

BANKRUPTCY AND ORDER

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This article argues that bankruptcy achieves order. It achieves not only commercial order, by regulating insolvent debtors and managing the collection and distribution of their bankrupt estates, but also order on many levels, including social and political order. From the 5th century BCE, when the first seeds of the idea of bankruptcy were planted in Republican Rome, through changes in outlook and approach to the present day, bankruptcy has acted as collective risk insurance protecting against the possibility of failure, while at the same time fostering business confidence. Although its underlying philosophy has changed over time, bankruptcy's function of delivering order and predictability has remained consistent.

I INTRODUCTION

Bankruptcy solves problems. It does this by bringing order to the financial and legal disarray that would otherwise exist between insolvent debtors and multiple creditors. Although first and foremost a commercial regulator, bankruptcy's influence is broad and, together with its economic role, it has an effect on both social and political order. This article examines the relationship between the idea of bankruptcy and the need for order. It focuses on three separate periods. First, it considers the Roman Republic. The origin of the idea of bankruptcy can be found in the collective approach to creditors of an insolvent debtor in Table III of the XII Tables. These laws, which aimed to bring order and make the law more accessible, were the first codification of Roman law and their influence became longstanding. As the Republic was nearing its end, the problems associated with debt and insolvency again demanded attention, and a new approach was needed. Widespread insolvency meant Caesar's political ambitions were threatened unless social and financial order could be restored. His response was to introduce a system of voluntary bankruptcy that has much in common with our bankruptcy laws today. The second period looks at England between the 16th and 18th centuries. Here, the importance of the role played by the trading classes in the growth of England's economy created the need for workable bankruptcy laws to underpin entrepreneurship. These laws provided structure to the commercial environment and confidence for creditors. Lastly, the philosophy and focus of modern bankruptcy law and the emergence of consumer bankruptcy reinforce the argument that regardless of the specifics or geography of bankruptcy laws, there remains a relevant connection between bankruptcy and order.

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II THE ROMAN REPUBLIC

A Establishing Order in the Early Republic: Table III and the Origins of Bankruptcy

Table III of the XII Tables enabled multiple creditors to divide the debtor's person, or property, proportionately amongst themselves.¹ The laws of the XII Tables were introduced in 449BCE to preserve order in an environment where plebeian agitation was a threat to patrician rule. The new citizen assemblies that had arisen in the early Republic strengthened the plebeian position,² and by the middle of the 5th century BCE the scene was set for change. Livy underlines the disorder existing in Rome at the time by referring to the plebeians as 'a rabble of vagrants ... quarrelling for power with the governing class of a city which did not even belong to them'.³ The outcome of this class struggle was the first codification of Roman law, and even though patrician self-interest may have been the motivation,⁴ the laws of the XII Tables proved to be of lasting significance to all Romans. Prior to the XII Tables, the relationship between multiple creditors and a single debtor was unclear. Ad hoc and inconsistent solutions would have arisen and predictability was absent. Table III however provided for the collective treatment of creditors and it did so by way of an ordered and regulated procedure.

- 1 There are a number of interpretations of the effect of the capital aspect in Table III. The most common is that it warrants physically cutting up the debtor. However there is also support for the proposition that the Law was either never actually implemented or that it concerns the division of property only. In relation to the use of Table III Law X, see William W Buckland and Peter Stein, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 3rd revised ed, 1963) 620. Buckland favours a division of property and believed that the sensibilities of Republican Romans would not sanction the physical violence of dismemberment. See also M Radin, 'Secare Partis: The Early Roman Law of Execution against a Debtor' (1922) 43 *American Journal of Philology* 32. Radin believed that *partis secanto* in Law X should in fact be translated as 'retail' or 'cut' in the sense of a division of the debtor's property between creditors by the *sectores*, who act as 'public agents': at 47. His understanding of *partis secanto* is framed in opposition to an alternative view that it referred only to the division of the debtor's physical body or person, that is, the familiar 'pound of flesh' scenario: at 34–7, 47–8. Further opinions of Table III Law X can be found in David Johnston, *Roman Law in Context* (Cambridge University Press, 1999) 109; Richard Ford, 'Imprisonment for Debt' (1926) 25 *Michigan Law Review* 24, 25; Sir Frederick Pollock, 'A Note on *Shylock v Antonio*' (1914) 30 *Law Quarterly Review* 175; Aulus Gellius, *The Attic Nights of Aulus Gellius* (John C Rolfe trans, Harvard University Press, revised ed, 1961) vol III bk XX.145–55, 425–7 [trans of: *Noctes Atticae* (first published 169 CE)].
- 2 These were the *comitia tributa*, *comitia centuriata* and *concilium plebis*. The *comitia centuriata* was the political and legislative assembly that ratified Tables I–X of the XII Tables in 451 BCE and Tables XI and XII in 449 BCE: P R Coleman-Norton, 'Cicero's Contribution to the Text of the Twelve Tables' (Pt 1) (1950) 46 *Classical Journal* 51, 51.
- 3 Livy, *The Early History of Rome: Books I–V of the History of Rome from its Foundation* (Aubrey De Séincourt trans, Penguin Books, first published 1960, 2002 ed) bk 2.1, 105 [trans of: *Ab Urbe Condita* (first published 27–25 BCE)]. See also Livy, *History of Rome* (B O Foster trans, Harvard University Press, 1919) vol I bk 2.1, 219 [trans of: *Ab Urbe Condita* (first published 27–25 BCE)].
- 4 Alan Watson, 'Two Early Codes, the Ten Commandments and the Twelve Tables: Causes and Consequences' (2004) 25 *Journal of Legal History* 129, 130–1: 'The code, designed to look like a compromise or even a defeat, was a great victory for the ruling elite'. See also Francis de Zulueta, 'The Science of Law' in Cyril Bailey (ed), *The Legacy of Rome* (Oxford University Press, first published 1923, 1962 ed) 171, 186–8. Although the conflict between patricians and plebeians ('the struggle of the orders') is generally cited as the impetus for the introduction of the XII Tables, there is opinion that this conflict may have had less impact than believed and that the XII Tables were simply a re-statement of existing Roman customary law: see Michel Humbert, 'La Codificazione Decemvirale: Tentativo d'Interpretazione' in M Humbert (ed), *Le Dodici Tavole: Dai Decemviri agli Umanisti* (IUSS Press, 2005) 3.

Table III importantly required that, prior to any collective action, all steps to execute judgment by individual creditors must have been exhausted.⁵ Only then — when it was obvious that the debtor was insolvent — did the Table address the vexing question of how to deal with the competing claims of multiple creditors. Table III accordingly contained not only a procedure for execution of a judgment debt, but it also set out in express terms that where execution failed, creditors, as a group, were entitled to their share of whatever was left. In the case of Table III, this could mean their share of the debtor's person.⁶

The focus on the collective rights of creditors where a debtor is insolvent is an essential characteristic of bankruptcy.⁷ In fact some commentators argue that the priority of creditors should continue to underpin bankruptcy even today and that 'bankruptcy systems exist only to increase efficiency by solving the creditors' coordination problem'.⁸ As bankruptcy history has unfolded, this creditor coordination problem has remained at the core of its development, with the absence of coordination generally bringing unpredictability.

The collective treatment of creditors in the XII Tables does not of course resemble a detailed modern bankruptcy process. But origins are just that: incomplete beginnings, not fully formed endings. Without collectivism, bankruptcy is merely

- 5 Initially there was a period of 30 days for the debtor to satisfy the judgment or to seek assistance to dispute it. Thereafter if the judgment remained unsatisfied, the debtor was transferred to the custody of his creditor. If no agreement or compromise was reached with the creditor, the debtor remained in chains for sixty days to be brought into the *comitium* in the Forum for three consecutive market days, and the amount of his judgment was publicly proclaimed. If at the end of this period judgment was still not satisfied, or a compromise reached, the debtor was arrested by his creditor and enslaved, or possibly sold 'across the Tiber', that is, sold to Rome's enemies. Where specific laws of the XII Tables are referred to, the footnoted reference will include three citations: M H Crawford (ed), *Roman Statutes* (Bulletin of the Institute of Classical Studies, Supplement 64, 1996) vol II; Allan Chester Johnson, Paul Robinson Coleman-Norton and Frank Card Bourne, *Ancient Roman Statutes: A Translation* (University of Texas Press, 1961) 10; S P Scott, *The Civil Law* (AMS Press, first published 1932, 1973 ed) vol I. Although editions of the XII Tables are similar, editors have not universally agreed upon the placement or translation of the various Tables. There is agreement that they existed as tablets, that they were destroyed, and that they were nonetheless salvaged to a sufficient extent for reproduction. There is no certainty that even the earliest reproduction was exact, however there is an acceptance of authenticity. Crawford's translation is the most pared back and adopts the fewest amount of assumptions. For a discussion of the uncertainties involved in the documenting of the history of the Republic, see T P Wiseman, *Roman Studies: Literary and Historical* (Francis Cairns, 1987). See particularly the chapter 'Practice and Theory in Roman Historiography': at 244–62. For the text of Table III, see Crawford, above n 5, Table III.1–7, 627–8; Johnson, Coleman-Norton and Bourne, above n 5, Table III.1–6, 10; Scott, above n 5, Table III.1–X, 62–4.
- 6 For the text of Table III, see Crawford, above n 5, Table III.1–7, 627–8; Johnson, Coleman-Norton and Bourne, above n 5, Table III.1–6, 10; Scott, above n 5, Table III.1–X, 62–4. Crawford identifies the provision as Table III.6, 627: '*ni pacit, tertiis nundinis partis secanto. si plus minusue secuerunt, se fraud esto*'. Johnson, Coleman-Norton and Bourne's English translation (they also identify the relevant provision as Table III.6) is illustrative: 'On the third market day the creditors shall cut shares. If they have cut more or less than their shares it shall be without prejudice': at 10. The division (of persons or property) amongst creditors is found in the words '*partis secanto*'.
- 7 In H H Shelton, 'Bankruptcy Law, Its History and Purpose' (1910) 44 *American Law Review* 394, Shelton sets out that 'if there is a fixed, permanent and fundamental principle underlying [bankruptcy] laws, it is that where a person's property is insufficient to pay all of his creditors in full, it shall be ratably divided among them': at 397. This is the *pari passu* principle.
- 8 Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 *Yale Law Journal* 1807, 1809.

a restructured form of debt recovery. Accordingly, the division between creditors possible in Table III is arguably the origin of the idea of bankruptcy.

B Bankruptcy's Solid Foundations: The Constitutional Significance of the XII Tables and Certainty Through the Law

The XII Tables represented a common interest in establishing order and opened the door for the majority of the population to engage with the law for the first time. This was a significant step and it ensured that their influence was longstanding, as is illustrated by the inclusion of the laws of the XII Tables in Roman life and literature not only during the Republic, but well beyond it.⁹ Not only are they 'the best evidence we have for life, and for moral and social values, in early Rome',¹⁰ but as the origins of Roman law they '[sink] into the collective history of the Roman people'.¹¹

Livy's account of the introduction of the XII Tables suggests an auspicious occasion. The impression is of a turning point as Livy describes the form of government changing for only the second time since Rome's foundation.¹² This in itself is a significant factor. In such a momentous situation, Romans would have expected a document of great importance and governance to eventuate.¹³ He distinguishes the XII Tables from all other law, referring to them as 'the

9 Paetus Catus reproduced them in 204 BCE with explanatory commentary and guidance as to their causes of action. It has been suggested that Paetus' *Tripertita* was the foundation of all later study of the XII Tables: J B Rives, 'Magic in the XII Tables Revisited' (2002) 52 *Classical Quarterly* 270, 272. See also Michael Lambiris, *The Historical Context of Roman Law* (Law Book, 1997) 160. Cicero, in the treatise *De Legibus*, states that he was taught the XII tables in school in the 1st century BCE: 'For we learned the Law of the Twelve Tables in our boyhood as a required formula': Cicero, *The Republic and Laws* (C W Keyes trans, Harvard University Press, first published 1928, 1970 ed) vol II bk XXIII.59, 445 [trans of: *De Re Publica and De Legibus* (first published 54 BCE)]. In the 2nd century CE, Gaius, in his *Institutes*, commented widely on them: Gaius, *Gaii Institutionum Iuris Civilis Commentarii Quattuor, or, Elements of Roman Law by Gaius* (Edward Poste trans, Clarendon Press, 2nd revised ed, 1884). Both *Justinian's Digest* and *Justinian's Institutes* include numerous references to the XII Tables: Justinian, *The Digest of Justinian* (Alan Watson trans, University of Pennsylvania Press, 1985) vol I [trans of: *Digesta* (first published 533 CE)]; Justinian, *Institutes* (Peter Birks and Grant McLeod trans, Duckworth, 1987) bk 1.15, 39, bk 1.17, 49, bk 1.23.3, 51, bk 1.26, 53, bk 2.1.29, 59, bk 2.1.41, 61, bk 2.6.2, 63, bk 2.13.5, 73, bk 2.22, 85–7, bk 3.1.1, 91, bk 3.1.9, 93, bk 3.1.15, 93, bk 3.2–3.5, 95–9, bk 3.7, 101, bk 3.9, 103, bk 4.4, 127–9, bk 4.9, 137, bk 4.18, 145–7 [trans of: *Institutiones Justiniani* (first published 533 CE)].

10 Alan Watson, *Rome of the XII Tables: Persons and Property* (Princeton University Press, 1975) 3.

11 Michael Steinberg, 'The Twelve Tables and Their Origins: An Eighteenth-Century Debate' (1982) 43 *Journal of the History of Ideas* 379, 395.

12 Livy, *The Early History of Rome*, above n 3. It was in fact turmoil that often initiated the growth of Rome's constitution. Hahn notes Polybius' idea of Rome's constitution developing naturally by 'many struggles and actions, in which the Romans repeatedly chose the better course': David E Hahn, 'Kings and Constitutions: Hellenistic Theories' in Christopher Rowe and Malcolm Schofield (eds), *The Cambridge History of Greek and Roman Political Thought* (Cambridge University Press, 2000) 457, 473. Lintott sees Polybius' theory similarly: Andrew Lintott, *The Constitution of the Roman Republic* (Oxford University Press, 1999) 38.

13 Livy, *The Early History of Rome*, above n 3, bk 3.35, 235. Livy underscores the importance by describing how the *decemvirs*

invited the whole population of Rome to come and read the statutes ... [and] it was their wish, therefore, that every citizen should first quietly consider each point, then talk it over with his friends, and, finally, bring forward for public discussion any additions or subtractions which seemed desirable. The object was for Rome to have laws which every individual citizen could feel he had not only consented to accept, but had actually himself proposed.

fountainhead of public and private law, running clear under the immense and complicated superstructure of modern legislation'.¹⁴

The XII Tables, as the will of the people, were valued at several levels. They were first and foremost an explicit and accessible legal code.¹⁵ Scott comments on how 'the inscriptions upon the bronze tablets posted in the Forum, enabled every citizen to become acquainted with the laws of his country'.¹⁶ Secondly, they played an important political role by establishing order between patricians and plebeians, and thirdly, they achieved desirable social goals because they set standards, guided and framed behaviour, and represented equality before the law.¹⁷

Throughout the history of the Republic there was little change to the XII Tables. They stood 'above the other laws of the state',¹⁸ representing order manifested in

- 14 Ibid. Note that in Foster's translation, the phrase is: 'which even now, in this great welter of statutes piled one upon another, are the fountain-head of all public and private law': Livy, *History of Rome* (B O Foster trans, Harvard University Press, 1922) vol II, bk III.xxxiv, 113 [trans of: *Ab Urbe Condita* (first published 27–25 BCE)]. Coleman-Norton comments of the XII Tables: 'in these laws lies the entire fabric of Roman Law': Coleman-Norton, above n 2, 51.
- 15 Pomponius describes the state of the law prior to the introduction of the XII Tables as 'vague ideas of right and ... customs of a sort': Justinian, *Digest of Justinian*, above n 9, vol I, bk 1.2.2.3, 3.
- 16 Scott, above n 5, vol I, 10–11. There have been varying views as to the construction of the XII Tables. However, the preponderance of evidence — 'almost unanimous tradition' — points to bronze: Johnson, Coleman-Norton and Bourne, above n 5, 13 n 3. The XII Tables were always destined to be more than a set of laws and the use of bronze invested them with an almost supernatural significance that ensured their content was widely known during the Republic. Romans used various writing media (including bronze tablets, wooden tablets, lead sheets, wax tablets and papyrus): Elizabeth A Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge University Press, 2004). However the 'ceremonial, authoritative, and active' nature and effect of bronze tablets carried significantly the most weight: at 9. In Republican Rome, 'the most ancient sanction of the power of the *tabula* lay in its association with ancient unitary acts that ordered cosmos, state, and household': at 295. They have been described as wielding a 'magic power': Donald R Kelley, 'Vico's Road: From Philology to Jurisprudence and Back' in Giorgio Tagliacozzo and Donald P Verene (eds), *Giambattista Vico's Science of Humanity* (Johns Hopkins University Press, 1976) 15, 22.
- 17 'The agreement (or consent) of all individuals subject to collectively enforced social arrangements shows that those arrangements have some normative property': Fred D'Agostino, Gerald Gaus and John Thrasher, 'Contemporary Approaches to the Social Contract' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Centre for the Study of Language and Information, Stanford University, Winter 2012) [1.1] <<http://plato.stanford.edu/archives/win2012/entries/contractarianism-contemporary/>>. From one perspective, there is a connection between the order sought in the laws of the XII Tables and the outcomes envisaged in social contract theory. For instance, Rousseau's ideas upon the 'social contract' were not intended to explain law, order and government in the Republic. However they are nonetheless relevant to understanding and interpreting the relationship between Roman law and order. They were drawn from a respect for the principles, and particularly the spirit, of the Roman law, including the laws of the XII Tables. Accordingly there is a synergy between the jurisprudential aspect of his ideas and the laws of the Republic. See Rousseau, '*Du Contrat Social*' (Gerard Hopkins trans) [first published 1762] in Sir Ernest Barker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (Oxford University Press, 1971). In social contract theory a citizen loses natural liberty but gains civil liberty. In the law this outcome is manifested in the relationship between the quality of an individual's freedoms and the impact of the punishments imposed by the legal system. Individual rights or entitlements are replaced by a broader political or social order. It must be noted however that social contract theory has its limits. It is possibly a 'vast oversimplification' as Chapman points out: John W Chapman, *Rousseau — Totalitarian or Liberal?* (AMS Press, 1968) 142. Further, Barker admits that '[h]istorians have not loved the idea. ... Lawyers have not loved the idea': Barker, above n 17, xliii. Nonetheless it is a theory analysing a transition to order in society, and particularly in Rousseau's case, a theory illuminated by Roman law, and as such throws light upon that by which it is lit.
- 18 Clinton Walker Keyes, 'Original Elements in Cicero's Ideal Constitution' (1921) 42 *American Journal of Philology* 309, 309.

the law; they exerted a superior, constitutional force.¹⁹ Change was tolerated as long as integrity remained.²⁰ Walton observes that ‘this devotion to the letter is because the Tables were looked upon as of the nature of a constitutional compact between the patricians and the plebeians’.²¹ Table III, which regulated debt and insolvent debtors, and introduced the idea of the creditors as a collective,²² was not amended even when more detailed processes of bankruptcy became available in the late Republic.²³

The XII Tables were a systematic expression of the fundamental legal principles of the Republic and in their aim to provide certainty through the law they were also symbolic of the desire for order, embraced not simply for their function as laws but also for their character. They not only regulated particular conduct but also influenced order generally. The harsh penalties, for instance the creditors’ right to execute upon the debtor’s person in Table III, were a clear message that these laws were designed to affect behaviour, and in the case of Table III this incorporated commercial trust and responsibility.

The procedure used in Table III of the XII Tables for dealing with debt and insolvency was simple and in some respects — particularly through the severity of its sanctions — primitive. Nonetheless, it aimed at achieving order and the *expectation* of order between debtors and multiple creditors. It functioned in a way similar to bankruptcy laws by dealing with the creditors as a group and

- 19 A constitution can be comprised in one document, for example in the USA and Australia, or it can be an aggregate mix including components such as legislation, judicial decisions and treaties. Both the English and the Roman constitutions are of this second type. The XII Tables and the laws they contained were the means by which ‘the rude customary law of a primitive pastoral people was shaped and moulded to fit the needs of a great imperial nation whose mission it was to civilise the western world’: Frederick Parker Walton, *Historical Introduction to the Roman Law* (WM W Gaunt & Sons, 3rd revised ed, 1916) 12–13. There are several significant reasons for the constitutional status of the XII Tables. Normal government functions were suspended during the considerations of the *decemviri*. The Tables crystallised the legal position of the ordinary people of Rome for the first time in that city’s history. The Tables also represented the Republic’s only legal code. Cicero considered them ‘weightier in authority ... than the libraries of all the philosophers’: Cicero, *Cicero on the Ideal Orator* (James M May and Jakob Wisse trans, Oxford University Press, 2001) 104 [trans of: *De Oratore* (first published 55 BCE)]. They were left intact and were deemed relevant enough for inclusion in Justinian’s *Institutes*, 1000 years after their introduction.
- 20 See Giambattista Vico, *The First New Science* (Leon Pompa trans, Cambridge University Press, 2002) [trans of: *Scienza Nuova Prima* (first published 1725)]. Vico’s explanation for the longstanding significance of the XII Tables supports the proposition that this significance arises from their character as a compact. He sees the amendments to the law during the Republic not as diminishing their importance but as adding rigour, giving the words of the XII Tables ‘ever more benign meanings. And all this always in order to preserve intact the same identical choice or selection of the public good proposed by the *decemvirs*: the salvation of the Roman city’: at 31.
- 21 Walton, above n 19, 111. Commentators have pointed to various parts of the XII Tables as clearly constitutional. For example, Borkowski says ‘Table IX contained vital constitutional provisions, which have prompted tentative comparisons between the Twelve Tables and Magna Carta’: Andrew Borkowski, *Textbook on Roman Law* (Oxford University Press, 2nd revised ed, 1997) 29–30.
- 22 See Crawford, above n 5, Table III.6, 628; Johnson, Coleman-Norton and Bourne, above n 5, Table III.6, 10; Scott, above n 5, Table III.X, 63–4.
- 23 In part via *bonorum venditio* (about 105 BCE). This process was initiated by a creditor and involved the creditor establishing an act of bankruptcy. An order was then made seizing the debtor’s whole estate which was sold to the bidder who offered the creditors the best return on their debt. The debtor was only discharged if debts were paid in full. A more sophisticated bankruptcy process was introduced via *cessio bonorum* (about 45 BCE). See below Part II.C.

offering processes directed at resolving uncertainty between them where the debtor's insolvency was obvious.

C Caesar and the Use of Bankruptcy to Quell Turmoil in the Late Republic

Much of the Republic's history was a time of consolidation and growth for Rome, and the significant upheaval that precipitated the introduction of the XII Tables was not repeated until late in the Republic under the rule of Julius Caesar. The triumph over Gaul in 52BCE and the disorder of the civil war of 49BCE that followed Caesar's return were turning points in Roman history. Real property lost value and fear of an uncertain market meant that the hoarding of money became common. Credit arrangements were unpredictable and loans increasingly defaulted upon. The centre of Rome was subject to 'almost continuous outbreaks of bloody scuffling'²⁴ as debt grew. Financial and civil unrest were a danger to commercial and political order and more importantly to Caesar's political ambitions. In these circumstances, control needed to be restored. There was also the dire situation of many of Caesar's soldiers, who were unpaid after carrying their leader to success in Gaul and now at the will of the moneylenders. Order could not be restored if Caesar's soldiers did not remain loyal and their support was critical to his further campaigns.

By the late Republic, bankruptcy process in Rome had advanced from the simple creditor remedies of the XII Tables. The introduction of *bonorum venditio* in about 105BCE had provided a means of distribution of the bankrupt's estate, and, at least where sufficient property existed to satisfy creditors' entitlements, a shift of focus from the debtor's person to the debtor's property. However, much of the early strictness of Table III remained and, critically, no incentive existed to surrender property before total collapse. As Frederiksen observed, it was not only the political and financial crises that needed a solution but also 'the savage operation of the laws of bankruptcy and debt'.²⁵

Caesar's problem was not only disorder itself on a large scale, but also political oblivion unless a solution to this disorder was found. A particular issue related directly to the nature of Caesar's political support involved the fact that in the bankruptcy system that Caesar inherited, *bonorum venditio*, a result of the seizure of the debtor's estate was that the bankrupt debtor became *infamis*. Infamy meant that certain rights and entitlements were lost, including the right to hold political office. This specifically had an impact on Caesar's political allies, many of whom, through excessive borrowing to support their political careers,

24 Michael Grant, *The Roman Forum* (Michael Grant Publications, 1970) 15. See also Christopher Howgego, 'The Supply and Use of Money in the Roman World 200 BC to AD 300' (1992) 82 *Journal of Roman Studies* 1; W V Harris, 'A Revisionist View of Roman Money' (2006) 96 *Journal of Roman Studies* 1. Howgego sees 'the prominence of debt as a cause of political change under the Roman Republic': Howgego, above n 24, 13.

25 M W Frederiksen, 'Caesar, Cicero and the Problem of Debt' (1966) 56 *Journal of Roman Studies* 128, 133.

had succumbed to insolvency. Clearly, without senatorial support, Caesar's career was doomed. Cicero was of the view that the solution to the crisis, as noted by Frederiksen, 'must come from within the Roman state itself'.²⁶ That is, to be able to restore order, predictability, and confidence, Rome needed a mechanism that restructured commercial relations, and quickly. The process introduced, *cessio bonorum*, was the first bankruptcy process to enable a voluntary surrender, and this characteristic proved invaluable in staving off the crippling effects of insolvency and financial failure in the late Republic.

To encourage the bankrupt, however, to make a *bonorum cessio*, in order that as much as possible might be saved from the wreck of his fortunes for the benefit of his creditors, *bonorum cessio* not only discharged him, as we have seen, from personal execution, but discharged from liability such portion of his after-acquired property as was necessary for his subsistence.²⁷

There was both protection for bankrupts and certainty for creditors in *cessio bonorum*. Surrendering to *cessio bonorum* did not result in infamy. This resulted in a level of order and predictability that had been missing from the largely punitive procedures associated with the XII Tables and, to a lesser extent, *bonorum venditio*.

Accordingly, bankruptcy had played a part in restoring order in the late Republic. Credit and debt had become entwined with the turmoil of politics, status and power, and Rome's stability was threatened. Caesar could not draw on unlimited funds to cure the problems faced by his senators, soldiers and other insolvents. The political, commercial and social pressures could only be released by restoring financial order and the only means of doing this was by encouraging insolvents to surrender to bankruptcy.

Bankruptcy is an important commercial regulator. It is the only branch of the law that is able to sweep up the debris from the laws of debt, property, credit, and finance, and manage the outcomes. Jackson comments that 'bankruptcy law inevitably touches other bodies of law. But none reflects bankruptcy law's historical function'.²⁸ Just as was the situation in the late Republic, the absence of bankruptcy laws today can mean commercial turmoil. By bringing order, structure and predictability to financial dysfunction, bankruptcy achieves its 'historical function' and lives up to its auspicious origins in the Roman Republic.

26 Ibid. Andreau, in discussing the financial activities of Rome's elite, comments that 'a desire for gain and a taste for wealth were certainly spectacularly apparent': Jean Andreau, *Banking and Business in the Roman World* (Janet Lloyd trans, Cambridge University Press, 1999) 14 [trans of: *Vie Financière dans le Monde Romain* (first published 1987)]. In most cases credit fed this desire and as a large part of Caesar's support came from within this group he would have been anxious to ensure the availability of sufficient options, including *cessio bonorum*, in the case of financial disaster.

27 Gaius, above n 9, 350. See also Justinian, *The Digest of Justinian*, above n 9, vol IV, bk 42.3.4, 545 for Ulpian's proposition that '[i]f someone surrender[s] to bankruptcy and later make[s] some acquisition, he can then be sued only for what he can afford'.

28 Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) 2.

III EARLY ENGLISH BANKRUPTCY

A *Difficulties with Debtors and the First English Bankruptcy Act*

English bankruptcy owes its immediate origins to the legislation in place in the medieval Italian towns.²⁹ However, in England the introduction of a system of bankruptcy was delayed due in large part to the singular focus of the law on imprisonment as a coercive debt recovery mechanism. It was only when problems arose with this narrow approach in the early 16th century, primarily as debtors discovered an increasing number of ways to avoid imprisonment,³⁰ that bankruptcy as a means of stemming creditor frustration and restoring some order to the management of outstanding debt was seen as a way forward. Parliament increasingly saw trade, and the protection of the trading classes, as crucial to the growth and stability of English commerce, and a solution was needed to curb the evasive, delaying and often fraudulent practices of debtors. In this respect bankruptcy played an important role.

The first English bankruptcy statute was introduced in 1542 during the reign of Henry VIII.³¹ This Act targeted the two most common debt avoidance practices of the 16th century: fleeing the jurisdiction and keeping house.³² In 16th century England, credit particularly, and trade generally, were largely personal processes and outstanding debt regarded as a breach of faith. This was more so when the debtor put himself out of reach of the creditor. The *Bankruptcy Act of 1542* characterised bankrupts as selfish and unscrupulous, and clearly the type of person likely to unsettle trust between traders. The Act described bankrupts as those who

craftily obtaining into their hands great substance of other mens [sic] goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors, their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience.³³

Just as with Rome during the Republic, England's rapid commercial growth — as it emerged from the middle ages and moved determinedly toward the industrial

29 Paolo Di Martino, 'Approaching Disaster: Personal Bankruptcy Legislation in Italy and England, c 1880–1939' (2005) 47 *Business History* 23, 25. It has been argued that not only bankruptcy, but also modern business enterprise generally, originated in medieval Italy: Robert Reynolds, 'Origins of Modern Business Enterprise: Medieval Italy' (1952) 12 *Journal of Economic History* 350.

30 See Jay Cohen, 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' (1982) 3 *Journal of Legal History* 153. Cohen sets out that '[d]ebtors' ability to circumvent imprisonment gave rise to the earliest bankruptcy law': at 155.

31 *An Act against Such Persons as Do Make Bankrupts*, 34 & 35 Hen 8, c 4 ('*Bankruptcy Act of 1542*'). It should be noted that there is some debate as to whether this Act was passed in 1542 or 1543: see, eg, Stanford E Lehmborg, *The Later Parliaments of Henry VIII, 1536–47* (Cambridge University Press, 1977) 162, 181. For the purposes of this article, it will be treated as 1542 legislation.

32 *Bankruptcy Act of 1542* preamble: 'Where divers and sundry persons craftily obtaining into their hands great substance of other men's goods do suddenly flee to parts unknown, or keep their houses'.

33 *Ibid.*

revolution — necessitated the imposition of internal order. Any reading of English history from the 16th to the 18th centuries is likely to reveal a recurring theme of political and social turmoil. It is in these circumstances that the need for order became a priority. Martin says: ‘Throughout history, culture has taken the leading role by informing society of what laws are necessary and appropriate’.³⁴ In the 1530s, the monarchy had become sufficiently consolidated to be able to withstand and address change and disruption. This was fortunate as ‘[t]his was a decade full of danger and disaffection’.³⁵ Surviving the crisis and strengthened by its success, the royal government responded by introducing more legislation designed to ensure order. Loades argues that ‘[t]he legislative programme of the Parliament from 1533 to 1539 was the heaviest which had ever been seen and remained unsurpassed until the nineteenth century’.³⁶ Accordingly, an increased propensity to govern through the legislature together with the failure of the existing law to control debtors heralded the introduction of bankruptcy into English law.

B The Need to Create Stability in Trading Relations

The next significant step in the development of bankruptcy in England arose in 1571 when the legislation was redrawn to apply only to traders. The *Act Touching Orders for Bankrupts* (*Bankruptcy Act of 1571*)³⁷ applied to ‘any merchant or other person using or exercising the trade of merchandize by way of bargaining, exchange, recharge, bartry, cheviance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling’.³⁸ Levinthal suggests that ‘[b]ankruptcy was confined to trademen only because merchants were regarded as having peculiar facilities for delaying and defrauding creditors’³⁹ and clearly the focus of the Act was upon the commercial uncertainty resulting from a lack of trust. The factors relevant to categorising a person as a trader were to undergo change due to that restriction remaining in the legislation, particularly so in the widening of the concept to include persons whose income was not wholly from trade. Nonetheless, trade, in its most obvious meaning of the word, remained the focus, and at its heart the legislation was ‘directed at a definite occupational class

34 Nathalie Martin, ‘The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation’ (2005) 28 *Boston College International and Comparative Law Review* 1, 1–2.

35 D M Loades, *Politics and the Nation 1450–1660: Obedience, Resistance and Public Order* (Fontana, 1974) 13.

36 *Ibid* 173.

37 *Bankruptcy Act of 1571*, 13 Eliz 1, c 7. It should be noted that until 1752, in accordance with *Calendar (New Style Act) 1970*, 24 Geo 2, c 23, the House Journals began the year on 25 March and statutes were dated accordingly. Cheney notes that any legislation ‘which received the royal assent at the end of a long session was deemed to have been in force ever since the first day (of the session) and even though this retrospective operation ... caused great injustice ... the principle was rigorously applied ... until 1793’: C R Cheney (ed), *A Handbook of Dates: For Students of British History* (Cambridge University Press, revised ed, 2000) 18. The session in which the *Bankruptcy Act of 1571* was introduced began 2 April 1571. It proceeded in its bill stage from the House of Commons to the House of Lords on 11 April 1571 and was returned to the House of Commons and read for the third time on 24 May 1571: see United Kingdom, *Journal of the House of Lords*, vol 1 (1509–77) 672–3; United Kingdom, *Journal of the House of Commons*, vol 1 (1547–1629) 97–8.

38 *Bankruptcy Act of 1571* ss 2–3.

39 Louis Edward Levinthal, ‘The Early History of English Bankruptcy’ (1919) 67 *University of Pennsylvania Law Review* 1, 16 n 59.

— i.e., the merchants'.⁴⁰ Christian explains that 'the articles bought must either be sold again in the same state, or improved and manufactured by the labour and art of man, not changed by the operations of nature'.⁴¹ His analysis of the numerous times that the courts were to be called upon to reinterpret the meaning of the concept of trade is evidence of the importance of the application of the bankruptcy legislation in ensuring order in trading relations.

Trade and credit were becoming increasingly entangled and the desire for order and certainty in trading relations had focused Parliament's attention on the needs and practices of traders. Parliament was less interested in the trials and tribulations of individual traders but rather what the group stood for, or more precisely, the uncertainty and disorder that would eventuate if that group could not rely on bankruptcy processes.

The preamble to the *Bankruptcy Act of 1571* reinforced the widespread nature of the 'fraudulent' activities of bankrupts. In the 30 years that had elapsed since the *Bankruptcy Act of 1542*, it was highlighted in the preamble that 'those kind of persons have and do still increase into great and excessive numbers, and are like more to do, if some better provision be not made for the repression of them'.⁴² The recognition that existing debt avoidance practices were damaging to trade was more evident in the *Bankruptcy Act of 1571* than in its predecessor and there is a clear suggestion that order is paramount in the concern expressed in the preamble to halt the increase of fraudulent bankrupts. Regulation of trade required a delicate balance between encouragement and restriction. Parliament may have been able to achieve this balance but not where the confidence of traders was shaken from within their own ranks. Bankruptcy legislation had to deal with this uncertainty.

In the second half of the 18th century, Blackstone justified the restriction to traders in the legislation on broad grounds of mutuality:

Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or tradesman becomes incapable of discharging his own debts, it is his misfortune and not his fault.⁴³

40 Lawrence M Friedman and Thadeus F Niemira, 'The Concept of the Trader in Early Bankruptcy Law' (1958) *Saint Louis University Law Journal* 223, 236. Bankruptcy was eventually available to all in the second half of the 19th century as a result of *Bankruptcy Act 1861*, 24 & 25 Vic 1, c 134 and *Bankruptcy Act 1869*, 32 & 33 Vic 1, c 71. Although it has been argued that during the period that bankruptcy was restricted to traders, the courts 'did not address the underlying question of why bankruptcy should be restricted to the trader and exclude the non-trader': Cohen, above n 30, 160. This does not mean that there were no reasons. The overriding reason was to maintain order and this involved the shielding of the aristocracy, the focus on commercial confidence, and the encouragement of trade as a means of underpinning a growing market. It is also possible that the restriction to traders 'was an attempt to establish a curious form of corporate limited liability in the absence of a general law of incorporation': V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* (Clarendon Press, 1995) 16.

41 Edward Christian, *The Origin, Progress and Present Practice of the Bankrupt Law Both in England and in Ireland* (W Clarke and Sons, 1st ed, 1812) vol I, 328.

42 *Bankruptcy Act of 1571* preamble.

43 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765–69, 1966 ed) vol 2, 474.

This view, however, was conditioned by the fact that in Blackstone's time the bankruptcy legislation had been improved by successive alterations and the introduction of discharge. Also, the advantages of credit had become more firmly entrenched. The outlook of the framers of the *Bankruptcy Act of 1571* was much less charitable.

C *Bankruptcy as a Response to Risk*

Although the restriction of bankruptcy to traders in 1571 was evidence of the concern for stability in commerce, the history of the 17th century highlights once again the problems caused by galloping enterprise. England's economy was maturing quickly and becoming more complex. The best example of the growing confidence was the expansion of trade, particularly overseas trade. However, more options for entrepreneurs meant more decisions and in turn more decisions that could go wrong. Wealth seemed more attainable in a market economy than in the earlier, largely rural, face-to-face economy. But it was not the goals of traders and entrepreneurs that created the need for effective insolvency measures — it was the risk of failure and its effect on the delicate order developing in commerce. Appleby says:

the seventeenth-century commercial order of England was exposed to a new battery of dislocating forces: international competition, monetary fluctuations, and discontinuities in the levels of supply and demand. No longer visible and tangible, the economy became generally incomprehensible.⁴⁴

The upside to the freer availability of credit was the expansion of England's economy. The downside was financial failure and its effects across the trading classes generally.⁴⁵ As commercial relationships became more complex, the need for the law to shore up business confidence grew. By the late 17th century, security and order had become obvious goals. This was not only evidenced in England's foreign policy where wars against the Dutch, Spanish and French kept Parliament's attention focused abroad⁴⁶ and destinations for trade riddled with uncertainty,⁴⁷ but also domestically where the desire for security 'was a rational

44 Joyce Oldham Appleby, *Economic Thought and Ideology in Seventeenth-Century England* (Princeton University Press, 1978) 25–6.

45 See Blackstone, above n 43, 474. Blackstone's observation of 'both traders' is consistent with the integration of trader's fortunes with other economic factors.

46 England was at war for most of the reign of William III. This not only placed ongoing strains on government resources but also brought uncertainty to overseas trade. Graves and Silcock write that '[i]t was the financial need created by war which established the custom of annual sessions of Parliament': Michael Graves and Robin Silcock, *Revolution, Reaction and the Triumph of Conservatism: English History, 1558–1700* (Longman Paul, 1984) 471.

47 An example of the connection between the financial hardships caused by England's rolling cycle of wars during the late 17th and early 18th centuries, and the need for bankruptcy, can be seen in the bankruptcy of Daniel Defoe. Defoe had underwritten insurance of merchant shipping during the long war with France and this venture resulted in substantial loss. Parliament had considered a Bill to compensate those involved in the venture but this did not proceed. See John Robert Moore, *Daniel Defoe, Citizen of the Modern World* (University of Chicago, 1958) 90–1.

response to a world in which no man was immune from disaster and there was no safety net apart from the family'.⁴⁸

Three bankruptcy Acts were introduced during the 17th century. They clarified aspects of the *Bankruptcy Act of 1571* and addressed particular issues, such as new acts of bankruptcy or the exclusion of certain categories of debtors from the legislation.⁴⁹ The power to examine the bankrupt and his affairs was created in the *Bankruptcy Act of 1604*. This improvement to the provisions of the *Bankruptcy Act of 1571* was necessary because although that Act enabled examination of the bankrupt's associates, it ignored the bankrupt himself.⁵⁰ The power to examine is closely connected to the imposition of order for it is only when the bankruptcy commissioners had the ability to undertake a full process of collection and distribution that the law was able to hold out to creditors that it could deliver results. Insolvency is the result of many factors, but all are certainly multiplied by uncertainty and unpredictability in commercial relations.

The fact that when disputes arose the courts could consider who was or was not a trader on a case-by-case basis allowed for judicial control over the application of the legislation. In some cases Parliament saw fit to widen the category itself. In the *Bankruptcy Act of 1623* the definition of a trader was amended to include a scrivener.⁵¹ Scriveners held other's money and played an important role in the machinery of investment. The trust placed in them made the misuse of funds and the negative consequences resulting from loss of investor confidence an important economic issue.

Managing the economy involved instilling confidence in trading relations, and this required satisfying commercial expectations in relation to an ordered and equitable bankruptcy process. A significant part of England's economic growth was tied to overseas expansion. Accordingly, there was a need to protect that part of the economy that underwrote this expansion. To this effect the *Bankruptcy Act of 1662* excluded from the definition of a trade those 'who have adventured or put in' money in the East India Company, the Guiney Company or The Royal Fishing

48 Richard Grassby, *The Business Community of Seventeenth Century England* (Cambridge University Press, 1995) 401. Harris confirms the increasing influence of credit during the 16th to 18th centuries, saying that '[c]redit and debt were fantastically pervasive': Harris, above n 24, 8. In relation to the problems at all levels of English society resulting from the obligations of credit, see Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Macmillan, 1998).

49 *An Act for the Better Relief of the Creditors against Such as Shall Become Bankrupts 1604*, 1 Jac 1, c 15 ('*Bankruptcy Act of 1604*'); *An Act for the Further Description of a Bankrupt and Relief of Creditors against Such as Shall Become Bankrupts and for Inflicting Corporal Punishment upon the Bankrupts in Some Special Cases 1623*, 21 Jac 1, c 19 ('*Bankruptcy Act of 1623*'); *An Act Declaratory Concerning Bankrupts 1662*, 13 & 14 Car 2, c 24 ('*Bankruptcy Act of 1662*').

50 See *Bankruptcy Act of 1604* s 6:

And for that the practices of bankrupts of late are so secret and so subtil [sic], as that they can very hardly be found out or brought to light; and for that the former statute, giving power to the commissioners to examine others than the bankrupts, hath not fully or sufficiently authorised them to examine the said bankrupt upon oath.

51 Christian, above n 41, vol II. Christian describes a scrivener as 'a country attorney or counsel' but not necessarily 'a regular professional man': at 21. He also confirms that regardless of the bankruptcy Acts introduced during the 17th century the *Bankruptcy Act of 1571* remained as the basis of the law until the significant changes brought about at the beginning of the 18th century: at vol I, 10.

Trade.⁵² It did so specifically to ensure that ‘such persons may not be discouraged in those honourable endeavors for promoting publique undertakings’.⁵³

Bankruptcy would not be able to deliver on its promise of order without efficient and structured administrative mechanisms. An important component in the introduction of a bankruptcy system in England during the 16th century was the creation of a separate layer of administration to deal with the processes of collection and distribution. The office of the bankruptcy commissioner was first created by the *Bankruptcy Act of 1571*. Predominantly, commissioners were drawn from the ranks of the legal profession. Citizens or merchants were also included and generally a creditor could be appointed as the treasurer of any fund received.⁵⁴ The ability of the commissioners to appoint an assignee was introduced in the *Bankruptcy Act of 1604*. In *Smith v Mills* (*‘Case of Bankrupts’*),⁵⁵ Wray CJ affirmed the judicial view of bankruptcy commissioners in the late 16th century. He set out that the *Bankruptcy Act of 1571* ‘hath appointed certain commissioners, of indifferency and credit, to make the distribution’.⁵⁶ Gradually with the improvement of the commissioners’ powers and particularly the introduction of discharge in the bankruptcy legislation of the early 18th century, the administration of bankrupt estates became more efficient.⁵⁷

D The Introduction of Bankruptcy Discharge as a Means of Maintaining Order

The introduction of discharge in 1706 brought with it an overhaul of the bankruptcy law,⁵⁸ yet the restriction to traders was to remain until later in the century when it was finally removed.⁵⁹

Just as it was with the *Bankruptcy Act of 1542* and the restriction to traders in the *Bankruptcy Act of 1571*, the introduction of discharge in the early 18th century

52 *Bankruptcy Act of 1662* preamble.

53 *Ibid.*

54 Gerard Malynes, *Consuetudo, Vel, Lex Mercatoria: Or, the Ancient Law-Merchant* (London Professional Books, first published 1686, 1981 ed) 158.

55 (1584) 2 Co Rep 25; 76 ER 441.

56 *Case of Bankrupts* (1584) 2 Co Rep 25, 26; 76 ER 441, 474.

57 Note though that many critics of the system, including Daniel Defoe, focused on the fact that estates were often managed in a manner favouring the commissioners. Defoe exposed the feastings, drunkenness and the litigious and vexatious law suits indulged in by the commissioners as ‘a Villany far greater than the Debtor’s Dissaster’: Daniel Defoe (1706) 3(34) *Review of the State of the English Nation* [published from 1704 to 1713] (19 March 1706) 134.

58 *An Act to Prevent Frauds Frequently Committed by Bankrupts*, 4 & 5 Anne, c 17, s 18 (*‘Bankruptcy Act of 1705’*). The session in which the Act was passed commenced on 25 October 1705. The Act was first referred to in the *Journal of the House of Commons* on 31 October 1705 and received the royal assent on 19 March 1706 (this date is 1705 in the House Journals): United Kingdom, *Journal of the House of Commons*, vol 15 (25 October 1705 to 1 April 1708). The discharge provision was modified to require four-fifths creditor approval (in number and value) in *An Act to Explain and Amend an Act of the Last Session of Parliament, for Preventing Frauds Frequently Committed by Bankrupts*, 5 Anne, c 22 (*‘Bankruptcy Act of 1706’*). The session in which this Act was passed commenced on 3 December 1706. The Act was first referred to in the *Journal of the House of Commons* on 17 January 1707 (this date is 1706 in the House Journals) and received the royal assent on 8 April 1707: United Kingdom, *Journal of the House of Commons*, vol 15 (25 October 1705 to 1 April 1708).

59 *Bankruptcy Act 1861*, 24 & 25 Vic 1, c 134; *Bankruptcy Act 1869*, 32 & 33 Vic 1, c 71.

reflected the close relationship between the bankruptcy law and commercial order. The need to modify and refine this relationship became particularly important as trade took on increasing significance as a mainstay of economic growth. All bankruptcy legislation deals with the realignment of debtor-creditor relations; however it is obvious that during the early history of bankruptcy this realignment favoured the position of creditors. As such, while the introduction of discharge was clearly a watershed in the development of bankruptcy law, the reality of the bankrupt securing four-fifths of the creditors' agreement for the purposes of discharge was a high bar. It meant that the introduction of discharge did little to unhinge creditor dominance of bankruptcy. Schur states: 'It can hardly be denied that in a general sense the legal order establishes (or at least recognises and legitimates) the broad patterns of power relationships in a society'.⁶⁰ The importance of creditor confidence to the rapidly industrialising society of 18th century England is undeniable and the fact that financial failure was high on Parliament's agenda reflects the close connection between bankruptcy law and the need for order and stability. Friedman and Niemira conclude:

This change in law [the introduction of discharge] is both cause and effect of a new attitude toward the bankrupt. From a crime, bankruptcy evolves into what we might call rather a commercial crisis.⁶¹

Better regulating the supply of credit and reversing the growing lack of confidence between traders was on the Parliament's agenda when in March 1705 the House of Lords ordered that the Judges draw 'a Bill, to prevent frauds frequently committed by Bankrupts'.⁶² The direction from the House of Lords to the Judges followed immediately on from the House resolving to pass an Act concerning Thomas Pitkin. He was a London linen draper and bankrupt whose fraudulent conduct and massive debt created much concern and anger throughout the commercial community.⁶³ There can be no doubt when the House journals are considered that the severity of Pitkin's bankruptcy, together in a lesser sense with the actions of his confederates or accomplices — Thomas Brerewood, Job Williams and Michael Miles — had a substantial effect on the perspective of the Parliament as the *Bankruptcy Act of 1705* made its way through both Houses. Duffy has referred to the *Bankruptcy Act of 1705* as the 'initial meliorating statute' from the bankrupt's perspective, yet it was 'introduced into parliament, in response to the notorious frauds of Thomas Pitkin in 1704'.⁶⁴ Contemporary opinion confirms the importance of the 'Pitkin affair' as a significant factor contributing

60 Edwin Schur, *Law and Society: A Sociological View* (Random House, 1968) 87.

61 Friedman and Niemira, above n 40, 234. The authors see bankruptcy as a commercial crisis. This is true but perhaps it is more precise to describe bankruptcy as the result of a commercial crisis. That is, bankruptcy is imposed to deal with a commercial crisis with the aim of bringing order to the previously disordered debtor/creditor relationships. It is, however, unlikely the 'criminal' aspect of bankruptcy had faded far from either Parliament's or the creditors' outlook. In fact the *Bankruptcy Act of 1705* introduced severe penalties. See below n 72.

62 United Kingdom, *Journal of the House of Lords*, vol 17 (1701–5), 3 March 1705, 687. This became the *Bankruptcy Act of 1705*.

63 *An Act for the Relief of the Creditors of Thomas Pitkin, a Bankrupt, and for the Apprehending of Him and the Discovery of the Effects of the Said Thomas Pitkin, and His Accomplices 1704*, 3 & 4 Anne, c 12.

64 Ian P H Duffy, 'English Bankrupts 1571–1861' (1980) 24 *American Journal of Legal History* 283, 286.

to the introduction of the *Bankruptcy Act of 1705*. The *Journal of the House of Commons* on 12 February 1706 stated that a petition of merchants and traders of London was tabled concerning the *Bankruptcy Act of 1705*. It set out that ‘Mr Walker, Citizen, and Linen-draper said, that the [*Bankruptcy Act of 1705*] was made upon the account of that notorious Fraud of one Pitkyn’.⁶⁵

While it is unlikely that the clause introducing discharge into the *Bankruptcy Act of 1705* was solely the result of the reaction to the Pitkin affair, clearly the various representations to the House of Commons during 1705 highlighted that, regardless of the penalties that existed in relation to fraudulent bankrupts, some means of preventing impecunious debtors from falling deeper into debt — in Pitkin’s case the amount was some £70,000⁶⁶ — was essential if the bankruptcy legislation was to engender financial restraint and at the same time provide a predictable and ordered financial climate. As Kadens observed, ‘[i]n the sordid detail of its cheats, bribery, blackmail, and betrayal of trust, the Pitkin Affair provides a rich study of bankruptcy crime and the reactions to it’.⁶⁷ In Daniel Defoe’s influential newspaper *Review of the State of the English Nation*, the extent of the fallout from Pitkin’s bankruptcy is potently described as having ‘so many Ill Consequences in Trade that few had more’.⁶⁸ He goes on to detail these consequences:

when Credit thus takes part with a Knave ... Trade feels an *Earthquake*; the Exchange seems to *Tremble*; the shock is felt so far, and the Blow so strong, that it overthrows those that totter’d, and totters those that stand too fast to be Overthrown; and the Calamity is fatal to Trade in General.⁶⁹

Earlier, in his essay ‘Of Bankrupts’ in *An Essay upon Projects*, Defoe had recognised the uncertainty caused by ineffective bankruptcy laws. He comments on the bankruptcy law in place at the end of the 17th century: ‘All people know, who remember anything of the times when [*the Bankruptcy Act of 1571*] was made, that the evil it was pointed at was grown very rank, and breaking to defraud creditors so much a trade, that the parliament had good reason to set up a fury to deal with it’.⁷⁰ Defoe argues that the changing circumstances had brought the need for further legislation and that debtors had misused the statute, learning to evade their creditors and threaten order and justice. The possibilities for misuse were such that even shopkeepers could benefit from the deficiencies in the legislation by arranging for the removal of the ‘greatest warehouse of goods

65 United Kingdom, *Journal of the House of Commons*, vol 15 (25 October 1705 to 1 April 1708), 12 February 1706, 291.

66 The committee appointed by the House of Commons noted that ‘*Thomas Pitkin*, late of *London*, Linen-draper, hath in Nine Months past defrauded the Petitioners, and other his Creditors, to the Value of Seventy thousand Pounds, and upwards’: United Kingdom, *Journal of the House of Commons*, vol 14 (20 October 1702 to 14 March 1704), 22 February 1704, 545 (emphasis in original).

67 Emily Kadens, ‘The Pitkin Affair: A Study of Fraud in Early English Bankruptcy’ (2010) 84 *American Bankruptcy Law Journal* 483, 487.

68 Daniel Defoe (1706) 3(24) *Review of the State of the English Nation* [published from 1704 to 1713] (23 February 1706) 94.

69 *Ibid* 95 (emphasis in original).

70 Daniel Defoe, ‘Of Bankrupts’ in Henry Morley (ed), *The Earlier Life and Chief Earlier Works of Daniel Defoe* (Burt Franklin, first published 1697, 1970 ed) 111.

or cellar of wines in the towns and carry them off into those nurseries of rogues, the Mint and Friars'.⁷¹

Accordingly, once again the need for order had precipitated a change in the bankruptcy law. Discharge was not a universally accepted notion, and bankrupts were still widely regarded as frauds. However, to ensure that traders remained positive and that an orderly means of dealing with insolvency existed, Parliament committed to a change in direction. Its philosophical struggle was reflected in the fact that the largesse of discharge was counterbalanced by the heavy-handedness of a capital punishment provision, and it has been suggested that although the Act was the first to include a provision enabling discharge it 'is more notable for the severe penalties it introduced'.⁷² Yet regardless of the underlying opposition to discharge, evident in the several petitions that had been presented to Parliament by merchants in the months immediately preceding the finalisation of the Bankruptcy Act of 1705,⁷³ the growing recognition by traders generally that a solution to the insolvency dilemma did not exist in the harshness of the existing legislation, and the backlash from the Pitkin affair, proved persuasive, and ingrained prejudice toward bankrupts gave way to the need for commercial stability.

Martin argues that '[i]nsolvency systems profoundly reflect the legal, historical, political, and cultural context of the countries that have developed them'.⁷⁴ This is true of bankruptcy. In England, the initial severity of the law toward bankrupts was to be gradually modified as politically and socially, punishment gave way to persuasion.

IV ORDER AND PREDICTABILITY IN MODERN BANKRUPTCY LAW

Historically, consideration for the plight of debtors has featured little in the philosophy behind bankruptcy legislation. However this is not uniformly the case today and countries like the United States and Australia have particularly liberal bankruptcy systems. The gradual, positive change in the outlook toward

⁷¹ Ibid 112.

⁷² Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis, 2009) 20. Section 1 of the *Bankruptcy Act of 1705*, 4 & 5 Anne, c 17 set out that if the bankrupt did not submit to be examined by the bankruptcy commissioners, or concealed property, then he 'shall suffer as a felon, without the benefit of clergy'. At the time the clergy avoided punishment in relation to certain offences. However, without this benefit and in being designated a felon, a bankrupt in breach of the Act was subject to capital punishment.

⁷³ On 11 March 1706, the *Journal of the House of Lords* noted 'the Petition of several Merchants and Traders in and about the City of London': United Kingdom, *Journal of the House of Lords*, vol 18 (1705–9), 145. See United Kingdom, *Journal of the House of Commons*, vol 15 (25 October 1705 to 1 April 1708) for other examples of pressure put on Parliament to establish order in relation to instances of insolvency, including by 'divers Merchants, and Traders' on 17 January 1706: at 240; by 'Merchants, Clothiers, Serge-makers, Fullers, Mercers, Grocers, and other principal Traders' on 27 January: at 254; by 'the incorporated Company of Mercers, Grocers, Apothecaries, and Haberdashers, within the city of Worcester' on 8 February: at 280; by various 'Merchants, and Traders of the City of London' on 12 February: at 291 (emphasis in original).

⁷⁴ Martin, above n 34, 4.

bankrupts beginning in the 18th century has accelerated rapidly since the middle of the 20th century with the rise of consumer bankrupts and the idea of the ‘fresh start’. Whereas the change, which places emphasis on discharge as a goal, rather than simply an outcome, seems dramatic, it is merely the evolution of bankruptcy to enable it to deliver its core promise of order. As social outlook and commercial realities change it has become necessary for the idea of bankruptcy to adapt. Cardozo states that ‘[t]he study of the law is thus seen to be the study of principles of order revealing themselves in uniformities of antecedents and consequents’.⁷⁵ The focus on the rehabilitation of the debtor has not arisen solely from a charitable view of insolvency but rather from a practical realisation that an individual’s hopeless, unsolvable financial situation may lead to a negative and costly social outcome with its resulting ‘relief costs, suicides, and criminality concomitant to financial despair’.⁷⁶ Bankruptcy systems are social tools; ‘[a]s such, they are value-laden and must be drafted with care to reflect the particular values of a culture’.⁷⁷

Bankruptcy has developed differently in different countries. Efrat divides philosophies in relation to current consumer bankruptcy laws into the following categories: conservative, where there is a ‘conspicuous absence of any debt forgiveness provision to consumers’;⁷⁸ moderate, where debt forgiveness is apparent but not necessarily certain; and liberal, where there is a high degree of certainty in relation to debt forgiveness, usually involving the right to automatic discharge.⁷⁹ All bankruptcy philosophies, and the systems they foster, have in common a predominate purpose: order and predictability. Each country though may have a particular approach focused on the adoption of either a creditor oriented or a debtor oriented perspective, or a mix of these. Efrat identifies four factors that lead to the global divergence in bankruptcy strategy: first, the continuing influence of the bankruptcy laws of the former colonial power in that country; second, the deregulation of the consumer credit market resulting in increased competition in consumer lending and greater access to consumer credit increasing financial vulnerability as individuals undertake excessive debt; third, governments’ differing dispositions toward entrepreneurship where a broad ‘fresh start’ policy encourages individuals to take risks in starting a new business venture because of the perceived protection; and fourth, the availability of social

75 Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924) 37.

76 G Stanley Joslin, ‘The Philosophy of Bankruptcy — A Re-Examination’ (1964) 17 *University of Florida Law Review* 189, 191.

77 Martin, above n 34, 5. In the broadest sense, bankruptcy solves problems between debtors and creditors. Yet this outcome may not always be obvious to either debtor or creditor. The mix of financial failure and social stigma on the debtor’s part, and outstanding debt and enforced compromise on the creditor’s part may not feel to either as a problem solved. However, without bankruptcy, things could be a lot worse.

78 Rafael Efrat, ‘Global Trends in Personal Bankruptcy’ (2002) 76 *American Bankruptcy Law Journal* 81, 82. Efrat says that South American countries have traditionally fallen into the conservative group and there is evidence of this reflected in a synopsis of the proceedings of a World Bank Taskforce Meeting in 2011 looking into the divergence of individual bankruptcy throughout the world: at 82–3. See Susan Block-Lieb, ‘Best Practices in the Insolvency of Natural Persons: Rapporteur’s Synopsis’ (Conference Report, World Bank Insolvency and Creditor/Debtor Regimes Task Force Meetings, 11 January 2011) [6] <<http://www.iiglobal.org/component/jdownloads/finish/352/6012.html>>.

79 Efrat, above n 78, 82–8. Australia is a prime example of a liberal bankruptcy system where, pursuant to s 149 of the *Bankruptcy Act 1966* (Cth), a bankrupt is (subject to certain conditions) discharged from bankruptcy after a period of three years.

welfare — ‘the weaker the social safety net a particular country provides to its citizens, the more likely it is that individuals will resort to borrowing to obtain services otherwise provided by the government, such as education, medical benefits and housing’.⁸⁰

Modern bankruptcy legislation is accordingly like its historical counterparts in that it addresses the unpredictability of financial disaster. As bankruptcy has become normalised as a component of modern industrialised society, the recipients of the order it delivers have been redefined. Bankruptcy is no longer merely providing opportunities for creditors through an orderly distribution and by encouraging early surrender of assets by accessible debtor-initiated procedures. Rather, it is placing the debtor centre-stage to ensure that society as a whole is not burdened or destabilised by the large number of non-business bankrupts who, lacking hope of re-establishing themselves, act to upset the order of the collective processes and perhaps shun community expectations in frustration. Bankruptcy law, as Jenkins described law in general, is ‘a principle of order in the sense that [its] laws are propositions that refer to and explicate the lines of connection that run through orderly contexts’.⁸¹

The relationship between bankruptcy and order is based on solid commercial principles. In an environment where the influence of credit has multiplied, not only laws but values generally have catered to the outcomes. Lester argues that ‘bankruptcy law originated from the need to solve the practical commercial problem created by failed businesses. Its roots were not in political philosophy or a particular theory of government, and there appears to be no evidence that it ever became a partisan political issue’.⁸² Whilst there is justification that bankruptcy is a practical commercial solution, and has not been used to divide political ideologies, it is difficult to ignore the political importance of solving debtor-creditor problems. Whatever bankruptcy laws are in place they must be able to address the symptoms of financial failure successfully. For just as the absence of bankruptcy can leave societies exposed to financial crisis, laws that are introduced must be able to function efficiently. Shepard has observed ‘there is some evidence that the high level of bankruptcy risk may even threaten the stability of the economy and play a role in propagating recessions’.⁸³

Risk and bankruptcy are closely connected. In one sense bankruptcy is financial risk insurance on a collective rather than individual scale. The existence of an efficient bankruptcy process becomes more important as risk, and awareness of risk, become more palpable; and resort to bankruptcy as risk rises is strong evidence of bankruptcy’s role in keeping order. A current example of how the increasing incidence of credit risk can create fear of commercial instability and

80 Efrat, above n 78, 96.

81 Iredell Jenkins, *Social Order and the Limits of Law: A Theoretical Essay* (Princeton University Press, 1980) 64.

82 Lester, above n 40, 37.

83 Lawrence Shepard, ‘Accounting for the Rise in Consumer Bankruptcy Rates in the United States: A Preliminary Analysis of Aggregate Data (1945–81)’ (1984) 18 *Journal of Consumer Affairs* 213, 214. See also Ben S Bernanke, ‘Bankruptcy, Liquidity, and Recession’ (1981) 71 *American Economic Review* 155.

set the scene for a bankruptcy solution is Russia. Traditionally a cash economy, Russia only introduced corporate insolvency legislation in 1992.⁸⁴ Personal insolvency had gone unaddressed until recently when a proposal to add provisions regulating personal bankruptcy into the existing legislation was introduced into the Russian Parliament. The changes are expected to become law in 2013.⁸⁵ The instability resulting from unmanageable debt became obvious several years ago — in 2006 the then director of the Russian Finance Ministry's financial policy department commented that the overall financial trend 'look[ed] threatening' with private loans increasing, overdue debt soaring, and Russian banks lacking effective mechanisms for dealing with insolvent borrowers.⁸⁶ The situation has only grown worse. Tai Adelaja reports that '[i]n a country where the volume of mortgages, car and consumer loans grows by the hour, the lack of personal bankruptcy regulation has been the source of business-related anxiety, confusion and even suicide'.⁸⁷ The extent of the upheaval has made the introduction of personal bankruptcy a critical initiative.

The government is taking its cue from the recent financial crisis, when the lack of a personal bankruptcy law in an unsecured credit market exposed Russian borrowers to a large set of problems. Russians who defaulted on their mortgages as a result of financial shocks, such as job loss, lost not just their homestead, but personal belongings as well.⁸⁸

It is clear that the increasing possibility of commercial and social disruption resulting from the changes in the Russian economy, particularly the spread of, and need for, credit, has prompted the introduction of personal bankruptcy legislation. Even though the legislation is not universally popular its inevitability supports the important relationship between bankruptcy and order.⁸⁹

Of course, commercial and social disruption arising from debt and insolvency are not new problems. They were also threats to order in Republican Rome and this is a reason why the issue was addressed in Table III of the XII Tables which enabled creditors to act collectively in relation to an insolvent debtor. This concern was repeated in the early English legislation where bankrupts were not only seen as frauds but also where the outcome of insolvency, the financial disruption and

84 Resolution of the Supreme Soviet of the Russian Federation No 3930-1, 'On Order of Entry into Force of Law of Russian Federation *On Insolvency (Bankruptcy) of Enterprises*' (19 November 1992); Russian Federation No 3929-1, *On Insolvency (Bankruptcy) of Enterprises* (19 November 1992). See also Steve Campbell, 'Brother, Can You Spare a Ruble? The Development of Bankruptcy Legislation in the New Russia' (1994) 10 *Emory Bankruptcy Developments Journal* 343, 358. See also Paul R Williams and Paul E Wade, 'Bankruptcy in Russia: The Evolution of a Comprehensive Russian Bankruptcy Code' (1996) 2(1-2) *Journal of East-West Business* 173.

85 Tai Adelaja, *Personal Bankruptcy Redux: The Russian Government Gives Green Light to a New Consumer Bankruptcy Law* (2 April 2012) Russia Profile <<http://russiaprofile.org/business/56857.html>>; Russian Legal Information Agency, *General Jurisdiction Courts Should Handle Personal Bankruptcy Cases — Supreme Court* (16 April 2013) RAPS News <http://rapsinews.com/judicial_news/20130416/267055834.html>.

86 Dmitry Dokuchayev, 'Dealing with Insolvent Borrowers', *The Washington Post* (online) <<http://www.washingtonpost.com/wp-adv/specialsale/spotlight2006/articles/insolvent.html>>.

87 Adelaja, above n 85.

88 Ibid.

89 Ibid.

uncertainty, was a 'hurt to the Realm',⁹⁰ that is, a major financial downside to the economy as a whole. The need for bankruptcy legislation is aligned with order; and the perception of order, even partial order, is essential to instilling commercial faith in bargaining, negotiating and contracting. It is an economic reality that 'while parties may have strong incentives to strike a bargain, their incentives after the fact are not always compatible with maintaining the agreement'.⁹¹ Bankruptcy solves this compliance problem by providing predictability to bargaining parties in relation to *ex post* problems that are anticipated *ex ante*. The existence and processes of bankruptcy laws accordingly alter incentives, thereby helping to 'promote compliance with bargains after the fact'.⁹²

In a social sense, bankruptcy law targets broken promises, and in any society where individuals break promises on a large scale there will be serious implications and a need for a solution. Bankruptcy law provides this solution by ensuring consistency of treatment for creditors and, through discharge, some hope for bankrupts.

Social trust is essential to efficient economic activity. ... Economists have just recently begun to recognize the importance of social trust in greasing the wheels of commerce and in creating a prosperous economy. ... Economic activity marked by opportunism and suspicion undermines social trust and a sense of community.⁹³

A race to seize the debtor's assets serves no wider social or economic purpose, and in fact has a negative effect on creditor confidence, isolating the less powerful creditors at the expense of the most resourced. Bankruptcy avoids these negative outcomes by imposing cooperation and creating inducements to encourage creditors to act cohesively.⁹⁴

The importance of creditors' entitlements reinforces the integral role played by bankruptcy law within the wider socio-economic requirement for order as a part of a 'coherent system of promise enforcement'.⁹⁵ In return for the expectation of predictability and ordered distribution, creditors are required to give up certain rights. This characteristic has been identified as the 'creditors' bargain'⁹⁶ which incorporates the assumptions, or expectations, involved in entering the debtor-creditor relationship, including the fact that as amongst themselves the creditors must share the risks of failure. Individual and business failure gives rise to the

90 *Bankruptcy Act of 1604* preamble.

91 Douglass C North and Barry R Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' (1989) 49 *Journal of Economic History* 803, 806.

92 *Ibid.*

93 Todd J Zywicki, 'Bankruptcy Law as Social Legislation' (2001) 5 *Texas Review of Law and Politics* 393, 401–2.

94 See José M Garrido, 'The Distributional Question in Insolvency: Comparative Aspects' (1995) 4 *International Insolvency Review* 25. Garrido expresses this as creditors collectively 'behav[ing] as an individual owner': at 26.

95 Elizabeth Warren, 'Bankruptcy Policy' (1987) 54 *University of Chicago Law Review* 775, 779.

96 Thomas H Jackson and Robert E Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 *Virginia Law Review* 155, 158. See also Robert E Scott, 'Through Bankruptcy with the Creditors' Bargain Heuristic' (1986) 53 *University of Chicago Law Review* 690. There are echoes of the reciprocity attending social contract theory in the 'creditors' bargain'.

self-interest of creditors which, if left uncontrolled, would place them in costly competition with one another for limited resources. The existence of a system of bankruptcy resolves this potential conflict.

An efficient bankruptcy system reduces the width of the financial fallout from failure. Therefore, the economic justification for bankruptcy law arises from the incidence of market failure.⁹⁷ If management of insolvency were left to individuals on a case-by-case basis, inefficiencies would arise as differently resourced creditors sought satisfaction. In her examination of bankruptcy policy, Warren sets out four key goals of the system: to enhance the value of the failing debtor; to distribute value according to multiple normative principles; to internalise the costs of the business failure to the parties dealing with the debtor; and to create reliance on private monitoring.⁹⁸ The fact that bankruptcy laws are organised to minimise losses to the general public, when personal or business failure forces parties dealing with the failing debtor to bear the burden of the failure, is an important aspect of the regulation of commercial order. In the somewhat less integrated financial world of Republican Rome or 17th century England, it was reasonable for bankruptcy to focus on creditors, as the immediate effect of this was enhanced confidence among the class primarily involved in trade. However, modern bankruptcy faces different organisational problems. If failure to control debt brings disorder then any solution to this problem will need to bear relation to the complexity of modern commerce. The structure imposed by bankruptcy limits the fallout. Creditors are less able to manipulate a debtor or associates if they are bound together under the trustee's umbrella. Accordingly the goal of community confidence is supported by the goal of collectivism in bankruptcy.

Modern bankruptcy administration provides even further incentive for all parties to embrace the system as a remedy for financial dislocation and friction. In Australia, bankruptcy is administered by the Insolvency and Trustee Service Australia (ITSA). ITSA's purpose is 'to provide [i]mproved and equitable financial outcomes for consumers, business and the community through application of bankruptcy and personal property securities law, regulation of personal insolvency practitioners and trustee services'.⁹⁹ The role of the bankruptcy trustee today is to put into practice bankruptcy's promise of order.

Lack of financial obligation diminishes the existence of obligation in a society generally. Where societies are based around commercial relationships, a failure of the foundation upon which those relationships are based affects community perceptions of order and weakens confidence. This is evident in the philosophy behind the introduction of bankruptcy legislation in England in the 16th century and particularly obvious today as modern legislation strives to ensure creditor confidence as well as to provide a considered outcome for debtors in which they can

97 This proposition is argued by Knot and Vychodil in relation to Czech bankruptcy law: Ondřej Knot and Ondřej Vychodil, 'What Drives the Optimal Bankruptcy Law Design?' (2005) 55 *Czech Journal of Economics and Finance* 110, 111.

98 Warren, above n 95, 778–9, 785, 789, 790.

99 Inspector-General in Bankruptcy, *Inspector-General Practice Statement 1: Regulatory Framework* (1 February 2013) Insolvency and Trustee Service Australia, 3
<<https://www.itsa.gov.au/about-itsa/policies-and-practices/inspector-general-practice-statements/regulatory-compliance-framework-for-bankruptcy-trustees-and-debt-agreement-administrators>>.

see commercial resurrection as a real possibility. Zywicki notes that in the 1970s in America, 'the weakening of financial obligations accompanied the weakening of other social obligations', and that this phenomenon was responsible for the need to implement a process of restoring greater balance to bankruptcy legislation.¹⁰⁰

Absence of commercial trust results in widespread vulnerability and the key factor in this equation is always risk. The management of risk, which is firmly entrenched in modern legal systems and where whole professions are devoted to every aspect of risk minimisation, has in fact been present in the philosophy of bankruptcy from its beginnings. In relation to modern America, McIntyre observes:

There can be no doubt that bankruptcy is bound up with the general conditions of collective life in capitalistic society. Even the most rudimentary understanding of economics suggests that capitalism is bound up with risk ... [and that] credit, debt, and fear of financial failure have long been part of the American way of life ...¹⁰¹

A bankruptcy solution is relevant where the financial failure of individuals results in multiple creditors seeking to assert their rights to the debtor's property. It is the curse of credit that most frequently leads debtors to this precarious position. Accordingly bankruptcy and credit have been, for a very long time, uncomfortable bedfellows. The need for the structure imposed by bankruptcy is not necessarily a singular function of the failure of the laws and customs of credit to avoid financial disaster, but more generally bankruptcy is a response to the widespread insecurity formed by the veneer of substance that credit engenders. This unpredictability and fragile order require the insurance provided by a system of bankruptcy. McIntyre argues that 'confidence — in more than just economic terms — must be present for society to continue. But socially, credit in the economic sense seems to have become shorthand for credit in every sense'.¹⁰² Even the stigma that attaches to bankruptcy is, if looked at strictly, not necessarily a factor of being bankrupt but more so a factor of going bankrupt. That is, it is the financial failure that is behind the stigma; being bankrupt is merely the peg upon which the hat of approbation is hung. If, as McIntyre points out, financial credit is both public and tangible proof of financial worth, then 'proving oneself unworthy of financial credit discredits one's claims to public approval'.¹⁰³

100 Zywicki, above n 93, 413, citing David Fraum, 'Bankruptcy Reform Is a Moral Issue', *Wall Street Journal* (New York), 11 February 2000, A14.

101 Lisa J McIntyre, 'A Sociological Perspective on Bankruptcy' (1989) 65 *Indiana Law Journal* 123, 126.

102 *Ibid* 136.

103 *Ibid*, citing Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Simon & Schuster, 1963). In relation to bankruptcy stigma, see also Rafael Efrat, 'The Evolution of Bankruptcy Stigma' (2006) 7 *Theoretical Inquiries in Law* 365, 369. Martin supports the idea that bankruptcy is a response to the need for order: Martin, above n 34, 21. She approves the arguments of Sullivan, Warren and Westbrook, saying that 'bankruptcy is a treatment of a financial problem but is not itself the disease. They conclude that unemployment or underemployment, illness, and divorce are the primary causes of bankruptcy in the United States, but that huge amounts of consumer debt in general, and credit card debt in particular, lower US citizens' threshold for collapse when financial disasters strikes [sic]': at 21. See generally Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000).

Bankruptcy process is a backstop where the various and specific mechanisms existing within the law of property, or credit, or debt, fail. The transition into bankruptcy reorders what has lost order in the course of the complex, and often for creditors, frustrating, procedures of execution and debt recovery. In an article supporting the use of a bankruptcy-styled solution for sovereign debt, White reiterates the purpose of the law as an assumption ‘that a quick and orderly debt restructuring process is more efficient than a prolonged and disorderly one, because a lengthy process of debt restructuring takes a high toll on debtor countries’ economies as well as harming creditors in general’.¹⁰⁴ White sees bankruptcy process as a legitimate foundation on which to rest recovery of countries in financial turmoil. There is an assumption in White’s argument that bankruptcy can deliver order and predictability, and offer a viable solution in relation to the problems of excessive debt. Bankruptcy has performed this important role throughout its history.

V CONCLUSION

This article has considered three important periods in the development of bankruptcy: its origins in Rome; its introduction and evolution in England; and its character and philosophy today. What is common throughout is that bankruptcy — its idea, its process, and its existence — establishes and influences order.

The origins of the idea of bankruptcy can be found in the collective treatment of creditors in Table III of the Roman law of the XII Tables. These laws played a part in maintaining order in the Republic and their importance and longevity influenced the Romans’ perceptions of what the law could achieve.

English bankruptcy arose to counter the damage to trading relations caused by the evasive and delaying tactics of debtors, and the early English bankruptcy Acts focused their attention on the idea of the fraudulent bankrupt. Eventually in the early 18th century the approach to bankruptcy regulation began to change with the introduction of discharge, and although it can be said that discharge was evidence that the legislation had finally recognised the honest bankrupt, it is also true that discharge was in fact merely another means by which bankruptcy sought to introduce order following financial failure.

The complications of modern commerce have necessitated a rethinking of priorities in relation to bankruptcy law and in some cases this has meant the introduction of bankruptcy systems into countries that had traditionally eschewed the process. Overall, the rehabilitation of debtors now plays a much larger part in the philosophy of bankruptcy.

From the Roman Republic to the present day, both the idea of bankruptcy and the process that puts this idea into practice have focused on imposing order where multiple creditors vie for the finite resources of an insolvent debtor. In so doing

104 Michelle J White, ‘Sovereigns in Distress: Do They Need Bankruptcy?’ [2002] (1) *Brookings Papers on Economic Activity* 287, 287.

bankruptcy has developed to meet the problems arising from the use of credit, the needs of politics, the risks of entrepreneurship and the realities of financial failure. Throughout its long history and through changing philosophies it has remained steadfast in its aim. Bankruptcy may well deal in failure but through its promise of order it also underwrites success.