BOOK REVIEW

WHO'S AFRAID OF BANKRUPTCY?

UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL. By Melissa B. Jacoby. New York, N.Y.: New Press. 2024. Pp. 308. $27.99.

*Reviewed by Abbye Atkinson**

INTRODUCTION

Who's afraid of a bankruptcy filing?[1] Perhaps we all should be given the increasingly outsized role that bankruptcy law plays in our market society. Handling more cases per year than any other category of federal court,[2] bankruptcy courts attend to the disposition of debts related to both mundane contractual relationships and pressing social issues. That is to say, beyond its niche façade and dry reputation, bankruptcy law plays a significant role in the resolution of important public and private concerns.

For example, bankruptcy law has resolved mass tort liability stemming from decades of widespread asbestos poisoning and from rampant child abuse within some of the most trusted social organizations like the Boy Scouts of America and the Catholic Church (pp. 166, 193–95). Moreover, bankruptcy law seems likely to become the primary locus for resolving mass tort liability stemming from the ongoing opioid crisis (pp. 155–56). Similarly, bankruptcy also indirectly resolves equally important, yet more quotidian social issues like the increasing economic vulnerability of the American family[3] and economic inequality engendered by historical and ongoing racism and sexism in American

* Professor of Law at the UC Berkeley School of Law. For comments and conversations that improved this project, I thank Hanoch Dagan, Mark Gergen, Josh Macey, Joy Milligan, and Frank Partnoy. Addie Gilson and Abdullah Seljuki provided excellent research assistance. I thank the *Harvard Law Review* for the opportunity to review this excellent book project. Any errors remaining are my own.

[1] *Cf.* Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1612 (2009) ("Who's afraid of Chapter 11? If responses to the [Great Recession] are any indication, the answer is: lots of people.").

[2] For example, between June 30, 2023, and June 30, 2024, a total of 486,613 bankruptcy cases were filed, *Table F. U.S. Bankruptcy Courts — Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2023 and 2024*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/bf_f_0630.2024.pdf [https://perma.cc/NC2K-D7GB], as compared to 431,025 cases filed in the U.S. district courts, *United States District Courts — National Judicial Caseload Profile*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2024.pdf [https://perma.cc/9E9H-5FDU].

[3] *See generally, e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000).

consumer markets.[4] In other words, debts related to issues that threaten to erode the fabric of our democracy[5] are common in bankruptcy.

Bankruptcy's prominent role exists at the confluence of two policy choices. First, legislatures and courts have long prescribed money as an appropriate substitute for the value of public and private obligations.[6] Second, Congress has broadly defined the scope of justiciable claims in bankruptcy to encompass any obligation that can be reduced to money.[7] Thus, in a world in which liability of all sorts — voluntary or involuntary, contractual, tort-based, criminal, civil, constitutional, and so forth — is regularly expressed in and satisfied by dollars and cents, bankruptcy lingers in the background, ready to redistribute loss when a debtor cannot satisfy their obligation.

In this regard, our federal bankruptcy law, the Bankruptcy Code, authorizes a system of "distribution and redistribution" of loss,[8] and as then-Professor Elizabeth Warren once observed, "the distributional issues arising in bankruptcy involve costs to some and benefits to others."[9] A bankruptcy filing first halts any underlying adjudication or collection of the debtor's financial obligations up to the time of filing,[10] then the bankruptcy process considers when and how to redistribute the burden of satisfaction of those obligations. Most obviously, those burdens are likely borne by the debtor's creditors who, once in bankruptcy, are

---

[4] *See, e.g.*, Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1405 (2020) ("[W]omen and African Americans, among other marginalized groups, continue to struggle at a group level when it comes to socioeconomic parity notwithstanding greater access to credit.").

[5] *See, e.g.*, Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 AM. J. POL. SCI. 48, 48 (2008) ("[E]conomic inequality powerfully depresses political interest, discussion of politics, and participation in elections among all but the most affluent and that this negative effect increases with declining relative income.").

[6] *See* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 348 (1981) ("Our materialistic society considers money an acceptable substitute for most recognized interests."); *see also* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 12–14 (1991) (describing money as an essentially incomplete substitutionary remedy for harm).

[7] *See* 11 U.S.C. § 101(5) (defining a "claim" in bankruptcy as a "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured").

[8] Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 786 (1987); *see also* Chrystin Ondersma, *Undocumented Debtors*, 45 U. MICH. J.L. REFORM 517, 520 (2012) ("Bankruptcy . . . partially shifts the burden of the survival of the destitute debtor from the public to the debtor's creditors."); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1935 (2011) (characterizing bankruptcy as a "redistributive program[]"); *cf.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 414 (2000) (observing in the context of constitutional torts that "government plays a distinctive role with respect to the distribution of wealth and entitlements in society").

[9] Warren, *supra* note 8, at 789.

[10] 11 U.S.C. § 362 (describing the "[a]utomatic stay").

generally no longer entitled to be repaid as required under nonbankruptcy law.[11] Bankruptcy sometimes decides, however, that the debtor deserves no relief and must instead continue to bear the weight of their obligations.[12] In addition, third-party stakeholders may also bear some burden attendant to this redistribution of obligation (p. 5).[13] Bankruptcy law then glazes this redistribution in a finality that forever ends the debtor's liability for any past, present, or future claims regarding liabilities accrued prior to bankruptcy, regardless of underlying law.[14] In other words, bankruptcy law is extraordinary; it is a "superpower" (p. 15).

In *Unjust Debts: How Our Bankruptcy System Makes America More Unequal*, Professor Melissa Jacoby shares her unique experiences embedded in the saga that is bankruptcy law's evolution over the last thirty years. Jacoby has borne witness to its transition from an emergency toolkit for "the honest but unfortunate debtor"[15] into an unduly biased institution that protects and indulges nonhuman entities, like corporations and municipalities, even as it directs its strongest disapprobation and illiberality toward individual filers.[16] For these and other reasons, Jacoby begins her excellent book by noting that for her, it "is a story of falling out of love" with bankruptcy law (p. 1).

She chronicles its descent into unjustified and sometimes cruel suspicion of individual filers (pp. 20–21). She explains how it makes the pain of financial distress worse by treating individuals as if their financial distress is their own fault rather than symptomatic of broad financial vulnerability in the American middle class (pp. 22–23).[17] Moreover, she shows how bankruptcy's apparent antipathy for the plight of individuals in financial distress further exacerbates the economic inequality that plagues our market society (pp. 49–50).

Jacoby then describes how bankruptcy law accords significant latitude to nonhuman filers as compared to individual filers. She documents how some nonhuman filers, through their sophisticated lawyers and C-suite denizens, have begun to exploit this leeway by invoking bankruptcy law's "power tools" (p. 199) to manage with greater convenience "thorn[y] . . . legal problems that are not fundamentally about money" nor accompanied by true financial distress (p. 200). Moreover,

---

11 *E.g.*, *id.* § 727 (describing the discharge of obligations in Chapter 7 bankruptcy).

12 *E.g.*, *id.* § 523(a) (listing various types of debt that are nondischargeable in individual bankruptcy).

13 Jacoby observes that "the bankruptcy system, as specialized as it seems, affects nearly everyone" (p. 5).

14 11 U.S.C. § 524 (describing the permanent injunction against the collection of debts discharged in a bankruptcy proceeding).

15 Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. 497, 502 (2023) ("A 1934 Supreme Court case used the term 'the honest but unfortunate debtor' to identify which debtors are worthy of debt relief under bankruptcy law." (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))).

16 *See id.* at 497.

17 *See generally, e.g.*, SULLIVAN, WARREN & WESTBROOK, *supra* note 3, at 3.

in using bankruptcy like "a legal Swiss Army knife" to satisfy their instant needs (pp. 152–53), nonhuman filers have molded bankruptcy laws in ways that predictably seem to undermine the interests of individuals, whether as debtors[18] or as creditors[19] (pp. 8–10).

In juxtaposing this disparate treatment of individual and nonhuman filers, Jacoby exposes bankruptcy law's current normative vulnerabilities. While there may be some reasonable basis for treating individual filers *differently* from nonhuman filers, there is no current reasonable basis for treating individual filers *worse* than nonhuman filers. This leaves bankruptcy law susceptible to the idea that its evolution might be positively described as evidence of its effective capture by powerful and innovative legal actors and stakeholders who have become de facto bankruptcy policymakers (p. 245).

Having witnessed firsthand bankruptcy law's evolution and expansion over the course of her career, Jacoby has come to believe that bankruptcy should play a more limited role in the resolution of obligation in our market society than it currently does. Marshaling her deep and broad expertise and experience with bankruptcy law, she concludes that bankruptcy's "expansion in usage" has carried it "into policy problems for which it has little training or preparation" (p. 153). Rather, bankruptcy's current availability as a forum of first choice in the resolution of debt that implicates public issues, like mass tort liability, undermines the "foundational legal principles, including separation of powers and federalism," that are meant to shore up our democracy (p. 11). Meanwhile, bankruptcy law has largely failed in its prime objective to "provide[] robust cancellation of obligations the average person recognizes as debts" (p. 11).

Consequently, Jacoby argues that it is time for bankruptcy law to retract its current overextended arms and return to its first principles. She states that if her "book has a policy prescription, it is to reduce the footprint of the bankruptcy system" so that it "focus[es] on *just debts*," where "*just debts*" has a dual meaning (pp. 10–11). First, bankruptcy should concern itself with only those debts that stem from traditional contractual relationships rather than taking up any obligation that can be expressed in monetary terms (p. 11). Second, bankruptcy should eschew attempts to harness its tremendous power to work around principles of fairness and justice (p. 11).

---

[18] *See, e.g.*, A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 939 (2006).

[19] *See, e.g.*, Deocampo v. Potts, 836 F.3d 1134, 1146 (9th Cir. 2016) (reasoning in the context of municipal discharge of civil rights liability that "the policies of satisfying the goals of bankruptcy and ensuring that our law enforcement officers can effectively perform their jobs are not the sole policies in play. . . . [There are also] significant public policies of (1) holding accountable state actors who misuse their positions of power to violate the constitutional and human rights of their fellow citizens; and (2) fully redressing the harms they have caused to their victims").

Jacoby's conclusion starkly contrasts with the expansiveness of the current bankruptcy system, and it invokes the current debate about bankruptcy's role in the resolution of the opioid crisis and other current mass tort controversies, like talc-based illness.[20] Clearly Jacoby's proposal is rooted in her deep sense of justice and fairness, and the ways in which current bankruptcy policy and practice, in the context of mass tort liability, threaten to subordinate overall fairness in the name of resolution and finality (pp. 233–34). Yet, the reality is that money is ubiquitous as an expression of all obligation, both voluntary and involuntary (p. 6). Consequently, if only as a practical matter, to shrink bankruptcy in the ways that Jacoby and other bankruptcy minimalists suggest would inadvertently justify bankruptcy's present shrunken approach to the most vulnerable individual debtors. From that perspective, an overinclusive bankruptcy law, with judicial safeguards, that is as generous to individuals as it currently is to nonhuman debtors might be preferable to an underinclusive bankruptcy system that is reduced in scope as to all filers.

This Review proceeds as follows. Part I describes Jacoby's observation that modern bankruptcy law unjustifiably treats individual filers worse than nonhuman filers. Jacoby explains how bankruptcy law generally treats individual filers, whom Jacoby refers to as "real pe[ople]" (p. 15), as presumptively abusive and profligate debtors from whom creditors and society should be protected (p. 21). She then explains how this approach exacerbates inequality among the most vulnerable debtors. Meanwhile, bankruptcy simultaneously treats nonhuman filers, whom Jacoby descriptively rather than pejoratively refers to as "fake people," generally as in need of protection from overzealous creditors and other stakeholders (p. 64). Consequently, while severely restricting individual access to a maximal discharge of debt, current bankruptcy law has simultaneously expanded to permit nonhuman filers to take full advantage of its "extraordinary powers . . . to stay [all] parallel litigation" and "to finally resolve all pending claims and bar future claims against the debtor."[21]

Part II posits that one way to reconcile this difference in treatment is to understand bankruptcy law positively as merely part of "the code of capital," as termed by Professor Katharina Pistor, in which powerful interests and the legal professionals who represent them have guided bankruptcy law away from the plight of ordinary, overindebted

[20] *Compare* 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, 528 (2024) (arguing against bankruptcy as a site of mass tort resolution because it undermines democratic values, like "transparency" and "accountability"), *with* Anthony J. Casey & Joshua C. Macey, Essay, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 977 (2023) (arguing that bankruptcy is the most efficient means for addressing mass tort liability in light of the variety of interests involved and its promise of finality).

[21] Gluck, Burch & Zimmerman, *supra* note 20, at 544.

Americans, and molded it into an institution that prioritizes their clients' ends.[22] Indeed, Pistor's insight maps onto Jacoby's explication of the general subordination of individual interests in bankruptcy law, whether as bankruptcy filers or as creditors in a nonhuman bankruptcy filing, in favor of more powerful institutional interests. Moreover, this perversion of bankruptcy law has caused Jacoby to take a minimalist stance on bankruptcy's proper normative orientation (pp. 5–7, 11).[23]

Part III considers Jacoby's minimalist stance on what role bankruptcy should play for individual filers and for nonhuman filers going forward. Her views align with bankruptcy minimalists who argue that bankruptcy's penchant for quick-and-rough justice and its limited opportunities for appellate review — together with its tremendous power to mandate "a final and centralized end to litigation in the past, present, and future"[24] — mean that bankruptcy's applicability to the resolution of "social debt"[25] should be limited.[26] These arguments have developed in the context of bankruptcy's current primacy in the resolution of mass tort liability, where minimalists have argued that bankruptcy law can conflict with core democratic features of our system of judicial federalism.[27] Consequently, arguing against bankruptcy maximalists who favor function over form by understanding bankruptcy as an appropriate forum for the efficient resolution of aggregate claims,[28] bankruptcy minimalists argue that bankruptcy is best suited to address the plight of companies in true financial distress, whose liability has ideally already been adjudicated in applicable state and federal courts.[29]

These minimalist arguments have crystalized in the context of bad-acting nonhuman filers who openly invoke a combination of limited liability and the Bankruptcy Code to escape from liability relatively

---

[22] *See generally* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

[23] It is important to note that in reaching this position, Jacoby does not lay blame at the feet of bankruptcy judges. Instead, she writes: "Though I have become concerned about the broader impact of the bankruptcy system, the nation's bankruptcy courts, helmed by merit-selected judges, remain a source of inspiration. Their commitment and work ethic are a model for other courts. But individual judges do not have the tools or the authority to address the forces that make the bankruptcy system undercut equality and liberty. Bigger rethinking is in order" (p. 5).

[24] Gluck, Burch & Zimmerman, *supra* note 20, at 528.

[25] Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 43 (2023) (defining "social debt" as "financial liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent governance failures of transparency and accountability").

[26] *See, e.g.*, Gluck, Burch & Zimmerman, *supra* note 20, at 525–26, 534.

[27] *E.g.*, *id.* at 528–34.

[28] *See, e.g.*, Casey & Macey, *supra* note 20, at 976.

[29] *See, e.g.*, Gluck, Burch & Zimmerman, *supra* note 20, at 527–34. Professors Abbe Gluck, Elizabeth Chamblee Burch, and Adam Zimmerman argue that resolution of mass tort liability in bankruptcy poses many harms, including, for example, that tort victims (that is, as mere creditors) are unlikely "to have their day in court." *Id.* at 527. They argue that "[t]hese [types of] risks are intensely exacerbated when cases come to bankruptcy prematurely . . . before matters like liability, applicable law, causation, and claim valuation are fully fleshed out." *Id.*

unscathed. For example, it is intolerable to think that an alleged mass tortfeasor, like Johnson & Johnson, which has been accused of knowingly selling carcinogenic talc-based hygiene products for decades,[30] could dance its way to financial exculpation merely by cleaving itself into two; saddling the resulting "bad company" with all its talc-based liability (in the case of Johnson & Johnson), while enriching the resulting "good company" with the profitable aspects of its business; then putting its "bad company" in bankruptcy in order to pay cents on the dollar to potentially thousands of its former customers (or their grieving families) presenting with, or who may in the future present with, ovarian cancer or other serious illnesses.[31] This apparent abuse of bankruptcy law is so objectionable that it has even inspired a rare bipartisan effort in Congress to limit this so-called "Texas two-step"[32] maneuver.[33]

Yet, as ever, bad facts threaten to make bad law. Although a minimalist approach to bankruptcy is intuitive in the present context, bankruptcy minimalism has hurt individual filers, particularly the most vulnerable individual filers. Thus, while bankruptcy's current expansive approach to nonhuman filers has emboldened certain debtors to abuse the bankruptcy power to satisfy their own ends,[34] a minimalist solution that is predicated on preconceived notions of financial distress or categorical limits on discharge threatens to throw the proverbial baby out with the dirty bathwater. Specifically, arguments in favor of further minimizing bankruptcy's reach across the board neglect a harsh practical reality: As long as money damages are the principal expression of all obligation, bankruptcy is an important, if imperfect, backstop. While a robust bankruptcy law with judicial discretion to weed out true opportunism on a case-by-case basis would undoubtedly be overinclusive, it may also better serve the needs of individual filers whose financial distress stems from underlying criminal, contract, tort, familial, or other indebtedness that defies mechanical adjudication in bankruptcy.

---

30 *See* Khristopher J. Brooks, *Johnson & Johnson Reaches $700 Million Settlement in Talc Baby Powder Case*, CBS NEWS (June 11, 2024, 6:53 PM), https://www.cbsnews.com/news/johnson-johnson-baby-powder-settlement-talc [https://perma.cc/NAR7-DZR2].

31 *See* Mike Spector, *The Battle over J&J's Bankruptcy Plan to End Talc Lawsuits*, REUTERS (July 8, 2024, 10:00 AM), https://www.reuters.com/investigates/special-report/usa-lawsuits-johnson-and-johnson-bankruptcy [https://perma.cc/NCZ6-TXWR].

32 *Id.*

33 In July 2023, Senators Whitehouse and Hawley along with Representatives Sykes and Gooden introduced the Ending Corporate Bankruptcy Abuse Act of 2024, S. 4746, 118th Cong. (2024), "to stamp out the growing trend of corporations using a bankruptcy maneuver known as the 'Texas Two-Step' to try to evade responsibility for injuries they caused, bog down consumers in bankruptcy proceedings, and delay justice for Americans hurt by corporate malfeasance." Press Release, Sen. Sheldon Whitehouse, Whitehouse, Hawley, Sykes, Gooden Introduce Bipartisan Legislation to Deter "Texas Two-Step" Bankruptcy Trick (July 23, 2024), https://www.whitehouse.senate.gov/news/release/whitehouse-hawley-sykes-gooden-introduce-bipartisan-legislation-to-deter-texas-two-step-bankruptcy-trick [https://perma.cc/NUK8-C7JS].

34 *See, e.g.*, Spector, *supra* note 31.

I. BANKRUPTCY BIAS

Bankruptcy law is inherently redistributive.[35] Once invoked by a distressed debtor, bankruptcy law allocates the loss attendant to unmanageable obligations across the debtor's creditors and other stakeholders, as long as those obligations are susceptible to quantification.[36] How those burdens are distributed depends significantly on the identity of the debtor. Indeed, as a matter of policy, bankruptcy law treats some debtors better than others (pp. 4–9). Thus, a principal claim in Jacoby's book is that bankruptcy is unsympathetic to and skeptical of the financial distress of individual filers, whom Jacoby refers to as "real pe[ople]" (pp. 13–21). At the same time, however, bankruptcy law embraces and supports the plight of nonhuman entities like corporations, churches, and municipalities, which Jacoby refers to as "fake people"[37] (pp. 8, 63–65).[38] Jacoby further shows how this disparate treatment of real people and fake people entrenches inequality in and among the most financially vulnerable communities. This section begins with a primer on bankruptcy law before fleshing out Jacoby's keen observations.

A. Bankruptcy Basics

The Bankruptcy Reform Act of 1978[39] (Bankruptcy Code or Code) provides the basis for bankruptcy relief. The Code is divided into nine chapters. The first three — Chapters 1, 3, and 5 — set out the basics of a bankruptcy filing. Specifically, Chapter 1 sets forth "G[eneral provisions]"[40] that include a set of defined terms[41] and that establish who may file for relief.[42] Chapter 3 then describes bankruptcy "C[ase administration],"[43] including how a debtor may begin a bankruptcy case.[44] It authorizes the crucial "[a]utomatic stay," which becomes effective the

---

[35] *See, e.g.*, Gluck, Burch & Zimmerman, *supra* note 20, at 527 (observing that bankruptcy courts "preserve and efficiently distribute resources"); Barry E. Adler, *The Law of Last Resort*, 55 VAND. L. REV. 1661, 1666 (2002) (defining "bankruptcy" as "any law that affects the distribution of assets in satisfaction of mutually incompatible obligations or any law that relieves an obligation that could otherwise have been satisfied").

[36] *See* 11 U.S.C. § 101(5).

[37] In a prior article, Jacoby notes that: "By 'fake person,' I do not mean avatars or bots or artificial intelligence or people who have undergone comprehensive cosmetic surgery. I mean corporations, limited liability companies, and their near and distant cousins that exist as a privilege of American business associations law. Fake personhood is the building block of enterprise: your local butcher, a multinational conglomerate, a charity, a church, a hospital, a city, or even a sewer system." Jacoby, *supra* note 15, at 499.

[38] Jacoby observes that "bankruptcy has fallen short in providing basic debt relief for struggling families" even as "lawyers for big enterprises and other powerful parties have transformed bankruptcy into a legal Swiss Army knife" (p. 5).

[39] Pub. L. No. 95-598, 92 Stat. 2549 (codified in scattered sections of 11 U.S.C.).

[40] 11 U.S.C. §§ 101–112.

[41] *Id.* § 101.

[42] *Id.* § 109.

[43] *Id.* §§ 301–366.

[44] *Id.* §§ 301–308.

moment a bankruptcy petition is filed.[45] As Jacoby explains, the automatic stay constitutes "a major legal protection" for the debtor insofar as it "prohibits creditors from . . . trying to collect payment on debts" in any way, shape, or form (p. 17). Chapter 5 carves out spheres of rights and obligations as between the filer and their creditors.[46] For example, it describes the bankruptcy "estate" that, like the automatic stay, comes into being at the moment of filing and is comprised of the debtor's property subject to a set of exemptions.[47] It also describes the debtor's administrative duties upon filing their initial petition for relief,[48] and it sets out how a creditor may subsequently file a claim against the bankruptcy estate.[49]

These initial, foundational chapters then apply to the remaining six chapters, four of which carve out different types of relief relevant to Jacoby's book: Chapters 7, 9, 11, and 13.[50] Chapter 7 authorizes a "liquidation" process for both individual and nonhuman debtors.[51] It is meant "to offer swift relief and cancel most unsecured debt" (p. 17). The United States Trustee appoints a trustee to administer the case.[52] The trustee's principal responsibility is to gather and liquidate the debtor's nonexempt property, then to distribute the proceeds to the debtor's creditors based on a set of statutorily described priorities.[53] Once this process is complete, the debtor receives a discharge of personal liability for applicable debts.[54]

Chapter 9 authorizes the adjustment of a municipality's debt; however, it functions as "[a] [c]hapter [n]ot [l]ike the [o]thers"[55] because the debtor is an arm of the state.[56] Consequently, while some of the foundational administrative aspects of a bankruptcy filing, like the automatic stay,[57] remain in effect, there are key differences given the public orientation of the filer. For example, the debtor must be "insolvent"

---

45 *Id.* § 362.

46 *Id.* §§ 501–562.

47 *Id.* § 541(a) ("The commencement of a case under . . . this title creates an estate.").

48 *Id.* § 521.

49 *Id.* § 502.

50 There is also Chapter 12, which authorizes the "A[djustment of debts of a family farmer or fisherman with regular annual income]," *id.* §§ 1202–1232, and Chapter 15, which authorizes "A[ncillary and other cross-border cases]," namely international bankruptcies, *id.* §§ 1501–1532.

51 *Id.* §§ 701–784.

52 *Id.* § 701.

53 *Id.* § 704.

54 *Id.* § 524.

55 Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REGUL. 55, 60 (2016) (emphasis omitted).

56 *Id.*; *see also* 11 U.S.C. § 109(c).

57 11 U.S.C. § 922.

before becoming eligible to file,[58] and there is no bankruptcy estate.[59] Moreover, "the debtor can sell property without court permission, even outside of the ordinary course of business,"[60] and "[n]either the court nor creditors can directly force a liquidation of a municipality's assets in bankruptcy."[61]

Chapter 11 authorizes the "reorganization" of the debts of both individuals and nonhuman entities.[62] The debtor presumptively remains in control of the bankruptcy estate as the case proceeds, permitting a filer "to restructure debts with the support of most but not all creditors, without ceding control to a government trustee" (p. 126).[63] In addition, the debtor possesses the exclusive right to file the requisite plan of reorganization during the first 120 days of the case,[64] and the plan is subject to court approval.[65] Upon court approval, the debtor receives a discharge of applicable obligations, whether or not the debtor actually completes the requirements set out in the plan.[66]

Finally, Chapter 13 authorizes the "adjustment of debts of an individual with regular income"[67] whose aggregate debts are less than $2,750,000.[68] As in Chapter 7, a trustee largely controls the bankruptcy estate and the general administrative aspects of the case.[69] As in Chapter 11, the court must approve a Chapter 13 plan lasting three to five years.[70] Unlike in Chapter 11, however, the debtor receives a discharge of personal liability only upon completion of the approved Chapter 13 plan.[71] For this reason, as compared to Chapter 7, Chapter 13 is "a longer and pricier road to debt relief" (p. 17), and data show that only one-third of debtors complete their Chapter 13 plan and receive a discharge.[72]

---

[58] *Id.* § 109(c)(3) (setting out the insolvency requirement); *see id.* § 101(32)(C) (defining "insolvent" to mean, "with reference to a municipality, financial condition such that the municipality is — (i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due").

[59] *See id.* § 902(1).

[60] Jacoby, *supra* note 55, at 61.

[61] *Id.*

[62] 11 U.S.C. §§ 1101–1195.

[63] *See id.* § 1107.

[64] *Id.* § 1121(b).

[65] *Id.* § 1129.

[66] *Id.* § 1141.

[67] *Id.* §§ 1301–1330.

[68] *Id.* § 109(e).

[69] *Id.* § 1302.

[70] *Id.* § 1322(d).

[71] *Id.* § 1328.

[72] Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017).

B. *Making Bankruptcy Difficult for "Real People"*

As Professor Katherine Porter observes, "[D]ebt permeates the lives of American families."[73] It is ubiquitous, in part, because many Americans routinely survive paycheck to paycheck and stretch their incomes to cover each month's needs, with little to nothing left for savings.[74] Indeed, many simply do not make enough to cover just their fully predictable, mundane expenses.[75] Even when they do, there is the constant threat of some unexpected expense that will unsettle the fragile economic balance in their lives. For example, should some emergency expense materialize, like a trip to the emergency room in an ambulance or a burnt-out transmission, many Americans report that they do not have the means to absorb the unexpected expense.[76]

Consequently, because income is often not enough to cover the (expected and unexpected) costs of living, many people look to debt to fill in the gaps: a car loan,[77] a home mortgage,[78] a credit card,[79] a payday loan,[80] a bail bond,[81] a car title loan,[82] a running balance on a school lunch account,[83] and so forth. For example, the Federal Reserve Bank of New York's (NY Fed) *Quarterly Report on Household Debt and*

---

[73] Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 980 (2012).

[74] Nakita Q. Cuttino, *The Rise of "FringeTech": Regulatory Risks in Earned-Wage Access*, 115 NW. U. L. REV. 1505, 1509 (2021) ("Between 50% to 78% of Americans live paycheck to paycheck . . . ."); Khristopher J. Brooks, *Inflation Is Cooling, Yet Many Americans Say They're Living Paycheck to Paycheck*, CBS NEWS (July 15, 2024, 12:01 AM), https://www.cbsnews.com/news/americans-living-paycheck-to-paycheck-survey [https://perma.cc/ZSP7-TTZA] (reporting that "[r]oughly one-third of U.S. workers say they're living paycheck to paycheck and have nearly no money for savings after paying their monthly bills"); Emily Batdorf, *Living Paycheck to Paycheck Statistics 2024*, FORBES (Apr. 2, 2024, 10:02 AM), https://www.forbes.com/advisor/banking/living-paycheck-to-paycheck-statistics-2024 [https://perma.cc/K7FR-8W9E] ("A 2023 survey conducted by Payroll.org highlighted that 78% of Americans live paycheck to paycheck, a 6% increase from the previous year. In other words, more than three-quarters of Americans struggle to save or invest after paying for their monthly expenses.").

[75] Batdorf, *supra* note 74 (noting that "a 2023 Forbes Advisor survey" found that twenty-nine percent of survey respondents "reported that their income doesn't even cover their standard expenses").

[76] Cuttino, *supra* note 74, at 1509 ("40% [of Americans] cannot cover a $400 emergency expense.").

[77] *E.g.*, Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 287, 290 (2020).

[78] *E.g.*, Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 324.

[79] *E.g.*, Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 547 (2013) ("[M]any [Earned Income Tax Credit recipients] reported using credit cards as a buffer to get by until they received their tax return.").

[80] *E.g.*, Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 2 (2002).

[81] *E.g.*, Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 109 (2019).

[82] *E.g.*, Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 537–38 (2012).

[83] *E.g.*, Abbye Atkinson, *Philando Castile, State Violence, and School Lunch Debt: A Meditation*, 96 N.Y.U. L. REV. ONLINE 68, 81 (2021).

Credit observes that for the first quarter of 2024, "[a]ggregate household debt balances increased [from the previous quarter] by $184 billion [or 1.1%] . . . [to] $17.69 trillion."[84]

Moreover, debt is increasingly "unmanageable" for many people across socioeconomic strata.[85] Again, per the NY Fed, the first quarter of 2024 witnessed increases in aggregate delinquency with "3.2% of outstanding debt . . . in some stage of delinquency" at the end of March.[86] Likewise, the number of accounts transitioning from good standing into delinquency increased, with "[a]pproximately 4.8% of consumers hav[ing] a 3rd party collection account on their credit report."[87] These statistics have prompted experts to worry openly about the micro and macro effects of overburdened consumer debtors.[88]

"Enter bankruptcy."[89] For many individuals and families struggling with overwhelming debt, bankruptcy can seem like a *deus ex machina* sent to pluck them to safety when their financial lives have become otherwise unresolvable.[90] As Professor Adam Levitin notes, "[b]ankruptcy is the last resort for millions of families that find themselves overburdened with debt, often through no fault of their own," and consequently, "bankruptcy serves as a financial safety net for families desperately trying to stay in the middle class."[91]

Many debtors have filed to take advantage of bankruptcy law's "superpower" to "cancel[] debts" (p. 15), rendering bankruptcy courts the

---

[84] FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT (2024), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2024Q1 [https://perma.cc/GD38-G3MS].

[85] Porter, *supra* note 73, at 981 ("The exploding debt loads of American families have increased the phenomenon of unmanageable debt."); *see, e.g.*, Tobias Burns, *Americans Are Struggling to Pay Their Debts as Economy Tightens*, THE HILL (Oct. 26, 2023, 6:00 AM), https://thehill.com/business/4272973-americans-are-struggling-to-pay-their-debts-as-economy-tightens [https://perma.cc/E4AJ-L269] ("Americans are having a harder time making interest payments as savings are shrinking and a barrage of interest rate hikes by the Federal Reserve has jacked up the cost of financing.").

[86] FED. RSRV. BANK OF N.Y., *supra* note 84.

[87] *Id.*

[88] *E.g.*, Krystal Hur, *Americans Are Falling Behind on Their Payments*, CNN (Apr. 25, 2024, 7:54 AM), https://www.cnn.com/2024/04/25/investing/premarket-stocks-trading-consumer-spending/index.html [https://perma.cc/9A3X-63YT] ("Chicago Federal Reserve President Austan Goolsbee said Friday that while consumer debt levels aren't yet 'especially' high, the Fed is concerned about the rate of consumer delinquencies, or missed or late payments on expenses such as auto loans, credit card bills and rent. 'If the delinquency rate of consumer loans starts rising, that is often a leading indicator for, "things are about to get worse . . . ."'").

[89] Gluck, Burch & Zimmerman, *supra* note 20, at 529.

[90] *See generally* EURIPIDES, MEDEA (Philip Vellacott trans., Penguin Books 1963) (431 B.C.E.). In *Medea*, for example, the god Helios sends a chariot to save Medea and her husband, Jason, from certain death, effectively (and unrealistically) resolving the dilemma into which they had gotten themselves. *See id.* at 58.

[91] Adam J. Levitin, *The Americans Joe Biden Left Behind on the Bankruptcy Bill*, AM. PROSPECT (Jan. 9, 2020), https://prospect.org/politics/bidens-votes-on-the-bankruptcy-bill-middle-class-joe [https://perma.cc/5MX6-FXR9].

busiest federal courts in the country.[92] Although total filings have decreased significantly since 2010 when approximately 1.6 million people sought relief,[93] they are once again steadily on the rise.[94] The Administrative Office of the United States Courts reports that "[p]ersonal and business bankruptcy filings rose 16.2 percent in the twelve-month period ending June 30, 2024, compared with the previous year,"[95] and the NY Fed details that approximately "121,000 consumers had a bankruptcy notation added to their credit reports" in the first quarter of 2024.[96]

Against this backdrop of widespread individual financial insecurity, however, the Bankruptcy Code may not bring the relief that it advertises to individuals.[97] Rather, Jacoby marshals existing work, including her own, to show how current bankruptcy law presents a system of "hurdles to . . . basic debt relief" (p. 7) for individual filers rather than functioning as a site of reliable and meaningful relief (pp. 4–7).[98] Indeed, most individual filers seek relief under Chapter 7 or Chapter 13, and Congress has filled each chapter with substantive and administrative burdens that intentionally make bankruptcy relief more painful for individual filers.[99]

---

[92] *See supra* note 2.

[93] Press Release, U.S. Cts., Bankruptcy Filings Rise 16.2 Percent (July 25, 2024), https://www.uscourts.gov/news/2024/07/25/bankruptcy-filings-rise-162-percent [https://perma.cc/5R9H-TF5Y]. Some scholars have argued that the decline in filings is not indicative of an improvement in overall debtors' wellbeing. Rather, they offer data to suggest that "[debtors in their study were] discouraged by the negative publicity surrounding the 2005 [Bankruptcy Code] amendments, concerned about the stigma associated with bankruptcy, or dissuaded by aggressive debt collectors who bull[ied] them into believing they c[ould] no longer file for bankruptcy," and "families are not turning to bankruptcy even when they have great need." Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 386 (2008); *see also* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 255 (2018) (finding that many distressed debtors will unduly delay a bankruptcy filing in order to try to rectify their financial problems on their own). Professors Pamela Foohey, Robert Lawless, Katherine Porter, and Deborah Thorne find: "To squeeze a few more dollars out of their lives, people work overtime, forego basic necessities, face serious health consequences, deal with persistent debt collection calls, end up in court, lose homes, and sell what little they own." *Id.*

[94] Press Release, U.S. Cts., *supra* note 93.

[95] *Id.* (observing that "[n]on-business bankruptcy filings rose 15.3 percent to 464,553, compared with 403,000 in the previous year," and that although "total filings [have fallen] steadily [between September 2010 and June 2022,]" they "have increased each quarter since").

[96] FED. RSRV. BANK OF N.Y., *supra* note 84.

[97] *See, e.g.*, Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 97 (2006) ("The postbankruptcy financial troubles that families report are not about absolute dollars but instead stem from incongruities between income and expenses.").

[98] *See* Jacqueline Brant, *The Texas Two Step: Double Standards of Bankruptcy Code Abuse*, MINN. J.L. & INEQ.: INEQ. INQUIRY BLOG (Apr. 12, 2024), https://lawandinequality.org/2024/04/12/the-texas-two-step-double-standards-of-bankruptcy-code-abuse [https://perma.cc/7QCG-CJ2E] ("Bankruptcy procedures for individual debtors have become increasingly harsh . . . .").

[99] *See, e.g.*, *id.* (describing how the "means test" in the 2005 reform to the Bankruptcy Code made it more difficult to obtain a Chapter 7 discharge and nudged many debtors to declare bankruptcy under Chapter 13 on less debtor-friendly terms).

For example, Jacoby explains that to realize "the full benefit of Chapter 7" relief, an individual filer first "must forfeit financial privacy" (p. 18).[100] Specifically, the Code requires individual filers to disclose for public consumption "all sorts of [personal and financial] information . . . under penalty of perjury" (p. 18). Congress also requires that an individual filer cede control of their case to a bankruptcy trustee, a "private individual" whose compensation derives from the administration of the filer's case (p. 18).[101] The trustee must "scrutinize" (p. 18) the filer's case and decide which of the filer's nonexempt property must be sold to repay the filer's creditors and to pay the trustee's own compensation (pp. 18–19). In truth, however, most individual filers have few, if any, assets to be sold, rendering most individual Chapter 7 cases so-called "no asset case[s]"[102] (p. 18). Nevertheless, Jacoby notes that the administrative complexities and pitfalls of filing for Chapter 7, including the ever-present threat of dismissal for even the most minor administrative errors, make a bankruptcy attorney a necessary luxury that an individual in distress can probably ill afford (p. 19).

Even with all its administrative and substantive burdens, Chapter 7 is nevertheless a veritable oasis for individual filers as compared to Chapter 13. As in a Chapter 7 case, the trustee presides over the Chapter 13 filer's case, and the filer must propose to "devote[] all disposable income to repay[]" some portion of their debt over a three- or five-year period as determined by the filer's income (p. 20).[103] Moreover, Congress has invited additional scrutiny of how the filer chooses to live their life by deducting from the filer's disposable income those living expenses deemed "not reasonably necessary" for the filer's survival (p. 20).

In this regard, the Bankruptcy Code subjects individual filers to additional stress in the already-harrowing experience of financial distress. Jacoby notes that "every small choice" an individual Chapter 13 filer makes in terms of how they spend money is "a potential discussion point," affecting whether the court will approve their proposed Chapter 13 plan (p. 20). It is part of "the everyday surveillance on which Chapter 13 debt relief hinges" (p. 21). Moreover, even if the Chapter 13 filer clears the hurdles of plan approval, there is still a difficult road ahead before the filer gets the relief they seek because the filer will receive a discharge only after successfully completing the three- or five-year

---

[100] *See* Abbye Atkinson, *Borrowing and Belonging*, 111 CALIF. L. REV. 1369, 1405 (2023) ("In the name of efficiency and of balancing the interests of creditor and debtor, the fresh start requires the debtor to accept publicization of their failure, loss of privacy, and shame as quid pro quo for a discharge.").

[101] 11 U.S.C. § 326.

[102] Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) (reporting that "only 11% of all allowed general unsecured claims," *id.* at 806, received any payout in Chapter 7 bankruptcy cases, *id.* at 805–06).

[103] Jacoby observes that "Chapter 13 conditions debt relief on completing a multiyear repayment plan" (pp. 19–20).

repayment plan (p. 17). This feat is statistically unlikely, because "most" Chapter 13 filers do not reach that milestone (p. 17).

1. Further Restricting Bankruptcy Access. — As Jacoby explains, Congress took a significant step in restricting bankruptcy access for individual filers when it passed the "draconian"[104] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[105] (BAPCPA). BAPCPA was the culmination of the so-called "bankruptcy wars," a term that then–bankruptcy professor (and now-Senator) Elizabeth Warren gave to the ten-year period ending in 2005, during which Congress commissioned various experts to assist in its determination to revamp the Bankruptcy Code.[106]

In the mid-1990s, when "waning personal responsibility" was Congress's go-to scapegoat for explaining widespread socioeconomic distress (as in its passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[107] (that is, welfare retrenchment)) (p. 22),[108] bankruptcy came into the congressional crosshairs as an area in which the purported lack of personal fiscal accountability was reflected in the skyrocketing number of individual bankruptcy filings.[109] The Bankruptcy Code was ripe for a major amendment, and Congress authorized the National Bankruptcy Review Commission in 1994 to report on the state of bankruptcy and to suggest necessary changes to the Bankruptcy Code (p. 23).[110]

Then a newly minted lawyer, Jacoby was on the frontlines of the ensuing battles that raged between those, like the credit industry, in favor of a more restrictive bankruptcy law, and those, like Warren, who believed an accessible bankruptcy law was a necessary safety mechanism for the increasingly economically fragile American middle class (p.

---

104 Michael D. Sousa, *Consumer Bankruptcy in the Neoliberal State*, 39 EMORY BANKR. DEVS. J. 199, 267 (2023) ("Despite vigorous attempts by academicians and practitioners to sway Congress otherwise, the creditor class and its intensive lobbying efforts successfully persuaded Congress to enact what would become the draconian 2005 amendments in BAPCPA, reforms that have been characterized as the most significant alterations to the Bankruptcy Code since 1978." *Id.* at 267–68 (footnotes omitted)).

105 Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of the U.S. Code).

106 Sheelah Kolhatkar, *Can Elizabeth Warren Win It All?*, NEW YORKER (June 14, 2019), https://www.newyorker.com/magazine/2019/06/24/can-elizabeth-warren-win-it-all [https://perma.cc/9PZG-P6RP].

107 Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

108 "The narrative of waning personal responsibility was already in the national spotlight because of debates over welfare reform that exploited race stereotypes" (p. 22).

109 *See, e.g.*, A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 628 (2012) ("Congress also felt that it was crucial to restore 'personal responsibility and integrity in the bankruptcy system' and prevent abusive, morally bankrupt debtors from opportunistically discharging their debts." (quoting H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89)); Littwin, *supra* note 8, at 1936 ("BAPCPA did not take place in a bankruptcy vacuum, but rather was a part of a broader contraction of the social safety net.").

110 *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended at 11 U.S.C. § 110 and 18 U.S.C. §§ 156–157).

23).[111] Warren was tasked with "lead[ing the Commission's] research, outreach, and development," and the Commission hired Jacoby, fresh from a post–law school clerkship with Bankruptcy Judge Ginsberg, to work alongside Warren as she delved into the Commission's work (p. 23).

When the dust settled, the proponents of "making personal bankruptcy harder to access and relief less available" prevailed (pp. 29–30). BAPCPA amended the Bankruptcy Code by injecting the statute with a healthy dose of bureaucratic disentitlement.[112] Its endgame was "to impose a death by a thousand cuts through low-visibility procedural burdens, and that high-visibility, substantive provisions . . . were simply distracting bonuses."[113] For example, Congress raised Chapter 7's filing fee, making it more expensive than Chapter 13's filing.[114] This made a simpler filing that was more likely to result in a discharge more expensive than a more burdensome filing that was less likely to result in a discharge. Congress also obligated individual debtors to complete "credit counseling" before becoming eligible to file a bankruptcy petition[115] and debtor education postfiling before becoming eligible to receive a discharge.[116]

The "centerpiece" of BAPCPA, however, was a means test, intended to weed out from Chapter 7 those filers that could repay at least some portion of their debt.[117] According to several bankruptcy experts, "BAPCPA was advanced with a narrative that while some could not afford to pay their creditors in bankruptcy, many others could, and the new law would sort the can-pays from the can't-pays."[118] The means test implemented a presumption of abuse that would prohibit individual

---

111 Jacoby recounts that "Warren was especially alarmed about financial distress and household debt burdens. But she also knew that it would be counterproductive to respond by restricting access to the bankruptcy system" (p. 23).

112 *See* Littwin, *supra* note 8, at 1936 (noting Congress's "use of procedural barriers to reduce substantive access" to bankruptcy relief and that it "highlights the extent to which [2005 bankruptcy reforms] did not take place in a bankruptcy vacuum, but rather w[ere] a part of a broader contraction of the social safety net").

113 Lawless, Littwin, Porter, Pottow, Thorne & Warren, *supra* note 93, at 380 (describing one view of the true purpose of the BAPCPA amendments).

114 *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 325(a), 119 Stat. 23, 98 (codified as amended at 28 U.S.C. § 1930).

115 11 U.S.C. § 109(h)(1).

116 *Id.* §§ 727(a)(11), 1328(g)(1); *see also* A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945, 946 (1999) ("To solve the bankruptcy problem, Congress proposed to make it harder to discharge debts, which would prevent debtors from using the easy way out, and to require debtors to participate in debtor education programs, which would prevent them from overextending themselves in the first place and in the future.").

117 Dickerson, *supra* note 18, at 939; *see* Lawless, Littwin, Porter, Pottow, Thorne & Warren, *supra* note 93, at 352 ("BAPCPA was built upon a controversial 'means test' to restrict eligibility for relief under Chapter 7.").

118 Lawless, Littwin, Porter, Pottow, Thorne & Warren, *supra* note 93, at 377.

filers from accessing the relatively speedy relief of a Chapter 7 filing.[119] The Chapter 7 filers who fail the means test are deemed presumptively abusive, and they can survive in bankruptcy only if they convert their case to the more onerous Chapter 13 or 11.[120] Namely, it's either a burdensome Chapter 13 or 11 filing, or nothing.

In sum, BAPCPA significantly hurt individuals with distressed debt by building a veritable minefield between them and relief in bankruptcy. Moreover, "creditors gain[ed] from BAPCPA . . . because they ha[d] a stronger hand to press the debtors — all debtors, regardless of income — to struggle outside the bankruptcy system."[121]

2. Burdening Marginalized Individual Filers. — Jacoby describes how individual bankruptcy policy, especially post-BAPCPA, exacerbates the underlying inequality that promotes disproportionate financial distress among marginalized groups, like Black Americans.[122] She explains how bankruptcy's seemingly neutral procedural and substantive rules "generate suboptimal experiences and outcomes for [individual] Black filers" (p. 8).[123] For example, drawing on work from the Consumer Bankruptcy Project's longitudinal study of individual bankruptcy filers, Jacoby details how Black filers disproportionately file for the more onerous Chapter 13 relief, even though they might otherwise be eligible for and benefit from Chapter 7's relatively speedy discharge (p. 37). Because this racial disparity "could not be explained by obvious financial and legal variables," bankruptcy Professors Jean Braucher, Dov Cohen, and Robert Lawless studied whether bankruptcy attorneys might be partially responsible for this puzzling fact (p. 37). Braucher, Cohen, and Lawless showed that "attorneys were more likely to recommend Chapter 13 [to a fictitious Black filer] than to [a similarly situated, fictitious White filer] or to a [filer] lacking demographic characteristics" (p. 38). Moreover, research shows that once in Chapter 13, "Black families complete payment plans and receive debt relief at *half* the rate of other Chapter 13 filers" (p. 39).

Substantively, bankruptcy rules for individual filers operate more harshly for Black Americans when considered against the backdrop of

---

119 *See* 11 U.S.C. § 707(b)(2)(A)(i).

120 *See id.* § 707(b)(1).

121 Lawless, Littwin, Porter, Pottow, Thorne & Warren, *supra* note 93, at 353.

122 *See* Dickerson, *supra* note 18, at 956 (cataloguing the relative effects of BAPCPA on both white and Black debtors and concluding that "BAPCPA's restriction on the types of debts that can be discharged is also likely to have a larger, negative effect on minority debtors").

123 *See* Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 232–33 (2009) ("Scholars have already shown that black and Hispanic families are far more likely to enter bankruptcy than are white families," *id.*, and "that the type of relief offered by bankruptcy laws favors white debtors over black debtors, since whites disproportionately own the type of assets that bankruptcy protects, and blacks disproportionately have the types of debts that bankruptcy does not relieve," *id.* at 233.).

persistent implicit and explicit discrimination.[124] For example, in a Chapter 13 filing, an individual debtor may "cram down"[125] the amount owed on a secured debt to the value of the asset securing that debt.[126] In a market in which the asset is worth less than the contractual amount owed to the secured creditor, this is a valuable benefit because the debtor must repay only the value of the asset in order to maintain possession of the asset. Yet, "[w]hile Chapter 13 permits restructuring of almost all types of debts, it explicitly excludes certain home mortgage loans,"[127] namely "real property that is the debtor's principal residence."[128] In other words, "if a debtor's financial distress stems from an unaffordable home mortgage, filing for bankruptcy will not help the debtor retain the home, and foreclosure will occur."[129]

Black Americans enter homeownership behind the proverbial eight ball.[130] They "fare poorly in housing markets partly because of lingering vestiges of housing discrimination, and even the U.S. government has admitted that 'discrimination and segregation likely contribute' to this gap."[131] For example, citing sociological research, Jacoby notes that "Black borrowers were significantly less likely to be approved for a home mortgage than white borrowers were, controlling for relevant financial factors" (p. 41). This disparate treatment is consistent with the historical exclusion of Black families from the midcentury federal "programs designed to help white people buy homes and build wealth with [federally subsidized] solid fixed-rate mortgages" (p. 40).[132] More than

---

124 *See, e.g.*, Abbye Atkinson, *Modifying Mortgage Discrimination in Consumer Bankruptcy*, 57 ARIZ. L. REV. 1041, 1046 (2015) (observing that "certain facets of consumer bankruptcy law, including the anti-modification provision, operate as a structural restraint on the recovery of economically disenfranchised groups and communities that continually face economic and social discrimination").

125 Joshua Goodman & Adam Levitin, *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates*, 57 J.L. & ECON. 139, 142 (2014).

126 11 U.S.C. § 1322(b)(2). The remaining portion of the debt is then treated as being unsecured and discharged accordingly.

127 Goodman & Levitin, *supra* note 125, at 143.

128 11 U.S.C. § 1322(b)(2).

129 Goodman & Levitin, *supra* note 125, at 143.

130 *See* A. Mechele Dickerson, *Public Interest, Public Choice, and the Cult of Homeownership,* 2 U.C. IRVINE L. REV. 843, 854 (2012) ("The road to homeownership has never been smooth for blacks and Latinos and the U.S. government itself is responsible for placing obstacles in their way."); *see also* Atkinson, *supra* note 4, at 1445 (observing that "Prince George's County's [predominantly Black middle-class] residents could not avoid the fact that their Blackness in a raced and gendered market society made it harder for them to leverage a home loan to build equity and wealth").

131 Dickerson, *supra* note 130, at 867 (quoting CHRISTOPHER E. HERBERT ET AL., U.S. DEP'T OF HOUS. & URB. DEV., HOMEOWNERSHIP GAPS AMONG LOW-INCOME AND MINORITY BORROWERS AND NEIGHBORHOODS, at viii (2005)).

132 *See also id.* at 854 ("Federal housing policies made it easier for lenders to discriminate against blacks and Latinos by creating 'redlined' areas, encompassing properties in racially mixed areas deemed to be high-risk and uninsurable.").

that, Black Americans pay more for mortgage credit[133] and possess significantly less familial wealth to mitigate financial distress.[134]

More generally, Jacoby cites Professor Mechele Dickerson for the proposition that individual bankruptcy is fashioned to bring the greatest relief to the "Ideal Debtor,"[135] and Black Americans tend not to fall into that category (p. 46).[136] For example, individual bankruptcy rules favor married debtors,[137] who "have *some* disposable income and a fairly steady income stream,"[138] possess wealth stored in assets that are exempt from the bankruptcy estate,[139] and are seeking relief from dischargeable debts.[140] Even though BAPCPA made bankruptcy more difficult for all consumer debtors,[141] against the backdrop of entrenched racialized socioeconomic inequality, post-BAPCPA bankruptcy law and policy arguably have more "harsh, unintended racial consequences for largely innocent victims."[142] Consequently, Jacoby notes that "bankruptcy affects white and Black households differently, starting even before they enter the [bankruptcy] system" (p. 40). Jacoby observes that while "it should not be surprising that debtor-creditor laws are not as race neutral

---

[133] *See* Atkinson, *supra* note 124, at 1044 (observing that in the lead-up to the subprime crisis, "[m]iddle-class African American and Latino homebuyers, as well as borrowers from lower-income communities more generally, were disproportionately steered into subprime mortgages even though some qualified for prime mortgages," and "[m]ortgage brokers and lenders also targeted African American and Latino homeowners for subprime refinancing products that stripped existing wealth from unsuspecting homeowners in already economically fragile communities").

[134] *See* Ana Hernández Kent & Lowell R. Ricketts, *U.S. Wealth Inequality: Gaps Remain Despite Widespread Wealth Gains*, FED. RSRV. BANK OF ST. LOUIS: OPEN VAULT BLOG (Feb. 7, 2024), https://www.stlouisfed.org/open-vault/2024/feb/us-wealth-inequality-widespread-gains-gaps-remain [https://perma.cc/WDT9-A2V5] (reporting that "Black families had 16 cents per dollar of white median wealth"); *cf.* Dickerson, *supra* note 18, at 929 ("[W]ealth can always be liquidated and serve as an income replacement if a person loses his job or incurs unexpected expenses.").

[135] A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1726 (2004).

[136] *Id.* ("Specifically, to benefit the most from bankruptcy laws, the 'Ideal Debtor' should be a married, employed homeowner who (1) is the beneficiary of a spendthrift trust or has a large employer-provided retirement account; (2) has high, but reasonable, living expenses; (3) provides financial support only to legal dependents; and (4) has little (or no) student loan, alimony, or child support debt. Because statistical data suggest that white people are more likely to fit the Ideal Debtor profile, race matters in bankruptcy.").

[137] Dickerson, *supra* note 18, at 953 ("Married debtors continue to be favored post-BAPCPA.").

[138] *Id.* at 927.

[139] *Id.* at 930–31 ("The Ideal Debtor pre-BAPCPA would own an expensive home and preferably live in a state that let him exempt most, if not all, of the value of that home," *id.*, and "would either be the beneficiary of a spendthrift trust or have an interest in a large ERISA-qualified retirement fund, both of which would be excluded from their bankruptcy estates," *id.* at 931.).

[140] *Id.* at 954; *see* 11 U.S.C. § 523 (listing nondischargeable debts, including fines and fees).

[141] *See* Dickerson, *supra* note 18, at 955 ("By revising the Code to harm the Abusive Debtor, certain provisions of BAPCPA will have a disproportionately negative harm on the hypothetical white debtor.").

[142] *Id.* at 956.

as they seem on their face," bankruptcy law "can, and should, stop piling on and exacerbating the effects of existing inequality" (p. 61).[143]

C. Favoring "Fake People" in Bankruptcy

Jacoby contrasts the bankruptcy system's treatment of individual filers with its treatment of "fake people," namely entities that derive their status as a "person" from law (p. 64). These include for-profit corporations, nonprofit associations, and municipalities. Jacoby shows how the Bankruptcy Code authorizes "a fresher start for fake people" who, because of their favorable treatment, are able to leverage the Bankruptcy Code's rights and protections to their benefit in ways that individuals may not (p. 67). Jacoby focuses on Chapter 11, which was "designed to allow and promote the reorganization of financially distressed companies" (p. 65), and which empowers the debtor to do a host of things that an individual filer in Chapter 7 or Chapter 13 may not. In this way, Congress has chosen to prioritize the interests of "artificial persons" in bankruptcy by willfully relieving them of "the value judgments that lower-income individuals face before, during, and after they file," and "undercutting liberty and equality" among the real people whose interests are at stake (p. 8).

1. Discharge Policy. — For example, bankruptcy rules impose "disparate discharge policies for businesses and individuals" (p. 69). The Code includes a list of debts that are categorically nondischargeable for individual filers.[144] These include certain tax debts,[145] debts incurred through fraud,[146] "domestic support obligation[s],"[147] debts stemming from "fine[s], penalt[ies], or forfeiture[s] payable to and for the benefit of a governmental unit"[148] — termed by some scholars as "[p]enal debt"[149] — and student loan debts that do not impose an "undue hardship" on the debtor.[150] Jacoby notes the difficulty these exclusions impose on individual filers. She argues that although "exceptions to discharge can be perfectly defensible, policy-wise . . . , any no-discharge list that applies to humans needs careful crafting because of the virtues of the fresh start" (p. 66).

Moreover, the existing nondischargeable debts in individual filings impose a burden particularly on marginalized communities given the

---

[143] *See* Dickerson, *supra* note 135, at 1776 ("If Congress and the courts commit to using the Code to achieve substantive racial justice, then bankruptcy laws will better provide fairer and more just benefits to financially strapped Americans of all races.").

[144] 11 U.S.C. § 523(a).

[145] *Id.* § 523(a)(1).

[146] *Id.* § 523(a)(4).

[147] *Id.* § 523(a)(5).

[148] *Id.* § 523(a)(7).

[149] Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 919 (2017) (describing "[p]enal debt" as including "debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees, and interest" (footnote omitted)).

[150] 11 U.S.C. § 523(a)(8).

disproportionate concentration and burden of several nondischargeable debts among historically financially vulnerable communities. For example, the practical nondischargeability of student loans in bankruptcy affects women and Black filers more given the disproportionate incidence of student loans among those communities, race and gender disparities in their income, and their overall socioeconomic vulnerability (p. 49).[151] Similarly, the nondischargeability of penal debt imposes a disproportionate hardship on Black and Brown communities that struggle with endemic overpolicing.[152] Indeed, the "selective enforcement of the law in certain economically disenfranchised communities undermines the simple association of liability and misconduct because it raises fairness concerns in terms of how the state administers justice."[153] Consequently, as Jacoby points out, "the no-discharge list narrows the boundaries of the fresh start for individuals" (p. 66).

Strikingly, however, the Bankruptcy Code gives a corporate filer carte blanche to propose a plan of reorganization in Chapter 11 without reference to categorically nondischargeable debt (p. 67).[154] Instead, a corporate filer may propose a plan of reorganization that discharges all manner of debts, including "debts arising from willful and malicious injury or fraud" as long as the filer "persuade[s] a majority of their creditors and a court to support their Chapter 11 plan" (p. 67).

To be fair, Jacoby acknowledges that the Code does include some mechanisms for the nondischargeability of debts in Chapter 11, but none are mandatory as in Chapter 7 and Chapter 13. For example, Jacoby observes that "courts sometimes rule that companies remain on the hook for obligations they would prefer not to honor by finding that those obligations are outside the definition of a claim under bankruptcy law" (p. 71). In addition, the Code "contains grounds to file lawsuits against third parties who might have colluded with the debtor somehow or

---

[151] Jacoby observes that "restricting student loan cancellation does not affect people equally because student loans do not burden everyone equally" and "race disparities in student loan burdens make the student loan exception to discharge hit Black people particularly hard" (p. 49). *See also* Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 5 (2010) (summarizing that "data suggest that African Americans may experience Congress's restrictive educational loan discharge policy more acutely than Whites because African Americans are more likely to borrow money for college, do not experience the same benefits of the education, and yet are bound by the same duty to repay educational loans"); KEVIN MILLER, AM. ASS'N OF UNIV. WOMEN, DEEPER IN DEBT: WOMEN AND STUDENT LOANS 2 (2017) ("On average women take on more debt than men at almost every degree level and type [—] . . . about 14 percent greater than men's in a given year. . . . Following graduation, women repay their loans more slowly than do men, in part because of the gender pay gap.").

[152] *E.g.*, ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 156 (2016) ("Monetary sanctions, solely because racialized communities are the disproportionate focus of the criminal justice system, are imposed in a disparate way on people of color . . . ."); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 154–55 (rev. ed. 2012); *see* MILLER, *supra* note 151, at 2.

[153] Atkinson, *supra* note 149, at 951.

[154] Jacoby writes that "the no-discharge list . . . does not apply to fake people" (p. 67).

might have extracted value that left other creditors worse off" (p. 72). Even so, "discharge policy . . . sends a troubling message about the differential treatment of real and fake people" (p. 72), such as who deserves relief in the first instance and who must, as a categorical matter, continue to struggle with debt.[155] It evinces a policy choice that disfavors individuals while simultaneously favoring corporate and other nonhuman filers in Chapter 11.

Similarly, the Code favors corporate filers and other Chapter 11 filers by permitting them to control their bankruptcy cases as a "debtor in possession" (pp. 73–76).[156] That is to say that there is no third-party trustee who takes control of the bankruptcy estate and its overall administration, as is the case in a Chapter 7 or Chapter 13 filing. The policy behind the debtor-in-possession in Chapter 11 was "to boost the odds that a company will reorganize and continue to operate, under ordinary management" (p. 75). Yet, Jacoby also points out what she terms "an open secret," namely that the debtor-in-possession rule in Chapter 11 serves another more practical reality: "[T]he parties controlling access to money for the company will not tolerate a trustee looking over their shoulder" (p. 80). Indeed, the rule appears to operate as a concession to entrenched power — the C-suites and the lawyers and law firms that populate Chapter 11 bankruptcy practice. Jacoby writes: "[B]ig businesses and the most elite law firms expect to run the show, even when they are not following the basic Bankruptcy Code requirements" (p. 82), and Congress sanctions that view insofar as, in its design of the Bankruptcy Code, Congress has entrusted to the Chapter 11 debtor-in-possession "the trustee's fiduciary duty to maximize the value of the bankruptcy estate."[157]

Individual filers are, by comparison, not privy to such congressional trust and certainly not of the institutional influence and power to demand it. Consequently, over in Chapter 7 or Chapter 13, the Code immediately divests individual filers of their autonomy and dignity as a quid pro quo for debt relief, ceding their control to a trustee to "run the show" (p. 82).[158] So, while "[b]ig enterprises" are "entrusted with the privilege of charting their own course, huddling with moneyed interests

---

[155] *See* Atkinson, *supra* note 149, at 982–83 ("This [nondischargeability] line-drawing has significant consequences for the most vulnerable debtors . . . . It further entrenches existing economic disenfranchisement when certain varieties of debt that are more likely to be concentrated in economically disenfranchised communities are regarded as categorically nondischargeable, while debts that are concentrated further along the socioeconomic spectrum are dischargeable.").

[156] *See* 11 U.S.C. § 1101(1) (defining "debtor in possession"); *see also* Lipson, *supra* note 25, at 48 ("Chapter 11 already gives debtors in possession significant advantages, in particular control of decisions about a plan of reorganization and whether (and how) to litigate estate causes of action.").

[157] Off. Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003).

[158] Elsewhere, Jacoby observes the "everyday surveillance on which [individual] debt relief hinges" (p. 21).

to plan the strategy," individual filers are subjected to the trustee's scrutiny of every detail of their lives in the first instance (p. 82).

Moreover, Chapter 11 filers receive a discharge of their obligations at the confirmation of the plan of reorganization, instead of receiving this discharge after completion of the plan's obligations (p. 83).[159] Jacoby notes that this discharge is typically final, even in cases where the debtor does not satisfy all its obligations under the Chapter 11 plan (p. 205). By contrast, to receive a discharge, individual Chapter 13 filers must linger under the jurisdiction and "everyday surveillance" (p. 21) of the bankruptcy court and the bankruptcy trustee until they have satisfied *all* of the terms of their Chapter 13 plan.[160] That is to say, when an individual Chapter 13 filer fails to satisfy all of their obligations under their Chapter 13 plan, their prebankruptcy debts are reinstated, with interest, without "refund for the cost of the [failed bankruptcy] process" like the filing fees, court fees, or attorney's fees (p. 83).

Chapter 9 municipal debtors are also accorded great privileges in bankruptcy as compared to individual filers. Although municipal bankruptcy was originally conceived to facilitate the "restructur[ing of] unpayable bond debt," Congress "overhaul[ed]" its approach to municipal relief in 1978 such that municipal bankruptcy "looked more like Chapter 11 for businesses than like the original municipal bankruptcy approach" (pp. 95–96). This new approach gives municipal entities, including cities, the power "to rewrite obligations to all sorts of parties, including retirees who ha[ve] earned pensions and [future] health care coverage" (pp. 96–97).

Some municipalities have successfully discharged debts owed to individual citizens for the violation of their civil rights as authorized under the Constitution, including those incurred from claims of excessive force and police brutality (pp. 97–98). For example, in its high-profile bankruptcy proceeding in 2012, the City of San Bernardino, California, was able to discharge 99% of liability incurred from pending and future claims of excessive force and police brutality committed by law enforcement before the time of filing (pp. 114–17). In approving the city's plan of readjustment, the Bankruptcy Court for the Central District of California reasoned that the interests of the victim-creditors were appropriately subordinated to "the efficient and effective functioning of the City and its departments, and in particular the City Police Department."[161] In reaching this conclusion, the court functionally held that even remedies for constitutional rights violations could be effectively trumped in municipal bankruptcy when held against the economic plight of the

---

[159] 11 U.S.C. § 1141(d)(1)(A).

[160] *Id.* § 1328.

[161] *In re* City of San Bernardino, 566 B.R. 46, 56 (Bankr. C.D. Cal. 2017). Jacoby also discusses this reasoning (pp. 116–17).

city.[162] Creditor-victims of police brutality were asking too much, and their expectations needed to be disciplined by the ostensibly more important goal of reorganization.

Jacoby notes that in tailoring the city's plan to include the discharge of its police officers' individual liabilities stemming from their violation of individual constitutional rights, San Bernardino's lawyers heeded the Ninth Circuit Court of Appeals's prior ruling in the City of Vallejo, California's Chapter 9 bankruptcy case (pp. 116–17) that certain Vallejo police officers' individual liability "remain[ed] undischarged, unadjusted, and untouched by Vallejo's bankruptcy."[163] Vallejo's plan of reorganization neglected to specify that the city's discharge would extend to its police officers' individual § 1983 liability.[164] Thus, even though California law required the city to indemnify its officers against individual liability incurred while performing their official duties, the court ruled that Vallejo's discharge excluded the individual officers' liability merely because the plan "d[id] not expressly release any debtor but Vallejo," nor did the bankruptcy court conclude "that third-party discharge or adjustment was an 'integral part of reorganization.'"[165]

Consequently, San Bernardino was able to stretch bankruptcy law to accommodate the discharge of its individual officers' liability for violating its citizens' civil rights (p. 117), a feat for which the city does not appear to show any remorse. For example, in 2022, San Bernardino marked its completion of its reorganization plan by issuing a press release celebrating its "strong financial position"[166] and thanking its "community along with the businesses who have stood fast with [the] city."[167] Missing from this exercise in self-congratulation was any gratitude for the individuals whose constitutional rights San Bernardino's police department had violated and yet who received no more than 1% of what the city owed to them. In this regard, the city's press release supports Jacoby's contention that under the Bankruptcy Code, "[e]nforcing the civil rights law of residents had become an unaffordable luxury" (p. 117).

2. Inequality in Bankruptcy for Fake People. — The court's approval of San Bernardino's plan is striking on its face and even more so when one considers it together with the fact that unlike San Bernardino's civil rights debt, individual penal debt is categorically nondischargeable under the Code.[168] Here again, Jacoby points out how

---

[162] *See City of San Bernardino*, 566 B.R. at 56.

[163] Deocampo v. Potts, 836 F.3d 1134, 1145 (9th Cir. 2016).

[164] *See id.* at 1144–45 (observing that "[t]he Plan does not expressly release any debtor but Vallejo," *id.* at 1144, and "[t]he bankruptcy court's Plan confirmation order, and the minute order it incorporates, make no reference to indemnity or third-party discharge," *id.* at 1144–45).

[165] *Id.* (quoting Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989)).

[166] Press Release, San Bernardino Exits Bankruptcy (Sept. 12, 2022), https://www.sbcity.org/CivicAlerts.aspx?AID=261&ARC=235 [https://perma.cc/J76R-VXFU].

[167] *Id.* (quoting Mayor John Valdivia).

[168] 11 U.S.C. § 523(a)(7).

bankruptcy's worse treatment of real people exacerbates inequality, particularly along racial lines (pp. 118–19). She observes that "[t]he U.S. Constitution is supposed to protect individuals," especially those from suspect classes, "from being harmed by state actors. Arguably that's one of its most important jobs" (p. 118).

The abuse of constitutional rights is remedied through civil liability. Moreover, given the overpolicing and incidence of excessive force in Black and Brown marginalized communities,[169] the vindication of civil rights through civil liability for police brutality is of particular social significance. Noting the disparity between people's outrage about looting versus their apathy about police misconduct, Jacoby argues that "[m]unicipal bankruptcy reinforces that disparity, granting more protection for claims that the government has taken property than for claims that the government has unconstitutionally harmed or killed Black and brown people" (p. 119).

To be sure, the issues surrounding municipal liability for the violation of civil rights are complex in and outside of bankruptcy. Without bankruptcy relief, for example, San Bernardino's taxpayers would carry the burden of paying the damages stemming from civil rights suits against their police department. Given the demographic makeup of San Bernardino, including its socioeconomic profile, that burden would be significant. Per the U.S. Census Bureau's 2023 American Community Survey, San Bernardino's population was disproportionately nonwhite,[170] and its poverty rate (19.5%)[171] was well above the national average (12.5%)[172] and the California state average (12%).[173] Consequently, with respect to the treatment of civil rights debt in municipal bankruptcies, there is a Catch-22 in cases where the debtor-municipality's taxpayers are disproportionately from marginalized groups. Jacoby acknowledges this complexity but concludes that "until bigger structural changes arrive, using bankruptcy to bluntly cancel responsibility for police violence, without alternative remedies in place, is unconscionable" (pp. 119–20).

---

169 *See generally* Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing*, SENT'G PROJECT (Nov. 2, 2023), https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing [https://perma.cc/6QYM-ZNG9] (investigating the harmful effects of "excessive police contact" with Black Americans).

170 *See QuickFacts: San Bernardino City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/sanbernardinocitycalifornia/RHI225223 [https://perma.cc/ACN4-ER99].

171 *Id.*

172 *Poverty Status in the Past 12 Months*, U.S. CENSUS BUREAU, https://data.census.gov/table/ACSST1Y2023.S1701?q=poverty [https://perma.cc/64U4-3VVR].

173 *San Bernardino City, California: Income and Poverty*, U.S. CENSUS BUREAU, https://data.census.gov/profile/San_Bernardino_city,_California?g=160XX00US0665000#incomeand-poverty [https://perma.cc/P9PA-7BA5].

II. Norming Individual Bias in Bankruptcy Policy

Jacoby engages with the broader normative question: Why, in the wake of financial distress, should real people be held more culpable than fake people? Her descriptive account of the disparity between real people and fake people, together with available empirical evidence on individual bankruptcy filings,[174] suggests that there is little basis for treating individual filers worse than nonhuman filers.[175] This leaves bankruptcy policy susceptible to critiques that its biased treatment is centered on an irrational suspicion of and apathy toward individual financial distress coupled with a naked preference for nonhuman financial wellbeing and is largely guided by institutional actors who have shaped bankruptcy law to preserve the concentration of wealth in specific spaces.[176]

A. Norming Suspicion of Individual Financial Distress

Conventionally, the normative purpose of individual bankruptcy is "to give poor but honest debtors a fresh financial start and to ensure that creditors are treated fairly in an orderly debt resolution proceeding."[177] Considered in the best possible light, the BAPCPA sea change was necessary to better screen for genuine financial need and honesty among individual filers.[178] Better screening would limit abuse and protect the general health of credit markets for consumers, hence the formal title of the amendments: the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[179] Moreover, because Congress perceived no similar need to screen fake people in bankruptcy, that is, it perceived that bankruptcy abuse was not a problem among nonhuman bankruptcy filers,[180] BAPCPA did not similarly restrict nonhuman filers.

---

[174] *E.g.*, Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Debt on the Ground: The Scholarly Discourse of Bankruptcy and Financial Precarity*, 20 ANN. REV. L. & SOC. SCI. 219, 222–24 (2024) (describing research on why individuals file for bankruptcy).

[175] *See* Sousa, *supra* note 104, at 234 (positing that "the rise of a credit-based American economy in the mid-twentieth century . . . had the consequential effect of leaving an ever-increasing volume of individuals and families dealing with troublesome personal indebtedness in its wake").

[176] *See, e.g.*, *id.* at 207 (arguing that commentators' purported balancing of debtors' and creditors' interests merely "reduce[s] to a moral evaluation of individual debtor motivations and behaviors"); *see also* Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1716 (2018) ("[C]orporate bankruptcy has been redistricted to wealth maximization, voluntary lenders, and investors.").

[177] Dickerson, *supra* note 135, at 1727 (citing, inter alia, Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting Williams v. U.S. Fid. & Guar. Co., 236 U.S. 539, 554–55 (1915)))).

[178] *See, e.g.*, Dickerson, *supra* note 18, at 938–39.

[179] Pub. L. No. 109-8, § 1(a), 119 Stat. 23, 23.

[180] *See* Atkinson, *supra* note 4, at 1438–39 (describing BAPCPA's legislative history, which illustrated Congress's concern with "lack of *personal* financial accountability," *id.* at 1439 (emphasis added) (quoting H.R. REP. NO. 109-31, pt. 1, at 2 (2005))).

Empirically speaking, however, there was little evidence to support Congress's normative position that individuals warranted greater legislative and judicial scrutiny than nonhuman filers. Indeed, during the bankruptcy wars, the Consumer Bankruptcy Project (CBP) had already observed that most individual filers were middle-class people in deep financial distress.[181] The CBP also revealed that historically marginalized groups, like Black Americans and women, were disproportionately represented among bankruptcy filers.[182] Thus, rather than a decline in personal responsibility, the rising tide of individual bankruptcy filings that awakened congressional interest in bankruptcy reform more credibly resulted from "individuals increasingly [bearing] the risks of job insecurity, health insurance fragmentation, wage stagnation, and more" (pp. 22–23). Unsurprisingly, the National Bankruptcy Review Commission — authorized by Congress in the mid-1990s to study the sharp increase in individual bankruptcy filings — concluded from empirical analysis that individuals were not to blame for their own financial distress (pp. 23, 26).

On the other hand, the credit industry was the chief vendor of the claim that individuals were abusing bankruptcy opportunistically to discharge their debts (p. 22). The credit industry lobbied Congress to restrict individual bankruptcy access to address what they characterized as the problem: their own customers' fiscal irresponsibility (p. 22). Despite contradictory empirical evidence, this characterization stuck, and Congress styled the 2005 amendments to guard against nonexistent bankruptcy abuse (pp. 29–30).

Consequently, BAPCPA willfully subordinated the ideal of a fresh start in favor of casting individuals in financial distress as profligate, opportunistic, and generally undeserving of broad debt relief in the first instance.[183] As Jacoby explains, "BAPCPA[] added hundreds of new pages to bankruptcy law that leaned largely in one direction: making personal bankruptcy harder to access and relief less available" (pp. 29–30). Thus, the unjustified fear of widespread individual bankruptcy abuse and the promotion of individual personal responsibility supplanted the fresh start as the primary aims animating individual bankruptcy policy.[184] This underlying suspicion, for example, explains the requirement that individual filers "buy and complete credit counseling"

---

[181] *Id.* at 1438 (citing SULLIVAN, WARREN & WESTBROOK, *supra* note 3, at 37, 46, 239).

[182] Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 624–26 (2022) (observing that "single women are much more likely to file bankruptcy than their incidence in the population," *id.* at 624–25, and "Black households file bankruptcy at more than twice the rate of their incidence in the population," *id.* at 625).

[183] Jacoby characterizes BAPCPA as a "crackdown on personal bankruptcy" (p. 87).

[184] *E.g.*, 151 CONG. REC. 4343 (2005) (statement of Sen. Orrin Hatch) ("This bill, with its means test, will discourage such abusive filings by restricting access to chapter 7 liquidation by those with relatively high incomes. We should all stand behind a law that requires people with the ability to repay their debts to actually repay those debts.").

in order to receive relief (p. 31). The result, as Jacoby notes, is that "[a] person whose bankruptcy is triggered by bad financial planning and a person whose bankruptcy is triggered by a hurricane and cancer have the same obligation to pay for and complete these steps" (p. 31).

By contrast, Chapter 11 is traditionally justified in terms of the need to limit the inefficient and destructive behavior of individual creditors once a debtor falls into financial distress.[185] Thus, the most conventional theoretical explanation of Chapter 11, the "Creditors' Bargain," premises bankruptcy law on a hypothetical ex ante agreement that the debtor's creditors would have made to modify their individual rights when the debtor is unable to meet all its obligations.[186]

Professor Anthony Casey has rejected the Creditors' Bargain as the "full and proper" justification for Chapter 11, proposing in its stead a "New Bargaining Theory of corporate bankruptcy" that focuses on the ex post problem of holdout creditors.[187] Casey argues that "bankruptcy's proper purpose is to solve a specific contracting failure" that "arises because financial distress presents uncertainty that is not contractible."[188] Consequently, "Chapter 11 is an attempt . . . [to] create[] a renegotiation framework designed to minimize the parties' ability and incentives to hold each other up."[189] Even in its rejection of the Creditor's Bargain, however, the New Bargaining Theory still understands

---

[185] *See, e.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711 (2020) (describing the purpose of Chapter 11 bankruptcy as being "to solve the incomplete contracting problem that accompanies financial distress" and to "facilitat[e] a structured renegotiation that allows parties to preserve value in the face of hold-up threats").

[186] *E.g.*, Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 857–58 (1982) (observing that "most of the bankruptcy *process* is in fact concerned with creditor-distribution questions," *id.* at 857, and that "[t]he priorities enunciated in the Bankruptcy Code itself deal largely with the allocation of rights among persons not entitled to preferential treatment outside of bankruptcy," *id.* at 858); *see also* Casey, *supra* note 185, at 1711 n.3 (characterizing the Creditors' Bargain as the "prevailing view" and collecting sources defending it).

[187] Casey, *supra* note 185, at 1715–16.

[188] *Id.* at 1715. Casey continues:

> For a business firm, financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules for every scenario. Moreover, the terms the parties do contract for will often be unenforceable because the relevant contingencies are impossible to verify to a court. Incomplete contracts therefore govern a firm's various relationships when distress arises. The parties in those relationships can then take advantage of the incompleteness to extract individual gains from each other — to hold each other up.

Id. (footnotes omitted); *see also* Anthony Casey, Joshua Macey & Edward Morrison, *What Happens After the Supreme Court's Debacle in* Purdue Pharma*?*, HARV. L. SCH. BANKR. ROUNDTABLE (July 18, 2024), https://bankruptcyroundtable.law.harvard.edu/2024/07/18/what-happens-after-the-supreme-courts-debacle-in-purdue-pharma [https://perma.cc/S9FT-V3B6] ("Bankruptcy is the only procedure in the United States that can fix th[e] hold-out problem.").

[189] Casey, *supra* note 185, at 1716 (footnote omitted).

creditor and stakeholder behavior as the main problem that bankruptcy law should address and resolve.[190]

Regardless of which theory of reorganization one accepts as underpinning corporate bankruptcy norms, creditors and other stakeholders are the potential problems that bankruptcy law should address, not the debtor's behavior that led it to the bankruptcy court's doorstep. Moreover, as a general matter, debtors in Chapter 11 are meant to be protected during the proceeding; their autonomy and agency should generally be shielded from destructive creditors and stakeholders (pp. 69, 75).[191]

This congressional grace extends even to the alleged worst of nonhuman filers, like corporations whose creditors include thousands of people grievously injured by their products. That is to say, there is no mechanical presumption of abuse for a solvent corporate filer who does not hide the fact that its Chapter 11 bankruptcy filing is intended as a litigation strategy designed to limit its financial liability from allegations of decades of tortious behavior.[192] Such a corporate filer is not categorically excluded from bankruptcy. By contrast, bankruptcy law mechanically scrutinizes individual debtors based on an unsupported fear of abuse.[193] The requirement of discretionarily determined "financial distress" as a prerequisite for a valid Chapter 11 petition compared with the mechanical means test applied to every individual Chapter 7 filer illustrates this point.[194]

1. Means Testing v. "Financial Distress": An Example. — BAPCPA ushered in a means test to determine whether an individual Chapter 7 filing is presumptively abusive.[195] Before the passage of the means test (with its mechanical presumption of abuse), Congress relied on a "substantial abuse" standard to weed out bad-faith individual filers.[196] In 2001, during the height of the bankruptcy wars, Jacoby, then an assistant law professor, noted that "[t]he Bankruptcy Code [did] not define

---

[190] *See id.* at 1734 ("[B]ankruptcy measures will properly target actions involving or affecting investments specific to relationships that relate in some way to the debtor or the debtor's going concern," whereas "[a]ttempts to fix other problems, while potentially valid, are not bankruptcy measures." (footnote omitted)).

[191] Jacoby writes: "Chapter 11 was designed to boost the odds that a company [could] reorganize and continue to operate, under ordinary management" (p. 75). For example, Jacoby observes that Chapter 11 "reflects a policy unabashedly in favor of reorganizing distressed companies" because, in part, "keeping viable companies alive is said to foster competition in a robust marketplace and to preserve jobs" (p. 127).

[192] *See* Jacoby, *supra* note 15, at 507 & n.57.

[193] *See id.* at 507.

[194] *See id.* at 499 (discussing "financial distress" as a factor considered by appellate courts for corporate bankruptcy cases); Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, But Practical Irrelevance, Of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 253–55 (2001) (describing the operation of the means test).

[195] *See* 11 U.S.C. § 707(b)(2); *see also* Jacoby, *supra* note 194, at 253–55 (discussing the means-testing provisions of BAPCPA's precursor bill).

[196] *See* Jacoby, *supra* note 194, at 257.

'substantial abuse'" and consequently, while "some courts evaluate[d] substantial abuse primarily based on debtors' ability to pay, many consider[ed] a variety of factors, including the types of problems that contributed to the debtor's financial downfall."[197] In other words, the pre-BAPCPA Code embraced the notion that financial distress was complicated and not subject to an on/off switch based purely on the debtor's balance sheet.

The logic of the means test is that individual filers who purportedly can pay back at least a portion of their debts, as determined by a statutory formula, are presumptively abusing the bankruptcy system if they attempt to receive a relatively speedy Chapter 7 discharge.[198] Indeed, Congress seemed to believe that personal financial responsibility was so far beyond the capacity of general individual filers that the only way to shore up the Code against abuse was to use a relatively inflexible mathematical formula. Thus, through its implementation of means-tested bankruptcy for individual filers, "Congress intended to make chapter 7 less welcoming, harder to navigate, and more expensive in order to encourage [individual] debtors to end their careless spending, stick to a budget, and repay their debts."[199]

Importantly, even though corporate entities and other fake filers may be debtors in Chapter 7, Congress mandated means testing *only* for real people.[200] If a fake person decides to liquidate in Chapter 7, their choice of chapter is generally honored in the first instance.[201] Similarly, there is no mechanical, one-size-fits-all means-tested barrier or other inherent presumption of abuse when filing a Chapter 11 petition, even though it too provides a relatively speedy discharge of debts.[202] Instead, consistent with the debtor-friendly norms that underpin Chapter 11, even technically solvent companies can enter Chapter 11, subject to more discretionary limits like "cause"[203] and lack of "good faith."[204] In the absence of a mechanical test, courts consider a range of factors to assess the legitimacy of a Chapter 11 filing, including "degree of financial distress"[205] of the filer and "whether the [debtor's] petition serves a valid

[197] *Id.* (footnote omitted).

[198] *See* 11 U.S.C. § 707(b)(2)(A)(i).

[199] Dickerson, *supra* note 109, at 627–28.

[200] 11 U.S.C. § 707(b)(1) (applying the means test only to "an individual . . . whose debts are primarily consumer debts").

[201] *See id.*

[202] *See* LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint & John & Jane Does 1-1000 (*In re* LTL Mgmt., LLC), 64 F.4th 84, 102 (3d Cir. 2023) (asserting that the Bankruptcy Code does not require "any specific test to apply rigidly when evaluating financial distress").

[203] 11 U.S.C. § 1112(b)(1), (b)(4).

[204] *Id.* § 1129(a)(3).

[205] NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 121 (3d Cir. 2004) (citing, inter alia, *In re* SGL Carbon Corp., 200 F.3d 154, 166 (3d Cir. 1999)).

bankruptcy purpose."[206] This leaves room for even solvent corporate filers, whose alleged malfeasance has precipitated their bankruptcy filing, to avoid being summarily kicked out under a presumption of abuse. Rather, nonhuman filers always begin with the benefit of the doubt, even when their debts implicate the worst of corporate behaviors.

For example, Johnson & Johnson (J&J), through various subsidiaries, marketed and sold Johnson's Baby Powder, a "popular . . . [talcum-based powder] used by or on hundreds of millions of people [in the United States and around the world] at all stages of life."[207] Beginning in 2013, "a wave of lawsuits" were filed alleging that Johnson's Baby Powder and other J&J talc products caused a variety of ailments, including ovarian cancer.[208] Spurred by some early successes before juries and "the U.S. Food and Drug Administration's finding of asbestos traces in a sample of Johnson's Baby Powder . . . and Health Canada's confirmation . . . of a significant association between exposure to talc and ovarian cancer," thousands of additional actions against J&J rolled in, "put[ting] financial pressure" on the company.[209]

In order to mitigate some of its exposure to billions of dollars in potential liability, J&J executed a "divisional merger" under Texas law, in which it "split[] [the subsidiary responsible for Johnson's Baby Powder and other talc products at issue] into two, divide[d] its assets and liabilities between . . . two new entities, and terminate[d] the original [subsidiary]."[210] This process gave birth to LTL Management, LLC (LTL), a new entity to which J&J assigned possession of all of its talc-based liability, and its twin, Johnson & Johnson Consumer Inc., to which J&J assigned "virtually all the productive business assets" inherited from the mother subsidiary.[211] The purpose of the divisional merger was to permit J&J "to isolate the talc liabilities in [LTL] so that [LTL] could file for Chapter 11 without subjecting [Johnson & Johnson Consumer Inc.'s] operating enterprise to bankruptcy proceedings."[212] Consequently, once formed, LTL filed for Chapter 11 relief, seeking to restructure its talc-based liability separate and apart from the ordinary operation of Johnson & Johnson Consumer Inc.[213]

Shortly after filing, various talc complainants "moved to dismiss LTL's bankruptcy case," arguing that is was "not filed in good faith."[214] The bankruptcy court denied the motions, reasoning that "the filing

---

206 *Id.* at 120 (citing *SGL Carbon*, 200 F.3d at 165).
207 *LTL*, 64 F.4th at 93.
208 *Id.* at 94.
209 *Id.*
210 *Id.* at 96. The Third Circuit remarked: "While some pejoratively refer to [this process] as the first step in a 'Texas Two-Step' when followed by a bankruptcy filing, we more benignly call it a 'divisional merger.'" *Id.*
211 *Id.* at 93.
212 *Id.*
213 *Id.*
214 *Id.*; *see also* 11 U.S.C. § 1129(a)(3).

served a valid bankruptcy purpose because it sought to resolve talc liability by creating a trust for the benefit of claimants," that "LTL was in financial distress" because LTL's talc-based liability risk "extrapolat[ed] . . . into the future showed the 'continued viability of all J&J companies [was] imperiled,'"[215] and that "LTL's corporate restructuring and bankruptcy were not undertaken to secure an unfair tactical litigation advantage against talc claimants, but constituted 'a single integrated transaction' that did not prejudice creditors and eliminated costs that would otherwise be imposed on [J&J]'s operating business had it been subject to bankruptcy."[216]

On appeal, the Third Circuit reversed the bankruptcy court's decision that J&J's filing was not in bad faith.[217] Writing for the court, Judge Ambro reasoned that "[b]ecause the Code's text neither sets nor bars explicitly a good-faith requirement, we have grounded it in the 'equitable nature of bankruptcy' and the 'purposes underlying Chapter 11.'"[218] The court wrote:

> [G]ood faith falls "more on [an] objective analysis of whether the debtor has sought to step outside the 'equitable limitations' of Chapter 11[, and t]wo inquiries . . . are particularly relevant": "(1) whether the petition serves a valid bankruptcy purpose[;] and (2) whether [it] is filed merely to obtain a tactical litigation advantage." Valid bankruptcy purposes include "preserv[ing] a going concern" or "maximiz[ing] the value of the debtor's estate." Further, a valid bankruptcy purpose "assumes a debtor in financial distress."[219]

With respect to the issue of "financial distress," the court emphasized that a mechanical approach or some other form of means testing was *un*necessary considering the normative goal of Chapter 11 to capture the debtor's value as a going concern.[220] Instead, the court noted that:

> To say, for example, that a debtor must be in financial distress is not to say it must necessarily be insolvent. We recognize as much, as the Code conspicuously does not contain any particular insolvency requirement. And *we need not set out any specific test to apply rigidly when evaluating financial distress. Nor does the Code direct us to apply one.*
>
> . . . .

---

215 *LTL*, 64 F.4th at 98–99 (second alteration in original) (quoting *In re* LTL Mgmt., LLC, 637 B.R. 396, 419 (Bankr. D.N.J. 2022)).

216 *Id.* at 99 (quoting *LTL*, 637 B.R. at 407).

217 *Id.* at 111.

218 *Id.* at 100 (quoting *In re* SGL Carbon Corp., 200 F.3d 154, 161–62 (3d Cir. 1999)).

219 *Id.* at 100–01 (second, fourth, fifth, sixth, and seventh alterations in original) (citations omitted) (quoting 15375 Mem'l Corp. v. BEPCO, L.P. (*In re* 15375 Mem'l Corp.), 589 F.3d 605, 618 & n.8, 619 (3d Cir. 2009); NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 128 (3d Cir. 2004)).

220 *Id.* at 101 (observing that a Chapter 11 proceeding did not serve a valid bankruptcy purpose where it could "preserve no 'value that otherwise would be lost outside of bankruptcy,' showing [its] problems were not the kinds of financial issues Chapter 11 aimed to address" (quoting *Integrated Telecom*, 384 F.3d at 120)).

> . . . [W]e cannot today predict all forms of financial difficulties that may in some cases justify a debtor's presence in Chapter 11. Financial health can be threatened in other ways; for instance, uncertain and unliquidated future liabilities could pose an obstacle to a debtor efficiently obtaining financing and investment. . . . What we can do, case-by-case, is consider all relevant facts in light of the purposes of the Code.[221]

Similarly, when the Third Circuit recently considered the bankruptcy court's subsequent dismissal of J&J's second bankruptcy filing, the court reiterated that present solvency and financial distress warranting a valid bankruptcy filing *were not* mutually exclusive.[222] Instead, the court reaffirmed its position that legitimate financial distress could not be determined by a singular mechanical approach.[223] More than that, the court left open the possibility that LTL could remain solvent while presenting a successful case for financial distress, reasoning that:

> No doubt solvent companies, confronted by mass-tort litigation, can encounter significant financial distress that warrants bankruptcy. And when future insolvency is a realistic possibility based on meaningful evidence — not just the result of a highly speculative "worst-case" scenario — a mass-tort defendant has a viable case for bankruptcy.[224]

Undeterred by the Third Circuit's rebuke, J&J shopped its petition to the more receptive Southern District of Texas, where the bankruptcy court denied the U.S. Trustee and various talc claimants' motion to transfer the case back to New Jersey.[225] Thus, according to court observers: "The case is now set to proceed in a court far from the company's hometown, in a jurisdiction that's more likely to let J&J's plan go forward."[226]

B. Norming the Concentration of Wealth

If even the least sympathetic nonhuman filers deserve rehabilitative grace in the first instance, why shouldn't individual filers receive the same treatment? The lack of any justifiable norm leaves room for critiques that assign to bankruptcy policy a more illegitimate animating force, beyond the relatively simplistic norm of unjustified suspicion. For example, Professor Pistor's arguments on how legal actors, and lawyers specifically, create and concentrate wealth through legal innovation in order to serve the wealth accumulations of their clients, map on to the

---

221 *Id.* at 102 (emphasis added) (citations omitted) (citing *SGL Carbon*, 200 F.3d at 163; *Integrated Telecom*, 384 F.3d at 121).

222 *In re* LTL Mgmt., LLC, Nos. 23-2971 & 23-2972, 2024 WL 3540467, at *4 (3d Cir. July 25, 2024).

223 *See id.*

224 *Id.*

225 Jonathan Randles & Steven Church, *J&J's Court-Shopping Win Highlights Irresistible Bankruptcy Tool*, BLOOMBERG L. (Oct. 11, 2024, 11:53 AM), https://news.bloomberglaw.com/bankruptcy-law/j-j-talc-bankruptcy-will-stay-in-texas-boosting-settlement-odds [https://perma.cc/P5AW-73BJ].

226 *Id.*

story that Jacoby tells in her book, providing another explanation for bankruptcy policy.[227]

Pistor posits that lawyers, not legislatures, are the principle innovators in "the creation and distribution of wealth in society" through their work to concentrate wealth in their clients.[228] Pistor argues that lawyers innovate "priority and durability rights," while ensuring that those rights are universal as "against the world such that others will yield."[229] Having encoded these priority, durability, and universality rights into the law in this regard, private lawyers then encode their clients' rights "to convert their [wealth] into state money when [their clients] can no longer find private takers."[230] Thus, capital, that is, wealth, "is coded in law, and, more specifically, in institutions of private law, including property, collateral, trust, corporate, bankruptcy law, and contract law."[231]

Pistor expressly understands bankruptcy law as part of the "code of capital,"[232] arguing, for example, that with its express focus on priority of competing claims, "[b]ankruptcy can . . . be called the acid test for the legal rights that have been created long before" financial distress materializes.[233] Bankruptcy rules like the preferential treatment of secured creditors over unsecured creditors exist simply because lawyers innovated a nonbankruptcy system of priority of claims against an asset and then preserved that ordering in the bankruptcy system.[234]

In the context of the bankruptcy wars that led up to the passage of BAPCPA, Pistor's insights illuminate the disparity of treatment between real and fake debtors. For example, the credit industry, including its lobbyists and legal representatives, was the principal pusher of the profligate individual-debtor narrative that convinced Congress to make consumer bankruptcy a hostile institution (pp. 21–22). They lobbied for the passage of legal innovations in bankruptcy, like means testing, because they meant to preserve their fiscal interests rather than to address any real social policies around alleged individual bankruptcy abuse. Thus, they succeeded in encoding their interests into consumer bankruptcy law over those of financially distressed individuals to whom they hawk their services.

The role of business bankruptcy lawyers in the practical extension of bankruptcy power in Chapter 11 filings also exemplifies Pistor's thesis

---

[227] PISTOR, *supra* note 22, at 162. Jacoby has made a similar point in prior work, arguing that "the field of corporate bankruptcy has been redistricted to wealth maximization, voluntary lenders, and investors." Jacoby, *supra* note 176, at 1716.

[228] PISTOR, *supra* note 22, at 159.

[229] *Id.* at 15.

[230] *Id.*

[231] *Id.* at 21.

[232] *Id.* at 15.

[233] *Id.* at 14.

[234] *See id.* at 13.

insofar as "companies, banks, private equity firms, and other powerful parties" have managed to manipulate bankruptcy rules to serve their "games of chicken that have implications far beyond the world of loans and debt" (pp. 125–26). For example, § 363 of the Bankruptcy Code authorizes the debtor to sell their assets during the pendency of the case "if that is the best way to realize on the value of the estate."[235] The Code originally contemplated that the debtor would merely sell "discrete assets," as necessary, while any proposed sale of an entire company would be accomplished "through a Chapter 11 plan approval process, with creditor voting" (p. 135).[236]

Debtor-in-possession lenders — who provide new capital to the distressed debtor after a filing and are rewarded with elevated priority claims above existing creditors — and their lawyers have, however, "rewrit[ten] bankruptcy law . . . by insisting that the debtor sell itself quickly, without creditor voting, without satisfying the requirements of a Chapter 11 plan, and without trustee oversight" (p. 132). These going-concern fire sales "can cause various kinds of harm" to other stakeholders, like creditors with lower priority such as "workers, retirees, suppliers of goods and services, tort claimants, and many others with insufficient knowledge and leverage for protecting their interests" (p. 136).

Moreover, they "can also be collaterally coercive of future outcomes in the bankruptcy," including by eliminating the prospect of a successful reorganization altogether, notwithstanding that reorganization is supposed to be the animating lodestar of Chapter 11.[237] These sales can also undermine bankruptcy law's internal distributive structure. As Professor Adam Levitin has observed: "[A]n asset sale can effectuate a distribution to creditors that does not comply with the minimum entitlements of the Bankruptcy Code and without being subject to the Code's procedural protections on distributions."[238]

In this regard, private legal actors have stretched the boundaries of bankruptcy law to make room for legal innovations that largely serve the interests of their clients, while undermining other stakeholders in the bankruptcy process.[239] For example, as Jacoby explains, "[t]he quick sale can cause financial harm" to other creditors "because the [quick]

---

[235] Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 874 (2014) (emphasis omitted); *id.* at 892 (affirming "that asset sales are an important source of Bankruptcy-Code-created value").

[236] *Id.* at 877 ("Although the Code drafters contemplated that going-concern sales could be conducted through Chapter 11 plans, such sales now often occur under § 363 instead." (footnote omitted)).

[237] Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1094 (2022).

[238] *Id.*

[239] *See, e.g.*, Lipson, *supra* note 1, at 1614–15 (defining "[s]hadow bankruptcy" as a process by which "unregulated private investors — such as hedge funds, private equity funds, and investment banks — exert [influence] over distressed companies," *id.* at 1614, in turn "privatiz[ing] gains and socializ[ing] losses" through exploitation of "regulatory gaps and ambiguities," *id.* at 1615).

sale did not maximize value or because the privately negotiated sale procedures distorted the distribution of the sale proceeds" (p. 136). Consequently, "workers, retirees, suppliers of goods and services, tort claimants, and many other[creditors] with insufficient knowledge and leverage for protecting their interests in these fast-moving transactions, sometimes with limited or no access to legal representation," lose more than they otherwise might (p. 136). Similarly, in their defense of a minimalist approach to bankruptcy policy with respect to the resolution of mass tort liability, Professors Abbe Gluck, Elizabeth Chamblee Burch, and Adam Zimmerman observe that "repeat-player lawyers have aggressively innovated to deliver bankruptcy's finality for third-party tailcoat riders, like the billionaire Sackler family in [the Purdue Chapter 11 bankruptcy case]."[240]

III. Against Bankruptcy Minimalism

Jacoby's book raises the important question of what role bankruptcy law should play in our market society where all obligations, regardless of their origin, can be reduced to a mere dollar figure. Given that the bankruptcy power is "extraordinary"[241] and, by design, "coercive,"[242] the debate has heated up against the backdrop of recent public litigation, namely amidst corporate entities' invocation of bankruptcy law in order to manage their mass tort liability.[243] This development has produced a strong minimalist argument against an expansive bankruptcy power, which reflects Jacoby's own minimalist position on the rightful place of bankruptcy going forward.

At least with respect to socially relevant public liability or "social debt,"[244] the bankruptcy minimalists rest their position on bankruptcy law's general lack of democratic credentials to resolve these issues in the first instance.[245] Minimalists argue against those who favor a practical bankruptcy maximalism, wherein bankruptcy functions as an

---

[240] Gluck, Burch & Zimmerman, *supra* note 20, at 544.

[241] *Id.*; *see also* Levitin, *supra* note 237, at 1121 (commenting that "[b]ankruptcy law has a tendency to normalize the extraordinary").

[242] Levitin, *supra* note 237, at 1089.

[243] Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1161 (2022).

[244] Lipson, *supra* note 25, at 43 (defining social debt as "financial liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent governance failures of transparency and accountability"); *see also, e.g.*, *In re* TGP Commc'ns, LLC, 662 B.R. 795, 811 (Bankr. S.D. Fla. 2024); Casey & Macey, *supra* note 20, at 975 & nn.8–10 (listing "scholars, policymakers, and media commentators [who] have argued that bankruptcy proceedings provide an improper forum for resolving [mass tort liability] cases" (footnotes omitted)).

[245] *See, e.g.*, Gluck, Burch & Zimmerman, *supra* note 20, at 544; Lipson, *supra* note 25, at 47 ("Purdue Pharma's bankruptcy bargains not only undercut transparency and accountability; they were also a bad deal.").

appropriate site for the efficient aggregation of claims.[246] They understand bankruptcy as a kind of path of least resistance to the protection of all interests involved and implicated by mass liability, whether public or private, debtor or creditor.[247]

Bankruptcy minimalism has both an instrumental and moral appeal in the context of mass tort crises like Johnson & Johnson's attempts to enter bankruptcy admittedly to isolate and then slough off its talc liability in the face of thousands of seriously ill claimants and their families, or the Purdue Pharma bankruptcy case in which the opioid crisis is playing out amidst a game of "bankruptcy hardball."[248] It is appealing instrumentally because minimizing bankruptcy encroachment into areas of large-scale social concern would protect the judicial democratic process and its broad concern for social values like transparency and accountability.[249] Morally, bankruptcy minimalism is appealing because it plays into notions of fairness and justice when one considers the vast profits that companies like Johnson & Johnson or Purdue Pharma have made while allegedly knowingly hawking products that were dangerous to ordinary Americans.[250]

Appealing as these minimalist arguments may be in the specific mass tort context, they are inconsistent with arguments that bankruptcy should have maximal effect in certain cases, particularly in the individual context.

A. Minimalism in Bankruptcy Policy

The Bankruptcy Code authorizes bankruptcy courts to resolve all existing and potential future "claims" that flow from the debtor's actions taken before the moment of filing.[251] The Code defines a "claim" expansively to include essentially any "right to payment"; it does not matter whether this monetary obligation sounds originally in contract law, criminal law, tort law, family law, constitutional law, etc. (p. 128).[252] Put differently, as long as a creditor's right as against the debtor can be

---

[246] *See, e.g.*, Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J.F. 1016, 1052 (2024).

[247] *Id.* at 1051.

[248] *See, e.g.*, Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 748 (2020) (arguing that "the norms restraining managers of distressed firms from declaring all-out war on creditors have been fading since the financial crisis" and that "[m]anagers are now playing what we call 'bankruptcy hardball' with creditors"); *see also* Simon, *supra* note 243, at 1205 (describing the Sacklers as "bankruptcy grifters" and observing that "[c]ongressional action would be the cleanest way to address the overall problem of bankruptcy grifters" because through "approving changes to the Bankruptcy Code, legislators could decide precisely what sort of nondebtor releases are permitted, under what circumstances, and at what cost").

[249] *E.g.*, Gluck, Burch & Zimmerman, *supra* note 20, at 528–29.

[250] *See, e.g.*, Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1266 (2023).

[251] 11 U.S.C. § 101.

[252] *Id.* § 101(5). Jacoby argues that "[b]ankruptcy law's definition of claim goes well beyond what the average person considers a debt" (p. 128).

reduced to money, that right is vulnerable to being extinguished in a bankruptcy proceeding.

In light of their authorization to impose a final, global resolution of rights to payment, coupled with our policy of "translat[ing] policy problems into money" (p. 6), bankruptcy courts have entertained claims related to controversies that implicate broad social concerns — like liability stemming from mass torts, the opioid crisis, entrenched racism and sexism in consumer mortgage markets, widespread child abuse in the Catholic Church, abortion, child support, and others — whose resolution should otherwise fall within the purview of the legislature, state courts, and/or Article III federal courts.[253] Thus, as Gluck, Burch, and Zimmerman observe, "[b]ankruptcy courts . . . are the only American courts that can overcome federalism's jurisdictional boundaries," and that "have the power to commandeer both state and federal litigants into a single forum and halt all other civil litigation, no matter what court it is in."[254]

B. The Purdue Pharma/Opioid Crisis Spark

In 2019, Purdue entered Chapter 11 following its principal role in the opioid crisis,[255] "one of the largest public health crises in this nation's history."[256] Purdue proposed a plan of reorganization that would have released members of the billionaire Sackler family, Purdue's former owners, from any existing or future liability for their role in Purdue's willful promotion and sale of highly addictive opioids.[257] The proposed release was breathtaking in its scope. As the Supreme Court explained:

> The release sought to void not just current opioid-related claims against the [Sacklers], but future ones as well. It sought to ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue. It sought to extinguish not only claims for negligence, but also claims for fraud and willful misconduct. And it proposed to end all these lawsuits without the consent of the opioid victims who brought them. To enforce this release, the Sacklers sought an

---

[253] *See* Jacoby, *supra* note 176, at 1716 ("In addition to basic capital structure problems, bankruptcy dockets and courtrooms contain allegations of sexual harassment, race discrimination, systemic financial risk, First Amendment issues, toxic and defective products (medical devices, airplanes, and automobiles), global warming litigation, and pyramid schemes.").

[254] Gluck, Burch & Zimmerman, *supra* note 20, at 528.

[255] Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2078–79 (2024).

[256] *Id.* at 2078 (quoting Purdue Pharma, L.P. v. City of Grande Prairie (*In re* Purdue Pharma L.P.), 69 F.4th 45, 56 (2d Cir. 2023)) (observing that "Purdue sits at the center of [the opioid crisis]"); *see also* Simon, *supra* note 243, at 1186 ("The United States is in the midst of a legal reckoning with the opioid industry," and "[t]he opioid crisis continues to ravage communities across the country with little end in sight.").

[257] *Purdue Pharma*, 144 S. Ct. at 2078–79 ("Purdue marketed OxyContin for use in 'a much broader range' of applications, including as a 'first-line therapy for the treatment of arthritis.'" (quoting *In re* Purdue Pharma, L.P., 635 B.R. 26, 42 (S.D.N.Y. 2021))); *see also* Simon, *supra* note 243, at 1166–67 ("Businesses using bankruptcy to obtain relief from mass-tort liability have also brought with them relief for nondebtor third parties.").

> injunction "forever stay[ing], restrain[ing,] and enjoin[ing]" claims against them. That injunction would not just prevent suits against the company's officers and directors but would run in favor of hundreds, if not thousands, of Sackler family members and entities under their control.[258]

In exchange for this third-party release,[259] the Sacklers pledged a fraction of their vast Purdue-sourced fortune[260] to the Purdue bankruptcy trust to help pay eligible claims.[261] For example, with respect to individual tort claimants, Purdue's plan of reorganization proposed "to provide payments from a base amount of $3,500 up to a ceiling of $48,000 (for the most dire cases, and all before deductions for attorney's fees and other expenses)."[262]

The bankruptcy court approved Purdue's plan of reorganization over the objection of several of Purdue's tort creditors, and the United States Trustee appealed the approval all the way to the Supreme Court.[263] During the 2023 Term, the Court in *Harrington v. Purdue Pharma L.P.*[264] considered whether the Bankruptcy Code, as a general matter, authorizes nonconsensual third-party releases, like the one Purdue included in its plan, in the first instance,[265] and the Court concluded that the Bankruptcy Code does not.[266]

C. *Urging Minimalism in Bankruptcy Policy*

The academic debate about bankruptcy's proper role in the resolution of mass tort liability came to a head in the context of the Purdue case's journey through the federal courts. The bankruptcy minimalists

---

[258] *Purdue Pharma*, 144 S. Ct. at 2079 (final three alterations in original) (citations omitted) (quoting Joint Appendix, Volume 1 at 279, *Purdue Pharma*, 144 S. Ct. 2071 (No. 23-124)) (citing Joint Appendix, Volume 1, *supra*, at 117–90, 193).

[259] Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 411 (2021) (explaining that a third-party release is deployed in bankruptcy "to insulate third parties from liability even though they have not undertaken the burdens of bankruptcy").

[260] Press Release, Comm. on Oversight & Accountability Democrats, Committee Releases Documents Showing Sackler Family Wealth Totals $11 Billion (Apr. 20, 2021), https://oversightdemocrats.house.gov/news/press-releases/committee-releases-documents-showing-sackler-family-wealth-totals-11-billion [https://perma.cc/NG4D-UW8Y].

[261] *Purdue Pharma*, 144 S. Ct. at 2079; *see also* Simon, *supra* note 243, at 1189 ("The Sackler contribution is significant but controversial given (1) the family's direct involvement in, and profit from, opioid marketing that caused significant harm; and (2) evidence that the family has hidden assets overseas and beyond the grasp of claimants.").

[262] *Purdue Pharma*, 144 S. Ct. at 2079 (citing, inter alia, Joint Appendix, Volume I, *supra* note 258, at 573–85).

[263] *Id.* at 2079–80 ("Thousands of opioid victims voted against the plan too, and many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent." *Id.* at 2079 (citing *In re* Purdue Pharma, L.P., 635 B.R. 26, 35 (S.D.N.Y. 2021))).

[264] 144 S. Ct. 2071 (2024).

[265] *See id.* at 2081 ("The question we face thus boils down to whether a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors*.").

[266] *Id.* at 2088 (holding that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants").

argued that in the first instance, bankruptcy should not be the forum where certain nonhuman filers look to find global relief from inconvenient, potential liability for alleged public harms.[267] Rather, bankruptcy's rightful role begins only after the underlying democratic court processes have run their course, and the filer is experiencing some legitimate form of financial distress.[268]

For example, concerned with the "swelling tide" of large, solvent corporate actors[269] using bankruptcy as a "salve for inefficient or unresolvable mass litigation in our intentionally redundant federalist litigation system,"[270] rather than to address true financial distress, Gluck, Burch, and Zimmerman caution that the bankruptcy "superpower" should not be invoked strategically to "trump[] all other[] [state and federal courts] in public litigation."[271] They worry that companies like Purdue and Johnson & Johnson subvert the democratic functions that traditional court systems are meant to play in our society when they circumvent state and federal court systems[272] in the name of "a final and centralized end to litigation in the past, present, and future" in bankruptcy.[273] Indeed, they posit that with respect to large-scale public litigation, the resolution of monetary liability is not the only interest at stake.[274] Consequently, "the more bankruptcy's unique features draw these [mass tort] cases in, the more distance we create from the traditional trial system's public values: transparency, accountability, participation, law development, due process, educating the public, jurisdictional redundancy, and more."[275]

Levitin similarly posits that "the increasingly illusory nature of appellate review" of bankruptcy court decisions, coupled with "the ability of debtors to handpick the [bankruptcy] judge for their case,"[276] has galvanized the incidence of unduly "coercive tactics,"[277] like the use of third-party releases[278] as a bargaining chip, in Chapter 11 cases.[279]

---

[267] *E.g.*, Foohey & Odinet, *supra* note 250, at 1266 (arguing that bankruptcy resolution is a way to silence the claims of injured tort victims and their families).

[268] Gluck, Burch & Zimmerman, *supra* note 20, at 528–29.

[269] *Id.* at 527; *see also id.* at 532 ("Our main concern is primarily those cases in which bankruptcy is used intentionally, especially by those not in financial distress, as a strategy to avoid all pretrial process.").

[270] *Id.* at 527.

[271] *Id.* at 528.

[272] *See id.* at 550–51.

[273] *Id.* at 528.

[274] *See id.* at 530 ("If the sole goal of litigation in public-health suits is money, then perhaps bankruptcy is an answer.").

[275] *Id.* at 528–29.

[276] Levitin, *supra* note 237, at 1121.

[277] *Id.* at 1084.

[278] *Id.* at 1106 (observing that "[t]hird-party releases are among the most controversial issues in Chapter 11 bankruptcy").

[279] *Id.* at 1088 ("The convergence of these trends is far more problematic than any single trend in isolation.").

Levitin argues that "[s]uch a system upsets Chapter 11's carefully calibrated balance between debtor and creditor rights and gives debtors and their favored creditor allies free rein to use bankruptcy to trample disfavored creditors, such as tort victims."[280]

Professors Pamela Foohey and Christopher Odinet argue that Chapter 11 bankruptcy threatens to "[s]ilenc[e] people and sweep[] the alleged [tortious] harms under the proverbial rug"[281] when invoked in the context of mass tort cases, a variety of what they call "onslaught litigation."[282] Foohey and Odinet focus on the preservation of procedural justice in bankruptcy, as "[p]roviding procedural justice is key to respecting human dignity and to meeting the requirements of due process."[283] Thus, they posit that in Chapter 11, "corporations' use of bankruptcy to deal with onslaught litigation is designed to cut short survivors' process for coping with alleged harms, cabin discovery about the alleged wrongdoing, and bury the possibility of future public exposure to the problems."[284] This is an untenable tradeoff for global resolution in bankruptcy.

These arguments are directed against bankruptcy maximalist arguments that posit that as a practical matter, bankruptcy has evolved into a justified form of aggregate litigation. For example, Professors Anthony Casey and Joshua Macey see bankruptcy as the mechanism equipped to "provide[] [the necessary] aggregation [implicated by mass tort claims] with the least cost and the most robust protections for procedural and public-regarding values"[285] like "the opportunity to be heard[] and the right to dissent and appeal."[286] Similarly, Professor Alexandra Lahav argues that "the class action, MDL, and bankruptcy [are] different forms of the same fundamental thing, rather than . . . separate spheres," and understanding them in this way offers "a real practical payoff."[287]

Jacoby too takes a minimalist stance on bankruptcy's applicability to global resolution of social debt. In her discussion of the Purdue case, she raises the democratic implications of bankruptcy plans of reorganization that unduly limit state and other federal legal processes. She asks: "Should federal bankruptcy law have the capacity to terminate your legal rights against Richard Sackler when neither of you is

[280] *Id.* at 1150.

[281] Foohey & Odinet, *supra* note 250, at 1266.

[282] *Id.* at 1264 (defining "onslaught litigation" as "alleged wrongful conduct that produces claims from multiple plaintiffs against the same defendant or group of defendants").

[283] *Id.* at 1316.

[284] *Id.* at 1315 (footnote omitted).

[285] Casey & Macey, *supra* note 246, at 1052; *see also* Casey & Macey, *supra* note 20, at 976–77; Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019) ("Mass litigation is like water, the cases will move to the form of litigation that is the most available, be it the class action, a consolidation of individual cases under the auspices of the MDL, or bankruptcy.").

[286] Casey & Macey, *supra* note 246, at 1037.

[287] Lahav, *supra* note 285, at 1409.

bankrupt?" (p. 161). Moreover, she posits that "[o]verriding the entire civil justice system is a lot to read into the Constitution's skinny little Bankruptcy Clause" (p. 162).

Jacoby is especially concerned with bankruptcy's power to shut down permanently nonbankruptcy legal recourse when post-discharge recoveries in the mass tort context have proven to be unreliable. Specifically, the Bankruptcy Code includes a feasibility standard that purports to ensure that Chapter 11 plans of reorganization are likely to be effective,[288] that is, "unlikely to be followed by liquidation or the need for subsequent reorganization" (p. 204). This step is crucial because once the debtor's plan is approved, its debts are discharged without reference to whether the debtor follows through with its commitments in the plan.[289]

Jacoby notes, however, that as a practical matter "the depth of the feasibility inquiry" is dependent on the degree of contestation of the proposed plan (p. 204). For example, when Mallinckrodt Pharmaceuticals filed a Chapter 11 petition in 2020 in the wake of significant liability stemming from its role in the opioid crisis, the company proposed a plan of reorganization in which it would establish and fund a trust to pay opioid claimants (p. 201). Mallinckrodt promised to contribute $1.725 billion to the trust (p. 202), and "[t]he court accepted the testimony of the company's chief restructuring officer, mostly uncontested, that things were likely going to be fine" (pp. 204–05). The bankruptcy court entered an order approving the plan in March 2022, and its effective date was in June 2022.[290] In August 2023, after transferring just a fraction of the money it promised to the bankruptcy trust, Mallinckrodt filed a second Chapter 11 petition (p. 202). This time around, Mallinckrodt proposed to reduce its outstanding $1.2 billion obligation to the trust to a mere one-time cash payment of $250 million (p. 203). Jacoby writes: "The trust's lawyer described this result as 'gruesome' even as he announced the deal was done. Opioid claimants had no claims or votes in this second case because the first bankruptcy canceled obligations to them. Ordinary commercial claims would get 100 percent of what the company owed them" (p. 203).[291]

That is to say, even though "[u]nfulfilled predictions are not uncommon in any kind of bankruptcy," Chapter 11 "front-load[s] debt relief,"

---

[288] *See* 11 U.S.C. § 1129(a)(11) ("The court shall confirm a plan only if . . . [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.").

[289] *See id.* § 1141(d)(1)(A).

[290] Notice of Occurrence of Effective Date of Fourth Amended Joint Plan of Reorganization (with Technical Modifications) of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code at 1, *In re* Mallinckrodt PLC, 639 B.R. 837 (Bankr. D. Del. 2022) (No. 20-12522).

[291] The author quotes Audio Recording of First-Day Hearing at 19:52, *In re* Mallinckrodt PLC, No. 23-11258 (petition filed Bankr. D. Del. Aug. 28, 2023) (statement of David Molton).

extinguishing the rights of creditors on the basis of a debtor's mere promises memorialized in its plan of reorganization (p. 205). This approach could not be any more different than what happens in Chapter 13, where individual filers only receive a discharge after satisfying their obligations as promised in the Chapter 13 plan (p. 205).

Jacoby's minimalism, however, extends beyond just the issue of fake filers abusing the bankruptcy system to manage their mass tort liability. More broadly, Jacoby concludes her book with the claim that bankruptcy law should merely provide an emergency toolkit for real people *and* fake people in perceptible financial distress (pp. 239–42). She argues that "[t]he most basic function American bankruptcy law serves is to cancel contract-based debts of real people," and that "bankruptcies of enterprises[] [should be guided by] modesty and minimalism" (p. 239). In other words, bankruptcy policy should attempt to accomplish much less than it currently permits, certainly with respect to nonhuman filers, like Purdue Pharma, but also with respect to individual filers' debts that do not originate in contract.

D. A Brief Case for Not Shrinking Bankruptcy

To the extent the minimalist view of bankruptcy is rooted in concerns that bankruptcy undermines underlying democratic processes like the adjudication of claims in state and federal courts, we should worry about how that line of argument may inadvertently undermine the interests of individual filers. For individual filers, bankruptcy is beneficial *because* it undermines democratic processes at state and federal law, like foreclosures, wage garnishment, repossessions, or the legal seizure of nonexempt possessions in satisfaction of outstanding debts. As Professor Chrystin Ondersma argues, "[b]ankruptcy can indeed be extremely valuable even for debtors with relatively low debt burdens" in part because it "puts a stop to garnishment, repossession, eviction, and foreclosure actions"[292] and "can also prevent evictions or foreclosures."[293] Arguably, just like the adjudication of tort liability, the adjudication and enforcement of these underlying democratic processes implicate important public norms like accountability and transparency. Yet it is possible to understand how those norms may have to yield to bankruptcy's superpowers for the greater good. In this sense, arguments about the public benefits of underlying processes, even in the worst cases, proceed on faith that those processes work for all as they promise to.

Similarly, to the extent that what animates bankruptcy minimalist arguments is the idea that entities and individuals who have the means to pay their nonbankruptcy obligations, like the Sackler family or Johnson & Johnson, should be forced to exhaust those options before turning to bankruptcy for relief, this too might have inadvertent effects on

---

[292] Chrystin Ondersma, *Small Debts, Big Burdens*, 103 MINN. L. REV. 2211, 2224 (2019).
[293] *Id.* at 2225.

individual filers. They sound in the register of means testing. Specifically, the idea that a nonhuman debtor must exhibit or satisfy some predetermined, mechanical sense of true financial distress before it can seek protection in bankruptcy seems to map onto the logic of individual means testing that became the heart of the 2005 BAPCPA amendments.[294]

In other words, if Johnson & Johnson may justifiably turn to bankruptcy only after democratic processes vis-à-vis the tort system have duly extracted enough expressive value from its civil prosecution, should that same logic apply to individual filers who may file a bankruptcy to preserve some aspect of their, albeit limited, wealth? For example, relying on data from the 2001 Consumer Bankruptcy Project,[295] Eric Nguyen showed that "parents [were] significantly more likely than nonparents to have filed for bankruptcy in order to save their homes," so as to preserve "their children's home and educational setting."[296] In one sense, this is a strategic use of the bankruptcy system intended to preserve an important asset when underlying democratic processes might dictate that those parents do not get to retain the home.

Thus, in order to avoid inadvertently sanctioning arguments that the credit industry, for example, successfully made to shrink bankruptcy for individuals (p. 22), bankruptcy minimalists must explain why and when the subordination of democratic process (as, for example, occurs when bankruptcy interferes with a state law–sanctioned foreclosure proceeding), is appropriate in one bankruptcy case but not another. For minimalists, then, their challenge in the mass tort context, for example, is to offer a normative account of why nonhuman filers should, as a rule, be treated worse than individual filers.

For her part, Jacoby clearly believes that individuals in financial distress should be able to access the bankruptcy system for help. Indeed, she fought alongside then-Professor Elizabeth Warren for "the fragile middle class"[297] on the front lines of the bankruptcy wars.[298] Yet, to the extent that Jacoby argues in favor of shrinking bankruptcy, her well-intentioned position may inadvertently undermine relief for the most socioeconomically vulnerable. For example, shrinking bankruptcy law to address only debts that are contractual in nature would sanction its current, categorically harsh treatment of involuntary debts like penal

---

[294] *See supra* notes 117–20 and accompanying text.

[295] Eric S. Nguyen, *Parents in Financial Crisis: Fighting to Keep the Family Home*, 82 AM. BANKR. L.J. 229, 235 (2008).

[296] *Id.* at 230.

[297] *See generally* SULLIVAN, WARREN & WESTBROOK, *supra* note 3.

[298] *See supra* section I.B.1, pp. 1331–33.

debt[299] or domestic-support obligations,[300] which are concentrated in historically marginalized communities because of their marginalization. Bankruptcy should provide an avenue for relief in this context.

CONCLUSION

Unjust Debts is an important book. Written to welcome all readers into the world of bankruptcy, the book chronicles the evolution of one of the most important legal institutions in our market-based democracy. Jacoby's brilliance in juxtaposing bankruptcy for real people and bankruptcy for fake people illuminates many of the pathologies that plague current bankruptcy law, including the lack of a normative center that can guide how it approaches debt relief across all debtors. Maybe the latter is too much to ask of one statute. Maybe the solution is that rather than legislating discharge for real and fake people in one statute, Congress might consider separating bankruptcy for real people and bankruptcy for fake people entirely.

This prospect is too much for the present Review. For now, the Bankruptcy Code must fairly address the needs of all the varieties of debtors who step into its arms seeking relief. The rise of mass tort liability creates an environment in which shrinking bankruptcy's reach seems constructive. Yet this context may be a case of bad facts making bad law. If, however, bankruptcy minimization takes hold, efforts to minimize the scope and power of bankruptcy's role must take care to minimize any collateral harm to individuals.

---

[299] *E.g.*, Atkinson, *supra* note 149, at 919–20.

[300] *E.g.*, Nicole Langston, *Discharge Discrimination*, 111 CALIF. L. REV. 1131, 1151 (2023); *see also id.* at 1167 ("Normatively, the consumer bankruptcy system should provide debt relief for individuals that carry burdensome debt, regardless of the type of debt.").