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Defamation, Bankruptcy & the First Amendment

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DEFAMATION, BANKRUPTCY & THE FIRST AMENDMENT

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In recent years, a series of high-profile defamation cases has wound up in bankruptcy court, involving such colorful characters as Rudy Giuliani, Alex Jones, and Cardi B. As demands and verdicts swell with the rise of social media in a polarized age, defamation defendants are filing bankruptcy more frequently and at earlier stages of litigation. But that doesn't mean bankruptcy is a magic wand for waving away debt. To the contrary, much defamation debt may be nondischargeable as "willful and malicious" under section 523 of the Bankruptcy Code. Of course, consumer bankruptcy attorneys are all too familiar with bankruptcy's discharge exceptions, but some courts are now starting to apply the exceptions to small businesses attempting to reorganize under subchapter V of the Code—a category that includes Alex Jones's InfoWars.

Defamation law is coming to bankruptcy court, and it's bringing the First Amendment with it. Yet scholars and practitioners have not yet placed these three areas of law—defamation, bankruptcy, and the First Amendment—next to each other. This Article provides both theoretical and practical guidance to litigants and lawyers, showing how bankruptcy's substantive and procedural rules will process defamation debt, including when the

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[*] Assistant Professor, University of Florida Levin College of Law. I set out to write this Article after thought-provoking interviews with journalists James Nani and David Schultz of Bloomberg Law. Many thanks to Bruce Ottley, Lyrissa Lidsky, David Hasen, Jane Bambauer, Peter Molk, Amy Stein, Alvin Velazquez, and participants at the University of Florida Levin College of Law, the DePaul College of Law, and the Harvard-Wharton Insolvency & Restructuring Conference for thoughtful comments and bracing conversations. Sarah Jones ('24), Zachary Torres ('24), Reese Sarnowski ('25), Katiuska Scovino ('25), and Xianjun Liang ('26) provided amazing research and editing assistance. I am deeply grateful to Sarah Burns and the *Journal of Free Speech Law* for their editing support. All remaining errors in this Article are my own, and if I've made any false claims, I did so without malice.

First Amendment protections of *New York Times v. Sullivan* and related cases are triggered. The ensuing mixture is a cocktail of torts, contracts, civil procedure, federal courts, and constitutional law.

When speech injures others, compensation and punishment are in order. Yet forgiveness and a fresh start have their place as well. As to individuals, defamation debt should cause us to reflect on whether our "fresh start" policy in bankruptcy is too anemic. As to business entities, the defamation cases continue to raise the specter of whether chapter 11 makes it too easy for bad actors to shed debt without compensating victims, suffering consequences, or reforming behavior. Either way, attorneys must be prepared to provide forward-thinking legal advice about bankruptcy whenever insolvency is on the horizon.

Introduction

In recent years, a series of high-profile defamation cases has wound up in bankruptcy court, involving such colorful characters as mayor-turned-MAGA Rudy Giuliani, polemic radio host Alex Jones, and pathbreaking rapper Cardi B. As demands and verdicts swell with the rise of social media in a polarized age, defamation defendants are filing bankruptcy more frequently and at earlier stages of litigation. But that doesn't mean bankruptcy is a magic wand for waving away debt. To the contrary, much defamation debt (an umbrella term covering slander, libel, false light, and invasion of privacy) may be nondischargeable as "willful and malicious" under section 523 of the Bankruptcy Code.[1] Of course, consumer bankruptcy attorneys are all too familiar with bankruptcy's discharge exceptions, but some courts (most notably the Fourth and Fifth Circuits) are now starting to apply the exceptions to small businesses reorganizing under subchapter V of the Code[2]—a category that includes Alex Jones's InfoWars.

Defamation law is coming to bankruptcy court, and it's bringing the First Amendment with it. Yet scholars and practitioners have not yet placed these three areas of law—defamation, bankruptcy, and the First Amendment—next to each other. To be sure, the scholarly literature contains a robust discussion of bankruptcy's discharge exceptions, including incisive analyses by Professors Abbye Atkinson[3] and Nicole Langston,[4] who have pointed out structural ways that the dis-

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[1] 11 U.S.C. §§ 101 *et seq.*; 11 U.S.C. § 523(a).

[2] *See* Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509, 512 (4th Cir. 2022); Avion Funding, LLC v. GFS Indus., LLC (*In re* GFS Indus., LLC), 99 F.4th 223, 232 (5th Cir. 2024). By contrast, every bankruptcy court to consider the issue has reached the opposite conclusion. *See infra* notes 142–143 and accompanying text.

[3] *See* Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 12–25 (2010) (presenting empirical research into bankruptcy filing rates by college education and race, and arguing that the benefits of a college education are not equally accessible to Americans of all racial backgrounds); Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 945–65 (2017) (criticizing bankruptcy's discharge exceptions as "arbitrary line-drawing" with "negative implications for economically and socially disenfranchised communities").

[4] Nicole Langston, *Discharge Discrimination*, 111 CALIF. L. REV. 1031, 1156–66 (2023) (analyzing how the discharge exceptions of the Bankruptcy Code structurally protect institutions like the police while subordinating debtors subject to their surveillance activity).

charge exceptions deepen disparate treatment along race and class lines. The conversation is particularly rigorous and longstanding with respect to student loans, both among academics and the public.[5] And the discharge exceptions recently came before the Supreme Court in *Bartenwerfer v. Buckley*,[6] foreshadowing tough questions about what Professor Angela Littwin calls "coerced debt" in the context of abusive and violent domestic relationships.[7]

On another front, Professors Pamela Foohey and Christopher Odinet have uncovered how large debtors use bankruptcy to silence plaintiffs in the context of "onslaught litigation"—discussing asbestos and breast implant product liability, the Catholic Church, and Alex Jones.[8] And legal scholar Adi Marcovich Gross has analyzed how bankruptcy discharge rules weaken key incentives to monitor for sexual misconduct.[9]

How and when defamation debt is nondischargeable, though, has received relatively less attention.[10] Attorneys Michael Traison, Michael Kwiatkowski, and Samantha Giuglianotti recently analyzed these issues in the context of the defamation

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[5] *See, e.g.*, John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. REV. 725, 729–30 (2019) (arguing that the stringent requirements for student loan dischargeability fit poorly with the goals of the student-loan program); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 246–47 (2006) (critiquing the Bankruptcy Code's treatment of student loans and advocating for an income-contingent approach). In 2022, the Department of Education and the Department of Justice issued new guidance concerning when the U.S. government would object to the discharge of student loans, developing a more debtor-friendly test than the prevailing caselaw as well as procedures for a settled outcome in bankruptcy court. *See* DEP'T OF JUST., GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION (Nov. 17, 2022), https://perma.cc/QP68-DR6F.

[6] 598 U.S. 69 (2023).

[7] Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV. 363, 365 (2013); Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 957–59 (2012).

[8] Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1296–1312 (2023).

[9] Adi Marcovich Gross, *Morally Bankrupt: Bankruptcy Law, Corporate Responsibility, and Sexual Misconduct*, 97 AM. BANKR. L.J. 480, 508–521 (2023).

[10] A 1995 article discussed defamation debt in the context of section 523(a)(6) but did not analyze the First Amendment. *See generally* George M. Ahrend & Randall T. Thomsen, *Tort Claims and Judgements as Debts for Willful and Malicious Injury Nondischargeable under Section 523(a)(6) of*

litigation between actors Johnny Depp and Amber Heard.[11] Pointing out that the jury found that Heard's defamation was made with "actual malice," the authors correctly note that the First Amendment test is insufficient to meet the bankruptcy test for dischargeability.[12] A leading defamation treatise by Judge Robert Sack and Professor Lyrissa Lidsky lays out the basic framework and remarks that there are "blessedly few cases addressing the issue."[13] As we enter a new era of defamation debt, our analytical framework may be too flimsy to handle the growing flow of cases.

This Article provides both theoretical and practical guidance to litigants and lawyers, showing how bankruptcy's substantive and procedural rules will process defamation debt, including when the First Amendment protections of *New York Times Company v. Sullivan*[14] and related cases are triggered. The ensuing mixture is a cocktail of torts, contracts, civil procedure, federal courts, and constitutional law.

The Article proceeds in four parts. In Part I, I explore the cases that establish the defamation-to-bankruptcy trendline, as well as analyze doctrinal and legislative changes that may crystallize this pattern. In Part II, I discuss bankruptcy's discharge exceptions and explain how bankruptcy courts determine which debts are unforgiveable in bankruptcy. In Part III, I place those rules alongside the First Amendment's rules for liability, exploring how the Bankruptcy Code can burden speech and is therefore subject to First Amendment scrutiny. Finally, in Part IV, I provide pragmatic advice to plaintiff-side and defendant-side defamation attorneys and

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the Bankruptcy Code, 100 COM. L.J. 498 (1995) (discussing the standard for willful and malicious injury under section 523(a)(6) of the Code). Bankruptcy and defamation have, of course, intersected in other ways. In *Moe v. Wise*, a former business owner attempted to sue the new CEO and the bankruptcy attorney after they sent a disparaging letter to the company's creditors. *See* 989 P.2d 1148, 1155–57 (Wash. Ct. App. 1999). And the famous Supreme Court case *Dun & Bradstreet* involved a credit reporting agency that was sued for defamation after it mistakenly reported to its subscribers that a construction contractor had filed for bankruptcy. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (1985).

[11] Michael H. Traison, Michael Kwiatkowski & Samantha Giuglianotti, *The Continuing Saga of Amber Heard and Johnny Depp*, 41 AM. BANKR. INST. J. 18, 18–19, 29 (2022).

[12] *Id.* at 19.

[13] ROBERT D. SACK & LYRISSA BARNETT LIDSKY, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 10:7 (5th ed. 2024).

[14] 376 U.S. 254 (1964).

present some systemic concerns from the bankruptcy point of view. How we treat defamation debt in bankruptcy triggers the policies behind both free speech law and bankruptcy law.

I. THE DEFAMATION-TO-BANKRUPTCY PIPELINE

The trend of defamation cases heading to bankruptcy court has garnered the attention of both journalists and scholars, a trend I have previously called a "defamation-to-bankruptcy pipeline."[15] In this Part, I recount the plot points that establish the trend and discuss where we might be headed next.

A. A Groundswell of Defamation Liability

Defamation exposure appears to be growing. To be fair, measuring that growth is hard to do: The numbers are scattered across jury verdicts, settlement amounts, and demand letters. Legal observers have noted that demand amounts have increased in recent years[16] and that the claims themselves have taken on a distinct politicized hue.[17] Plaintiffs may have any number of goals in such suits, such as silencing critics, attracting media attention, refuting misinformation, or seeking

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[15] *See* James Nani, *Giuliani Joins Alex Jones in Defamation-to-Bankruptcy Pipeline*, BLOOMBERG L. (Dec. 22, 2023, 5:00 AM) (quoting author), https://perma.cc/X8DC-K6TV.

[16] *See* Mark Curriden, *The Defame Game: Libel Cases Are on the Rise and Increasingly Politicized*, A.B.A. J. (Oct. 1, 2023, 12:00 AM), https://perma.cc/A3N7-QMBK.

[17] It is increasingly common for political actors to be plaintiffs or defendants in defamation cases, as well as for individual journalists to be named in complaints. *See id.* Political defamation cases include Alex Jones and Rudy Giuliani, discussed below, as well as many others. Former GOP Congressman Devin Nunes has brought several of these cases, as has Donald Trump. *See id.* For example, in 2022, former Alaska governor and vice-presidential candidate Sarah Palin sued *The New York Times* for linking her campaign rhetoric to a 2011 mass shooting in Arizona. *See* First Am. Compl., Palin v. New York Times Co., No. 17 Civ. 4853 (S.D.N.Y. Dec. 30, 2019), ECF No. 70, 2019 WL 11616892; Palin v. New York Times Co., 940 F.3d 804 (2nd Cir. 2019) (vacating dismissal and remanding); Palin v. New York Times. Co., 113 F.4th 245 (2d Cir. 2024) (vacating and remanding for new trial). And after the 2020 presidential election, voting machine firms Dominion and Smartmatic sued Fox News, One America News Network, Newsmax, and several Republican pugilists for accusing them of surreptitiously delivering the 2020 election to President Joe Biden through faulty or compromised voting machines. *See* Compl., US Dominion, Inc. v. Fox News Network, LLC, No. N21C-03-257 (Del. Super. Ct. Mar. 26, 2021), 2021 WL 1153152. In April 2023, Fox News settled with Dominion for $787.5 million—and the remaining cases are similarly massive. *See* US Dominion, Inc. v. Fox News Network, LLC, No. N21C-03-257 (Del. Super. Ct. Apr. 19, 2023) (dismissed with prejudice); *see also, e.g.*, Compl. and Demand for Jury Trial, Smartmatic USA Corp. v. Herring Networks, Inc., No. 1:21-cv-02900 (D.D.C. Nov. 3, 2021), ECF No. 1, 2021 WL 5121115.

compensation for harm. And in several of these cases, the defamation defendant has faced financial distress in the wake of the litigation.

Some examples in the defamation-to-bankruptcy pipeline involve lies peddled by big players. Rudy Giuliani, once dubbed "America's mayor" for his role as head of New York City in the wake of 9/11, threw in his lot with Donald Trump during the 2016 and 2020 presidential campaigns.[18] After Joe Biden won the 2020 election, Giuliani accused two Georgia election workers of rigging the Fulton County vote in favor of Biden. The election workers, Ruby Freeman and Shaye Moss, faced an "immediate onslaught of violent and racist threats and harassment."[19] They sued Giuliani for defamation, intentional infliction of emotional distress ("IIED"), and civil conspiracy.[20] On December 15, 2023, a D.C. jury awarded Freeman and Moss $148 million in damages.[21] On December 20, the judge ruled that the plaintiffs could begin seizing Giuliani's nonexempt assets.[22]

The next day, Giuliani filed for bankruptcy in New York, pausing collection efforts pursuant to bankruptcy's automatic stay.[23] While Giuliani used social media to spread the "Big Lie," his capacity and credibility were predicated on his celebrity status: the former mayor of America's largest city and legal counsel to a presidential candidate.[24] Giuliani's bankruptcy case ended ignominiously. On July 12, 2024, the

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[18] *See, e.g.*, Michael R. Sisak, *The Fall of Rudy Giuliani: How "America's Mayor" Tied His Fate to Donald Trump and Got Indicted*, AP NEWS (Aug. 17, 2023, 5:22 PM), https://perma.cc/A23C-J74L.

[19] Am. Compl. at ¶ 14, Freeman v. Giuliani, No. 21-cv-03354 (D.D.C. May 10, 2022), ECF No. 22.

[20] *Id.* at ¶¶ 14, 163–177, 178–186, 187–191.

[21] *See* Verdict Form, *Freeman v. Giuliani* (Dec. 15, 2023), ECF No. 135.

[22] *See* Mem. and Order, *Freeman v. Giuliani* (Dec. 20, 2023), ECF No. 144.

[23] *See* Voluntary Pet., *In re* Giuliani, No. 23-12055 (Bankr. S.D.N.Y. Dec. 21, 2023), ECF No. 1, 2024 WL 3384185. Giuliani's financial distress is not the end of his legal exposure: Giuliani is a criminal defendant in a sweeping racketeering case in Georgia, and his license to practice law has been revoked. Alanna Durkin Richer, *$148 Million Damages Verdict Adds to Rudy Giuliani's Financial Woes as He Awaits His Criminal Trial*, AP NEWS (Dec. 16, 2023, 4:52 PM), https://perma.cc/3F97-2DXU; Philip Marcelo, *Giuliani Is Disbarred in New York as Court Finds He Repeatedly Lied About Trump's 2020 Election Loss*, AP NEWS (July 2, 2024, 7:48 PM), https://perma.cc/45BP-XY6K.

[24] *See, e.g.*, Beau Evans, *Georgia Senate Panel Hosts Trump Attorney Giuliani as Election Officials Dispute Fraud Claims*, AUGUSTA CHRON. (Dec. 3, 2020, 7:04 PM), https://perma.cc/T8ZS-4F8V.

bankruptcy judge dismissed the case, ruling that Giuliani had not complied with the transparency required by a bankruptcy filing.[25] Since then, Giuliani's creditors' efforts to recover have continued in federal court, pursuant to nonbankruptcy rules.

Other examples of this phenomenon involve content producers who operate through alternative or social media.[26] Take Alex Jones, host of The Alex Jones Show and owner of InfoWars.com. Jones built an online empire, trafficking in far-right hysteria, dietary supplements, and conspiracy theories—including the notion that the 2012 Sandy Hook school shooting was a "false flag" operation.[27] Jones spread the conspiracy theory that no one had died at Sandy Hook, that the massacre was staged by gun control advocates, and that the parents were actors.[28] In response, grieving parents sued Jones in Texas[29] and Connecticut[30] for defamation and IIED.

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[25] *In re Giuliani*, 2024 WL 3384185, at *4 (noting "Mr. Guiliani's continued failure to meet his reporting obligations and provide the financial transparency required of a debtor in possession").

[26] Numerous scholars have examined the impact of social media—with its Section 230 protection from liability—upon the traditional news press and the tradition of free speech. *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45; Lyrissa Lidsky, *Defamation Law and the Crumbling Legitimacy of the Fourth Estate*, KNIGHT FIRST AMEND. INST. (July 11, 2024), https://perma.cc/TK9X-TBB3.

[27] Pls.' Fourth Am. Pet., Heslin v. Jones, No. D-1-Gn-18-001835 2022, at ¶¶ 11–17 (Tex. Dist. Ct. Travis Cnty.), 2022 WL 4182077, at *2; *see also* Juan A. Lozano, *Who Is Alex Jones? The Conspiracist and Dietary Supplement Salesman Built an Empire Over Decades*, AP NEWS (June 14, 2024, 6:24 PM), https://perma.cc/6QYN-ZAUE. The truth is horrific: In 2012, a shooter entered Sandy Hook Elementary School in Newtown, Connecticut, and slaughtered twenty-six people, including twenty children. John Christoffersen & Jocelyn Noveck, *Routine Morning, Then Shots and Unthinkable Terror*, AP NEWS (Dec. 15, 2012, 1:18 AM), https://perma.cc/5DE6-K9EJ.

[28] *See* Pls.' Fourth Am. Pet., *Heslin*, *supra* note 27, at ¶¶ 13–85, 2022 WL 4182077, at *2–10.

[29] The Texas litigation is comprised of three related actions: Heslin v. Jones, No. D-1-GN-18-001835 (Tex. Dist. Ct. Travis Cnty. 2018); Lewis v. Jones, No. D-1-GN-18-006623 (Tex. Dist. Ct. Travis Cnty. 2018); Pozner v. Jones, No. D-1-Gn-18-001842 (Tex. Dist. Ct. Travis Cnty. 2018).

[30] The Connecticut litigation is also comprised of three related actions, which were procedurally consolidated: Compl., Lafferty v. Jones, No. UWY-CV-18-6046436-S (Conn. Super. Ct. May 23, 2018), ECF No. 2; Compl., Sherlach v. Jones, No. UWY-CV-18-6046437-S (Conn. Super. Ct. July 2, 2018), ECF No. 2; Compl., Sherlach v. Jones, No. UWY-CV-18-60464386-S (Conn. Super. Ct. July 2, 2018), ECF No. 2.

Jones failed to comply with his discovery obligations, and so the judges entered default judgments against him and sent the cases to juries to determine damages.[31] In 2022, a Texas jury awarded the parents $49.3 million in damages,[32] and a Connecticut jury awarded the parents $1.5 billion in damages.[33] Jones filed for individual bankruptcy in Texas shortly afterward,[34] joining his company, Free Speech Systems, which had filed earlier that summer.[35] While Jones's personal estate is headed for liquidation, his corporate case ended up exiting bankruptcy court—after a judge found that it had lingered too long for the fast pace required of a small-business case under subchapter V of the Code.[36]

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[31] Heslin v. Jones (*In re* Jones), 655 B.R. 868, 871–72 (Bankr. S.D. Tex. 2024) [hereinafter *In re* Jones Personal Tex.]; Wheeler v. Jones (*In re* Jones), No. 22-33553 (Bankr. S.D. Tex. 2023) [hereinafter *In re* Jones Personal Conn.], 2023 WL 6979358, at *1–2.

[32] *See, e.g.*, Roxanna Asgarian, *Texas Judge Rules Alex Jones Must Pay Sandy Hook Parents Full $49 Million in Defamation Case*, TEX. TRIB. (Nov. 23, 2022, 11:00 AM), https://perma.cc/J82G-UAS2.

[33] *See, e.g.*, Jack Queen & Jacqueline Thomsen, *Alex Jones Must Pay Sandy Hook Families Nearly $1 Billion for Hoax Claims, Jury Says*, REUTERS (Oct. 12, 2022, 8:50 PM), https://perma.cc/J5H9-75Q9.

[34] *See* Voluntary Pet., *In re* Jones Personal Tex., No. 22-33553 (Bankr. S.D. Tex. Dec. 2, 2022), ECF No. 1.

[35] *See* Voluntary Pet., *In re* Free Speech Sys. LLC, No. 22-60043 (Bankr. S.D. Tex. July 29, 2022), ECF No. 1. Jones's business elected to file under the new subchapter V of the Bankruptcy Code.

[36] *See* Order Dismissing Case, *id.*, ECF No. 956; *see also* Elizabeth Williamson, *Judge Orders Sale of Alex Jones's Personal Assets but Keeps Infowars in Business*, N.Y. TIMES (June 14, 2024). In the wake of that decision, the Texas and Connecticut creditors have continued to wrangle over the assets of Free Speech Systems. *See* Elizabeth Williamson, *Sandy Hook Families' Fight for Alex Jones's Money Takes an Ugly Turn*, N.Y. TIMES (June 27, 2024). As of last review before publication, the bankruptcy court halted the creditors' efforts so that Jones's chapter 7 trustee could conduct an orderly liquidation of Free Speech Systems and its assets. *See, e.g.*, Dave Collins, *Bankruptcy Trustee Discloses Plan to Shut Down Alex Jones' Infowars and Liquidate Assets*, AP NEWS (June 24, 2024, 1:15 PM), https://perma.cc/WWF6-TDME. On November 14, 2024, the chapter 7 trustee announced that the winning bid was submitted by the Connecticut parents and Global Tetrahedron, LLC, the parent of the satirical news outlet *The Onion*, while the backup bid was submitted by First United American Companies, LLC. *See* Notice of Successful Bidder, *In re* Jones Personal Tex., No 22-33553 (Bankr. S.D. Tex. Nov. 14, 2024), ECF No. 903. The trustee's designation was immediately challenged.

Similarly, in April 2024, the parent company of *Gateway Pundit*, a right-wing blog founded by Missouri blogger Jim Hoft, filed for bankruptcy in Florida in the wake of defamation lawsuits

Turning from politics to entertainment, consider Tasha K (Latasha Transrina Kebe), a YouTuber with over one million subscribers to her account "unWine-withTashaK," where she engages in salacious celebrity gossip. Tasha K spread lies about renowned rapper Cardi B (Belcalis Marlenis Almánzar), including the rumor that Cardi B had herpes and that her child had an intellectual disability because of the disease. In 2019, Cardi B sued Tasha K for defamation and won $3.4 million in damages.[37] In 2023, Tasha K filed for bankruptcy in Florida, listing Cardi B as her largest creditor.[38]

While one can imagine Giuliani's case following a similar course before the dawn of the Internet, the cases of InfoWars and Tasha K seem more tightly tied to social media. These debtors built large online audiences, enabling them to gain enormous capacity for damage without a corresponding growth in personal or business wealth. In his bankruptcy petition, for example, Jones declared between

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brought by Freeman and Moss. Voluntary Pet., *In re* TGP Commc'ns, LLC, No. 24-13938 (Bankr. S.D. Fla. Apr. 24, 2024), ECF No. 1; *see* Will Sommer, *Gateway Pundit to File for Bankruptcy Amid Election Conspiracy Lawsuits,* WASH. POST (Apr. 24, 2024, 4:33 PM). That case, too, was dismissed for the debtor's failure to comply with its disclosure obligations. *See In re* TGP Commc'ns, LLC, No. 24-13938 (Bankr. S.D. Fla. Apr. 24, 2024), 2024 WL 3548248, at *4–6, 13. Several months after the dismissal, the litigants settled. *See* Jeff Amy, *Georgia Election Workers Settle Defamation Lawsuit Against Conservative Website*, AP NEWS (Oct. 11, 2024, 1:57 PM), https://perma.cc/BLK4-VL7C.

[37] Compl. and Demand for Jury Trial, Almánzar v. Kebe, No. 1:19-cv-01301-WMR (N.D. Ga. 2023), ECF No.1; Compl. to Determine Non-Dischargeability of Debt, Almánzar v. Kebe (*In re* Kebe), No. 23-01153-SMG, at ¶¶ 16–31 (Bankr. S.D. Fla. Aug. 8, 2023).

[38] Voluntary Pet. Sch. E/F, *In re* Kebe, No. 23-14082-SMG (Bankr. S.D. Fla. May 25, 2023), ECF No. 1 (listing claims).

$1 and $10 million in assets[39] (an assertion that one should take with some skepticism[40]), compared to $1 to $10 billion in liabilities.[41] Tasha K declared between $50,000 and $100,000 in assets, compared to $1 to $10 million in debt.[42]

The #MeToo Movement has also produced a number of defamation-to-bankruptcy cases. In 2017, prompted by news reports of sexual harassment allegations against Hollywood film mogul Harvey Weinstein,[43] women across the world took to social media to share stories of sexual harassment, rape, and hostile work environments under the hashtag #MeToo.[44] Many women shared their stories for the first time; others found that previously ignored or minimized accounts gained new weight as they retold their stories alongside thousands of others, underscoring the severity and pervasiveness of sexual harassment in American culture. Since many of the allegations were years or decades old, statutes of limitations barred claims for rape and sexual harassment.[45]

Defamation law became a second-best avenue for litigating sexual harassment. Some men sued their accusers for defamation; other men denied the accusations publicly and, in turn, were sued for their denials.[46] In 2023, for example, former

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[39] *See* Voluntary Pet., *In re* Jones Personal Tex., *supra* note 31, at 7.

[40] The plaintiffs accused Jones of transferring assets to his wife and parents, and of fraudulently entering into secured transactions. The Sandy Hook parents sued to unwind those transactions in 2022. *See Heslin*, 2022 WL 4182077, at *2; *see also* Elizabeth Williamson & Emily Steel, *Sandy Hook Families Are Fighting Alex Jones and the Bankruptcy System Itself*, N.Y. TIMES (Mar. 18, 2023), https://perma.cc/8ZTA-BRU6.

[41] Voluntary Pet., *In re* Jones Personal Tex., *supra* note 31, at 7. Jones also filed his media company Free Speech Systems for chapter 11 bankruptcy. *See In re* Free Speech Systems, LLC, *supra* note 35.

[42] Voluntary Pet., *In re* Kebe, *supra* note 37, at ¶ 20.

[43] *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), https://perma.cc/LC7G-N9F5; *Harvey Weinstein Timeline: How the Scandal Has Unfolded*, BBC (Feb. 24, 2023), https://perma.cc/Q2CP-SY2U.

[44] *See* Leah Asmelash, *In 5 Years of #Metoo, Here's What's Changed – and What Hasn't*, CNN (Oct. 27, 2022, 11:17 AM), https://perma.cc/E5VV-AH9C.

[45] Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. TIMES (Jan. 12, 2020), https://perma.cc/B8WY-PLAC.

[46] Whether defamation law ultimately subverts or reinforces gender norms is up for some debate and may change over time. In 1997, Professor Diane Borden conducted a study of defamation

FTC Commissioner and ex-George Mason University law professor Joshua Wright filed a $108 million defamation claim against two attorneys who told Law360 that he had sexually harassed them while they were 1Ls.[47] Conversely, in 2018, actor Ashley Judd sued Harvey Weinstein for defamation after learning that Weinstein had claimed she was a "nightmare to work with."[48]

Of course, Weinstein went to prison, not into bankruptcy,[49] though his network of film production companies filed for bankruptcy in Delaware in 2018.[50]

As with Weinstein, not all defamation cases end up in bankruptcy. In some cases, even very large defamation judgments do not create financial distress in a wealthy debtor. In other cases, substantial defamation judgments spark speculation about financial distress, but we have not yet seen a bankruptcy filing. This category

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actions and concluded that women were more successful when they alleged harm to their "private-sphere roles" rather than their "public-sphere roles." Diane L. Borden, *Patterns of Harm: An Analysis of Gender and Defamation*, 2 COMMC'N L. & POL'Y 105, 107 (1997). One wonders whether the result would hold for the #MeToo defamation cases.

[47] *See* Compl., Wright v. Dorsey, No. CL-2023-12232 (Va. Cir. Ct. Fairfax Cnty. Aug. 24, 2023), ECF No. 1; Aebra Coe, *'I Suffered Silently': Ex-Law Prof Allegedly Preyed on Students*, LAW360 (Aug. 14, 2023, 12:11 PM), https://perma.cc/4TD9-8WUW. Dorsey and Landry filed a counterclaim alleging a violation of Virginia's Anti-SLAPP law, Wright filed an amended complaint adding his company, Lodestar Law & Economics, and the matter is set for trial in early 2025. Dorsey & Landry's Countercl., *Wright*, No. CL-2023-12232.

[48] Judd v. Weinstein, 967 F.3d 952, 954 (9th Cir. 2020); *see* First Am. Compl., Judd v. Weinstein, No. 2:18CV05724 (C.D. Cal. 2018), ECF No. 26.

[49] People v. Weinstein, No. 24 (N.Y. Apr. 25, 2024), 2024 WL 1773181, at *1. Weinstein was found guilty in both Los Angeles and New York, though his conviction in the latter state has recently been overturned by the New York Court of Appeals, which ruled in April 2024 that evidence of Weinstein's prior bad acts was improperly admitted at trial. *See id.* at *12–13. He was subsequently indicted again. *See* Adam Reiss, Chloe Melas & Daniel Arkin, *Harvey Weinstein Indicted on New Charges by New York Grand Jury*, NBC NEWS (Sept. 12, 2024, 10:23 AM), https://perma.cc/BGS9-GVC7.

[50] Order Directing Joint Administration of the Debtors' Chapter 11 Cases, *In re* The Weinstein Company Holdings LLC, et al., No. 18-10601-MFW (Bankr. D. Del. Mar. 20, 2018), ECF No. 69.

may include actor Amber Heard,[51] politician Donald Trump,[52] and comedian Bill Cosby.[53] As we will see below,[54] bankruptcy does not solve all financial problems and it comes with heavy costs, so debtors tend to forego a filing if at all possible.

B. Tectonic Shifts in the Law

We have a second reason to expect more defamation activity in the coming years: tectonic shifts in the legal framework, either at the federal or the state level.

1. The Supremes Wobble

The Supreme Court has taught since the 1960s that the First Amendment requires a heightened showing for defamation actions. But a handful of recent cases

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[51] In 2022, a jury found Amber Heard liable to Johnny Depp for $15 million, including $10 million in compensatory damages and $5 million in punitive damages. Judgment Order, Depp v. Heard, No. CL-2019-2911 (Va. Cir. Ct. 2022), 2022 WL 2342058, at *1–2. Commentators have wondered about Heard's financial health, but an insurance dispute appears to be the first order of business. *See, e.g.*, Second Am. Compl., New York Marine & Gen. Ins. Co. v. Heard, No. 2:22-cv-04685 (C.D. Cal. Aug. 28, 2023), ECF No. 76, 2023 WL 5723286; Aaron Keller, *Amber Heard Would 'Gain No Real Benefit' by Using Bankruptcy to Avoid Paying Johnny Depp Millions, but There's a Catch: Law Prof*, LAW & CRIME (June 2, 2022, 2:56 PM), https://perma.cc/LE2J-2K63.

[52] In 2019, the author E. Jean Carroll accused Donald Trump of sexually assaulting her. When Trump denied the accusation, saying Carrol was "totally lying" and "not my type," she sued him for defamation. *See, e.g.*, Compl. & Demand for Jury Trial, Carroll v. Trump, No. 22-cv-10016-UA, at ¶¶ 99–107 (S.D.N.Y. Nov. 24, 2022), ECF No. 1, 2022 WL 19826795, at *11–12. In May 2023, a New York jury found Trump liable for $5 million. Verdict Form, *id.* Trump continued to defame Carroll, and she sued him again: He now owes $83.3 million, rulings he has appealed. *See* Jake Offenhartz, *Trump's Legal Debts Top a Half-Billion Dollars. Will He Have to Pay?*, L.A. TIMES (Feb. 17, 2024, 11:16 AM), https://perma.cc/GDK9-6C8R. Those sizable judgments, along with additional debt from Trump's civil fraud case, have prompted speculation about Trump's financial health. *See, e.g.*, Maggie Haberman, *Trump's Financial Squeeze*, N.Y. TIMES (Mar. 26, 2024). That said, Donald Trump's decisive victory in the 2024 presidential election makes the odds of a bankruptcy filing vanishingly small—at least until his second (and final) term ends in January 2029.

[53] Bill Cosby has been fending off numerous defamation lawsuits in recent years. *See, e.g.*, Second Am. Compl., Green v. Cosby, No. 3:14-cv-30211-MGM (D. Mass. Apr. 16, 2015), ECF No. 48, 2015 WL 1850657; Barbara Goldberg, *Bill Cosby Settles Defamation Lawsuit Brought by Seven Women*, REUTERS (Apr. 5, 2019, 10:01 PM), https://perma.cc/K7Y7-GHU6. Even though he has settled some of the claims, commentators have wondered about his ability to pay all of them. Whitney Vasquez, *Bill Cosby in 'Financial Turmoil,' Liquidating Assets and 'Selling Off Artwork' to Fight Civil Lawsuits*, RADAR ONLINE (Nov. 13, 2023, 2:30 PM), https://perma.cc/Y26Z-Q9UW.

[54] *See infra* Section II.A

indicate that some of the Justices would like to reconsider the scope of that protection.

In *New York Times v. Sullivan*,[55] *Gertz v. Robert Welch*,[56] and subsequent cases, the Supreme Court held that the First Amendment requires a defamation plaintiff to prove "actual malice" when (a) the plaintiff is a public figure and the defamatory statements involve issues of public concern;[57] or (b) the plaintiff seeks presumed or punitive damages, regardless of whether the plaintiff is a public figure or not.[58] Underscoring the importance of free speech in our democracy, the Supreme Court pointed out that public figures can readily mount a defense in the public square, instead of relying on the courts.[59] Since those seminal cases, courts have expanded

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[55] 376 U.S. 254 (1964).

[56] 418 U.S. 323 (1974).

[57] *See Sullivan*, 376 U.S. at 279–80 (requiring public officials to prove "actual malice" to recover damages in a defamation case); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–61 (1985). "Actual malice" is met if the speaker knew the statement was false or made it with "reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 280. The Court then expanded the requirement to public figures. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153–56 (1967) (expanding the *New York Times* protections to public figures, including two football coaches and a former U.S. army general); Associated Press v. Walker, 389 U.S. 28 (1967). *Gertz* refined the *Curtis Publishing* rule several years later, separating all-purpose public figures and limited-purpose public figures. *Gertz*, 418 U.S. at 344–46. Limited-purpose public figures "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. *Gertz* clarifies that such public figures typically expose themselves to increased risk of "defamatory falsehood" and have "a more compelling call on the courts for redress of injury inflicted." *Id.* All-purpose public figures, by contrast, have compelling persuasive power and could be seen as more traditional public officials. *See id.*

[58] *Id*. at 344–46 ("Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."). "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347.

[59] *See id.* at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.").

the scope of this heightened requirement to include individuals who find themselves thrust into the limelight, such as by "going viral" on social media.[60]

Two Justices have recently signaled their discomfort with *New York Times* and its progeny and have expressed a willingness to reconsider the doctrine. In *McKee v. Cosby*,[61] Kathrine McKee asked the Supreme Court to take up her defamation claim against Bill Cosby. In 2014, McKee had publicly accused Cosby of raping her forty years earlier; Cosby's response letter was leaked and disseminated around the world. McKee then sued Cosby for defamation.[62] The district court dismissed the suit, deeming McKee to be a public figure,[63] and the First Circuit affirmed.[64] Although the Supreme Court decided not to review the dismissal, Justice Thomas wrote a lengthy concurrence, arguing that *New York Times* and its progeny were "policy-driven decisions masquerading as constitutional law" and urging the Court to reconsider its jurisprudence.[65]

Then, in *Berisha v. Lawson*,[66] Shkelzen Berisha asked the Supreme Court to take up his defamation claim against Guy Lawson. In 2015, Lawson published a book

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[60] Lower courts have had to further refine the distinctions made by the Supreme Court. The Ninth Circuit, for example, asks:

> (i) whether a public controversy existed when the statements were made,
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> (ii) whether the alleged defamation is related to the plaintiff's participation in the controversy, and
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> (iii) whether the plaintiff voluntarily injected itself into the controversy for the purpose of influencing the controversy's ultimate resolution.

See Makaeff v. Trump Univ., LLC, 715 F.3d 254, 266 (9th Cir. 2013). The Ninth Circuit utilized this test twice to find limited-public figure status for entities that engaged social media for advertising efforts or to "invite[] public attention." *Id.* at 268–69 (internal citation omitted); *see also* Planet Aid, Inc. v. Reveal, 44 F.4th 918, 924–25 (9th Cir. 2022).

[61] 139 S. Ct. 675 (2019) (denying cert.).

[62] McKee v. Cosby, 874 F.3d 54, 54 (1st Cir. 2017).

[63] McKee v. Cosby, 236 F. Supp. 3d 427, 445–47 (D. Mass. 2017).

[64] *McKee*, 874 F.3d at 61–65.

[65] *McKee*, 139 S. Ct. at 676 (Thomas, J., concurring from denial of cert.); *see also* Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022) (Thomas, J., dissenting from denial of cert.) (arguing for reconsideration of *Sullivan*).

[66] 141 S. Ct. 2424 (2021) (denying cert.).

accusing Berisha (the son of the former prime minister of Albania) of being associated with the Albanian mafia.[67] The book was turned into a Warner Brothers movie called *War Dogs*.[68] Berisha sued for defamation. The district court granted summary judgment for the defendant on the grounds that Berisha was a public figure,[69] and the Eleventh Circuit affirmed.[70] As in *McKee*, the Supreme Court declined to take the case, but now both Justice Thomas and Justice Gorsuch dissented. Thomas expressed skepticism that the First Amendment would require public figures to forego civil remedies,[71] especially when the plaintiff never "voluntarily sought attention."[72] Gorsuch, dissenting separately, emphasized that the scope of First Amendment protection needed to be reconsidered for a new media environment.[73]

Scholars like John Bruce Lewis, Bruce L. Ottley, Lyrissa Lidsky, RonNell Andersen Jones, and others have begun to debate the pros and cons of defamation reform.[74] Naturally, if the Supreme Court pulls back on the scope of First Amendment protection for defamation defendants,[75] we would see more civil exposure—and, correspondingly, more defamation debt in bankruptcy.

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[67] Berisha v. Lawson, 973 F.3d 1304, 1306–09 (11th Cir. 2020).

[68] WAR DOGS (Warner Bros. 2016); *see Berisha*, 973 F.3d. at 1309.

[69] *See* Berisha v. Lawson, 378 F. Supp. 3d 1145, 1155–60, 1163–64 (S.D. Fla. 2018).

[70] *Berisha*, 973 F.3d at 1321.

[71] *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting from denial of cert.).

[72] *Id.* (quoting *Berisha*, 378 F. Supp. 3d 1145, 1156 (S.D. Fla. 2018)).

[73] *Berisha*, 141 S. Ct. at 2425, 2425–30 (Gorsuch, J., dissenting from denial of cert.).

[74] *See, e.g.*, John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 60: Where Does Defamation Law Go Now?*, 73 DEPAUL L. REV. 995, 1066 (2024) (arguing for expedited procedures under anti-SLAPP laws); Lyrissa Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. FREE SPEECH L. 79, 80 (2023) (advocating for a "comprehensive approach to reform"); RonNell Andersen Jones, *Defamation, Disinformation, and the Press Function*, 3 J. FREE SPEECH L. 103, 104 (2023) (arguing that a "*Sullivan* scaleback" would harm news entities that already have the right incentives to produce accurate reporting).

[75] It is hard to know whether the Supreme Court's wobble has petered out. In *Frese v. Formella*, 53 F.4th 1 (1st Cir. 2022), petitioners sought the High Court's review of a New Hampshire criminal defamation law. One of only a few states with a criminal defamation statute, New Hampshire makes it a misdemeanor to purposely share "any information which [the defendant] knows to be false and knows will tend to expose any other living person to public hatred, contempt, or ridicule." N.H. REV. STAT. § 644:11(I); *see Frese*, 53 F.4th at 1. The First Circuit upheld the law, noting that its limited scope fell within what the Supreme Court had previously deemed permissible. *Frese*, 53 F.4th at

2. State Legislative Initiatives

In any event, the signals from Thomas and Gorsuch have emboldened some state legislators, who have proposed laws that would dramatically expand defamation liability and invite First Amendment challenges that could press the Supreme Court for new decisions.

In 2023, for example, Florida lawmakers considered House Bill 991, which would have provoked several constitutional challenges. First, the bill would have specified that those who merely defend themselves or "go viral" on social media are not "public figures,"[76] a clarification that conflicts with several cases decided by lower courts under the U.S. Constitution. Second, the bill would have defined any accusations of discrimination on account of race, sex, sexual orientation, or gender identity to be defamation per se, and would award successful plaintiffs statutory damages of $35,000 in addition to other damages.[77] In such cases, defendants could not prove the truth of their statements by referring to a plaintiff's religious or scientific beliefs.[78] The bill also would have enacted fee-shifting for successful plaintiffs.[79]

We should not overestimate the likely success of such efforts. H.B. 991 died in committee. Still, it may spark subsequent legislation in Florida or other states.[80]

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6 (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)). Even though criminal punishment of defamation raises even more serious First Amendment concerns than civil liability, the Court denied certiorari in 2023, with no dissenters. Frese v. Formella, 144 S. Ct. 72 (2023) (mem. op.) (denying cert.). In *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), six Justices drew on *Sullivan* to inform what type of *mens rea* the First Amendment requires before punishing threats. *Id.* at 2115, 2130. And in *Blankenship v. NBCUniversal*, 144 S. Ct. 5 (2023), the Court denied a petition for certiorari that asked it to overrule *Sullivan*.

[76] H.R. 991, 125th Leg. (Fla. 2023) (amending FLA. STAT. § 770.105).

[77] *Id.* (amending FLA. STAT. § 771.11).

[78] *Id.*

[79] *Id.* (amending FLA. STAT. § 770.09).

[80] In 2024, the Florida Legislature considered a successor bill, H.B. 757, which does not contain many of the most objectionable provisions, but it would create a presumption of actual malice when a publisher relies solely on an anonymous source for a defamatory claim. *See* H.R. 757, 125th Leg. (Fla. 2023) (establishing FLA. STAT. 770.11); *see also* S.B. 1780, 125th Leg. (Fla. 2023) (same). Those bills have since died as well.

C. Defamation Debt in Bankruptcy

All told, it may be too early to measure the defamation-to-bankruptcy pipeline with precision. And, of course, it is not entirely new. Consider murder suspect Casey Anthony. In 2008, a meter reader stepped into the woods behind an Orlando home and found the skeletal remains of a child, stuffed in a laundry bag, with duct tape covering the mouth of the child's skull.[81] Florida authorities identified the skeleton as belonging to missing toddler Caylee Anthony.[82] State prosecutors charged her mother, Casey Anthony, with first-degree murder.[83] The jury found Anthony not guilty of the most serious charges—a result that shocked the American public.[84]

What fewer news outlets focused on, though, was the bankruptcy aftermath. Anthony's legal team had pointed the finger at the meter reader, Roy Kronk, as well as Caylee's babysitter, Zenaida Gonzalez, implying that one of them had murdered Caylee. Both Kronk and Gonzalez sued Anthony for defamation.[85] Faced with mounting civil legal exposure, Anthony filed for bankruptcy in 2013.[86]

There is, as the Teacher said, nothing new under the sun.[87] Still, we should anticipate more cases in the defamation-to-bankruptcy pipeline for three reasons. First, as discussed above, the sheer size of defamation judgments is growing, making it more likely that a defamation verdict (or even the threat of one) could swamp a defendant. Second, the growth in legal exposure is financially asymmetric; it does

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[81] Natisha Lance & John Couwels, *Caylee Anthony's Skull Was Duct-Taped*, CNN (June 19, 2009), https://perma.cc/R9BQ-HWBK.

[82] *Id.*

[83] Breeanna Hare, *'What Really Happened?': The Casey Anthony Case 10 Years Later*, CNN (June 30, 2018, 12:54 AM), https://perma.cc/FLT9-R2ML.

[84] *Id.*

[85] Kronk v. Anthony (*In re* Anthony), No. 8:13-bk-00922-RCT (Bankr. M.D. Fla. Feb. 28, 2019), 2019 WL 10734097, at *1; Gonzalez v. Anthony (*In re* Anthony), 538 B.R. 145, 147–50 (Bankr. M.D. Fla. 2015).

[86] *See* Voluntary Pet., *In re* Anthony, No. 8:13-bk-00922-KRM (Bankr. M.D. Fla. Jan. 25, 2013), ECF No. 1; *see also* Associated Press, *Casey Anthony Files for Bankruptcy in Orlando*, FLA. TIMES-UNION (Jan. 28, 2013, 4:12 AM), https://perma.cc/EPZ6-ZN99. Both defamation claims ended up being dischargeable. *See infra* note 126 and accompanying text.

[87] *Ecclesiastes* 1:9.

not come with a corresponding growth in assets.[88] Indeed, the social media ecosystem makes it easier for a regular person, not a media tycoon nor even a workaday journalist indemnified by their employer, to "go viral" and cause harm far beyond their means. And third, legal reform efforts would increase the very types of liability that can be discharged in bankruptcy.

If a new generation of defamation defendants is tagged with significant statutory or negligence damages, a bankruptcy case could grant them a fresh start, incentivizing more bankruptcy filings. But bankruptcy does not wipe away claims for "willful and malicious" injury—and, as we'll see below,[89] that fact dramatically impacts bankruptcy's efficacy for some defamation defendants.

II. BANKRUPTCY-PROOF JUDGMENTS

Defamation defendants who file for bankruptcy soon realize that bankruptcy is not a magic wand.[90] True, the filing of a petition in bankruptcy imposes an automatic stay that pauses debt collection activity,[91] and bankruptcy can resolve some financial problems, but the pathway to debt forgiveness is narrow and costly. Bankruptcy for individuals can last anywhere from ninety days to several years, and it includes routine financial disclosures and examinations that put the debtor in a "fishbowl" for the duration of the case.[92] And while bankruptcy promises an orderly resolution of debt, a filing also requires the debtor to notify all creditors of the case, drawing everyone to bankruptcy court and putting an end to one-at-a-time negotiations.[93] Navigating the bankruptcy process almost always requires an attorney (and attendant attorneys' fees). Even a successful bankruptcy case leaves a stain on an individual's credit score for ten years,[94] and a debtor cannot file a subsequent

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[88] As Prof. Gus Hurwitz puts it, "[t]he cost of producing and publishing speech has never been lower and the scale of the audience for that speech has never been larger." Justin "Gus" Hurwitz, *Defamation and Privacy: What You Can't Say About Me*, 3 J. FREE SPEECH L. 75, 75 (2023).

[89] *See infra* Part II.

[90] *See* Nani, *supra* note 15.

[91] *See* 11 U.S.C. § 362.

[92] *See, e.g.*, 11 U.S.C. § 343 (requiring the debtor to "appear and submit to examination under oath at the meeting of creditors); *id.* § 521 (listing debtor's duties, including numerous disclosure obligations).

[93] *See, e.g.*, FED. R. BANKR. P. 2002 (providing for notices to creditors).

[94] 15 U.S.C. § 1681c(a)(1) (providing that a credit report may not include a record of a bankruptcy case that antedates the report by more than ten years).

bankruptcy case without waiting a significant period of time.[95] The same factors cut against the frivolous use of bankruptcy for businesses.[96]

At the same time, the bankruptcy "discharge" (a permanent injunction against the collection of a debt) can ameliorate many kinds of financial problems. Indeed, because of bankruptcy's expansive definition of "claim," debtors can gather up and resolve any debts that have arisen before the petition date, including claims that haven't yet seen the inside of a courtroom.[97]

But the discharge comes with limits. For example, debtors who have concealed or destroyed assets or records, made false claims, or refused to testify are ineligible for the discharge.[98] Crucially, while the discharge covers a wide world of prepetition debts—that is, debts arising before the filing of the bankruptcy petition—it does not cover postpetition debts.[99] And, most importantly for individual defamation defendants, the discharge comes with numerous exceptions, one of which—debts for "willful and malicious injury"—may apply to certain kinds of defamation debt.

This Part analyzes how the discharge exceptions apply in defamation cases and shows how a bankruptcy filing is not the panacea that many imagine it to be. Indeed, by the time a defendant becomes a debtor, the dischargeability of defamation debt may have been settled already.

A. Willful and Malicious Injury

Section 523 of the Bankruptcy Code contains a list of twenty exceptions to the bankruptcy discharge, or "nondischargeable" debt. The discharge exceptions include certain debts owed to the government, such as taxes, fines, and, for some debtors, student loans;[100] domestic support obligations and debts incurred in the

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[95] 11 U.S.C. § 727.

[96] The length of the cooldown period turns upon the type of the prior bankruptcy and the subsequent bankruptcy. *See* 11 U.S.C. § 727(a)(8)–(9) (providing that chapter 7 debtors cannot receive a discharge if they received a chapter 11 discharge within eight years or a chapter 12 or 13 discharge within six years); *id.* § 1328(f) (providing that chapter 13 debtors cannot receive a discharge if they received a chapter 7, 11, or 12 discharge within four years, or a chapter 13 discharge within two years).

[97] *Id.* § 524(a)(2).

[98] *Id.* § 727.

[99] *See id.* §§ 727(b), 1141(d)(1)(A).

[100] 11 U.S.C. § 727(a)(1), (7), (8), (14). Federal judgments for restitution are likewise excepted from the discharge. *Id.* § 727(a)(13).

course of divorce or separation;[101] and debts for various bad acts, like money obtained through fraud or false pretenses,[102] defalcation, embezzlement, or larceny;[103] drunk driving,[104] securities law violations,[105] slavery or sex trafficking,[106] and—core to our topic—debts for "willful and malicious injury."[107]

The phrase "willful and malicious" presents thorny statutory interpretation questions, with no obvious tiebreaker. Courts sometimes invoke bankruptcy's "fresh start" policy to construe the discharge exceptions narrowly in favor of the debtor (like the rule of lenity),[108] but that canon of construction applies more naturally to debtors who fell behind on student loans or their taxes than to a debtor who is liable for "willful and malicious" injury. As the Supreme Court has pointed out, the "fresh start" is for the "honest but unfortunate debtor,"[109] so to apply the canon when trying to figure out if the debtor caused "willful and malicious" injury would be textbook question-begging.

Plus, purposivism is on shaky doctrinal footing these days. In 2023, the Supreme Court in *Bartenwerfer v. Buckley*[110] applied a textualist approach to section 523(a), holding that the passive phrase "obtained by fraud" was not limited to the debtor's fraud, but could mean debt that was "obtained" by someone else's fraud, so long as the debtor was still liable for the debt under state law.[111] Writing for a

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[101] *Id.* § 727(a)(5), (15).

[102] *Id.* § 727(a)(2). The Supreme Court took up a case under this subsection in *Bartenwerfer*. *See infra* notes 111–114 and accompanying text.

[103] *Id.* § 727(a)(4).

[104] *Id.* § 727(a)(9).

[105] *Id.* § 727(a)(19).

[106] *Id.* § 727(a)(20).

[107] *Id.* § 727(a)(6).

[108] *See, e.g.*, Denton v. Hyman (*In re* Hyman), 502 F.3d 61, 66 (2d Cir. 2007) ("The consequences to a debtor whose obligations are not discharged are considerable; in many instances, failure to achieve discharge can amount to a financial death sentence. In view of these harsh consequences, exceptions to discharge are to be narrowly construed, and genuine doubts should be resolved in favor of the debtor.").

[109] *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citing Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554–55 (1915)).

[110] 143 S. Ct. 665 (2023).

[111] *Id.* at 670.

unanimous Court, Justice Barrett underscored the Code's use of the passive voice[112] and poo-pooed bankruptcy policy as a "last-ditch effort" to persuade the Court with "color."[113] The problem with purposivism, noted the Court, is that Congress never pursues any policy "at all costs," so the Bankruptcy Code reflects a balance.[114] Implicitly stated, of course, is the premise that fidelity to that balance is best undertaken by interpreting the text without resort to policy arguments.

So what does "willful and malicious" mean? Numerous courts have held that breach of contract does not result in the sort of "injury" meant by the Code[115]—this is the domain of torts. Although one might suppose that the phrase "willful and malicious" would capture something of common-law "malice" (hatred, ill-will, or spite), most bankruptcy courts interpret "willful and malicious" to require a conjunctive, two-part analysis: A claim is nondischargeable only when the debtor (a) intended to cause harm (b) without legal justification.[116] As to the requisite culpability standard, negligent or reckless action does not suffice, and even intentional action counts only where the debtor intended injury or acted with substantial certainty that injury would result.[117] A creditor seeking to prove nondischargeability of a debt must do so by preponderance of the evidence.[118]

For example, Michael Hanson had HPV with an active outbreak of warts. He had unprotected sex with his girlfriend, Teresa Fischer, and did not warn her of his disease, even though he knew that it was sexually transmitted. Five months after they moved in together, Fischer had an abnormal pap smear, but Hanson still did not disclose his condition. Fischer sued Hanson in Montana state court. When

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[112] *Id.*; *see also* Laura N. Coordes, *'Til Fraud Do Us Part:* Bartenwerfer v. Buckley, 26 GREEN BAG 273 (2023) (underscoring the hypertextual focus of the *Bartenwerfer* Court).

[113] Bartenwerfer v. Buckley, 598 U.S. 69, 80–81 (2023).

[114] *Id.* at 81–83.

[115] *See* 4 COLLIER ON BANKRUPTCY ¶ 523.12 n.4 (16th ed. 2024) (collecting cases).

[116] Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); *see also* 4 COLLIER ON BANKRUPTCY ¶ 523.12 (16th ed. 2024); MarketGraphics Rsch. Grp., Inc. v. Berge (*In re* Berge), 953 F.3d 907, 914 (6th Cir. 2020).

[117] *See Kawaahau*, 523 U.S. at 61–62.

[118] Grogan v. Garner, 498 U.S. 279, 286 (1991). Bankruptcy courts make such determinations as part of an "adversary proceeding" in bankruptcy, essentially a separate civil action, associated with the bankruptcy case, that includes dispositive motions, discovery, a trial before the judge as factfinder, and appellate rights. *See* FED. R. BANKR. P. 4007.

Hanson filed for bankruptcy, Fischer argued that Hanson's debt to her was nondischargeable as a "willful and malicious injury," and the bankruptcy court agreed.[119]

Debts for intentional torts generally fall within the discharge exception. Most courts, for example, have interpreted sexual harassment claims to fall within the discharge exception, though others insist on additional evidence of intent.[120]

But other torts, where a defendant can be found liable for negligence or recklessness, present a tougher analysis. Even if the elements of the underlying claim do not require willful or malicious conduct, bankruptcy courts examine the factual record to see if the debtor's conduct fits the language of the discharge exception. In *McClendon v. Springfield*,[121] for example, a jury found the debtor liable for $341,000 in actual damages for defamation.[122] Even though the state court judgment did not require "willful or malicious" conduct, the bankruptcy court conducted additional factfinding, disbelieved the debtor's testimony that he believed his statements were true, and deemed the debt nondischargeable.[123] Other courts have followed the same approach.[124]

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[119] Fischer v. Hanson (*In re* Hanson), 171 B.R. 869, 872–74 (Bankr. D. Minn. 1994).

[120] *See* Gross, *supra* note 9, at 483 n.9 (analyzing cases). As Gross uncovers, in one case, the bankruptcy court required another trial to show intent, but the victim refused to re-testify. *See* Sanger v. Busch (*In re* Busch), 311 B.R. 657, 669 (Bankr. N.D.N.Y. 2004). The court found the debt dischargeable, a result that has been sharply criticized. *See* David L. Adamson, *The Discharge of Sexual Harassment Judgments in Bankruptcy Court: An Attempt to Right a "Grave Injustice,"* 25 HOFSTRA LAB. & EMP. L.J. 283, 285–95 (2007); Andy Gaunce, *Rethinking* In re Busch*: Bankruptcy Discharge of Sexual Harassment Judgments Under Section 523(a)(6)*, 56 S.C. L. REV. 645, 645–46 (2005).

[121] *In re* McLendon, 765 F.3d 501 (5th Cir. 2014).

[122] *Id.* at 503–04.

[123] *Id.* at 504–05 (noting that the bankruptcy court "conducted an independent inquiry into the willful and malicious character of McClendon's defamatory statements, conducting a trial of its own into questions not determined by the state court jury"). The Fifth Circuit affirmed on a clear error standard of review. *Id.* at 504, 506.

[124] *See, e.g.*, Conte v. Gautam (*In re* Conte), 33 F.3d 303, 305 (3d Cir. 1994) (reversing bankruptcy court on issue preclusion and remanding for factfinding); MarketGraphics Rsch. Grp., Inc. v. Berge (*In re* Berge), 953 F.3d 907, 912–13 (6th Cir. 2020) (affirming bankruptcy court that denied preclusive effect to a state court judgment and held a bench trial on the issue of malice); First Weber Grp., Inc. v. Horsfall, 738 F.3d 767, 775 (7th Cir. 2013) (affirming bankruptcy court's preclusion determination in part and finding no clear error in bankruptcy court's trial).

Similarly, courts typically find that vicarious liability, by itself, cannot establish the necessary intent for nondischargeability.[125] But they will hear additional facts that might show the requisite intent. This approach played out in Casey Anthony's bankruptcy case. The bankruptcy judge found that Anthony's legal team was only attempting to create reasonable doubt of their client's guilt by suggesting that either Kronk or Gonzalez could have been the murderer, not purposefully attempting to harm them, and that the lawyers' intent couldn't be imputed to their client anyway.[126]

Note the interpretive approach here. Even though the Bankruptcy Code says that the discharge exception applies to debts "for willful and malicious injury," bankruptcy courts frequently investigate the underlying facts even if they are not elements of the claim. This approach, what we might call the "factual approach," differs sharply from the "categorical approach" used to determine whether a criminal defendant has committed a "crime of violence" or a "violent felony" under federal law.[127] And it may be on shaky theoretical ground. Bankruptcy courts do not let creditors with debts arising from breach of contract show that such breaches were done with common-law malice and are therefore nondischargeable.[128] Why should they let creditors with debts arising out of negligence or recklessness torts do so? The answer is not obvious and, to my mind, has more to do with bankruptcy pragmatism than a textualist interpretation of the word "for" in the statute.

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[125] *See, e.g.*, Thatcher v. Austin (*In re* Austin), 36 B.R. 306, 311–12 (Bankr. M.D. Tenn. 1984) ("[A]pplication of vicarious liability would effectively vitiate the § 523(a)(6) requirement that only debts resulting from the *willful* acts committed *by the debtor* be nondischargeable. Vicarious liability as a social policy or legal fiction ignores the master's knowledge and imposes fault and financial responsibility without regard to culpability or intent.").

[126] *See* Kronk v. Anthony (*In re* Anthony), No. 8:13-bk-00922-RCT, 2019 WL 10734097, at *13–14 (Bankr. M.D. Fla. Feb. 28, 2019). Kronk's attempts to uncover additional evidence ran into an attorney-client privilege problem. *Id.* at *12. Similarly, the bankruptcy court found that Anthony's vague implication of "that girl down in Kissimmee" failed to establish the required intent for nondischargeability because Anthony did not know Gonzalez and did not intend to hurt her specifically. Gonzalez v. Anthony (*In re* Anthony), 538 B.R. 145, 156 (Bankr. M.D. Fla. 2015).

[127] *See* Taylor v. United States, 495 U.S. 575, 599–602 (1990).

[128] *But see* Rivera v. Moore-McCormack Lines, Inc., 238 F. Supp. 233, 234 (S.D.N.Y. 1965) (holding a debt for breach of contract nondischargeable when the act that breached the contract was done willfully and maliciously).

In the defamation context, this analysis suggests that compensatory damages are usually dischargeable, assuming that the creditors cannot find any additional facts to prove a higher standard of fault. Thus, a debtor can be liable for defamation even without the requisite intent to make the debt nondischargeable in bankruptcy. In *Qui v. Zhou*,[129] for example, the bankruptcy judge ruled that the debtor, who suffered from schizophrenia, genuinely believed the defamatory allegations, and that the debt was therefore dischargeable.[130] In *Kanaga v. Landon*,[131] the bankruptcy judge reached the same result without relying on any medical condition, emphasizing that the debtor "genuinely believed" the defamatory material and that the Bankruptcy Code required a higher showing.[132]

Conversely, punitive damages are almost always nondischargeable in bankruptcy, since state law usually (though not always) requires something like common-law malice.[133]

Presumed damages create what one court euphemistically called an "analytical wrinkle": In such claims, called defamatory per se, the law presumes that the victim was injured, without requiring proof of harm.[134] Bankruptcy courts struggle to determine whether the debtor intended to cause harm when no injury needs to be proven. Instead, many courts focus on whether the debtor knew or was "substantially certain" that the statement was "false and published without privilege."[135]

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[129] Qui v. Zhou (*In re* Zhou), 331 B.R. 274 (Bankr. E.D. Mich. 2005).

[130] *Id.* at 276–77.

[131] Kanaga v. Landon (*In re* Landon), 657 B.R. 128 (Bankr. N.D. Okla. 2024).

[132] *Id.* at 143–46.

[133] *See, e.g.*, Prozeralik v. Cap. Cities Commc'ns, Inc., 626 N.E.2d 34, 42 (N.Y. 1993) (requiring evidence that the defendant acted "out of hatred, ill will, spite, criminal mental state, or that traditionally required variety of common-law malice"); Combs v. Richardson, 838 F.2d 112, 117 (4th Cir. 1988) ("We do not imply that every punitive award in a prior tort suit automatically renders the judgment debt nondischargeable in bankruptcy. . . . The standard for punitive damages is established by state law and may vary from the federal requirement for nondischargeability.").

[134] *See, e.g.*, Watson v. Bradsher (*In re* Bradsher), No. 1:21-CV-1778-SEG (N.D. Ga. Aug. 12, 2022), 2022 WL 3335523, at *5–6.

[135] *Id.* at *6, *13 (remanding to bankruptcy court to determine whether a defamation defendant knew that his accusations were false).

When a debt contains multiple related dollar amounts, some of which fall into a discharge exception, bankruptcy courts may deem the whole amount nondischargeable. For example, if a judgment contains nondischargeable punitive damages, bankruptcy courts may hold that corresponding compensatory damages are nondischargeable as well.[136] In *Gober v. Terra + Corporation*,[137] the Fifth Circuit held that the status of "ancillary obligations"—such as attorneys' fees and interest—turns on the status of the "primary debt."[138]

The discharge exceptions apply to individual debtors in chapters 7 and 11, and (with some exceptions) to individual debtors who complete a payment plan under chapters 12 and 13.[139]

Crucially, though, the discharge exceptions do not always apply to businesses: Business entities that reorganize under chapter 11 receive an immediate discharge of almost all claims against them,[140] while companies that are liquidating under chapter 7 of the Code get no discharge at all.[141] That leaves small businesses and family-owned farming or fishing businesses, which have special options under the Code. Ambiguous provisions in the Code leave it unclear whether Congress meant to incorporate the discharge exceptions against all debtors in chapter 12 and subchapter V, or just individual debtors. To date, the Fourth and Fifth Circuits have

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[136] *See, e.g.*, Macris v. Saxton (*In re* Saxton), No. 10-4412-RFN (Bankr. N.D. Tex. June 8, 2011), 2011 WL 2293320, at *8.

[137] Gober v. Terra + Corp. (*In re* Gober), 100 F.3d 1195 (5th Cir. 1996).

[138] *Id.* at 1208.

[139] *See* 11 U.S.C. §§ 523, 1141(d)(2), 1228(a)(2), 1328. Chapters 11, 12, and 13 authorize the bankruptcy court to provide a discharge to an individual debtor that has not completed its plan payments, so long as (1) the failure to complete payments "is due to circumstances for which the debtor should not justly be held accountable"; (2) the debtor has made enough payments that the unsecured creditors have received more than they would have in a chapter 7 liquidation; and (3) modification of the plan is impracticable. 11 U.S.C. §§ 1141(d)(5)(B), 1228(b), 1328(b). But neither provision authorizes the judge to include section 523 claims in that hardship discharge. *See* 11 U.S.C. §§ 1141(d)(2), 1228(c)(2), 1328(c)(2).

[140] Even under chapter 11, corporations cannot get a discharge for debts owed to a state or federal government and obtained by false pretenses or fraud (including debts owed under a *qui tam* statute) or tax or customs duties where the debtor made a fraudulent return or attempted tax evasion. *See* 11 U.S.C. § 1141(d)(6); 31 U.S.C. §§ 3721–3733.

[141] 11 U.S.C. § 727(a)(1).

applied the discharge exceptions to corporate debtors in subchapter V,[142] while several bankruptcy courts have come out the other way.[143]

B. Issue Preclusion in Bankruptcy

When a bankruptcy petition is filed, the automatic stay stops litigation against the debtor in its tracks and the spotlight turns on the bankruptcy court.[144] The petition, though, doesn't always come neatly after a judgment becomes final on appeal. If the debtor files for bankruptcy after committing a defamation tort, but before the case reaches final judgment—or even before a lawsuit is filed—the bankruptcy court has jurisdiction over the claim and must decide whether to hear the matter itself, send it to the district court for a jury trial,[145] or lift the stay and abstain

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[142] Cantwell-Cleary Co. v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509, 512 (4th Cir. 2022); Avion Funding, LLC v. GFS Indus., LLC (*In re* GFS Indus., LLC), 99 F.4th 223, 232 (5th Cir. 2024). As of last review before publication, the matter is pending before the Eleventh Circuit. *See* BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC), No. 23-12342 (11th Cir. July 19, 2023).

[143] *See* Lafferty v. Off-Spec Sols., LLC (*In re* Off-Spec Sols., LLC), 651 B.R. 862, 867 (B.A.P. 9th Cir. 2023); Nutrien Ag Sols., Inc. v. Hall (*In re* Hall), 651 B.R. 62, 67–69 (Bankr. M.D. Fla. 2023); BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC), 650 B.R. 521 (Bankr. M.D. Fla. 2023); Primary Invs. Grp., Inc. v. Ra Custom Design, Inc. (*In re* Ra Custom Design, Inc.), No. 23-58494-SMS (Bankr. N.D. Ga. Feb. 13, 2024), 2024 WL 607716, at *2; Chicago & Vicinity Labs.' Dist. Council Pension Plan v. R&W Clark Const., Inc. (*In re* R&W Const., Inc.), 656 B.R. 628, 634–38 (Bankr. N.D. Ill. 2024).

[144] 11 U.S.C. § 362.

[145] Whether the bankruptcy court may adjudicate defamation actions depends on whether they are classified as "personal injury" claims, which must be tried in the district court. *See* 28 U.S.C. §§ 157(b)(2)(B), (O), 157(b)(5), 1411(a). The Supreme Court ducked this very issue in the landmark case of *Stern v. Marshall*, 564 U.S. 462 (2011), ruling that section 157(b) is not jurisdictional and so the defamation plaintiff could consent to the bankruptcy court's jurisdiction. *Id.* at 479. Many lower courts, however, apply a "narrow view" of "personal injury," requiring some "trauma or bodily injury or psychiatric impairment beyond mere shame or humiliation." Byrnes v. Byrnes (*In re* Byrnes), 638 B.R. 821, 826 (Bankr. D.N.M. 2022); *In re* Gawker Media LLC, 517 B.R. 612 (Bankr. S.D.N.Y. 2017). Under a "middle view," personal injury can include "emotional and reputational harms," but not business or financial injuries. *See In re* Stewart, 649 B.R. 755, 760–61 (Bankr. N.D. Ill. 2023) (holding that claims for defamation, stalking, intimidation, and harassment were "personal injury" claims under the Bankruptcy Code, but that tortious interference with a business relationship was not); *see also In re* Ice Cream Liquidation, 281 B.R. 154 (Bankr. D. Conn. 2002); Joseph Collini, *Bankruptcy Court Jurisdiction: Are Libel and Slander Personal Injury Torts?*, 10 ST. JOHN'S BANKR. RSCH. LIBR. 6 (2018), https://perma.cc/DZ62-HA7D.

so that another court can proceed with a suit that has already been filed.[146] That determination is a complex one, triggering questions of jurisdiction, comity, federalism, and procedural rights.[147] Bankruptcy judges must decide, among other things, whether allowing a different federal or state court to adjudicate a dispute will disrupt the plan process in bankruptcy court.[148]

When litigation between the debtor and a creditor reaches final judgment, and the creditor asks the bankruptcy court to declare the debt nondischargeable, the bankruptcy court will apply standard principles of issue preclusion to that determination.[149] The preclusive effect of a judgment turns on the law in that jurisdiction, but most jurisdictions will give preclusive effect over a prior adjudication of an issue when it is (1) the same issue, (2) actually litigated, (3) between the same parties or

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[146] *See* 28 U.S.C. § 1334(c) (providing for both permissive and mandatory abstention). The bankruptcy court may also abstain from hearing the entire bankruptcy case under 11 U.S.C. § 305. For example, in *Fischer v. Hanson (In re* Hanson), 171 B.R. 869 (Bankr. D. Minn. 1994), the bankruptcy court abstained to allow the Montana state court to liquidate damages. *Id.* at 872 n.2. Similarly, a bankruptcy court may lift the stay to allow postjudgment motions and appeals to continue. Giuliani, for example, asked the bankruptcy court to lift the stay so that he could pursue remittitur and an appeal of Freeman and Ross's trial verdict against him. *See* Debtor's Motion for an Order Modifying the Stay, *In re* Guiliani, *supra* note 23, ECF No. 25. The bankruptcy court agreed. *Id.*, No. 23-12055 (Bankr. S.D.N.Y. Feb. 20, 2024), 2024 Bankr. LEXIS 954. The district court denied Giuliani's Rule 50 and Rule 59 motions, *see* Freeman v. Guiliani, No. 21-3354 (D.D.C. Apr. 15, 2024), 2024 WL 1616675, at *20, so Giuliani filed his notice of appeal—before running into further problems in his bankruptcy case. *See supra* note 25 and accompanying text.

[147] *See* 28 U.S.C. § 1334(c)(1) (authorizing the court to abstain from hearing a bankruptcy proceeding "in the interest of justice, or in the interest of comity with State courts or respect for state law"). For an insightful look at how section 1334 might be amended to address forum-shopping in the bankruptcy context, see Sarah Jones, *Ameliorating Bankruptcy's Forum Shopping Crisis Through Abstention and Venue Transfer*, 76 FLA. L. REV. 405 (2024).

[148] *See id.* § 1334(c)(2) (requiring the court to abstain if a state-law action, one that could have been brought in federal court only because it is related to the bankruptcy case, has already begun and "can be timely adjudicated" in state court).

[149] *See* Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991) ("Our prior cases have suggested, but not formally held, that the principles of collateral estoppel apply in bankruptcy proceedings under the current Bankruptcy Code. . . . We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."); *see also* Moyer v. Anthony (*In re* Anthony), 648 B.R. 556, 560, 572–77 (Bankr. S.D. Ohio 2023) (finding that willfulness and malice were both necessary to a prior sanctions judgment and holding that debt nondischargeable).

their privies, when that issue was (4) essential to the judgment, which (5) is valid and has become final.[150]

For certain claims, a prior judgment can be completely preclusive of the bankruptcy court determination. For example, in *Silas v. Arden*, the Ninth Circuit held that a state court judgment for malicious prosecution had preclusive effect over every element under section 523(a)(6).[151] Of course, whether the debtor acted "willfully" and "maliciously" is not always "actually litigated" as part of the prior proceeding.[152] And jury instructions and verdict sheets do not always recite specific facts.

Alex Jones found himself on the wrong side of issue preclusion in bankruptcy. Jones had failed to comply with his discovery obligations in the litigation brought against him in Connecticut and Texas. As a result, both courts deemed the allegations against him admitted and sent the cases to juries for a determination of damages. After Jones filed for bankruptcy, the Sandy Hook parents, now his creditors, followed him to bankruptcy court and argued that Jones could not discharge his debt in bankruptcy.[153] The bankruptcy judge agreed in part, concluding that the Texas and Connecticut default judgments had preclusive effect in bankruptcy, that the adverse facts had been deemed true, and that Jones was not free to relitigate over $1 billion in damages—but that the remainder of Jones's debt, which could

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[150] *See, e.g.*, Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., 590 U.S. 405, 411 (2020) ("[I]ssue preclusion (sometimes called collateral estoppel) . . . precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment.") (citing Allen v. McCurry, 449 U.S. 90, 94 (1980)); Anderson v. Genuine Parts Co., 128 F.3d 1267, 1273 (8th Cir. 1997) (setting forth requirements for issue preclusion); *see also* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4416 (3d ed., rev. June 2024).

[151] Silas v. Arden (*In re* Arden), 834 F. App'x 393 (9th Cir. 2021) (mem. op.); *see also* Kennedy v. Mustaine (*In re* Kennedy), 249 F.3d 576 (6th Cir. 2001) (same).

[152] *See, e.g.*, Kanaga v. Landon (*In re* Landon), No. 19-01038 (Bankr. N.D. Okla. Aug. 11, 2020), 2020 WL 4658284, at *8 (holding that a prior state court judgment for defamation did not preclude litigation in bankruptcy court over nondischargeability since the jury verdict allowed for liability on reckless disregard alone). Arbitral awards present the same analytical problem. *See* Swan Pediatric Dental, LLC v. Hulse (*In re* Hulse), No. UT-22-001 (B.A.P. 10th Cir. Nov. 8, 2022), 2022 WL 16826561, at *8–11 (holding that arbitration award did not contain sufficient findings of fact for a Utah defamation judgment to preclude the dischargeability determination in bankruptcy).

[153] *See* Heslin v. Jones (*In re* Jones), 655 B.R. 868, 874 (Bankr. S.D. Tex. 2023); Wheeler v. Jones (*In re* Jones), 655 B.R. 884, 893 (Bankr. S.D. Tex. 2023).

have arisen out of merely reckless conduct, required a fresh look in bankruptcy court.[154]

C. Life Under Nondischargeable Debt

Life under nondischargeable debt is not ideal, but some debtors can make it work, particularly if they have sheltered their assets from the bankruptcy process. Such debtors plan to live "below the radar," avoiding assets and income that would be subject to collection efforts.[155]

Every state protects a certain amount of property from collection efforts, called *exempt* property. The exemption laws are both over- and under-inclusive.[156] In 2022, the National Consumer Law Center published an exhaustive report detailing how exemption laws in almost all states fail to protect poor families adequately.[157] Yet wealthy debtors can find ways to shield their assets from debt collection. For instance, debtors who own their primary residence outright can keep their home up to a certain dollar amount in some states and up to a certain acreage in others. That means that some debtors can live out their days in luxurious homes, particularly in states like Texas and Florida, where the homestead exemption is capped by acreage and not by a dollar amount.[158] Similarly, federal law protects a certain percentage of income from garnishment, so debtors may try not to work or to lower their income just enough to avoid the harshest bites from garnishment actions.[159]

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[154] *See Heslin*, 655 B.R. at 884; *Wheeler*, 655 B.R. at 902–03.

[155] After the bankruptcy ends, the automatic stay terminates, replaced by the discharge injunction. The injunction permanently enjoins creditors from attempting to collect on the debt. *See* 11 U.S.C. § 524(a).

[156] *See, e.g.*, Christopher D. Hampson, *Harsh Creditor Remedies & the Role of the Redeemer*, 92 FORDHAM L. REV. 935, 954–55 (2023) (describing state exemption laws and arguing that they protect not only the debtor but also the debtor's family).

[157] Michael Best & Carolyn Carter, *No Fresh Start 2022: Will States Let Debt Collectors Push Families Into Poverty as the Cost of Necessities Soars?*, NAT'L CONSUMER L. CTR. (Dec. 2022), https://perma.cc/K537-S825.

[158] *See, e.g.*, Hampson, *supra* note 156, at 937 n.2; *see also* TEX. PROP. CODE ANN. § 41.001 (West 2024); FLA. CONST. art. X, § 4; ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, THE LAW OF DEBTORS AND CREDITORS 73–83 (8th ed. 2014) (describing uncapped homestead exemptions).

[159] *See* 15 U.S.C. § 1673.

And since the nondischargeable debt is *ad personam*, debtors can continue to live off of spendthrift trusts or the largesse of friends, family, or political allies.[160]

III. THE FIRST AMENDMENT IN BANKRUPTCY COURT

Enter the First Amendment. The First Amendment affects defamation claims in two ways. First, under *New York Times* and its progeny, plaintiffs who are public figures must show that the defendant acted with "actual malice," by clear and convincing evidence.[161] And second, under *Gertz*, plaintiffs must show "actual malice" for presumed or punitive damages. That heightened showing applies "by analogy" in the context of labor disputes, where states may adjudicate "actual malice" defamation claims but other claims fall within the preemptive scope of the National Labor Relations Act.[162]

These First Amendment requirements are hotly litigated outside bankruptcy court, but scholars and practitioners alike have all but ignored what they could mean inside bankruptcy court.[163] In this Part, I explain the differences between constitutional law's "actual malice" test and bankruptcy law's "willful and malicious" test. I also point out that the First Amendment applies just as much to insolvency rules as it does to liability rules—a point that is obviously true but commonly forgotten. While section 523 is constitutional as written, the First Amendment governs Congress's power to pass a discharge law.

A. "Actual Malice" and Dischargeability

As noted above, a claim is nondischargeable in bankruptcy when it is for "willful and malicious injury."[164] On the surface, it might appear that a plaintiff who can demonstrate "actual malice" for First Amendment purposes can also show "willful and malicious injury" for bankruptcy purposes. But the Supreme Court has clari-

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[160] Indeed, such spendthrift trusts are enforceable even in bankruptcy court, although transfers to the trust might be challenged as fraudulent transfers. *See* 11 U.S.C. § 541(c)(2).

[161] *See supra* notes 55–60 and accompanying text.

[162] Linn v. United Plant Guard Workers of Am., 383 U.S. 53, 65 (1966); *see also* Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1, 10–13 (2009) (describing *Linn*'s doctrinal history and warning against restricting the scope of the NLRA's preemption).

[163] *See supra* notes 3–13 and accompanying text (discussing the literature).

[164] 11 U.S.C. § 523.

fied that the "actual malice" test in constitutional law can be met by "reckless disregard of the truth,"[165] while the discharge exception in bankruptcy requires a higher showing than recklessness.[166]

Put simply, the discharge exception in bankruptcy requires a higher showing of culpability than the First Amendment does. Two conclusions follow:

First, even when "actual malice" is a requirement for liability, including presumed or punitive damages and debt owed to public figures, the debt may still be dischargeable in bankruptcy. Bankruptcy courts would have to look beneath any finding of "actual malice" to see whether the underlying facts met the bankruptcy standard. The constitutional standard does not settle the issue.

Second, and relatedly, a prior adjudication of the "actual malice" standard does not predetermine the bankruptcy outcome under standard issue preclusion rules, as they are not the same issue.[167]

B. Section 523 as Speech Regulation

We might also wonder whether section 523 of the Bankruptcy Code could run afoul of the First Amendment. If the Free Speech Clause governs liability rules, does it also govern insolvency rules? The answer is clearly *yes*. I see no legal or policy reason that the Constitution should apply to liability and not to discharge. That said, I also see no free speech issues with section 523 as it stands today.

As a threshold matter, Congress has the power to pass a statute granting a discharge for debtors. The U.S. Constitution gives Congress the power to enact uniform bankruptcy laws,[168] just as it restricts states from impairing contracts.[169] Conversely, most commentators believe that individuals have no constitutional right to

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[165] *See* St. Amant v. Thompson, 390 U.S. 727, 728, 731–34 (1968).

[166] *See supra* note 117 and accompanying text.

[167] *See supra* notes 149–150 and accompanying text.

[168] U.S. CONST. art. I, § 8, cl. 4.

[169] U.S. CONST. art. I, § 10, cl. 1; Sturges v. Crowninshield, 17 U.S. 122, 208 (1819) (holding that Congress may pass discharge laws pursuant to the Bankruptcy Clause but that states may not, as such laws violate the Contracts Clause). At the same time, of course, the Constitution prohibits the federal government from taking "property." *See, e.g.*, Tyler v. Hennepin Cnty., 598 U.S. 631, 647–48 (2023) (seizure of $40,000 house sold for $15,000 tax debt was an unconstitutional taking). Scholars have long questioned whether stripping or cramming down a secured creditor's interest in property (a lien) might be a taking subject to constitutional scrutiny. Everyone agrees that the matter is fine prospectively, so long as secured creditors take their lien subject to whatever rules are in force.

the discharge that would stop Congress from repealing it.[170] In fact, the country had no bankruptcy laws at all for more than one hundred years of its history.[171]

But constitutional law frequently imposes limits on *how* Congress acts, even if it need not act at all. A discharge provision intended to benefit members of a favored religion (or to punish members of a disfavored religion) would violate the Free Exercise Clause.[172] Similarly, a discharge provision that discriminates on the basis of protected classes would likely violate the Equal Protection Clause.[173]

The First Amendment, then, governs how the Bankruptcy Code treats debt arising out of speech. To be sure, most debts that come into bankruptcy court have nothing to do with speech at all, and many of the debts deemed "nondischargeable" by bankruptcy judges are rooted in conduct, not speech. But by excepting speech-related debts from the discharge, section 523 does burden speech, both for defamation debt that rises to the level of "willful and malicious injury" and for money obtained through false representations.[174]

This means that Congress may be subject to some constitutional limitations if it wanted to *reduce* the rights available to secured creditors in bankruptcy retrospectively.

[170] *See* United States v. Kras, 409 U.S. 434, 446–47 (1973) (dealing with a filing fee for bankruptcy, and distinguishing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

[171] *See Kras*, 409 U.S. at 434.

[172] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (holding that the City of Hialeah's ordinances prohibiting ritual animal sacrifices violated the Free Exercise Clause because they were neither neutral nor generally applicable).

[173] For example, in *DuPhily*, the bankruptcy court ruled that court-ordered support payments for a child born to unmarried parents were nondischargeable, even though the statute seemed to limit the discharge exception only to support payments arising out of separation or divorce. *See* DuPhily v. DuPhily, 52 B.R. 971, 976 (D. Del. 1985); *see also* Pierson v. Toman (*In re* Pierson), 47 B.R. 258, 260–61 (Bankr. D. Neb. 1985) (same). When no protected class is implicated, courts have found no constitutional infirmity in section 523. For example, Dalkon Shield argued that it violated equal protection for the discharge to apply differently to individuals as to corporations. Beard v. A.H. Robins. Co., 828 F.2d 1029, 1031 (4th Cir. 1987). The Fourth Circuit rejected that approach. *Id.* at 1031–32. A similar challenge to section 523's provisions concerning taxes also failed, *see* Wood v. United States (*In re* Wood), 866 F.2d 1367, 1370–72 (11th Cir. 1989), as did various equal protection challenges to the student loan debt provisions, *see* McClain v. Am. Student Assistance (*In re* McClain), 264 B.R. 230, 232–34 (Bankr. D.N.H. 2001); Logal v. Educ. Credit Mgmt. Corp. (*In re* Logal), 381 B.R. 706, 713–17 (Bankr. N.D. Ind. 2007).

[174] *See* 11 U.S.C. § 523(a)(2), (6).

Indeed, the way that legal entitlements are processed in bankruptcy is arguably more important than the pre-bankruptcy system of liability rules or property rules.[175] Liability is a waystation on the journey through debt collection and into bankruptcy court. And enforcement of legal entitlements takes on a whole different dimension when the debtor files for bankruptcy. Insolvency rules, in that way, can have a much more profound impact on a debtor's life—and creditors' lives—than liability rules or property rules.

That said, the discharge exception turns on the mental state of the debtor, not the content of the speech itself, and thus needs to meet only intermediate scrutiny.[176] Beyond that, the discharge provision stands at a much higher standard than what the First Amendment requires for liability. By excepting only debts for "willful and malicious injury" (or for money obtained through falsehood or fraud) from the discharge, Congress is operating well within its constitutional zone. Put differently, the Bankruptcy Code protects *more* speech than the First Amendment does.

But that does not mean that the First Amendment has nothing to say about bankruptcy's discharge provisions. Congress's discharge power is cabined by the Constitution.

First, Congress clearly cannot slant section 523. For instance, if Congress amended the Bankruptcy Code to provide a discharge for some types of speech-related injuries and not others, based on viewpoint, that disparity would violate the First Amendment's clear prohibition on viewpoint discrimination.[177]

Second, I doubt that Congress could treat negligent speech less favorably than negligent conduct. So long as the Bankruptcy Code offers a discharge for debts for negligent conduct, it must offer the same discharge for debts for negligent speech. Any other rule would treat constitutionally protected speech less favorably than

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[175] Judge Guido Calabresi and Professor A. Douglas Melamed's seminal 1972 article set forth a typology for understanding legal entitlements based on how the legal system enforces them. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Perhaps Calabresi and Melamed can be forgiven for ignoring this dimension since their article antedates the Bankruptcy Code of 1978, which renewed interest in insolvency as a key part of the legal system.

[176] *See, e.g.*, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994).

[177] *See, e.g.*, Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 187 (2024) ("At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society.").

conduct, which is outside the protection of the Free Speech Clause. For example, imagine that Congress decided to crack down on "fake news" by making all defamation debt nondischargeable, regardless of the level of culpability. Such a reform would violate both First Amendment and equal protection principles. Indeed, the Supreme Court in *Gertz* noted that the "legitimate state interest underlying the law of libel is the compensation of individuals," especially "compensation for actual injury."[178] But that interest is at a nadir in bankruptcy, where not everyone is paid in full.

IV. BANKRUPTCY ADVICE FOR DEFAMATION COUNSEL

This analysis gives rise to an all-important set of questions for defamation counsel: When should you think about bankruptcy and what steps should you take in advance?

For those who don't think about bankruptcy all the time, I offer the following rubric: Think about bankruptcy unless the defendant could readily pay a reasonable settlement amount without facing financial distress—and that's on both the plaintiff-side and defendant-side of the table. Put differently, bankruptcy comes into play whenever insolvency is on the horizon.[179]

This Part examines some of the strategic considerations that both sides should take into account and concludes with some systemic concerns and normative suggestions from the bankruptcy perspective.

A. Strategic Considerations for Plaintiffs' Counsel

Defamation plaintiffs have many goals: their day in court, vindication for wrongs, compensation for injury, and (sometimes) punitive damages as well. As described earlier,[180] procedural goals can be frustrated by a bankruptcy filing. Remember that the defendant may file for bankruptcy upon receiving a demand letter,

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[178] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 349 (1974).

[179] Insolvency professionals regularly think about three types of insolvency: first, when liabilities outweigh assets (balance-sheet insolvency); second, when a debtor has insufficient liquidity to service its debt (cash flow insolvency); and third, when a debtor has insufficient funds to undertake its chosen course of business (insufficient capital). *See* 11 U.S.C. § 101(32)(A) (defining insolvency as when "the sum of such entity's debts is greater than all of such entity's property, at a fair valuation," *i.e.*, the balance sheet test); EBI, Inc. v. Am. Online, Inc. (*In re* EBI), 380 B.R. 348, 355 (Bankr. D. Del. 2008) (citing 11 U.S.C. § 548(a)(1)(B)(ii)(III) & (II) for cash flow and inadequate capital tests), *aff'd*, 382 F. App'x 135 (3d Cir. 2010).

[180] *See supra* Section II.B.

after the jury leaves to deliberate, or even immediately after the judge enters the final judgment. The bankruptcy petition will create an automatic stay, and the plaintiff will have to stop everything and head to bankruptcy court. If the bankruptcy petition is filed early, the plaintiff may be relegated to airing out her claim before the bankruptcy judge. But if the parties have already completed significant work in the defamation case, the plaintiff may be able to ask the bankruptcy judge to abstain and let the prior court finish its work.[181]

Bankruptcy can frustrate monetary goals as well. If the plaintiff's claim is only for negligent or reckless conduct, a defendant may be able to discharge that claim in bankruptcy.[182] That result does not always mean that the plaintiff will recover nothing: The defamation claim will be placed alongside all other sorts of unsecured, nonpriority debt, receive cents on the dollar, and then be discharged at the end of the case. The ultimate treatment of the claim will turn on many factors, including whether the case is proceeding under chapter 7, chapter 11, chapter 12, or chapter 13 of the Bankruptcy Code.[183]

Strategically, then, if the defendant's conduct was intentional, plaintiff's counsel may wish to make *intent to harm* a theme of the case by seeking punitive damages and by proving facts that a bankruptcy judge could rely on for a "willful and malicious injury" determination. That means building a factual record that shows not only constitutional malice, but also common-law malice. In jurisdictions that allow jury forms to include specific questions, plaintiff's counsel may wish to ask the jury whether it concluded that the defendant intended to harm the plaintiff.[184] Such a finding would likely be given issue-preclusive effect by a bankruptcy judge.

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[181] *See supra* note 147.

[182] This, of course, depends on whether plaintiffs' counsel can submit additional factfinding to the bankruptcy court showing that the debtor caused the injury willfully and maliciously. *See supra* Section II.A.

[183] In particular, if an individual debtor proceeds under chapter 13 of the Code, plaintiff's counsel should analyze whether the jurisdiction takes a broad or narrow view of "personal injury" under the Code. *See infra* notes 208–210 and accompanying text.

[184] *See* Steve Zansberg, *How Best to Explain "Actual Malice" to Juries? For Starters, Don't Use Those Words*, A.B.A. (June 9, 2023), https://perma.cc/FNV6-J8RN.

If a plaintiff decides to settle before reaching judgment, bankruptcy may disrupt her expectations for a settlement payout. Most settlements do not address bankruptcy at all,[185] and if the settlement is "bare," *i.e.*, containing no admissions of fact, it may be treated as merely establishing a dischargeable debt in bankruptcy court—or, at minimum, that issue will need to be relitigated.[186] Accordingly, if the plaintiff has the negotiating power to do so, she should seek to include factual admissions in the settlement, or ask for a stipulated judgment in case the defendant fails to pay.[187] The text of the judgment must be carefully drafted if it is to have preclusive effect in bankruptcy court. Because a defendant cannot prospectively bind the bankruptcy court by admitting that the debt is for "willful and malicious injury under section 523(a)(6) of the Bankruptcy Code,"[188] it is better to focus on facts that will bring the bankruptcy judge to that conclusion, instead of stating the conclusion in the settlement agreement.[189]

Structured settlements can be landmines in bankruptcy. A structured settlement turns the plaintiff into a creditor and the defendant into a debtor. If the de-

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[185] Christopher B. Lega, *Protecting Settling Plaintiffs When a Defendant Goes Bankrupt*, 101 ILL. BAR J. 200, 200 (2013).

[186] As noted above, *supra* notes 121–128 and accompanying text, the bankruptcy court will likely conduct additional factfinding to determine whether the underlying claim was for "willful and malicious" conduct. In the related section 523 of context of debts for "money obtained by fraud," the Supreme Court has rejected the theory that a settlement works a sort of novation, requiring bankruptcy courts to look through the settlement to the claim it settled. *See* Archer v. Warner, 538 U.S. 314, 318–23 (2003).

[187] *See* Son v. Park, No. C 10–00085 MHP (N.D. Cal. Nov. 19, 2010), 2010 WL 4807089, at *1–3; *see also* Lega, *supra* note 185, at 203; Fifth Third Bank v. Baumhaft (*In re* Baumhaft), 271 B.R. 523, 525–27 (Bankr. E.D. Mich. 2001).

[188] Bankruptcy courts typically do not enforce prepetition waivers of dischargeability, but they may enforce stipulations of facts that lead to that conclusion, particularly if the stipulation is entered by the court as a consent judgment. *See* Ira L. Herman, *Settlement Agreements in Bankruptcy*, LEXISNEXIS (Oct. 12, 2022) (citing Lichtenstein v. Barbanel, 161 F. App'x 461, 468 (6th Cir. 2005)); Klingman v. Levinson, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987).

[189] *See* Lega, *supra* note 185, at 203 (discussing Nw. Bank & Tr. Comp. v. Edwards (*In re* Edwards), 439 B.R. 870, 873–74 (Bankr. C.D. Ill. 2010)); *see also* Minor v. United States (*In re* Minor), No. 21-55360 (9th Cir. Apr. 18, 2022), 2022 WL 1135391, at *2 (denying preclusive effect to a stipulation between the IRS and the bankruptcy trustee because it was not intended to settle dischargeability and the debtor was not privy to the agreement).

fendant is insolvent at the time of entering into the settlement, the bankruptcy trustee or other creditors could challenge the settlement agreement as a fraudulent transfer, if they believe that the defendant settled for an unreasonable amount.[190] After payments have been made, the bankruptcy trustee may be able to claw them back into the bankruptcy estate under preference law, arguing that the defamation plaintiff is getting repaid more than other creditors.[191]

Remember that, as discussed above, the discharge exceptions only apply to individual defendants. While a judgment against a company (like Free Speech Systems) may be appealing for other reasons, those debtors may try to reorganize under chapter 11 or 12 and shed the debt.

Lastly, keep in mind that the bankruptcy discharge covers only the debt of the debtor, not other entities.[192] If a plaintiff can bring claims against two or more defendants, her ability to recover is strengthened, since one defendant might file for bankruptcy while the other does not. Similarly, when a debtor files for bankruptcy, its insurance company (usually) stays solvent, providing another pot of money against which a plaintiff may seek relief.[193]

B. Strategic Considerations for Defendants' Counsel

On the defense side, when a defamation case presents a risk of financial distress, a defendant may wish to retain bankruptcy counsel to determine whether a bankruptcy filing might be a viable strategic move. Preparing a well-organized filing in advance can ward off all sorts of problems, and the legal team will have to consider

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[190] *See* 11 U.S.C. §§ 544, 548.

[191] *See* 11 U.S.C. § 547. Bankruptcy attorneys can advise several ways to structure payment streams to avoid these problems, including taking a security interest, preserving the claim's full value until the preference period has passed, requesting a guaranty from a third party, or requiring that payments be made directly by a third party (or if routed through the debtor, protected under the earmarking doctrine). *See* Lega, *supra* note 185, at 202–03; Herman, *supra* note 188.

[192] This point is especially poignant after the Supreme Court's decision in *Purdue Pharma*, ruling that bankruptcy judges have no statutory authority to issue nonconsensual third-party releases. *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2088 (2024).

[193] If the debtor files for bankruptcy, however, its insurance policy will likely be considered property of the estate under section 541 and therefore subject to the automatic stay. *See* 11 U.S.C. § 541. While a claimant's rights to the proceeds of the insurance policy may have stronger footing than claims against the debtor, claimants will have to be careful not to violate the automatic stay. *See* 11 U.S.C. § 362.

whether and when to file. While it may be appealing to yank a case away from an unsympathetic judge or jury, the bankruptcy judge may use the Code's abstention rules to place the defendant right back before the same factfinder, irritated all the more for the defendant's dilatory actions.[194]

Naturally, defense counsel will want to understand not only the size of the claims against the client, but also whether any judgments or settlements are likely to be dischargeable in bankruptcy should the client ever need it. Defense counsel will, of course, attempt to dispose of the case through anti-SLAPP laws,[195] but if they cannot, even getting rid of claims for punitive damages on a motion to dismiss or a motion for summary judgment will significantly cabin the downside risk for the client: Whatever's left is more likely to be dischargeable in bankruptcy. Similarly, if the judge is amenable to a bifurcated trial, where liability is determined before damages, that approach might help the client grapple with the economic and emotional consequences of a loss.

As above, analyze individual defendants and corporate defendants separately. While defamation debt owed by an individual debtor may fall under a discharge exception, debt owed by a business debtor can be cleared away if the debtor can restructure under chapter 11 or 12.

Just as plaintiffs must think about settlements, so too must defendants. Depending on the defendant's negotiating power, defense counsel should try to settle without any admissions of guilt that could adversely affect the client's rights in bankruptcy court. If the plaintiff asks for a stipulated judgment, make sure that the judgment does not contain anything that would preclude the ability to argue that it is dischargeable later on. For the defendant's side, structured settlements are ideal, because they establish an ongoing debt that could be disrupted by a bankruptcy filing in the future.

As with plaintiff-side counterparts, co-defendants and insurance companies will be a key part of any strategic approach to the case.

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[194] *See supra* notes 146–148 and accompanying text.

[195] *See, e.g.*, D.C. CODE ANN. § 16-5502 (West 2012); Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1331 (D.C. Cir. 2015) ("But the D.C. Anti–Strategic Lawsuits Against Public Participation Act of 2010 (known as the Anti–SLAPP Act) requires courts, upon motion by the defendant, to dismiss defamation lawsuits that target political or public advocacy, unless the plaintiff can show a likelihood of success on the merits.").

Lastly, remember that bankruptcy reorganizes only prepetition debt.[196] This means, of course, that the client should not file for bankruptcy unless they have already gotten all the defamation out of their system, so to speak. Any defamation that takes place after the bankruptcy petition has been filed cannot be discharged.[197] To the same end, a plan of reorganization in bankruptcy cannot be confirmed unless the judge is satisfied that it is unlikely to be followed by another bankruptcy case.[198] For both reasons, after a bankruptcy filing, defamation defendants would be well advised to adjust their speech patterns to avoid future liability.

C. Systemic Concerns from the Bankruptcy Perspective

The rise in defamation exposure, along with its potential for nondischargeability in bankruptcy, raises thorny systemic concerns. To some degree, the groundswell in liability may be a good thing—social media has made it easier than ever for a lie to "travel halfway around the world while the truth is still putting on its shoes," as the saying goes.[199] And defamation torts provide compensation for dignitary harms, disincentivize reckless speech, and promote the virtue of honesty in public life.[200] Yet if liability has a chilling effect on speakers, the threat of nondis-

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[196] 11 U.S.C. § 1141(d)(1)(A).

[197] 11 U.S.C. § 727(b). Donald Trump, for example, continued to defame E. Jean Carroll after the first jury verdict in her favor and has publicly promised to repeat his claims "a thousand times." *See* RonNell Andersen Jones, *The E. Jean Carroll Verdict Exposes the Limits of Libel Law*, N.Y. TIMES (Jan. 28, 2024), https://perma.cc/E4HU-CGKL. While every additional act of defamation broadens Trump's legal exposure, much of it might be dischargeable in bankruptcy because all of it has occurred before any bankruptcy filing.

[198] 11 U.S.C. §§ 1129(a)(11); 1112(b)(4). This provision was part of what induced the bankruptcy judge to dismiss Gateway Pundit's bankruptcy case, though the judge framed it as a business-model problem. *See In re* TGP Commc'ns, LLC, No. 24-13938 (Bankr. S.D. Fla. July 25, 2024), 2024 WL 3548248, at *10 (noting that the debtor's "brash (and allegedly not fact-checked) reporting style" had been challenged in court and that "a more restrained editorial style" could "soften revenue").

[199] In a textbook example of irony, the source of this quote is often misattributed to Mark Twain and others, but likely traces back to Jonathan Swift. *See* Niraj Chokshi, *That Wasn't Mark Twain: How a Misquotation Is Born*, N.Y. TIMES (Apr. 26, 2017).

[200] The interplay between these values and free speech is complex and dynamic. In a new book, Prof. Rachel Bayefsky argues that "freedom of expression values" and dignitarian values might be mutually defining—and points out that public figures accept "some risk of dignitary harm" by stepping into power. RACHEL BAYEFSKY, DIGNITY AND JUDICIAL AUTHORITY 104–08 (2024).

chargeable debt is positively freezing. We may be tempted to shrug away this concern, especially when the speaker is someone like Alex Jones or Rudy Giuliani—but how about when the speaker is a women sharing her #MeToo experience of sexual harassment and staring down a defamation suit in response?[201] Yet we need a single, content-neutral rule for all of it. And amidst growing concerns that defamation liability has been weaponized, bankruptcy law may need to stretch a little to preserve the goal of providing a fresh start for the "honest but unfortunate debtor."[202]

Right now, bankruptcy law only declares defamation debts nondischargeable when they are for *intentional misconduct*, a standard that is higher than anything the First Amendment demands and one that excepts from bankruptcy's forgiveness the most egregious offenses. Section 523 is evenhanded when it comes to viewpoint, content, or conduct distinctions. We are, therefore, a healthy distance away from any free speech problem.

This is not to say, of course, that section 523 is above reproach. Far from it. Scholars like Professors Abbye Atkinson, Angela Littwin, and Nicole Langston have underscored a number of places where the Code does not seem to reflect fair, efficient, or formative results. Nondischargeable criminal justice debt weighs down poor and minority populations in overpoliced jurisdictions.[203] Nondischargeable student loans overburden student borrowers trying to build a new career.[204] And nondischargeable debt "obtained by fraud" can haunt borrowers, particularly women, in coercive or violent domestic relationships.[205] At a minimum, bankruptcy should provide a fresh start for contractual debts, debts imposed without

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[201] For an incisive analysis of how women's speech that injures men's reputations is recast as violent speech, see Mary Anne Franks, *Witch Hunts: Free Speech, #MeToo, and the Fear of Women's Words*, 2019 U. CHI. LEGAL F. 123.

[202] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citing Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554–55 (1915)).

[203] *See supra* notes 3–4 and accompanying text (citing articles by Atkinson and Langston).

[204] *See, e.g.*, Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 414, 419–32 (2005); Hunt, *supra* note 5, at 727–30; Pottow, *supra* note 5, at 245–47.

[205] *See supra* note 7 (citing articles by Littwin).

any finding of fault, and even debts that are labeled "criminal" but function more like taxes.[206]

Beyond that, perhaps we should take far more seriously the call to forgive even debts arising from morally repugnant behavior—especially after good faith efforts to repay. For bankruptcy's discharge is not just about fairness or efficiency; it is also a place where the legal system can cultivate virtue, as Heidi Hurd and David Baum have persuasively argued.[207] We can cultivate the virtue of responsibility in debtors by extending the discharge after reformed behavior and good faith efforts to repay. And we can cultivate the virtue of mercy in the legal system by forgiving old debts or debts that create undue hardship.

Indeed, in some jurisdictions, defamation debt may be one of the few types of debt that a debtor can "work off" through a chapter 13 plan. The Bankruptcy Code used to include more debts in the chapter 13 discharge, which a debtor receives after paying disposable income to creditors over a three- to five-year period, something commentators once called a "super-discharge." Today, the difference between the chapter 13 discharge and the chapter 7 discharge is almost negligible.[208] But the chapter 13 discharge can forgive debts for willful and malicious injury, so long as the injury did not cause "personal injury to an individual or the death of an individual."[209] In a jurisdiction that follows the "narrow" approach to personal injury, the reputational or emotional effects of defamation would be insufficient to bring defamation claims within the discharge exception of a chapter 13 case, clearing the way for a payment plan followed by forgiveness.[210] That said, not all courts

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[206] *See, e.g.*, Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 3–8 (2016).

[207] *See* Heidi M. Hurd & David C. Baum, *The Virtue of Consumer Bankruptcy*, *in* A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 217, 221–22 (Ralph Brubaker, Robert Lawless & Charles Tabb eds., 2012).

[208] For this reason, a consumer debtor's only incentive to embark upon a payment plan in bankruptcy (unless forced into it by the means test) is to preserve collateral, typically a house or a car—not to work off nondischargeable debt.

[209] *See* 11 U.S.C. § 1328(a)(2) (omitting subsection (a)(6)); (a)(4); *see also* Hardin v. Caldwell (*In re* Caldwell), 895 F.2d 1123, 1126 (6th Cir. 1990).

[210] *See supra* note 145.

follow this approach. Other jurisdictions consider defamation torts to count as personal injury torts.[211]

Reinvigorating the "super-discharge" would not fix the other problems with a dual pathway model to individual bankruptcy, especially the inefficiency, unfairness, and poor formation introduced to the system by "chapter choice."[212] Thus, along with many other scholars,[213] I have called for abolishing the dual pathway and creating a single chapter 10 for all individual debtors with debts of less than $7.5 million.

Under either model, though, the discharge exceptions could be amended to allow for greater forgiveness of debts. Indeed, we have precedent for a more magnanimous approach. Under the law as it stands today, older tax debts can be discharged in bankruptcy (newer tax debts cannot).[214] Student loans can be discharged when repaying them would create "undue hardship," a standard that usually requires a showing of good faith efforts to repay.[215] We could combine those approaches to require that individual debtors owing certain nondischargeable debts make good faith efforts to repay over a period of years before becoming eligible for a bankruptcy discharge. Imposing this requirement through section 523 would avoid the problem of plan failure and allow debtors living under nondischargeable debt to make arrangements to repay before filing for bankruptcy.

Business debtors present tougher challenges. InfoWars filed for subchapter V, the small-business chapter that would have entitled Alex Jones to reclaim his business after making three to five years of payments. If such entities owe debts that would be nondischargeable under section 523(a), the debtors in those cases (and their owners) will need to know whether section 523(a) applies to business entities reorganizing under subchapter V.[216] The statutory interpretation question is

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[211] *Id.*

[212] *See, e.g.*, Langston, *supra* note 4, at 1145, 1153–55.

[213] *See* Letter from Richard Alderman et al., to Hon. Elizabeth Warren (Sept. 28, 2022), https://perma.cc/GE59-KF9X.

[214] *See* 11 U.S.C. § 523(a)(1), (7).

[215] *See supra* note 202.

[216] *See supra* notes 142–143 and accompanying text (collecting cases).

vexed,[217] but as a policy matter, applying the discharge exceptions to subchapter V debtors may make some sense: Since the company will be returned to its former owners after the payment period, the discharge exceptions ensure that the bankruptcy case is not being used to wipe away debts arising out of misconduct before delivering the company back to the old owner. In a regular chapter 11, the absolute priority rule serves some of the same function: ensuring that old equity cannot walk away with the company, unless the former owner provides cash or procures consent.

Going a step further, we may wish to revisit the rule that the discharge exceptions do not apply to businesses reorganizing under chapter 11 of the Code, a policy decision tracing back to 1978. As Gross points out, the discharge exception for "willful and malicious" injury used to apply to both individuals and corporations.[218] There are, of course, sometimes good reasons to treat businesses differently than individuals. Defunct corporations can wind down and dissolve under state law; individuals cannot. Nevertheless, as Prof. Melissa Jacoby has recently laid bare in her book *Unjust Debts*, the bankruptcy system too frequently makes escaping debt much easier for large corporations than it does for small corporations and individuals.[219]

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[217] For a brief discussion of the state-of-play, see Christopher D. Hampson & Jeffrey A. Katz, *The Small Business Prepack*, 92 GEO. WASH. L. REV. 101, 126 n.133 (2024). Regardless of how one comes out, the statutory text in subchapter V, "of the kind specified in section 523(a)," 11 U.S.C. § 1192(2), and in chapter 12, "of a kind specified in section 523(a)," *id.* § 1228(a)(2), ought to have the same effect—the difference between the definite article "the" and the indefinite article "a" is too thin to bear the weight of such an important distinction. For an argument that subchapter V does not incorporate discharge exceptions against corporate debtors, see Hon. Paul W. Bonapfel & Robert Schaaf, *Do 523(a) Exceptions to Discharge Apply to the Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under Section 1191(b)?*, 32 NORTON J. BANKR. L. & PRAC. art. 1 (2023). In particular, the ABI Task Force has noted that applying discharges to corporations would be a significant change in bankruptcy policy from the 1978 Code, and Congress would presumably have made such a substantial change more expressly or with stronger legislative history. *See* HON. MICHELLE M. HARNER ET AL., AM. BANKR. INST. SUBCHAPTER V TASK FORCE, FINAL REPORT OF THE AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE 591–92 (2024).

[218] *See* Gross, *supra* note 9, at 483 n.10 (citing Bankruptcy Act of 1898, 30 Stat. 544, 550–51, § 17(a). As Gross notes, however, the 1978 Bankruptcy Code applied this section to individuals only, and Congress last reconsidered that approach in 2005. *Id.*

[219] MELISSA JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 63–89 (2024).

Of course, such a change could have unintended consequences: Nondischargeable debt could induce more business debtors to sell the company or avoid bankruptcy altogether.[220] And it could disrupt the genius of chapter 11, namely, to wipe out old equity through the absolute priority rule while forcing creditors to make a deal by binding holdouts. Perhaps for this reason, the American Bankruptcy Institute's Subchapter V Task Force recommended a statutory tweak to confirm that the discharge exceptions do not apply to business entities in subchapter V.[221]

Either way, we are left with massive problems in business bankruptcy. Numerous scholars have criticized the use of bankruptcy by large corporations to evade civil liability for mass torts.[222] In some cases, perpetrators of mass torts file for bankruptcy and shed massive amounts of debt, giving most of the value to secured creditors. In other cases, debtors find ways of keeping value outside the jurisdiction of the bankruptcy court. Some debtors load up a subsidiary with the liability and send it into bankruptcy, a move dubbed the "Texas Two-Step."[223] Other debtors, like the Sackler family, until recently could send their company (Purdue Pharma) into bankruptcy and ask the bankruptcy court for a release of their own liability in exchange for providing funds to the bankruptcy estate.[224] The Supreme Court has now curtailed such third-party releases, at least without consent of the victims. Applying some discharge exceptions to chapter 11 would give victims a sort of superpriority

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[220] *See, e.g.*, Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. L. REV. 757, 764 (2005) (arguing that the new fraud exceptions in chapter 11 would exacerbate the very holdout problem that chapter 11 is designed to overcome).

[221] *See* HARNER ET AL., *supra* note 217, at 9, 61–67.

[222] *See, e.g.*, JACOBY, *supra* note 219, at 155–200. For a helpful set of differing views on the subject, see Anthony J. Casey & Joshua C. Macey, Essay, *In Defense of Chapter 11 for Mass Torts*, 90 U CHI. L. REV. 973 (2023); Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J.F. 525 (2024).

[223] Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 40–41 (2022) (providing a helpful description of this strategy).

[224] *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2088 (2024). Numerous bankruptcy scholars weighed in on this debate in advance of the Supreme Court's 2024 ruling. For some highlights, see Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1183–1202 (2022) (criticizing the use of third-party releases by non-debtor entities); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 960–66 (2022) (arguing that the Supreme Court should ban nonconsensual third-party releases).

against assets of the debtor and might prevent some of the worst abuses of the bankruptcy system.

More modest reforms could work better. *Purdue Pharma* removes the possibility that a corporate debtor might "buy" a third-party release that would otherwise be nondischargeable.[225] Some debtors attempt to shed liability by selling the company as a going concern, wiped clean of any debts, to a third-party buyer. But under state law, buyers that take on an entire business can be liable for legacy debt, under doctrines of successor liability or *de facto* merger.[226] Congress (or courts) could clarify that a bankruptcy sale, which empowers the trustee to sell assets of the estate "free and clear of any interest in such property," does not release the buyer from successor liability, *de facto* merger, or other theories—unless the bankruptcy court takes evidence and determines that the buyer is not a successor under applicable state law.[227] That premise is important for all debts, but particularly for nondischargeable debt. Other initiatives to ban the "Texas Two-Step" are underway in Congress.[228]

Whether we reform the law or not, the bankruptcy rules do not mean that defamation (or any other nondischargeable debt) is truly unforgivable. The effect of section 523 is to prevent the debtor from unilaterally invoking bankruptcy's discharge. In every case where the judge denies a debtor a discharge, some other entity could release the debt: for criminal fines and fees, an executive wielding the pardon

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[225] *See, e.g.*, Gross, *supra* note 9, at 506, 518–19 (noting that Harvey Weinstein received discharges in the bankruptcy of his company, Weinstein Co., that he would not have been able to receive had he filed for bankruptcy personally).

[226] *See, e.g.*, City of Syracuse v. Loomis Armored US, LLC, 900 F. Supp. 2d 274, 290 (N.D.N.Y. 2012). Texas, by contrast, has abolished successor liability by statute. *See* TEX. BUS. ORGS. CODE § 10.254(b).

[227] I am not the first to make this connection. Profs. Vincent Buccola and Joshua Macey have argued that if tort claims cannot be given priority status, they should at least be given durable status, allowing them to attach to whichever entity owns the assets after the bankruptcy. *See* Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REG. 766, 766–73 (2021). The problem is that, as Buccola and Macey point out, both bankruptcy plans and section 363 sales cut off tort claimants' rights against the assets of the company. *See id.* at 786–88.

[228] *See, e.g.*, Evan Ochsner, *Bipartisan Bill Aims to Deter 'Texas Two-Step' Bankruptcy Tactic*, BLOOMBERG L. (July 23, 2024, 8:09 PM), https://perma.cc/VZ7T-WZ2F (discussing the bipartisan "Ending Texas Two-Step Act").

power; for taxes and student loans, lawmakers or administrative agencies; for domestic support obligations, a family law judge; and for fraud or willful and malicious injury, the victim. For defamation debt, then, the Code puts the victim in the seat of power. Where appropriate, victims and perpetrators can find a path to reconciliation. Forgiveness remains an open path, just not one that can be ordered by a court.

Conclusion

Even without legal reform, we can at least ensure that plaintiffs and defendants alike understand and can reckon with the bankruptcy consequences of defamation cases. Where a claim is likely to be deemed nondischargeable, both parties to the underlying action should be able to litigate (or settle) appropriately. The same rule should obtain where a claim likely can be discharged in bankruptcy. Even though most people don't like to think about it, figuring out some of these answers in advance helps everyone.

We are just starting to grapple with the legal ramifications of the new social media ecosystem, ranging from medical disinformation to revenge porn.[229] When speech injures others, compensation and punishment are in order. Yet forgiveness and a fresh start have their place as well. As to individuals, defamation debt should cause us to reflect on whether our "fresh start" policy in bankruptcy is too anemic. As to business entities, the defamation cases continue to raise the specter of whether chapter 11 makes it too easy for bad actors to shed debt without compensating victims, suffering consequences, or reforming behavior. Either way, attorneys must be prepared to provide forward-thinking legal advice about bankruptcy whenever insolvency is on the horizon.

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[229] In a thought-provoking new article, Profs. Leah Fowler, Max Helveston, and Zoë Robinson analyze the role of social media influencers in providing health information and disinformation, arguing that the legal system should impose tort liability for negligent provision of medical advice. *See* Leah Fowler, Max Helveston & Zoë Robinson, *Influencer Speech-Torts*, 113 GEO. L.J. (forthcoming 2025), https://papers.ssrn.com/abstract=4933788.