite the fact that it was largely overlooked in the recent political debates over changes in the bankruptcy laws, this hypothesis is as straightforward as the hypothesis that hospital admissions rise in times of epidemics. If more people are filing, perhaps that is because more people are in genuine financial distress.[101]

There are a number of ways to test the greater-stress hypothesis. One is to look at other data that demonstrate increasing financial difficulties for families. So, for example, mortgage foreclosure rates have climbed from 0.52 in 1980 to 0.73 by the close of 2001.[102] Credit card debt ballooned at the same time that savings fell, so that many more families were juggling more payments without the security of any backup cash if something went wrong.[103] Families report an increase in debt collection calls. Currently one in every seven American families reports being pressured by creditors to pay late bills, a 26% increase in little over a decade.[104] Other research shows that a significant proportion of the

---

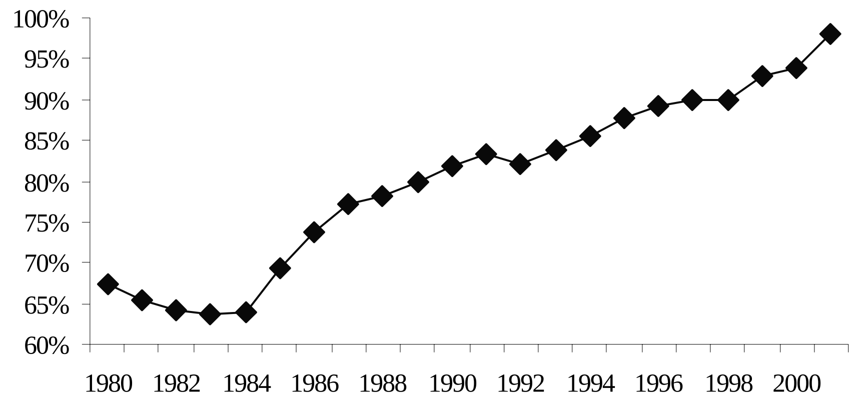
101. *See* Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1083-84 (1998).

102. Mortgage Bankers Association, Delinquency and Foreclosure Rates (2004) (data spreadsheet of mortgage foreclosure rates).

103. From 1981 to 2001, total outstanding consumer debt (in 2001 dollars) increased from $650 billion to $1645 billion. Consumer Installment Credit, 69 FED. RES. BULL. A42 (1983) (adjusted to 2001 dollars); Consumer Installment Credit, 79 FED. RES. BULL. A38 (1993); Consumer Credit, 88 FED. RES. BULL. A36 (2002). The savings rate, a solid 11% of take-home pay in the mid-1970s, shrunk to a negative 1% by 2002, while credit card debt climbed from 4% to 12% in the same time period. SMR RESEARCH CORP., THE NEW BANKRUPTCY EPIDEMIC: FORECASTS, CAUSES, AND RISK CONTROL 14, 94 (2001) (credit card debt calculated as revolving credit per adult divided by income per adult).

104. SMITH, *supra* note 95, at 23 tbl.2. The number of families reporting that they were

Figure 10. Aggregate Household Debt as a Percentage of Aggregate Personal Income in the U.S., 1980-2001



Source: Federal Reserve Bank of St. Louis, Federal Reserve Economic Data (FRED), http://research.stlouisfed.org/fred2/.

bankruptcies labeled "non-business" are actually small business failures,[105] and the proportion of families indicating that their own business was losing money or failing jumped by more than 50% between 1991 and 2005.[106] These data demonstrate that the increase in bankruptcy filings did not occur in isolation. If the declining stigma hypothesis accurately explains the rise in bankruptcy filings, then those filings should have risen while other indicators of financial distress remained steady. Instead, the rise in bankruptcy filings was part of a larger mosaic that indicates growing financial stress among the middle class. The non-bankruptcy data are inconsistent with the declining stigma hypothesis, but they provide support for the increasing financial difficulty hypothesis.

The growing signs of financial pressure are no surprise, given the debt loads that families are trying to manage. From the early 1980s to the present, Americans' debt burden compared with their disposable income has risen considerably.[107] At the same time, increased layoffs, high divorce rates, lack of

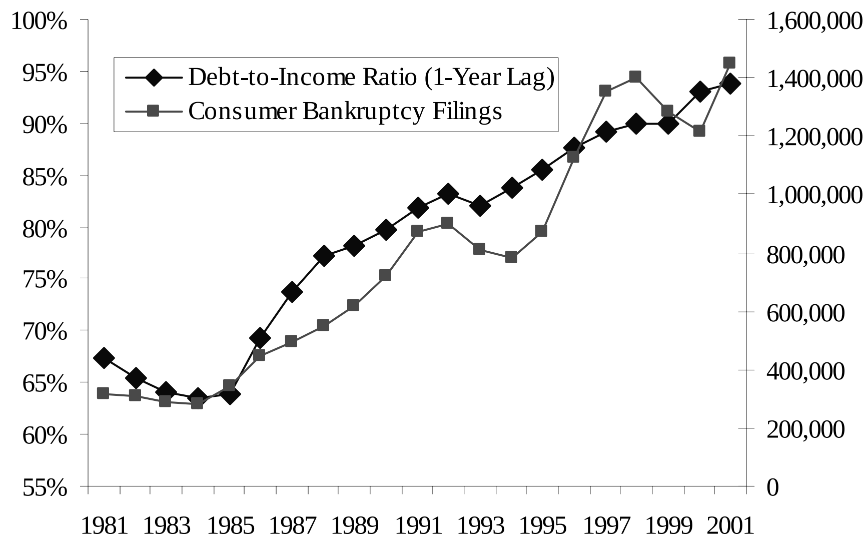
being pressured by their creditors to pay late bills rose significantly from 12.5% of the 1991 sample to 15.8% of the 2004 sample.

105. Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743, 745-48 (2005). It is also possible that some of these people saw their bankruptcies as a "business bankruptcy" and so did not believe they needed to answer yes to the question about "personal bankruptcy," even though the courts might not have made that distinction. *Id.*

106. SMITH, *supra* note 95, at 22 tbl.2. The number of respondents indicating that their business (farm or professional office) was "losing money or failing" increased from 2.1% to 3.2% of those surveyed. *Id.*

107. *The Condition of the Banking Industry: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 4 (2004) [hereinafter *FDIC Testimony*] (statement

Figure 11. Bankruptcy Filings and Household Debt as a Percentage of Personal Income in the U.S., 1981-2001



Sources: Federal Reserve Bank of St. Louis, Federal Reserve Economic Data (FRED), http://research.stlouisfed.org/fred2/.
American Bankruptcy Institue, Annual Business and Non-Business Filings by Year (1981-2005), http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=18753.

medical insurance, income volatility, and rising housing costs have left families even more vulnerable to bankruptcy.[108] Many families have tried to adjust by sending two parents into the workforce, but the unexpected result has been to increase rather than decrease the risks of going broke.[109]

The debt-to-income ratio that we used earlier to show the deteriorating economic circumstances of the families in bankruptcy is instructive here as well. The increasing debt trend observed among the families in bankruptcy is mirrored by a similarly worrisome trend for families across the country. Figure 10 charts the increase in outstanding consumer debt as a proportion of household income during the first half of the period under study. When those

of Donald E. Powell, Chairman, Federal Deposit Insurance Corp. (FDIC)), *available at* http://banking.senate.gov/_files/powell.pdf; *see also* Warren, *supra* note 101, at 1083.

108. *See* FRAGILE MIDDLE CLASS, *supra* note 17.

109. TWO-INCOME TRAP, *supra* note 17 (arguing that increases in mortgages, health insurance, transportation, child care, and taxes mean that today's two-income families have less uncommitted cash left over than their one-income parents of a generation ago, leaving today's families dependent on maintaining two jobs and twice as vulnerable to layoffs, illnesses and divorce than they were a generation earlier).

data are graphed with the bankruptcy filing data, and lagged by one year, Figure 11 shows that the fit is very good. We ran a bivariate regression that showed an R^2 of 0.917, suggesting a very close relationship between debt-to-income ratios and bankruptcy filings.

As the Chair of the FDIC explained: "Total household debt is at an historical high of 112 percent of disposable personal income."[110] Perhaps the presence of much greater debt explains why so many more families find themselves considering filing for bankruptcy. Given the eternal verity that "time and chance happeneth to them all,"[111] the existence of more debtors in the zone of default-risk could plausibly be a sufficient explanation of the increase in bankruptcy filings.[112]

The straightforward explanation of more-trouble-more-bankruptcy may include one more unexpected twist: changes in credit practices may have permitted debtors to become more indebted when they are under financial stress, thus increasing the number of people who must turn to bankruptcy following a financial reversal and increasing the debt loads they carry when they file for bankruptcy.

In the 1970s and 1980s, when the family had a serious economic disruption—a job loss, a medical problem, a divorce—the credit spigot was turned off. Credit cards were available only for customers with sterling credit ratings (and current jobs) and second home mortgages were limited largely to home improvement and college loans. Families were often forced to find other means to deal with serious financial problems. They might move in with family members, accept charity or state-sponsored welfare, farm out the children, sell off household items, switch to the underground economy with day labor or other cash-only employment, or hide out from creditors until the problem passed. Some headed into bankruptcy, but others may have sought alternatives that permitted the family to survive without increasing debt load beyond levels that it could never repay.

By the 1990s, the availability of credit to financially distressed families permitted more of them to survive a period of unemployment or medical problem without turning to charity or the underground economy—even though more would also load themselves with debt that quickly became unmanageable. The increasing ubiquity of credit cards permitted even an unemployed person to make a range of purchases from food to utilities to taxes with plastic.[113]

110. *FDIC Testimony*, *supra* note 107, at 4.

111. *Ecclesiastes* 9:11 (King James).

112. This relationship has been apparent for a long time. *See, e.g.*, Jay L. Westbrook, *A Comparative Empirical Research Agenda in Consumer Bankruptcy*, 21 CAN. BUS. L.J. 30 36 (1992).

113. In the 1980s, the fictional book and later the movie starring Dustin Hoffman and Meryl Streep, *Kramer vs. Kramer*, derived much of its ironic humor from the idea that a family that was broke could survive by charging everything at Bergdorf's (at a time when grocery stores were cash-only operations). We wonder if the rising generation would see any

Moreover, when a debtor made purchases over the credit limit, instead of cutting the debtor off as in the 1980s, lenders in the 1990s began to raise the limit and to offer more credit, while imposing a hefty fee for doing it.[114] Homeowners, encouraged by Federal Reserve Chairman Alan Greenspan, learned a new phrase, "tap your home equity," that kept money flowing even when income had stopped.[115] Even nonhomeowners could stay in the credit game when they were in financial trouble. A new player—the payday lender—made sure that there would be cash to pay the landlord or the daycare center even for those with the worst credit records.[116] If someone had no income or the bills were overwhelming, the music eventually would stop, but in the meantime creditors offered debt in abundance.

In this contemporary financial environment, families could self-fund themselves through a difficult financial stretch using credit, but if they misjudged how long they would be unemployed or how high their medical bills would eventually go, they would find themselves unable to regain their economic footing because their debts were now sky-high. In other words, the changes in the credit industry in making money available to troubled borrowers may have changed the calculus that leads to bankruptcy. For some people, the lender offered a way for families to stay afloat longer and delay (or perhaps evade) the bankruptcy day of reckoning. But delay has its own costs. The interest payments increased so fast that even a small stumble meant that these borrowers would have to declare bankruptcy or literally never get out of debt.

The data presented in this paper are consistent with the proposition that changes in credit availability have increased the number of consumer bankruptcies by providing credit to families already in trouble. Moreover, the rise in the amount of debt families are carrying at the time of their bankruptcies and the decline in their incomes (suggesting weaker borrowers) is also consistent with this hypothesis. The strongest direct support for this hypothesis, however, comes from the credit industry itself. Business consulting firm August, Fair, Isaac & Co. argues that minimal credit screening—that is, cutting out those who have lost jobs or are already awashed in debt they are unlikely to repay—could cut bankruptcy losses for credit card issuers by 54% each year.[117]

---

anomaly at which to smile. It may be that credit as a survival tool, available to the broke and the solvent alike, now seems commonplace.

114. *See, e.g.*, Household Credit Servs., Inc., v. Pfennig, 541 U.S. 232, 236 (2004).

115. The percentage of homeowners with home equity loans almost doubled from 2001 to 2004 alone. Brian K. Bucks et al., *Recent Changes in U.S. Family Finances, Evidence from the 2001 and 2004 Survey of Consumer Finance*, 92 FED. RES. BULL. A1, A27 (2006) (documenting an increase from 4.8% to 8.6%).

116. *See generally* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361 (2003).

117. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 88 (1997), *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html. The 1998 Survey of Consumer Finances supports reports by consumer bankruptcy lawyers

Why the change in lending practices? The effective repeal of usury laws combined with the falling wholesale cost of money has altered the economics of consumer lending.[118] Subprime lenders have learned that when inflation is low, lending out at 18%, 22%, or 34% can be extraordinarily profitable even if a substantial portion of borrowers ultimately default on their loans. The math is nothing short of stunning. At a time when the wholesale cost of money is 4%, for example, a subprime lender who places a $10,000 loan at 26% has by year four earned back everything the debtor borrowed plus more than $7000 in profit, and the borrower still owes more than half of the loan—so the profits will keep on rising. Once they have worked out the math, it is little wonder that mainstream lenders such as Citibank and Ford Motor Credit have taken their place alongside marginal operations that target financially troubled families.[119] Indeed, nowadays commercial lending is a declining source of income for the major banks; their most important profit center is the interest and fees generated by consumer debt.[120]

Changes in creditor practices may also have affected the perception of stigma. The subprime creditors themselves do not heap shame on those already in debt, but instead offer more debt at higher interest rates. It is possible that the very acts the credit industry has taken to extend credit (at a high price) to those in terrible financial shape has had the effect of reducing the stigma of financial failure and, in turn, of reducing the stigma associated with bankruptcy. But it is possible that the impact of changes in subprime credit work instead in the other direction. By making credit available to those in terrible financial distress, the message is clear: no need to face the horrors of bankruptcy, just refinance your way back to economic security. The promise may be illusory, but the fact that so many people seize it suggests that bankruptcy is a horror to be avoided. The rise in debt management plans and other borrow-to-repay schemes is direct evidence that the bankruptcy alternative remains unattractive for many people already in financial trouble. Millions of people are willing to put their homes at

---

that debtors are flooded with credit card offers following bankruptcy. *See* Stavins, *supra* note 53, at 21-22 & tbl.1.

118. *See* Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate*, BANK TRENDS, Mar. 1998, *available at* http://www.fdic.gov/bank/analytical/bank/bt_9805.html.

119. The extension of credit to financially troubled families is purposeful, because the pattern of minimum payments, late fees, over-limit charges, and the like is readily detectable by the grantors' computers and regularly followed by its staff. *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS AROUND THE WORLD (forthcoming 2006). If creditors are not keeping close track of the difficulties of their borrowers, then they are likely to be in serious financial trouble themselves. *See, e.g.*, Amy Merrick, *Spiegel Files for Chapter 11—Retailer's Aggressive Credit-Card Expansion Was a Losing Bet*, WALL ST. J., Mar. 18, 2003, at B4.

120. *See, e.g.*, Carrick Mollenkamp & Joseph T. Hallinan, *Moving the Market: Consumer Lending Boosts Bank of America Profit*, WALL ST. J., Oct. 15, 2004, at C3; *see also FDIC Testimony*, *supra* note 107, at 14 ("Bank commercial and industrial lending has declined sharply . . . .").

risk by taking out second mortgages to pay off debts that could have been discharged in a quick trip to the bankruptcy courthouse.[121] A generation ago, someone in financial trouble might have faced bankruptcy head on, swallowing the shame and filing when there were no other options. Today, a family in financial trouble that finds the bankruptcy alternative distasteful is offered so many options to extend the credit game that they may delay longer before filing and then file with greater debts.

We offer data consistent with the possibility that the dawn of the Internet combined with aggressive, industry-financed public relations campaigns may have made filing for bankruptcy a more wrenching experience than ever before. But we also recognize that the stigma associated with bankruptcy will not remain static. As more families feel intense financial pressure—as homeowners face foreclosure, as more students graduate from college with six-figure debt loads, as twenty-five-year employees are laid off as medical bills rise and health insurance coverage shrinks—bankruptcy may be the only option for economic survival. What is unthinkable to them today—as unthinkable as the bankruptcy of General Motors or Ford was to most of us until very recently—may become a godsend tomorrow. We are confident that the rise in bankruptcy filings over the past twenty years has not been driven by a decline in stigma, but by economic and social factors, which remain as unpredictable as ever.

CONCLUSION

Empirical data have become central to the debates about personal bankruptcy.[122] For twenty years, the fulcrum point in the bankruptcy debates has been the dramatic rise in bankruptcy filings. In 1995, the credit industry thought it prudent to reinvigorate its struggle for "tougher" bankruptcy laws with an empirical study, albeit one that was distributed in press releases rather than published in the professional literature.[123] The legislation the industry put forward was in turn significantly narrowed because of three later empirical studies revealing the weaknesses of some of the proposed provisions.[124] In the

121. In 2004, 17.8% of all homeowners took out home equity loans, and about a third—31%—of those home equity loans were for debt consolidation. Bucks et al., *supra* note 115, at A29.

122. *See generally* Jay Lawrence Westbrook, *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2129-32 (2002).

123. *See id.* at 2129 n.40.

124. *See* Culhane & White, *supra* note 31; *see also* Teresa A. Sullivan & Elizabeth Warren, *Women in Bankruptcy*, July 13, 1999, *available at* http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/Women_in_Bankruptcy.htm; Teresa A. Sullivan & Elizabeth Warren, *More Women in Bankruptcy*, July 30, 1999, *available at* http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/MORE_Women_in_Bankruptcy_-_Sullivan_and_Warren.htm. *See generally* Westbrook, *supra* note 122, at 2129-33 (discussing the effects of these two

end, only enormous political effort overcame the later academic data that had cast serious doubt on some of the central premises of the bill.[125]

This Article provides strong evidence that the principal argument supporting the legislation was simply wrong. Bankrupt debtors were not able to pay in 1981, and they were even less able to pay twenty years later. The data are also inconsistent with the hypothesis that the declining stigma of bankruptcy has encouraged millions of debtors to file "bankruptcies of convenience" that, in earlier times, they would not have filed. Because there are a number of more plausible explanations available that fit the data much more closely than a decline in stigma, anyone who attempts to resurrect that hypothesis bears a heavy burden of supplying concrete empirical evidence in its support.

Beyond that specific debate, this Article offers a baseline of data reflecting U.S. personal bankruptcies over two decades. These data can be compared with the data that will describe the experience that emerges under the new legislation. The collision between the legislative assumptions and the reality revealed by the existing data will make a fascinating study—at least for those who are not personally at the point of contact, of course.

articles). One final article, David Himmelstein et al., *Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF., Feb. 2, 2005, at W5-63, was released shortly before the final round of the bankruptcy debates in 2005 and was widely cited in the debates, including the negotiations to include more provisions for debtors who were ill or who were trying to pay for health insurance.

125. Policy groups such as the National Organization for Women estimate that the costs of the lobbying effort for the bankruptcy bill exceeded $100 million. Jan Erikson, *Legislative Update: GOP Budget Undercuts Equity, Human Needs Programs, Adds More Tax Cuts*, NAT'L NOW TIMES, Spring 2005, http://www.now.org/nnt/Spring-2005/GOPBudget.html. The debtors, without a PAC or a lobbyist in Washington, spent nothing. Consumer bankruptcy lawyers waded into the fray, but most were solo or small firm practitioners whose presence could not rival that of the high-spending financial services lobby. *See generally* Rafael Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL'Y 205 (2003).

APPENDIX

Table 1. Distribution of Income, Assets, and Debts for Bankruptcy Petitioners in 1981, 1991, and 2001 (2001 Dollars)

Distribution	Family Income	Total Assets	Total Debt	Secured Debt	Unsecured Debt
	Panel A: Characteristics in 2001 (2001 Dollars)				
Mean	22,191[a,b]	69,910[a,b]	90,894[a,b]	56,779[a,b]	34,290[a,b]
Standard Deviation	13,292	88,231	91,941	74,423	51,933
25th Percentile	14,400	6,860	26,863	1,953	9,667
Median	20,172	36,913	63,486	25,000	20,276
75th Percentile	27,576	107,150	124,789	91,648	40,080
Observations	1,215	1,204	1,231	1,229	1,228
Outliers Removed	10	10	10	10	10
Missing	18	29	2	4	5
	Panel B: Characteristics in 1991 (2001 Dollars)				
Mean	26,565[a,c]	49,253[a,c]	68,033[c]	40,089[c]	28,009[c]
Standard Deviation	15,952	67,868	86,239	65,420	46,600
25th Percentile	15,600	4,121	19,250	1,180	8,643
Median	23,400	18,331	38,459	13,517	16,202
75th Percentile	34,726	75,530	84,480	59,818	28,906
Observations	622	622	622	621	622
Outliers Removed	5	5	5	5	5
Missing	0	0	0	1	0
	Panel C: Characteristics in 1981 (2001 Dollars)				
Mean	30,735[b,c]	57,179[b,c]	75,186[c]	44,867[c]	30,187[c]
Standard Deviation	12,492	52,044	71,260	50,136	40,648
25th Percentile	18,403	5,820	18,966	3,051	7,453
Median	29,167	27,318	40,819	18,702	13,736
75th Percentile	41,545	86,356	86,641	59,332	27,144
Observations	1,289	1,490	1,496	1,501	1,495
Outliers Removed	44	44	44	44	44
Missing	213	12	6	1	7

[a] Significantly different from the 1981 survey at the .05 level

[b] Significantly different from the 1991 survey at the .05 level

[c] Significantly different from the 2001 survey at the .05 level

Table 2. Distribution of Total Debt-to-Income Ratio for Bankruptcy Petitioners

Distribution	Total Debt-to-Income Ratio 2001	1991	1981
Mean	4.35[a,b]	2.52[a,c]	3.2[b,c]
Standard Deviation	5.27	3.05	10.45
25th Percentile	1.58	0.937	0.7
Median	3.04	1.69	1.41
75th Percentile	5.19	2.98	2.6
Observations	1167	603	1241
Zero-Income	47	19	47
Outliers Removed	10	5	44
Missing	19	0	214

[a] Significantly different from the 1981 survey at the .05 level
[b] Significantly different from the 1991 survey at the .05 level
[c] Significantly different from the 2001 survey at the .05 level

Table 3. Distribution of Total Nonmortgage Debt-to-Income Ratio for Bankruptcy Petitioners

Distribution	Total Nonmortgage Debt-to-Income Ratio 2001	1991	1981
Mean	2.44	1.63	2.11
Standard Deviation	3.89	2.41	8.05
25th Percentile	0.81	0.62	0.48
Median	1.48	1.03	0.79
75th Percentile	2.57	1.75	1.46
Observations	1165	590	1147
Zero-Income	47	19	35
Outliers Removed	10	5	
Missing	21	13	313

[a] Significantly different from the 1981 survey at the .05 level
[b] Significantly different from the 1991 survey at the .05 level
[c] Significantly different from the 2001 survey at the .05 level