

PAINTED INTO A CORNER: REMBRANDT'S BANKRUPTCY TODAY

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This Article analyzes the development of the concept of bankruptcy by examining Rembrandt's insolvency through the lens of modern law. To lay a foundation, it provides the historical context of Rembrandt's bankruptcy and his specific actions most pertinent to modern bankruptcy proceedings. This analysis then transitions into the modern era with a comparison of the seventeenth-century Dutch insolvency to modern bankruptcy law. It then proceeds to analyze this famous insolvency had it occurred today. This case demonstrates the means by which insolvency law serves society's interests by providing debtors such as Rembrandt with a second chance to contribute to the world.

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INTRODUCTION

Art, that noble thing, it never shall abandon me,
 Even if I wander penniless, seeking out back alleys, . . .
 Art is a glorious jewel, worth more than any treasure¹

It was not uncommon in seventeenth-century Netherlands for Dutch merchants engaged in trade to suffer great losses and be driven into bankruptcy,² for their success was affected by weather, piracy, market conditions, and other factors entirely outside of their control. In contrast, the artist had a source of success that was wholly within himself: his talent.³ As a result, of the thousands of Dutch artists of the era, the vast majority were financially sound.⁴ However, despite possessing arguably the most talent of them all, a fate befell Rembrandt “which is seldom told about other painters, namely, that he went bankrupt.”⁵

Rembrandt Harmensz van Rijn is generally considered one of the greatest painters of all time.⁶ With a talent admired throughout seventeenth-century Europe, he received large sums from the sale of his paintings, portraits, and sketches, and those of the students in his school.⁷ Despite his pecuniary successes, the great artist’s lavish spending and sometimes irrational investments caused his wealth to dwindle even as his international fame grew.⁸ With Rembrandt’s patrons abandoning him and his creditors demanding repayment, the man once deemed “one of the great prophets of civilisation”⁹ applied for *cessio bonorum*, or “surrender of goods” insolvency, in 1656.¹⁰

This study analyzes the circumstances of Rembrandt’s insolvency from the perspective of modern bankruptcy law. It begins by providing the historical context of Rembrandt’s bankruptcy and his specific actions most pertinent to modern bankruptcy proceedings. The study then transitions into the modern era by means of a

1. PHILIPS ANGEL, PRAISE OF PAINTING (1642), in 24 SIMIOLIUS 227, 241 (1996) (Michael Hoyle trans.).

2. PAUL CRENSHAW, REMBRANDT’S BANKRUPTCY 17 (2006).

3. *See id.* at 18.

4. *Id.* at 17.

5. *Id.* (quoting FILIPPO BALDINUCCI, COMINCIAMENTO E PROGRESSO DELL’ARTE DELL’INTAGLIARE IN RAME, COLLE VITE DI MOLTI DE’ PIÙ ECCELLENTI MAESTRI DELLA STESSA PROFESSIONE 80 (1686)).

6. E. H. GOMBRICH, THE STORY OF ART 420 (16th ed. 1995).

7. *Id.* at 28-29, 32. Rembrandt taught nearly every important Dutch painter during the twenty years his school operated. KENNETH CLARK, CIVILISATION 203 (1969).

8. *See CRENSHAW, supra* note 2, at 1.

9. CLARK, *supra* note 7, at 205.

10. CRENSHAW, *supra* note 2, at 1.

comparison of the *cessio bonorum* insolvency of Rembrandt's time with modern bankruptcy law. Lastly, the study analyzes this famous insolvency had it occurred today. Rembrandt's case triggered immediate reforms in the Netherlands and may even have ramifications that continue to reverberate through bankruptcy law.

I. REMBRANDT'S *CESSIO BONORUM*

Artists of the "Dutch Golden Age" were typically from privileged families who provided cushions against the swings of the sometimes-volatile Dutch art market.¹¹ Whether they used their craft as their main source of income or supplemented it with mercantile endeavors,¹² relatively few artists of the era became insolvent.¹³ G. J. Hoogewerff's study of St. Lucas guilds throughout the northern Netherlands concluded that such organizations successfully provided economic security to local artists.¹⁴ Such guilds, if powerful and well-organized, were able to keep prices high and afford the area artists the luxury of living off their works. In fact, those artists who suffered bankruptcy "worked in Amsterdam and other places where the guild system had largely deteriorated – or never existed."¹⁵ Rembrandt was one such case.

A. *The Artist's Rise and the Foundations of His Fall*

Rembrandt was born into "embarrassingly humble" beginnings.¹⁶ Despite being part of the lower-middle class, Rembrandt's family income¹⁷ provided him with the privilege of attending the University of Leiden before taking on apprenticeships with painters to learn the craft.¹⁸ He enjoyed early success in Leiden and then in Amsterdam, where he became a respected member of society.¹⁹ His paintings fetched thousands of guilders and his school was filled with students, from whom he received tuition and part

11. *See id.* at 20.

12. Or merely lived off inherited wealth.

13. *Id.* at 17-20.

14. *Id.* at 20.

15. *Id.*

16. CLIFFORD S. ACKLEY ET AL., *REMBRANDT'S JOURNEY* 12 (2003).

17. EMILE MICHEL, *REMBRANDT, HIS LIFE, HIS WORK AND HIS TIME* 5-6 (Frederick Wedmore ed., Florence Simmonds trans., 1918).

18. *Id.* at 7, 12-15. Whatever the family's social standing, Rembrandt's father was a relatively prosperous miller and his mother was the daughter of a baker. Worldwide Gallery of Art, Rembrandt Harmenszoon van Rijn (1606 – 1669), <http://www.theartgallery.com.au/ArtEducation/greatartists/Rembrandt/about/> (last visited on Mar. 4, 2009).

19. *See* ACKLEY, *supra* note 16, at 12.

of the revenue from the sale of their works.²⁰ However, Rembrandt's income dwindled in the 1640s and 1650s due to three interrelated causes: 1) a decline in Rembrandt's production that followed his decision to retire from the lucrative portrait market; 2) the negative impact on his standing in the community that resulted from the chaos in his personal life; and 3) a general economic downturn following the First Anglo-Dutch War that tempered demand for luxury goods.²¹

Ironically, Rembrandt's success hastened his economic demise. The popularity of his style in the 1630s diluted the market as his maturing students began offering similar works at much lower prices.²² The merchant class increasingly purchased these similar, albeit far less expensive, paintings and portraits that glutted the market.²³ This, in turn, led the Rembrandtesque style to be deemed unfashionable by the elite;²⁴ however, rather than cater to the new fashions, "Rembrandt expected his patrons to cater to him."²⁵

This shift in tastes coincided with problems in Rembrandt's personal life.²⁶ After the deaths of his first three children and his wife, Rembrandt "retire[d] from society"²⁷ and became embroiled in various publicly-known affairs with women of lower social standing.²⁸ This led to further declines not only in his production but also demand for his works, as his reputation among the elite, who were the most able to afford his work, soured.²⁹ With his income stream waning throughout the 1640s, Rembrandt was particularly vulnerable to the effects of the economic depression that hit the Netherlands following the First Anglo-Dutch War in the 1650s.³⁰ This downturn had a detrimental impact on the merchants who formed the core of his clientele.³¹ In such hard times, "[l]uxury goods stood little chance of making a profit."³² However, despite his income dwindling over this period, Rembrandt's spending habits

20. CRENSHAW, *supra* note 2, at 28-29.

21. *See id.* at 31-43.

22. *Id.* at 32.

23. *See id.*

24. *See id.*

25. *Id.* at 33.

26. *Id.* at 40-43.

27. *Id.* at 31.

28. After his romantic relationship with Geertje Direx, his son's nurse, soured she sued him for payment. The next year "he was instrumental in having Geertje confined to a . . . house of correction." This scandal damaged his reputation among the community. *Id.* at 41-42.

29. *Id.* at 43.

30. *See id.* at 38.

31. *See id.*

32. *Id.*

were escalating.³³

Upon finding success in the 1630s, Rembrandt quickly began living well beyond his means. His financial difficulties began when he purchased a rather large townhouse in Amsterdam in 1639.³⁴ Taking on enormous debt for the purchase, he had to scramble to make his mortgage payments.³⁵ Had he invested his significant earnings prudently, he likely would have had few difficulties paying off this primary liability. However, instead of paying down his debt and investing in the booming worldwide trade and manufacturing of the 1640s with his significant earnings,³⁶ he enjoyed a lavish lifestyle and filled his home with items that were exorbitantly expensive but possessed little income potential.³⁷ An obsessive collector of all types of art, he spared no expense.³⁸ In fact, with a narrow focus on restoring the value of his art, he reportedly spent exorbitant amounts on repurchasing his own paintings from all over Europe at inflated prices in a failed attempt to make them more scarce and coveted.³⁹ Not only was he spending lavishly and imprudently, he was also taking on additional debt to do so.

Infatuated with his art and collecting aesthetically pleasing things, Rembrandt saw his financial obligations as mere distractions.⁴⁰ When he was forced to address issues outside of his artistic realm, he consistently took the most expedient measures to resolve them. When creditors came to collect, he borrowed more money from elsewhere, repaid just the amount immediately due and spent the rest of the new loan elsewhere.⁴¹ For example, in 1653, he needed to repay 7,000 guilders of the 8,100 owed for his house mortgage.⁴² He quickly borrowed 9,000 guilders elsewhere and, rather than paying off this debt, he repaid only the 7,000 immediately owed. “[I]t is unclear what happened to the remaining” 2,000 guilders.⁴³ “This priority of spending proved to be typical for the painter . . . Rembrandt’s continual neglect for his debts eventually debilitated the confidence of his creditors and opened him

33. *See id.* at 38-39, 92-108.

34. *Id.* at 44.

35. *See id.* at 46.

36. *Id.* at 37.

37. His spending on a lavish lifestyle was derided by some as “typical of the nouveau riche.” *Id.* at 2.

38. *See id.* at 92-109.

39. *Id.* at 36-37. Note, however, that the source of this assertion has been characterized as unreliable; consequently, this account may be apocryphal. *See id.*

40. *See id.* at 92-108.

41. *Id.* at 54-55.

42. *Id.*

43. *Id.*

up to litigation.”⁴⁴ Rembrandt’s unsustainable lifestyle eventually began to catch up with him.

B. Rembrandt’s Spiral

As creditors began to close in during the mid-1650s, Rembrandt resorted to underhanded maneuvers and “clandestine deals” as quick fixes to his troubles.⁴⁵ Resorting to tactics described by his contemporaries as “narrowly within legal bounds” and “socially disreputable.”⁴⁶ On one occasion, he attempted to liquidate assets without the knowledge of his creditors. In one rumored scheme, two art dealers acting on Rembrandt’s behalf attempted to sell one of his paintings, with the stipulation that the transaction not be mentioned to a certain creditor of Rembrandt’s.⁴⁷ Ironically, the deal apparently fell through when the buyer attempted to pay with an uncollectible debt from a bankrupt merchant.⁴⁸ In 1656, Rembrandt again resorted to what the Dutch considered shameful activity: knowing “that a declaration of bankruptcy was inevitable,” he transferred the deed of his house to his son Titus less than two months before applying for *cessio bonorum*.⁴⁹ While this was technically legal at the time, “it ran so contrary to customary and accepted practice that it was quickly outlawed” two weeks later.⁵⁰ Rembrandt was becoming increasingly desperate as he ran out of financing.

Although Rembrandt had been able to accumulate debt for years, a small, court-ordered sum may have been the immediate trigger that drove him into insolvency. This obligation stemmed from a romantic affair with his son’s nurse, Geertje Dircx. When the relationship soured, Geertje took her case for financial support before the Chamber of Marital Affairs.⁵¹ While the two were not technically married, the commissioners ruled that he was required to pay her 200 guilders a year.⁵² However, Rembrandt “was instrumental in having Geertje confined to a . . . house of correction,”⁵³ which happened to relieve him of this court ordered obliga-

44. *Id.* at 55-56.

45. *Id.* at 57.

46. *Id.* at 2.

47. *Id.* at 57; John Michael Montias, *A Secret Transaction in Seventeenth-Century Amsterdam*, 24 NETH. Q. FOR HIST. ART 1, 5 (1996).

48. CRENSHAW, *supra* note 2, at 57.

49. *Id.* at 68-69.

50. *Id.*

51. *Id.* at 41.

52. WALTER STRAUSS & MARJON VAN DER MEULEN, REMBRANDT DOCUMENTS 276 (1979).

53. CRENSHAW, *supra* note 2, at 42.

tion for a time.⁵⁴ Once Geertje was released, she sought resumption of payment in 1656 and Rembrandt, so incredibly overleveraged, was unable to acquire the necessary cash.⁵⁵ While he had put off payment to creditors for years, he could no longer circumvent the Chamber's order.⁵⁶ Two months later, he applied for *cessio bonorum*.⁵⁷

C. Cessio Bonorum in Action

In pre-modern Europe, insolvency carried with it great moral condemnation.⁵⁸ It was not always this way. A Roman practice attributed at times to both Emperor Augustus or Caesar,⁵⁹ *cessio bonorum* was not accompanied by great shame during Roman times.⁶⁰ Instead, it was seen as a demonstration of "princely grace toward debtors"⁶¹ that allowed them "to escape imprisonment through a public ceding of all their goods, saving a few life necessities, to their creditors."⁶² Insolvents were typically jailed but *cessio* allowed them immunity from imprisonment, although the Roman *cessio* typically did not provide discharge.⁶³ However, when the practice was revived in the Middle Ages, it was merged with heavy sanctions of dishonor.⁶⁴ While it came with the added benefit that "a debtor insolvent through no fault of his own could receive a full discharge by declaring *cessio*," it nevertheless required a shameful path.⁶⁵ Pre-modern Europe incorporated into the Roman tradition certain public shaming rituals, often including bizarre practices involving heckling crowds and public nudity.⁶⁶ In fact, a legal text,

54. *Id.* at 67.

55. *Id.*

56. *See id.*

57. *Id.* at 67, 69.

58. James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1877-79 (1996).

59. *Id.* at 1872.

60. *See* G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 514 (2000).

61. Whitman, *supra* note 58, at 1872.

62. *Id.* For a full description, see MAX KASER, DAS R'MISCHE ZIVILPROZESSRECHT 316-17 (1966).

63. *See* Whitman, *supra* note 58, at 1872-73 (citing MATTEO BRUNO, TRACTATUS MATTHAEI BRUNI ARIMINENI DE CESSIONE BONORU 115[v] (Venice 1561)); Robert T. DeMarco, *Bankruptcy in a Word* (2004), <http://www.thrushandrohr.com/history.htm>.

64. *See* DeMarco, *supra* note 63.

65. Roman law as interpreted by early-sixteenth-century canon lawyers. Whitman, *supra* note 58, at 1873 (citing BRUNO, *supra* note 63, at 115[v]).

66. *See id.* (citing BRUNO, *supra* note 63, at 115[v]). In one of the more colorful punishments,

[t]he custom has grown up, in parts of Italy, that the insolvent who wishes to declare a *cessio bonorum* must go naked in a public and notorious place. There he strikes his backside three times against a rock or column, crying

written contemporarily to Rembrandt's application, described an old law on the books in the artist's hometown, Leiden: "those that want the benefit of a *cessio* must expose themselves in their underclothes before the city hall for an hour at midday, for several days, at a certain raised spot called 'the jaws' [i.e., the stocks]." ⁶⁷ Luckily for Rembrandt, this law had fallen into disuse. ⁶⁸

By the seventeenth century, "traditional, and brutal, shame sanctions died away in the commercializing Lowlands." ⁶⁹ The Dutch had sought to develop a more Romanesque, shame-free view of *cessio*. ⁷⁰ In this period, it was typically not the lower classes that used the practice, but instead merchants, who were of higher social station, ⁷¹ a circumstance that may have helped promote this more favorable opinion of insolvency. Viewing their practices as more enlightened, Dutch authors of the day contrasted their nation's unique *cessio* with that of France's more common setup. ⁷² For example, while France required the debtor declare *cessio* himself in a "humiliating" way, the law adopted in Amsterdam ⁷³ sought to remove the "public scandal" from the practice and allowed for legal representatives to declare in the debtor's place. ⁷⁴ While a difference such as this may seem subtle from today's perspective, some even saw the Dutch approach as so liberalized that Iooost de Damhouder van Brugge wrote, in 1626, that "some debtors even gloried in having performed a *cessio bonorum*." ⁷⁵

Even with the Netherlands' determined shift away from public shaming for insolvency, "many members of society would have viewed Rembrandt's declaration of bankruptcy unfavorably on moral grounds, and some would have denounced him for it." ⁷⁶ Despite the progressiveness of the legal system, religious institutions still held the notion that shame was the rightful price to be paid for violating the demands of the Bible. ⁷⁷ The Calvinist Church of the era delineated between *faillissement*, in which the debtor was

out, I DECLARE BANKRUPTCY.

Id.

67. *Id.* at 1878 (citing SIMON VAN LEEUWEN, MANIER VAN PROCEDEREN IN CIVILE EN CRIMINELLE SAAKEN 104 (1666)).

68. *Id.* at 1879.

69. *Id.* at 1877.

70. *Id.* at 1871.

71. CRENSHAW, *supra* note 2, at 68. And higher station meant higher social esteem. *Id.*

72. Whitman, *supra* note 58, at 1877-78.

73. Calvinist Amsterdam adopted Flemish law in this area. *Id.* at 1878.

74. *Id.* at 1879 (citing SIMON VAN LEEUWEN, MANIER VAN PROCEDEREN IN CIVILE EN CRIMINELLE SAAKEN 104 (1666)).

75. *Id.* at 1878 n.140.

76. CRENSHAW, *supra* note 2, at 69.

77. Whitman, *supra* note 58, at 1874-75.

seen as “unfortunate but faultless,” and *bankroet*, where the insolvency was “considered to have been brought on by deception and fraud.”⁷⁸ Rembrandt likely fell nearer the *bankroet* end of the spectrum, as “[t]he church was wary of people like Rembrandt who left their debts unresolved.”⁷⁹ A case like Rembrandt’s likely caused much embarrassment and “aroused ill-will from neighbors,” such that many who went bankrupt fled town in order to gain a fresh start.⁸⁰ However, Rembrandt was an eccentric artist who was so fixated on his art that personal shame was likely of secondary importance.⁸¹

Within this context, Rembrandt applied to the High Court in The Hague for *cessio bonorum* in July of 1656.⁸² This would allow him to cede all of “his assets to his creditors with the condition that they could make no further claims on him.”⁸³ Hoping that his house was safely out of reach in his son’s hands, he applied to the court for protection from his creditors.⁸⁴ It is likely he “knew that his collection of art and artificialia would not bring enough money to satisfy his debts, but he showed little concern for providing fair recompense to his creditors.”⁸⁵ He was apparently only interested in the protection from imprisonment and harassment that the court could grant him.⁸⁶

Adhering to the typical *cessio* process, the court appointed a trustee from Amsterdam’s Desolate Boedelskamer (Chamber of Insolvent Estates). The trustee commenced by taking a thorough inventory of all of Rembrandt’s possessions.⁸⁷ While it is unproven, scholars suspect Rembrandt successfully hid some of his possessions. As evidence, they first cite the absence of Rembrandt’s printing plates from the inventory.⁸⁸ While arguably of professional necessity, such items were not protected under *cessio*, as evidenced by other artists’ bankruptcies of the period.⁸⁹ Scholars also point to the absence of most of his own prints even though other artists’ works in his albums were duly catalogued.⁹⁰ The most damning evidence involves reports that Rembrandt sold certain items out-

78. CRENSHAW, *supra* note 2, at 69.

79. *Id.*

80. *Id.* at 70.

81. *Id.* at 54-55.

82. *Id.* at 69.

83. *Id.*

84. *Id.* at 69.

85. *Id.*

86. *See id.*

87. *Id.* at 70.

88. *Id.* at 75.

89. *Id.* Specifically, those of Jan Blom and Pieter Willemsz. *Id.*

90. *Id.* Only one album of Rembrandt’s prints was catalogued. *Id.*

side the jurisdiction of the Desolate Boedelskamer.⁹¹ Specifically, he reportedly sold uninventoried sculptures to the Elector Palatine in 1658.⁹²

Although the Desolate never took action against Rembrandt for such alleged conduct they did react to his transfer of house title to Titus immediately prior to his bankruptcy. While his transfer had been legal at the time, it was found to be of such a “mendacious nature” that new regulations forbade it.⁹³ Further, finding Rembrandt’s act so “patently evasive,” the Desolate Boedelskamer overrode the transfer of title to Titus and liquidated Rembrandt’s Amsterdam townhouse in 1658.⁹⁴ This revulsion is indicative of the Dutch attitude towards asset concealment.⁹⁵

As it developed, Dutch bankruptcy law displayed “a movement from penalizing insolvency[, as discussed above,] to penalizing asset concealment.”⁹⁶ Dutch moralists of the day explained that “[i]f insolvency came, merchants were simply, and honestly, to declare a *cessio*. Above all, they were not to conceal assets.”⁹⁷ There are many instances where Dutch debtors, in an effort to later provide for themselves and families, “[b]efore they ma[de] an ostensible *cessio bonorum*, they conceal[ed] all the assets that they c[ould].”⁹⁸ This practice was described, in no uncertain terms, as “com[ing] from Satan.”⁹⁹ This shift from viewing declaring *cessio* as reprehensible to only condemning violations of the process marked a profound change.¹⁰⁰ In this way, the Dutch had altered the institution to better conform to its increasingly commercial society, even as the rest of Europe still viewed *cessio* declaration itself as profoundly objectionable.¹⁰¹

Once catalogued, Rembrandt’s items were sold at auction.¹⁰² The law technically provided priority to those creditors with official loans registered with the magistrates.¹⁰³ However, political influence seemingly played an important role, as Rembrandt’s most powerful creditors were paid first, leaving little for the oth-

91. *Id.*

92. *Id.*

93. *Id.* at 87.

94. *Id.* at 78.

95. Whitman, *supra* note 58, at 1882-83.

96. *Id.* at 1882.

97. *Id.*

98. *Id.* at 1881 (quoting GODFRIED UDEMANS, ‘T GEESTELYK ROER VAN ‘T COOPMAN’S SCHIP 14[r] (1638)).

99. *Id.*

100. *Id.* at 1882.

101. *See id.* at 1882-83.

102. CRENSHAW, *supra* note 2, at 75.

103. *Id.* at 80.

ers.¹⁰⁴ Even after his house was included in the estate, his assets were still far from equaling his total debt, and even some of his major creditors received nothing.¹⁰⁵ Throughout the rest of his life, Rembrandt continued, to a degree, to treat his finances as an afterthought to his art. He never made great efforts to repay his creditors. To the day he died, Rembrandt refused to relinquish his artistic control and paint his way out of his subsequent debt.¹⁰⁶

II. THROUGH THE LOOKING GLASS: REMBRANDT'S BANKRUPTCY TODAY

“At a time when French or Italian debtors faced fearsome shame sanctions, and German and English ones faced hellish prisons, this Dutch practice was stunningly liberal, a long step on the road toward modern bankruptcy.”¹⁰⁷ Dutch debtors took full advantage of this, “with rates of the declaration of *cessio* noticeably high in the seventeenth century.”¹⁰⁸ With nearly 1.5 million individuals and over 50,000 businesses filing for bankruptcy in 2006 and 2007, it would appear that modern Americans have more in common with the seventeenth-century Dutch than one would think.¹⁰⁹ Based upon *cessio bonorum*, modern bankruptcy continues the Dutch-pioneered movement away from shaming.¹¹⁰ In fact, the United States has taken additional steps relatively recently to continue to move away from the shroud of public shame long associated with bankruptcy. The Bankruptcy Act of 1978 continued moving in the direction begun centuries ago in Holland by helping to lessen the stigma associated with bankruptcy via such measures as using the word “debtor” instead of “bankrupt”¹¹¹ and creating

104. See *id.* at 80, 87-88.

105. See *id.* at 88.

106. While there are accounts of him seeking to paint more lucrative portraits and finish paintings to raise funds, *id.* at 134, 142, he nevertheless refused to paint certain portraits, *id.* at 142, and “[t]he artist’s determination to maintain a high level of control in all aspects of production, revealed most acutely when disputes arose, left him with few consistent and reliable patrons,” *id.* at 135.

107. Whitman, *supra* note 58, at 1881.

108. *Id.*

109. AMANDA LOGAN & CHRISTIAN E. WELLER, CTR. AM. PROGRESS, BUSH'S BANKRUPTCY LEGACY (Apr. 17, 2008), http://www.americanprogress.org/issues/2008/04/bankruptcy_column.html; MARK DOUGLAS, UNITED STATES: THE YEAR IN BANKRUPTCY: 2007 (Mar. 12, 2008), <http://www.jonesday.com/files/Publication/34b19d7b-0c3f-4c53-bfe3-6217cf0e6e9d/Presentation/PublicationAttachment/2bb4b1df-21aa-411a-bca2-023da0d4a175/2007YearInReview.pdf>.

110. See Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 870-76 (2003).

111. Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 163 (2004) (citing Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 148 (1986)).

Chapter 13, which provides a means of avoiding the stigma of liquidation.¹¹² Despite the centuries between them, modern bankruptcy law holds much in common with the Dutch *cessio bonorum*.

A. General Similarities Between the Systems

U.S. bankruptcy proceedings and seventeenth-century Dutch *cessio bonorum* possess similar policy goals. Both share the general, overarching objectives to both provide debtors with a fresh start and rehabilitate viable endeavors, all while providing creditors with equality of distribution.¹¹³ In doing so, both promote future productivity by restoring incentives.¹¹⁴ Similar to the manner in which Dutch *cessio* was seen as an “act of princely grace toward debtors”¹¹⁵ that sought to remedy the debtors’ insolvency without shame, modern bankruptcy likewise aims to provide debtors with a financial “clean slate.”¹¹⁶ Both provide discharge, which allows the debtor the chance to reinvigorate his livelihood, rather than condemning him to prison or some kind of indentured servitude. Further, while extremely limited in the case of *cessio*, certain life necessities are exempted from the creditors’ reach, thereby permitting the debtor to emerge from insolvency as a productive citizen.¹¹⁷

From the creditors’ perspective, both *cessio bonorum* and modern bankruptcy provide a centralized proceeding with a focus on gathering accurate information for creditors to use. The court then develops a plan to best utilize the debtor’s assets (liquidation in both *cessio* and Chapter 7 in modern bankruptcy¹¹⁸) and divides the proceeds among the creditors with the objective of distributing the funds in the fairest way possible.¹¹⁹ Although in Dutch *cessio* the politically powerful often received the most repayment, both systems nevertheless strive to more efficiently allocate the debtor’s resources through a centralized process.¹²⁰

While a far cry from historic British and German remedies of incarceration, ear-cutting, or even execution, both systems’ lenien-

112. MODERN REAL ESTATE PRACTICE IN NEW YORK 364 (Edith Lank et al. eds., 7th ed. 2001).

113. See Brunstad, *supra* note 60, at 499.

114. Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 58 (2002).

115. As derived from its Roman predecessors.

116. Whitman, *supra* note 58, at 1872, 1881-82.

117. See Brunstad, *supra* note 60, at 514 n.50.

118. And potentially in the case of Chapter 11 as well.

119. See *id.* at 524-30.

120. See generally *id.*

cy is not without bounds.¹²¹ Both reserve the privilege of bankruptcy protections for honest but unfortunate debtors.¹²² While the modern concept of the “honest but unfortunate debtor” is a new one, the seventeenth-century Dutch system was similar in that it contained the requirement that debtor claiming *cession* be honest and forthcoming.¹²³ Those who did not act honestly received fierce retribution from the court. Although the Dutch tradition of branding for such a transgression had fallen into disuse by Rembrandt’s time, a debtor caught acting dishonestly faced great shame and imprisonment.¹²⁴ As was the case with the Dutch merchants who followed what was seen as Satan’s call to hide assets,¹²⁵ Americans today also attempt to underhandedly circumvent the system and are punished for it. The majority in *Marrama v. Bank of Massachusetts* found that “a debtor who acts in bad faith prior to, or in the course of, filing a Chapter 13 petition by, for example, fraudulently concealing significant assets, thereby forfeits his right to obtain [bankruptcy] relief.”¹²⁶

B. Differences: Rembrandt Before the Judge

Despite the many general similarities between the two systems, Rembrandt’s bankruptcy would have unfolded differently in modern times. This section traces the artist’s actions from the vantage of U.S. bankruptcy law in 2009. It relies primarily upon the information known to the High Court in The Hague and the Desolate Boedelskamer. For example, the court knew of Rembrandt’s house transfer but was not seemingly aware of those occasions when he sought to hide assets. After laying this foundation, this study goes further to interject the probable consequences of Rem-

121. See Georgakopoulos, *supra* note 114, at 56.

122. Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI. L. REV. 17, 17 & n.2 (2006) (citing 11 U.S.C. § 727 (2000) (“The court shall grant . . . a discharge, unless’ the debtor commits any of several forms of falsehood”).

[T]he characterization of the “honest but unfortunate debtor” as the one for whom the bankruptcy discharge is intended is a twentieth century development. The phrase itself can be traced to *Local Loan Co v. Hunt*, 292 US 234, 244 (1934) (explaining that the Bankruptcy Act “gives 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 pre-existing debt”).

Id. at 17 n.2.

123. Whitman, *supra* note 58, at 1882 (“Concealment of assets had traditionally been penalized . . . through the awesome shame sanction of branding.”).

124. *Id.*

125. *Id.* at 1881.

126. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)).

brandt's more notorious actions that went seemingly undetected by the court.

Prior to his proceeding, Rembrandt transferred his house to his son, Titus.¹²⁷ While technically legal at the time, this was seen as quite unethical.¹²⁸ In modern times, this transfer would likely be unnecessary. Under 11 U.S.C. § 522's homestead exemption, Rembrandt's townhouse would be exempted because it likely qualifies as "personal property that the debtor or a dependent of the debtor uses as a residence."¹²⁹ Although the *cessio* process sought to enable a fresh start once discharged, it nevertheless left the debtor with little to do so. In fact, the *cessio* proceedings took Rembrandt's home, furniture, all of his (known) paintings, and tools. This process left him with little except food, linens, and some of his clothes. He would have fared far better under modern bankruptcy. Aside from retaining his home, he would likely have retained his non-antique furniture, his late wife's jewelry worth less than the equivalent of \$550, and the tools of his art trade.¹³⁰ While his large collection of other artists' work would be accessible to creditors, he would likely argue that the art he created should be exempt under the Code's § 522 (B)(i), which protects such possessions. However, it would be open to the court to decide whether to treat Rembrandt's works as business inventory, since Rembrandt was running a profitable business of teaching students and selling art.¹³¹

Rembrandt's attorney would likely have no choice but to file for Chapter 11 on his behalf.¹³² While it is difficult to compare with certainty, Rembrandt would likely fail the means test for Chapter 7.¹³³ "While there's no accurate way to render [it] in today's greenbacks," a wealthy merchant in seventeenth-century Netherlands would earn roughly 3,000 guilders annually, which would already comfortably surpass the median income for the time.¹³⁴ In comparison, Rembrandt's net worth was appraised at 40,000 guilders in 1647.¹³⁵ With Rembrandt selling multiple paintings in the mid-1650s, one even fetching over a thousand guilders,¹³⁶ this analysis assumes that his income surpassed the median income of similar

127. CRENSHAW, *supra* note 2, at 68.

128. *Id.* at 68-69.

129. 11 U.S.C. § 522(d)(1) (2007).

130. *See* 11 U.S.C. § 522(d) (2007).

131. CRENSHAW, *supra* note 2, at 29-32.

132. *See* *Toibb v. Radloff*, 501 U.S. 157 (1991) (citing section 109(d) as the source of an individual debtor's right to file Chapter 11).

133. *See* 11 U.S.C. § 707(b) (2008).

134. Mike Dash, *When the Tulip Bubble Burst*, BUS. WK., Apr. 24, 2000, available at http://www.businessweek.com/2000/00_17/b3678084.htm.

135. CRENSHAW, *supra* note 2, at 2.

136. *Id.* at 29-30.

households. While it is entirely possible that Rembrandt had not sold any paintings immediately prior to bankruptcy,¹³⁷ it is unlikely that he had below median income over the six months prior to his bankruptcy, as documents show that he still operated an art school with “very high tuition fees” and received a portion of his students’ sales.¹³⁸

In addition to ruling out Chapter 7, his circumstances would also likely prohibit Rembrandt from filing for Chapter 13. Under 11 U.S.C. § 109(e), a debtor may only file for Chapter 13 if his or her unsecured debts are less than \$336,900 and his or her secured debts are less than \$1,010,650.¹³⁹ While the entire extent of Rembrandt’s debt is unknown, the fact that the more than 16,000 guilders raised by the Desolate Boedelskamer’s sale of Rembrandt’s house, furniture, and extensive art collection left even some of his primary creditors with nothing suggests that Rembrandt’s debt was extremely large.¹⁴⁰ Thus, Rembrandt’s only option today would be Chapter 11.

Rembrandt’s artistic endeavors were much more valuable as a going concern,¹⁴¹ and Chapter 11 reorganization would potentially give his creditors substantially more money than *cessio bonorum*’s straight liquidation and discharge.¹⁴² Were he facing a Chapter 11 proceeding, he would have to provide the bankruptcy court with extensive financial information and work with his creditors and the court to develop a plan for reorganization.¹⁴³ However, with

137. The history suggests that he was busy negotiating with creditors and attempting to hide assets. *See supra* text accompanying notes 46-50.

138. *Id.* at 28-29.

139. 11 U.S.C § 109(e) (2006); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(b) of the Code, 72 Fed. Reg. 7082 (Feb. 14, 2007).

140. *Id.* at 76-79. As a means of comparison, if the “wealthy merchant”, *see supra* text accompanying note 134, made the equivalent of \$200,000 a year, that would mean that the 16,000 guilders were worth \$1.01 million.

141. It is difficult to draw the line between Rembrandt’s personal life and his business, which was basically an art sole proprietorship.

142. Unless, of course, the court allows Rembrandt to hold most of his future earnings, as discussed in the following paragraph.

143. Unless the court orders otherwise, the debtor must file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. FED. R. BANKR. P. 1007(b)(1).

If the debtor is an individual, there are additional document filing requirements. Such debtors must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income; any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in an education individual retirement account or qualified State tuition program.

11 U.S.C. § 521(a)(1)(B)(iv)-(vi), (b)-(c) (2006).

Rembrandt's history of "continual neglect for his debts,"¹⁴⁴ and "resist[ance to] making arrangements with his creditors that would sacrifice his personal authority,"¹⁴⁵ it is likely his role as "debtor in possession"¹⁴⁶ would be short-lived. Even if Rembrandt's asset concealment and illegal transfer went undetected, as it largely did in 1658,¹⁴⁷ it is still rather likely the creditors or the U.S. Trustee would motion for appointment of a trustee due to "incompetence or gross mismanagement."¹⁴⁸ After consultation with parties in interest and subject to the court's approval,¹⁴⁹ the Trustee would be appointed to manage the property of Rembrandt's estate, oversee the operation of his art business, and file the plan of reorganization.

If *In re Cooley*¹⁵⁰ or *In re FitzSimmons*¹⁵¹ are any indications, the plan would likely leave Rembrandt in a comfortable financial position. Ironically, Rembrandt's wasteful spending tactics may actually play in his favor in modern proceedings, as the "burden of proof rests upon the creditor as movant to show that the purported individual debtor's earnings are in actuality '[p]roceeds, product, offspring, rents [or] profits' derived from those assets or other property interests which have previously accrued to the estate by operation of Section 541."¹⁵² Rembrandt spent almost all of his creditors' money on a lavish lifestyle, buying non-income-bearing furniture and artwork, and paying interest payments to other creditors. His earnings, on the other hand, primarily stemmed from his own human capital: his artwork and teaching students.¹⁵³ The court in *FitzSimmons* held that "[t]o the extent that the law practice's earnings are attributable not to FitzSimmons' personal services but to the business' invested capital, accounts receivable, good will, employment contracts with the firm's staff, client relationships, fee agreements, or the like, the earnings of the law practice accrue to the estate."¹⁵⁴ In *FitzSimmons*, the court split his earnings with creditors because the sole proprietorship was not composed of just him alone.¹⁵⁵ However, with the exception of contracts that may have been made possible by the creditors, Rem-

144. CRENSHAW, *supra* note 2, at 55-56.

145. *Id.* at 88.

146. 11 U.S.C. § 1101(1) (2006).

147. *See supra* Part I.C.

148. 11 U.S.C. § 1104(a)(1) (2006).

149. FED. R. BANKR. P. 2007(a).

150. *In re Cooley*, 87 B.R. 432 (S.D. Tex. 1988).

151. *In re FitzSimmons*, 725 F.2d 1208 (9th Cir. 1984).

152. *In re Cooley*, 87 B.R. at 441 (quoting 11 U.S.C. § 541(a)(6) (2006)).

153. *See* CRENSHAW, *supra* note 2, at 28-59.

154. *In re FitzSimmons*, 725 F.2d at 1211.

155. *Id.*

brandt's income is largely attributed to services he personally performed.¹⁵⁶ Following the logic employed in *Cooley* and *FitzSimmons*, it is likely that Rembrandt would be able to retain the bulk of his future earnings under a reorganization plan.

If the reorganization plan is accepted, § 1141(d)(1) provides that confirmation of a plan discharges Rembrandt from the enormous debt that he accumulated before the date of confirmation.¹⁵⁷ Rembrandt would then be bound by the plan and required to make the provided payments.¹⁵⁸ The creditors would receive pro rata distribution—not based upon their political influence, as in the Dutch *cessio* system, but based on a formula developed in accordance with the court's policy goal of providing equality of distribution among creditors. If Rembrandt "behaved" himself, which may be unlikely in light of his penchant for blatantly disregarding his finances, the estate could eventually be fully administered.¹⁵⁹ In this best case scenario, Rembrandt would retain his beloved house as well as much of his earnings while achieving a fresh start to begin running up debts once again. However, this is all assuming the court never learned of Rembrandt's more underhanded actions.

Before filing for *cessio bonorum*, Rembrandt attempted to manipulate his financial position. If Rembrandt's secret attempt to exchange a painting for cash, as described in Part I. B., had been successful and undiscovered, he might be deemed to have made a fraudulent transfer under § 548 (a)(1)(A).¹⁶⁰ The trustee would likely use his or her avoiding powers to nullify the transfer and make the paintings available to all of Rembrandt's creditors.¹⁶¹ This practice of "avoiding transfers" is analogous to what the Desolate Boedelskamer did in "avoiding" Rembrandt's property transfer to his son, Titus.¹⁶² Although the modern court would not likely find fault with Rembrandt transferring his homestead to Titus, if the Desolate Boedelskamer did find the transfer objectionable, it had the power to avoid the transfer. The aforementioned painting transfer may have been only one of Rembrandt's objectionable dealings.

156. See CRENSHAW, *supra* note 2, at 28.

157. 11 U.S.C. § 1141(d)(1) (2006).

158. Further, "Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation." Chapter 11 – Bankruptcy Basics, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html#work> (last visited Mar. 4, 2009).

159. See FED. R. BANKR. P. 3022.

160. As long as he made the sale with the intent to defraud, although this may be hard to prove.

161. Provided the transfer occurred within the statutory window before filing the petition. 11 U.S.C. § 548(a)(1) (2006).

162. See Chapter 11 – Bankruptcy Basics, *supra* note 158.

During his liquidation, Rembrandt allegedly hid assets, as discussed in Part I.B. If caught, he would be dealt with harshly under both *cessio bonorum* and modern U.S. bankruptcy law. Under seventeenth-century Dutch law, hiding assets, if detected, would likely have led to branding.¹⁶³ Under modern U.S. law, such action would place Rembrandt outside of “the class of ‘honest but unfortunate debtor[s]’ that the bankruptcy laws were enacted to protect.”¹⁶⁴ As such, his case could “be dismissed . . . because of . . . bad-faith conduct,” thereby denying Rembrandt any bankruptcy protection.¹⁶⁵ The U.S. Code and the Federal Rules of Bankruptcy Procedure were designed “to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction.”¹⁶⁶ Therefore, “dishonesty among debtors in failing to completely disclose their financial affairs undermines the civil bankruptcy system, and certain dishonest acts committed by debtors may even constitute bankruptcy crimes under 18 U.S.C. §§ 151-157.6.”¹⁶⁷ Specifically, 18 U.S.C. § 152(1) makes it a criminal offense for a debtor to “knowingly and fraudulently” conceal from a trustee or “other officer of the court” any property “belonging to the estate of a debtor.”¹⁶⁸ While historians may never know for sure, Rembrandt reportedly attempted to sell a sculpture, which he hid well enough to escape the Desolate Boedelskamer’s inventory, outside the *cessio* proceedings.¹⁶⁹ This sculpture, since it was not Rembrandt’s work, would most likely not be exempted under § 522 and therefore would be included in the estate. Under similar circumstances, Harry Herbert Wagner, Jr. was sentenced to six months imprisonment when the Sixth Circuit upheld his conviction for concealment of assets under § 152(1).¹⁷⁰ Rembrandt would likewise face imprisonment if his transaction were discovered today.

163. Whitman, *supra* note 58, at 1882.

164. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 374 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)).

165. *See id.*

166. *In re Marrama*, 430 F.3d 474, 478 (1st Cir. 2005) (quoting *Boroff v. Tuley*, 818 F.2d 106, 110 (1st Cir. 1987)).

167. Michael D. Sousa, *The Crime of Concealing Assets in Bankruptcy: An Overview and an Illustration*, 26 AM. BANKR. INST. J. 20, 20 (Mar. 2007).

168. 18 U.S.C. § 152(1) (2006).

169. CRENSHAW, *supra* note 2, at 75.

170. *United States v. Wagner*, 382 F.3d 598, 602-03 (6th Cir. 2004).

CONCLUSION

This study analyzed Rembrandt's insolvency from the perspective of modern U.S. bankruptcy law. It focused on Rembrandt's most pertinent—and allegedly unscrupulous—actions leading up to and during his bankruptcy. The study then compared the Dutch *cessio* process with bankruptcy law today and, despite the overall similarities between the two systems, determined that Rembrandt would have fared better under the more lenient modern system. As long as he was honest in the eyes of the court, bankruptcy would enable him to escape the yoke of his unwieldy debt and once more serve society as a productive citizen.

Rembrandt was an unbelievably gifted artist but also an unbelievably inept businessman. He painted and sketched his way into history, earning great fame and riches. However, his poor financial management led him to squander his wealth and lose almost everything he amassed over his lifetime. Luckily, the Netherlands had a liberal interpretation of the Roman concept of *cessio bonorum* that enabled Rembrandt to retain his freedom by surrendering his goods. Possessing many of the same general goals as modern U.S. bankruptcy law, the Dutch *cessio bonorum* insolvency law provided Rembrandt with discharge and a fresh start with which to resume his art business. Had he been caught circumventing the system, he would have likely been imprisoned under either system. However, for those who act honestly, the law provides a second chance. This Article focuses on a man who used that second chance to produce cherished works of art that now line museum walls. In this way, insolvency law enabled Rembrandt to utilize his tremendous gift and grace the world with more of his masterpieces.

