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Demonizing Debtors: A Response to the Honsberger-Ziegel Debate

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DEMONIZING DEBTORS: A RESPONSE TO THE HONSBERGER-ZIEGEL DEBATE©

BY KAREN GROSS*

I. INTRODUCTION

John Honsberger, in his article "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy,"[1] and Jacob Ziegel, in his article "The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison,"[2] address the meaning of the so-called fresh start for individual debtors in bankruptcy. Both authors include a discussion of the fresh start's historical antecedents in Canada, Britain, and the United States.[3] Both authors lament the process by which recent changes to the Canadian bankruptcy system have occurred.[4] Both acknowledge, either implicitly or explicitly, that we actually have very little consensus on the meaning of the fresh start concept—a rather remarkable (though accurate) observation given the centrality of the concept to the system that is intended to provide relief to financially troubled individuals.[5]

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* Professor of Law, New York Law School. This article was originally presented at the Conference on the Contemporary Challenges of Consumer Bankruptcies in a Comparative Context, Faculty of Law, University of Toronto, 21-22 August 1998. I want to take this opportunity to thank Professor Jacob Ziegel, the organizer of this conference. His extraordinary efforts led to a remarkable gathering of bankruptcy professionals. We were all enriched by the proceedings. I want to express my appreciation to my New York Law School Library Liaison, Joseph Molinari, who assisted me with the preparation of the footnotes for this article. As always, his help makes my life easier.

1 See J.D. Honsberger, Q.C., "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37 Osgoode Hall L.J. 171.

2 See J.S. Ziegel, "The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison" (1999) 37 Osgoode Hall L.J. 205.

3 See Honsberger, *supra* note 1 at 173-85; and Ziegel, *supra* note 2 at 211-13.

4 See Honsberger, *supra* note 1 at 186-88; and Ziegel, *supra* note 2 at 231-35, 249-52.

5 See Honsberger, *supra* note 1 at 173-74; and Ziegel, *supra* note 2 at 240-48.

Like Honsberger and Ziegel, I am troubled by the lack of understanding of bankruptcy's fresh start.[6] Indeed, we frequently define the term by using euphemisms for it—an opportunity to start over ... a chance to begin again ... a fiscal car wash ... a cleansing of one's economic sheets.[7] We recite the words from *Local Loan Co.* v. *Hunt*[8] as if they were some mantra. However, repeating or re-wording a phrase does not illuminate its meaning.

I have tried elsewhere to give substantive meaning to the term "fresh start."[9] I have identified what I take to be the key components of the fresh start: societal recognition of the importance of risk-taking in a market-based economy; forgiveness for the inevitable failures that occur; and rehabilitation through forgiveness. Certainly, not everyone is in accord. Some have suggested that the fresh start justification is incomplete heuristics.[10] More recently, "sympathy" has been proffered as a plausible justification.[11]

I am not alone in examining notions of forgiveness. In a remarkable recent collection of essays, the centrality of interpersonal and societal forgiveness is explored.[12] These essays emphasize that a country (or an individual or individuals within society) that does not

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6 This is only one of a number of things that trouble me about the bankruptcy system. One perennial concern that I have is the fact that we make decisions about bankruptcy in a vacuum—without empirical support. It is like building a mouse house without knowing anything about mice. As this Symposium demonstrates, we are now starting to collect key empirical data that should inform bankruptcy legislation in both Canada and the United States: see, for example, I.D.C. Ramsay, "Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis" (1999) 37 Osgoode Hall L.J. 15; S. Schwartz, "The Dark Side of Student Loans: Debt Burden, Default, and Bankruptcy" (1999) 37 Osgoode Hall L.J. 307; and T.A. Sullivan, E. Warren & J.L Westbrook, *The Fragile Middle Class* (New Haven, Conn.: Yale University Press) [forthcoming in 2000].

7 Over the course of the Conference, I learned a number of new phrases. My particular favourite, although it does not relate directly to this subject, is "sexually transmitted debt."

8 292 U.S. 234 at 244 (1934): "One [of] the primary purposes of the bankruptcy act is to ... [give] to the honest but unfortunate debtor ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

9 See K. Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven, Conn.: Yale University Press, 1997) [hereinafter *Failure and Forgiveness*].

10 See T.H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Mass.: Harvard University Press, 1986).

11 This appears in a forthcoming book review of *Failure and Forgiveness*, supra note 9: see M.L. Girth, "Rethinking Fairness in Bankruptcy Proceedings" 73 Am. Bankr. L.J. [forthcoming in 1999]. A copy of the review is on file with the author, and can be obtained from Professor Marjorie Girth, Georgia State College of Law.

12 See R.D. Enright & J. North, eds., *Exploring Forgiveness* (Madison, Wis.: The University of Wisconsin Press, 1998).

forgive others is making a choice.[13] Indeed, forgiveness is not just for the benefit of the forgiven; it benefits the forgiver as well.[14] Forgiveness is, to my mind, an act of a society's maturity, connectedness, and progress, and it is what animates the fresh start. We would do well to pay attention to those writing on forgiveness outside of the law to enrich our understanding of it within the law.[15]

Although Honsberger, Ziegel, and I agree that the definition of the fresh start is lacking, I want to hone in on precisely where Honsberger and Ziegel disagree, namely on how "fresh" the fresh start must be. Honsberger and Ziegel disagree about the desirability of the burgeoning limitations on the availability of an unfettered fresh start for Canadian debtors. Honsberger is troubled by the increasing curtailment of the fresh start; he sees this trend as emblematic of the way in which modern law has developed: we have too many rules, penalties, conditions, and guidelines, and too few understandable, predictable, and affordable results.[16] Ziegel, in contrast, is considerably more comfortable with the concept of a conditional discharge (which could lead to the utilization of an individual debtor's future income), although he, too, is worried about some of the less debtor-friendly 1997 amendments to the Canadian bankruptcy system.[17]

This disagreement is important on one obvious level. The Honsberger-Ziegel disagreement hits directly on what people are currently debating about bankruptcy—at least in the United States[18]

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13 See D. Couper, "Forgiveness in the Community: Views from an Episcopal Priest and Former Police Chief" in *ibid.*, 121.

14 See P.W. Coleman, "The Process of Forgiveness in Marriage and the Family" in Enright & North, eds., *supra* note 12, 75.

15 In a recent letter that I received from Professor Robert Enright (of the University of Wisconsin), he points out that lawyers and philosophers or psychologists may view forgiveness differently. For example, he remarks, defining forgiveness in terms of cancellation of indebtedness is not necessary; forgiveness can occur person-to-person without adjusting legal consequences. Moreover, forgiveness is not necessarily equated with reconciliation outside the law since resentment is an intangible, and what is forgiven in law is frequently concrete: see Letter from R.D. Enright to K. Gross (9 December 1998) [on file with author]. Discussions of this sort are well worth pursuing.

16 See Honsberger, *supra* note 1 at 188.

17 See Ziegel, *supra* note 2 at 248.

18 See, for example, "Colloquium: Consumer Bankruptcy" (1999) 67 Fordham L. Rev. 1311; M.B. Culhane & M.M. White, "Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors" (1999) 7 Am. Bankr. Inst. L. Rev. 27; M. Mannix, "Bankruptcy Reform Rush" *U.S. News & World Report* (12 October 1998) 77; K.Q. Seelye, "Republicans Agree to New Limits on Consumer Bankruptcy Filings" *New York Times* (8 October 1998) A1; and G. Klein, "Consumer Bankruptcy in the Balance: The National Bankruptcy Review

and, I gather, in Canada as well. This is the question of whether a bankruptcy system should be able to capture at least a portion of the debtor's future income as a requirement for obtaining the all-important bankruptcy discharge.[19] This is an important debate, because it calls into question whether and how human capital is distinguishable from other forms of capital that a debtor could be compelled to submit to a court or a trustee.

In the United States, there has been a growing effort to pass legislation limiting access to the bankruptcy system based on whether a debtor is capable of repaying at least a portion of his or her indebtedness.[20] Led by the credit industry, this view (commonly referred to as "means-testing" or "needs-based bankruptcy")[21] has gained considerable support in Congress where debates have centred around the rising rate of bankruptcy filings in a time of relative economic prosperity.[22] So, the refrain goes, the only explanation for the current high number of bankruptcy filings in the United States is that bankruptcy has lost its stigma, and debtors who are not "unfortunate" are "willy-nilly" accessing the system to obtain relief. Yet, many who

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Commission's Recommendations Tilt Toward Creditors" (1997) 5 Am. Bankr. Inst. L. Rev. 293. Bills were introduced into the 106th Congress that, albeit in slightly different ways, create a mechanism for capturing a debtor's future income: see *Bankruptcy Reform Act of 1999*, H.R. 833, 106th Cong. (1999) [hereinafter "H.R. 833"]; and *Bankruptcy Reform Act of 1999*, S. 625, 106th Cong. (1999) [hereinafter "S. 625"]. For those who prognosticate, it is probable that new legislation will be enacted in the United States by winter 1999, although the precise contours of the law cannot be predicted as of this moment.

[19] I, too, entered into the fray: see K. Gross, "The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions" (1990) 65 Notre Dame L. Rev. 165 [hereinafter "The Debtor as Modern Day Peon"].

[20] See H.R. 833, *supra* note 18; and S. 625, *supra* note 18. A recent roundtable discussion appeared in the American Bankruptcy Institute Journal regarding what will happen to bankruptcy reform in the 106th Congress: see "Picking Up the Pieces on Bankruptcy Reform" (1998) 17 Am. Bankr. Inst. J. 186. For a discussion of how various versions of means-testing would affect the bankruptcy system, see E. Flynn & G. Bermant, "Measuring Means-Testing: It's All in the Words" (1998) 17 Am. Bankr. Inst. J. 169; and Culhane & White, *supra* note 18.

[21] I prefer the term "means testing" since it reflects the actual practice as well as the spirit behind the suggestion (*i.e.*, meanness).

[22] At a news conference on bankruptcy reform, Senator Charles Grassley stated:

> The main goal of this effort [to reform bankruptcy] has been to address the very negative trends of the three years that we've had of record breaking numbers of filings of consumer bankruptcies. And, these have come at a time when we've had a very healthy and growing economy, and you would not expect these to be statistics that would be happening during this particular time of economic growth.

C. Grassley, "U.S. Representative George Gekas and U.S. Senator Charles Grassley Hold News Conference On Bankruptcy" *Federal Document Clearing House Political Transcripts* (7 October 1998), online: LEXIS (News, POLTRN).

have worked with debtors or studied this issue empirically do not see support for this observation.[23] Unfortunately, the tenor of the debate has been sufficiently loud that non-creditor voices can hardly be heard above the roar.[24] It is the level of the roar—the intensity of the roar—that leads me to my next point.

II. THE *WHY* QUESTION

For some time, I have been trying to assess *why* it is that people disagree—commonly vehemently—over how debtors should be treated. So, I would like to take Honsberger and Ziegel's disagreement over *how* to treat debtors as the basis upon which to probe *why* people—indeed nations—have such sharply divergent views on how a bankruptcy system should treat individuals in financial distress.[25]

The *why* question proves to be, in my judgement, much more central than one might anticipate. Indeed, understanding *why* people disagree over bankruptcy issues illuminates the issue of *how* to treat debtors. Stated differently, we have difficulties defining what is meant by the fresh start because the definition requires that we delve deeply into issues many of us would prefer to ignore or forget. My focus on the *why* question will touch on three separate points: (1) bankruptcy as more than a legal concept; (2) the unrecognized centrality of money; and (3) the concept of shaming. All these issues are certainly worthy of more lengthy discussion; however, it is my hope that this short foray into these topics will open the door for an ongoing discourse.

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[23] See, for example, "Administration Threatens Veto of Bankruptcy Reform Compromise; Republicans Mystified by White House, Democratic Response" *The White House Bulletin* (8 October 1998) 7. See also Culhane & White, *supra* note 18.

[24] See K. Gross, "As We Fleece Our Debtors" (1999) 102 Dick. L. Rev. 747. An example of the problem for non-creditor voices is recounted in a recent issue of Bankruptcy Court Decisions, a weekly bankruptcy publication. The article tells of how Judge Jones told an audience at a breakfast sponsored by the Commercial Law League at the National Bankruptcy Conference that, in her opinion, many of those who were against bankruptcy reform had not even bothered to read the bill. She added that even those who had read the bill were standing "in the way of history shouting no." See "Judge Edith Hollan Jones Issues Challenge" *Bankruptcy Court Decisions* (10 November 1998) A3.

[25] In my oral remarks at the Conference, I did feel compelled to defend the "American fresh start." I would still be willing to do that; indeed, most of my recent writing reflects just such an effort. However, I do feel that the issues addressed in this article are, in some ways, precursors to that ultimate debate.

III. BANKRUPTCY'S BROAD DIMENSION

To begin, I think that people disagree over bankruptcy because, while bankruptcy is a legal concept, the issues it raises extend well beyond the law. By treating bankruptcy as purely a legal doctrine, we mask the deeper, more controversial issues. Bankruptcy—and the accompanying possibility of a discharge of indebtedness—makes us think about money, debt, credit, risk-taking, loss, failure, and forgiveness. In addition to its obvious economic dimension,[26] bankruptcy also has political, moral, and psychological dimensions, among others. In terms of its political dimension, it speaks to how a nation operates—whether we operate in a market-based economy, whether personal credit is available and on what basis, at what cost, and to whom. It speaks to whether we live in a society with governmental safety nets to assist those less fortunate. Bankruptcy speaks to family structure and family support (or the lack thereof).

Bankruptcy also has a moral dimension; it speaks to how we live, how we pay for our lives, how we deal with the myriad of choices that confront us, and the choices we have made in the past. It speaks to whether we save or spend; it makes us confront whether we can control our lives and, if so, at what cost. James Whitman, in a recent article addressing Roman law, suggests that we often ignore not just the history of commercial law but the history of commercial morality.[27] And, there is a rich and significant history regarding insolvency and its shamefulness.[28] If we needed more support for the moral aspect of bankruptcy, we need only look at the Bible—its treatment of usury and its creation of the Year of the Jubilee.[29]

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[26] The economic dimension has, until very recently, overtaken the debate. However, lately, scholars both within and outside bankruptcy have challenged the effort to explain all law based on economic theory. So, while law certainly is impacted by economic issues (and it is easy to see how that plays out in bankruptcy), economics (unless very broadly defined) fails to capture much of what motivates people: see, for example, J.L. Schroeder, "The End of the Market: A Psychoanalysis of Law and Economics" (1998) 112 Harv. L. Rev. 483.

[27] See J.Q. Whitman, "The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence" (1996) 105 Yale L.J. 1841 at 1888 [hereinafter "The Moral Menace"].

[28] See generally *ibid.*

[29] See, for example, Leviticus 25:10, *et seq.*; and Nehemiah 5:10. For an interesting article on a biblical interpretation of bankruptcy, see S.H. Resnicoff, "Bankruptcy: A Viable Halachic Option?" (1992) 24 J. Halacha & Contemp. Soc'y 5. I am grateful to Cyril Sapiro, a fellow presenter at the Conference and a Canadian trustee in bankruptcy, for bringing this article to my attention.

So, a purely legal focus on bankruptcy is far too narrow; it strips bankruptcy of its richness.[30] One consequence of broadening the basis upon which we think about bankruptcy is that people—and nations—inevitably approach the issue from different perspectives.[31] Indeed, that is why defining the fresh start is no simple task; one's definition depends on one's perspective.[32] And, one can come at the issue from a wide range of perspectives, many of which are intersecting and intertwined—and perhaps even contradictory.

Let me give an example of the role of perspective. As was explained at the Conference last August, some countries have few, if any, protections for individuals in financial trouble. In countries with non-market-based economies, there has been no need for a system of personal bankruptcy. Similarly, in countries with no personal credit, consumer bankruptcy is an alien concept. A country's approach to bankruptcy, then, is a reflection of a host of broader policies, issues, and values. One can tell something about a nation's economic system—perhaps even its national psyche—based on its approach to debt.

In a comparative law symposium such as this, that is an important realization. Harmonizing of systems is not necessarily the goal, and defending one's own system without regard to the social context in which it is situated is misguided. But, understanding what a chosen system says about a nation is significant. It may help explain differences; it may also forecast the immense difficulties one encounters in trying to change from one type of bankruptcy system (or no system) to another. In a recent collection of essays on comparing legal cultures, Maria Ferrarese addressed how the American legal system exemplifies an entrepreneurial conception of the law.[33] She tracks the features of American law that support its entrepreneurial spirit. While I do not necessarily share her specific examples, she is correct in looking more broadly at what the law says about a nation.

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30 It has always struck me as somewhat ironic that a topic about a lack of richness is, in and of itself, so rich.

31 See *Failure and Forgiveness, supra* note 9.

32 This is discussed in a wonderful piece by Iain Ramsay: see I.D.C. Ramsay "Models of Consumer Bankruptcy" (1997) 20 J. Consumer Pol'y 269.

33 See M.R. Ferrarese, "An Entrepreneurial Conception of the Law? The American Model Through Italian Eyes" in D. Nelken, ed., *Comparing Legal Cultures* (Brookfield, Vt.: Dartmouth, 1997) 157.

IV. WHAT ACCOUNTS FOR THE INTENSITY OF VIEWS?

Multi-perspectivity explains why people think about bankruptcy differently; however, it does not necessarily explain the intensity of their thought. Consider the following reality. Non-debtors commonly comment on the unfairness of the bankruptcy system. Their lament is well known: "Why should I work so hard to pay my bills when others can simply access the bankruptcy system to obtain debt relief?" It is as if non-debtors have assumed that the bankruptcy costs them (the non-debtors) money. In other words, non-debtors are seemingly worried about the redistributive effects of bankruptcy. The credit industry has piggybacked off this lament, arguing that bankruptcy costs every American $400 a year.[34] In addition to the immensely problematic calculation of this number, it is not at all clear that bankruptcy losses filter down in the manner suspected. (It is certainly clear that bankruptcy savings would not be passed on to every American household either!) And, even if they did, it is not clear that everyone would object—if they understood what was at stake.

But, I think that there is something beyond bankruptcy's redistributive potential that worries non-debtors. It is the moral dimension that is bothersome to them. People struggling to do the "right" thing are disquieted by rewarding the "wrong" thing. This observation is not unique to bankruptcy. It occurs in the context of our voluntary tax system; those who manipulate the system or avoid taxes are viewed with disfavour by those who have to struggle hard to fulfil their obligations. Providing welfare and other social services is another example. The argument is something like: "Why should I work so hard to provide for others who are unwilling to work that hard or unwilling to work at all?"[35] Another example is insurance: people will take unnecessary risks if any downside will be paid by an insurer. Such risky behaviour costs non-risktakers money in the form of higher premiums. These examples are important, and it becomes incumbent upon those of us who believe in the bankruptcy discharge to explain this moral

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[34] See N. Hammes, "Banking Industry Targets the Wrong Credit Abusers" *San Jose Mercury News* (2 December 1997), online: LEXIS (News, SJMERC); "Bankruptcies are Costing Americans Billions, Says Retailer, Underscoring Urgent Need for Reform" *PR Newswire* (29 July 1998), online: LEXIS (News, PRNEWS); and P. Overby, "Congress to Reform Bankruptcy Laws" *National Public Radio: All Things Considered* (1 May 1998), Transcript No. 98050111-212.

[35] That concern is what I suspect led to the push for workfare as opposed to welfare. A recent article in the Sunday *New York Times Magazine* described the enormous push to remove individuals from the dole: see J. DeParle, "What Welfare-to-Work Really Means" *New York Times Magazine* (20 December 1998) 50.

dilemma or, at a minimum, to recognize its legitimacy.[36] This is an aspect of the "moral hazard" problem, as it is known in the literature.[37] In the bankruptcy context, the answer rests, at least in part, on understanding what is at bankruptcy's core—money.

V. THE CENTRALITY OF MONEY

I have frequently spoken and written about how bankruptcy is a receptacle for failures that manifest themselves in economic terms. In a sense, the lack of money of debtors is a stand-in for other "lacks." A failure in one's finances is a stand-in for failures in one's health, one's job, one's marriage, one's business, one's investment choices, one's saving habits, and so on. I still believe this to be so. But, until very recently, I think I underestimated the centrality of money.[38] Yes, money (or the lack thereof) is a substitute for other things. But, it is much more than that; it is significant in and of itself.

Money is a powerful language in society—and it has been for centuries. Money is the basis for social structure, for power (or lack of power), and for status. It is how we measure who we are; it is how we compare ourselves to others. Money is, in essence, as basic and as fundamental as written or spoken language; it is how we communicate with each other and with ourselves. Indeed, money is itself a language—the language of exchange. It is no wonder, then, that the loss of money—for both the debtor and the creditor—cuts right to the core of our identity.

Now, here is my provocative thesis.[39] I suspect that we lash out at debtors because what has happened to them is what the rest of us fear most—the loss of money. We go out of our way, perhaps at some deep unconscious level, to define debtors in a way that ensures that we cannot be them. We are unsympathetic to debtors because we fear them; they

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[36] A recent conversation with my colleagues, David Schoenbrod and Faith Kahn, illuminated this point for me, and I appreciate their insights.

[37] See T. Baker, "On the Geneology of Moral Hazard" (1996) 75 Tex. L. Rev. 237.

[38] On this point, I owe a belated thank-you to the late Professor Myers McDougal, who taught at New York Law School from 1976 until 1986. Early in my academic career, he said that if scholars did not re-think what they wrote over the years, there was something wrong. Indeed, to re-think one's early work and change one's position was part of one's development as an academic. So, I took his message to heart—in 1984 and now.

[39] Jacob Ziegel had asked that I be provocative in my comments at the Conference. While I much prefer the terminology "thought-provoking" for reasons that the reader can easily ascertain, I have never had a problem raising issues that force us to think long and hard.

bring us too close to the possibility that we could become them. And, the more that the empirical data demonstrate that debtors are more or less like the rest of us, the more we struggle to differentiate ourselves from them. The more it looks like debtors are just ordinary people who hit one or more bumps in life's road, the more we wax eloquent about personal responsibility, proper planning, or bad morals. I keep hearing between the lines: "There but for the grace of God go I."

This phenomenon is not unique to bankruptcy debtors. There are a lot of outliers in society whom we treat badly because they scare us. They do not scare us in any physical sense; they scare us at the emotional level—which is a much more dangerous place to feel threatened. So, for example, we ostracize the mentally ill. I suspect that we are so scared and so threatened by the possible loss of rational thought and by being overtaken by uncontrollable anger or some other mental collapse, that we treat those with mental illness badly.[40]

There is much more to be said, ultimately, about the meaning of money.[41] And, there is much more to be said about the psychoanalytic literature on displaced anger and fear. For my purposes here, it suffices to suggest that when we react so strongly and intensely to something or someone, that should give us pause. It should make us realize that something else must be operating at the psychodynamic level. And, it should make us step back long enough to reflect on whether we are speaking out of concern for others and society or whether, more probably in my judgement, a concern about ourselves. The heated response to debtors, then, should put us on notice that the debate is about something deeper. Shakespeare had it right when he cautioned us: "The lady doth protest too much, methinks."[42]

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[40] See M.L. Perlin, "Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law" (1994) 20 New. Eng. J. on Crim. & Civ. Confinement 369; M.L. Perlin & D.A. Dorfman, "Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence" (1993) 11 Behav. Sci. & L. 47; and M.L. Perlin, "On 'Sanism'" (1992) 46 SMU L. Rev. 373.

[41] I am deeply indebted to the faculty at the University of San Diego Law School, especially Professor Paul Wohlmuth, for their insights into this topic.

[42] W. Shakespeare, *Hamlet*, ed. by T.J.B. Spenser (London: Penguin Books, 1980) at III.ii.240.

VI. THE ROLE OF SHAMING

In several recent articles, Whitman has addressed shaming sanctions, a growing form of punishment in contemporary society.[43] From public lists of "johns" to neighbourhood notification of convicted child molesters, we have turned to this public form of humiliation. This approach to punishment has long roots, and one of the early groups singled out for shaming sanctions was debtors. (I have to say that, although I am not surprised at some level by his historical findings, I was unfamiliar with the depth of shame to which debtors were exposed.) For example, to obtain a *cessio bonorum*[44] in the early sixteenth century, a debtor was required to proceed to a rock in a public square completely naked and rub his buttocks on the rock.[45] A similar custom arose in parts of Italy where a debtor seeking to declare a *cessio bonorum* had to appear naked in public, banging his buttocks against a rock or a column three times and stating, "I declare bankruptcy."[46] Similarly, in France, debtors were required to wear a green beret.[47] In some regions, the beret was replaced with a public posting of lists of debtors.[48] In England, loss of an ear was an initial punishment.[49] Indeed, in the fifteenth and sixteenth centuries, one could not declare bankruptcy through an attorney, as that would spare the debtor too much shame.[50]

Now, at some level, shaming sanctions make us uncomfortable. Some have argued that what makes shaming sanctions problematic is that they do not respect the dignity of the individual shamed.[51] Indeed, I have made a similar argument against compelling the debtor to contribute future income as a prerequisite for bankruptcy relief.[52]

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43 See J.Q. Whitman, "What is Wrong With Inflicting Shame Sanctions?" (1998) 107 Yale L.J. 1055 [hereinafter "Shame Sanctions"]; and "The Moral Menace," *supra* note 27.

44 The *cessio bonorum* was originally developed under Roman law as the equivalent to the fresh start, so to speak.

45 See "The Moral Menace" *supra* note 27 at 1872-74.

46 *Ibid.* at 1872-73.

47 *Ibid.* at 1872-74.

48 *Ibid.* at 1873.

49 *Ibid.*

50 *Ibid.* at 1877.

51 See, for example, T.M. Massaro, "Shame, Culture and American Criminal Law" (1991) 89 Mich. L. Rev. 1880.

52 See "The Debtor as Modern Day Peon," *supra* note 19.

But—and this is what particularly intrigues me—Whitman argues that what makes contemporary shaming sanctions unpalatable is the way it empowers the public to behave.[53] It inappropriately places the power to punish in the hands of the public—which cannot handle that responsibility.[54] As he suggests, we should not want to live in an ochlocracy where we are so susceptible to the pull of the public's psyche.[55]

That is a striking observation in the context of debtors. If, as I have suggested earlier, we fear debtors because they are too close to us,[56] then we should not be the ones choosing their punishment. We already have some public shaming of debtors, accomplished, I suspect, without much thought. Local newspapers list the names of debtors in their jurisdiction. Over the Internet, we can access who has sought bankruptcy relief, and with an appropriate hook-up, we can ascertain their assets and liabilities, among other information. Credit reports, available with remarkable ease, are allowed to list a debtor's bankruptcy for up to ten years.[57]

To my mind, means-testing (or a conditional discharge, or whatever other form we undertake to disable debtors from getting a fresh start) is a form of shaming sanction. Requiring debtors to turn over their future income produces shame—indeed, ongoing shame. It is a quite public form of saying "debtors are bad and we should humiliate them as the price for the discharge." It is how we will separate debtors from the rest of us. We will make them metaphorically naked.

VII. CONCLUSION

I recently had occasion to re-read portions of Nathaniel Hawthorne's *The Scarlet Letter*.[58] At one level, Hawthorne was writing

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[53] See "Shame Sanctions," *supra* note 43 at 1092.

[54] *Ibid.* at 1088-89.

[55] *Ibid.* at 1089.

[56] See notes 39-42, *supra*, and accompanying text.

[57] See *Fair Credit Reporting Act*, 15 U.S.C. § 1681c(a)(1) (1998). As a practical matter, the three major credit reporting agencies have apparently voluntarily agreed to reduce the listing time to seven years.

[58] See N. Hawthorne, *The Scarlet Letter* (New York: Bantam Books, 1981). In the interest of candour, I did not just sit down to reread the classics I never really understood or appreciated in my youth. Instead, I was propelled by my son Zack's tenth-grade reading list. David Denby clearly came to a similar recognition about what we missed in the classics: see D. Denby, *Great Books: My*

about Hester's sin of adultery; however he was commenting on much more than that. Hawthorne saw sin in all of us—in Dimmesdale, in Chillingsworth, and in the reader. But, to Hawthorne, the greatest sin was to be untrue to one's self. I suspect that *vis-à-vis* debtors, we have not been honest with ourselves. We would do well to look at the Honsberger-Ziegel debate as an opportunity to pause. Maybe we can take a lesson from Hester Prynne. Her scarlet letter started out as a terrible shaming sanction; but, as time progressed, "the scarlet letter ceased to be a stigma which attracted the world's scorn and bitterness, and became a type of something to be sorrowed over, and looked upon with awe, yet with reverence, too."[59] While we do not need to regard debtors with awe, perhaps at a minimum, we can accord them some respect. That would not be a bad place from which to start.

Adventures with Homer, Rousseau, Woolf, and Other Indestructible Writers of the Western World (New York: Simon & Schuster, 1996).

[59] Hawthorne, *supra* note 58 at 238-39.