

# Consumer Bankruptcy, Nondischargeability, and Penal Debt

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*This Article examines the issue of categorically nondischargeable debts in the Bankruptcy Code. These debts are excepted from discharge ostensibly because they indicate that the debtor incurred the debt through some misconduct, there is an important public policy at play that requires the debt to be excepted from discharge, or a discharge of certain state-imposed debts raises federalism concerns. Using penal debt as its lens, this Article critiques these analytical frames, arguing that they do not do much work to help explain why some debts are treated as categorically nondischargeable while others that seem to implicate the same concerns are not treated similarly. The practical consequence of this analytical murkiness is that some debtors may look to the Bankruptcy Code for relief from unmanageable debt while others may not. Significantly, this arbitrary line-drawing has negative implications for economically and socially disenfranchised communities in which categorically nondischargeable debts may be concentrated. This Article argues that categorical nondischargeability denies relief from unmanageable and socially undesirable debt to those who are least able to bear the burden of ongoing debt.*

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## INTRODUCTION

On a hot summer’s day in 2014, newly minted eighteen-year-old Michael Brown died at the hands of the state, in the middle of a Ferguson, Missouri, street. His death and the subsequent Department of Justice investigation brought into sharp relief a pervasive system of

profit-motivated justice that binds whole communities with unrelenting and unmanageable penal debt.

“Penal debt”—which includes debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees,<sup>1</sup> and interest—is a significant problem borne disproportionately by over-policed and economically disenfranchised communities. This debt has resulted in a crush of socially undesirable debt spirals in many communities like Ferguson, Missouri, where “nearly a quarter of residents and over a third of children live below the poverty line.”<sup>2</sup> For example, in circa 2013 Ferguson, with its predominantly African-American population of twenty-one thousand and a per capita income of just \$20,472, the Ferguson Municipal Court issued 32,975 arrest warrants for nonviolent offences.<sup>3</sup> The city then routinely jailed individuals who could not pay off the resulting debt.<sup>4</sup>

Ferguson is a cautionary tale of the perverse incentives that have followed the “dramatic expansion” of fines and fees bearing little relationship to traditional goals of civil and criminal liability and fashioned instead to fill in gaps in municipal funding.<sup>5</sup> The vast majority of individuals caught in this web of legal financial obligations are indigent,<sup>6</sup> making slight the likelihood that any significant number of them can afford to pay.<sup>7</sup> When these individuals are

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1. *See Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1727 (2015) (describing usage fees in the criminal context, including arrest, adjudication, and incarceration costs).

2. *Id.* at 1724; *see also* Ta-Nehisi Coates, *The Gangsters of Ferguson*, ATLANTIC (Mar. 5, 2015), <http://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/> [<https://perma.cc/M7HR-SVTQ>] (examining how the Ferguson police force uses black residents of the community to generate revenue).

3. *Developments in the Law—Policing*, *supra* note 1, at 1724.

4. *See, e.g.*, Ryan J. Reilly & Mariah Stewart, *Ferguson Considers Settling Suit over ‘Debtors Prison’ Abuses*, HUFFINGTON POST (Oct. 19, 2015), [http://www.huffingtonpost.com/entry/ferguson-municipal-court-federal-civil-rights-lawsuit\\_us\\_562542a7e4b0bce34701a232](http://www.huffingtonpost.com/entry/ferguson-municipal-court-federal-civil-rights-lawsuit_us_562542a7e4b0bce34701a232) [<https://perma.cc/DP44-NHBC>] (describing Department of Justice report that made this finding and the private lawsuits resulting from it).

5. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 18–23 (2016); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 154–55 (2012) (characterizing the range of fines, fees, and costs that are imposed on defendants as “generally quite new—created by law within the past twenty years”).

6. ALEXANDER, *supra* note 5, at 85.

7. *See* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 1–2, (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/2R6N-RMVN>] (illustrating relationship between inability to pay legal debt and incarceration); *see also* Stephen J. Ware, *Debt, Poverty, and Personal ‘Financial Distress’*, 89 AM. BANKR. L.J. 493, 501 (2015) (“[P]overty (being ‘poor’) generally correlates with low income, and even small debts can quickly overwhelm someone with a very low income.” (citation omitted)).

deemed willful in their failure to pay, the state can seize their bodies.<sup>8</sup> Thus, perhaps most significantly, penal debt occupies an important space in economically disenfranchised communities because it regularly imperils the only asset that individuals who live there are likely to truly possess: their liberty.<sup>9</sup>

Curiously, even though unmanageable penal debt disproportionately sends the most economically vulnerable individuals into socially undesirable debt spirals, our bankruptcy laws—which as a normative matter are focused on stemming that very problem and thus promoting a “fresh start” for unduly overburdened debtors<sup>10</sup>—generally do not permit a debtor to discharge criminal and civil penal debt. Penal debt, along with twenty other categories of debt, is categorically nondischargeable.<sup>11</sup> This exceptional treatment is explained by reference to public policy, misconduct, and federalism concerns. Specifically, the debts subject to the extraordinary treatment of categorical nondischargeability purportedly are incurred through some misconduct, implicate an important public interest or issue, and/or involve some undue encroachment of the federal bankruptcy power onto important state interests or prerogatives.<sup>12</sup>

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8. See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (finding that trial court erred by failing to make determination of willfulness before seizing petitioner); see also Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), [https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/?utm\\_term=.c997ed08e4e3](https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/?utm_term=.c997ed08e4e3) [<https://perma.cc/N24B-VMYU>]:

Bolden didn't show up in court because she didn't have the money to pay it and feared they'd put her jail. It's a common and unfortunate misconception among St. Louis County residents, especially those who don't have an attorney to tell them otherwise. A town can't put you in jail for lacking the money to pay a fine. But you *can* be jailed for not appearing in court to tell the judge you can't pay—and fined again for not showing up.

9. See Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1630 (2015) (“Using the threat of incarceration to pressure low-income people to pay off their debts has become a common strategy of the criminal justice system.”); Beth A. Colgan, *Revising the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 290–91 (2014) (noting that “some people are never able to pay off economic sanctions, [and] the threat of arrest and incarceration may be perpetual”); Bannon, Nagrecha & Diller, *supra* note 7, at 2 (observing that “[a]lthough ‘debtors’ prison’ is illegal in all states, reincarcerating individuals for failure to pay debt is, in fact, common in some—and in all states new paths back to prison are emerging for those who owe criminal justice debt”).

10. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934). See generally Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) (exploring the “fresh-start” policy).

11. See 11 U.S.C. § 523(a) (2012) (listing exceptions to discharge); COLLIER ON BANKRUPTCY ¶ 523.13 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) (categorizing “criminal fines” as an exception to discharge under Section 523(a)(7)).

12. See DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 53–54 (4th ed. 2006) (discussing types of and motivations for Section 523 exceptions).

Yet, many other debts that implicate public policy, stem from debtor misconduct, and/or raise federalism concerns, like environmental liability, tort liability for reckless or negligent behavior, and state income taxes under certain conditions, are readily dischargeable even though, when viewed through the lens of the existing frames, they look very similar to categorically nondischargeable debts. Consequently, this Article critiques the existing analytical frames by arguing that they do not provide a satisfying means for us to understand why some debts are accorded the exceptional treatment of categorical nondischargeability while others are not. The practical consequence of this analytical murkiness is that some debtors have access to relief and a fresh start and others do not. Moreover, this line-drawing has distributional effects across the socioeconomic spectrum, proving to disfavor certain debts along social and class lines. It functions to deny a pathway to debt relief for debtors based on their lower socioeconomic status and the resulting debt they are more likely to carry.

The categorical nondischargeability of penal debt gives some insight into this problem. Penal debt is a useful example because it is an important public policy problem of particular salience in present times. Moreover, as a debt problem that implicates socially undesirable debt spirals in many communities, penal debt falls squarely within the ambit of bankruptcy's principal concern. Yet Congress and the courts have branded it as categorically nondischargeable on the basis of each of the existing frames. On closer view, however, the frames do not explain why penal debt should be treated so exceptionally as compared to other debts that implicate the same concerns. Moreover, the penal debt example gives insight into how the frames themselves are deployed in an oversimplified manner in a set of complex social circumstances that defy such simple classification. More specifically, by categorically excluding penal debt from discharge, bankruptcy law leaves a wide swath of already financially vulnerable people without access to debt relief, even though it is unclear whether the benefits of nondischargeability (for example, deterrence in the penal debt context) outweigh the costs of unrelenting debt in the communities least able to bear it.

Thus, the current crisis of penal debt stemming from the nontraditional use of fines and fees as a source of municipal funding creates an opportunity to reconsider the concept of categorical nondischargeability in the Bankruptcy Code more generally. It helps us to take up the difficult task of trying to resolve the tensions between the corrosive and paralyzing effects of overwhelming debt and policy concerns that, at least in some cases, favor permanent

liability. Bankruptcy scholars and commentators, however, have paid significant attention to neither this treatment of penal debt<sup>13</sup> nor to the broader question of whether, lacking an intelligible organizing framework, categorical nondischargeability frustrates the fresh start by subordinating relief for certain overburdened debtors. In so doing, the literature has overlooked possible reforms to bankruptcy law that could promote what, as a normative matter, bankruptcy is supposed to accomplish: providing a backstop against socially undesirable debt spirals. In that regard, this Article makes a unique contribution to the literature by engaging with the question of categorical nondischargeability as in tension with the fresh start principle. More broadly, through its examination of the nondischargeability of penal debt and its focus on the connection between bankruptcy law and criminal law, this Article aspires to engage with larger questions of debt relief and the social utility of bankruptcy law, with an end to addressing socially undesirable debt.

This Article proceeds in four parts. Part I describes the basic operation of consumer bankruptcy law and its normative orientation, the fresh start. It describes bankruptcy's goal of maximizing ex post productivity while motivating socially optimal risk-taking ex ante. Part II describes the set of twenty-one debts that, fresh start notwithstanding, are categorically excepted from discharge. It focuses on penal debt as an example of an exception to discharge, tracing the history of this exceptional treatment as both a statutory and doctrinal matter. Part III describes the frames that justify categorical nondischargeability: misconduct, public policy, and federalism. It argues that these analytical frames are incoherent to the extent that there is no clear distinction between currently listed debts that are excepted from discharge and other debts that seem to implicate the very same concerns yet are readily dischargeable. Focusing on penal debt, it shows how the frames provide little structure for the notion of categorical nondischargeability where complex social circumstances belie such simplistic, determinative classifications. It further contends that this treatment unduly limits debt relief for the most vulnerable debtors, limiting bankruptcy's utility across the socioeconomic spectrum. It closes by arguing that because the current frames for categorical exception to discharge do not make sense, there is an opportunity for rethinking the concept of categorical nondischargeability, particularly where it tends to subordinate bankruptcy's normative principle, the fresh start. Part IV broadens

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13. Notable exceptions include Margaret Howard, *Bankruptcy Federalism: A Doctrine Askew*, 38 PEPP. L. REV. 1 (2010).

the scope of the Article to suggest how bankruptcy law might take on greater social utility. Moreover, this view is consistent with current scholarly views of bankruptcy utility.

## I. BANKRUPTCY BASICS AND THE FRESH START PRINCIPLE

Consumer bankruptcy is the primary means by which overburdened debtors may discharge unmanageable debt. The bankruptcy discharge is non-waivable,<sup>14</sup> and, proverbially, it represents a “fresh start” for those fortunate enough to receive a discharge.<sup>15</sup> At the outset, it may be helpful to those unfamiliar with bankruptcy law to know some basic aspects of bankruptcy operation. After this primer, I then describe the fresh start principle that operates at the heart of consumer bankruptcy law and dictates the bounds of the discharge of debt.

### A. Bankruptcy Basics

An individual debtor has two principal options for debt relief under the Bankruptcy Code.<sup>16</sup> First, the debtor can file a petition under Chapter 7, in which she turns over her personal assets that are not exempt from collection (generally as determined under state law) to a bankruptcy trustee.<sup>17</sup> The trustee then sells those assets and uses the proceeds to repay the debtor’s creditors on a pro rata basis.<sup>18</sup> The typical Chapter 7 proceeding is a short affair. Because most filers in Chapter 7 have no assets available for liquidation,<sup>19</sup> the result is that general unsecured creditors usually recover little to nothing, while the debtor receives her discharge with the hope of reengaging the market with a renewed financial life.

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14. See Barry Adler, Ben Polak & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 587 (2000).

15. See H.R. REP. NO. 95-595, at 128 (1977) (“Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge.”); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 13 (2000) (“[T]he ‘fresh start’ . . . is the traditional objective of American bankruptcy law, with . . . future income free of old debts.”); Jackson, *supra* note 10, at 1393 (exploring the “fresh-start” policy).

16. Under certain circumstances, individual debtors may also file for bankruptcy protection under Chapter 11. 11 U.S.C. § 109(d) (2012).

17. 11 U.S.C. § 522 (2012).

18. See Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 116 (2011) (summarizing the quick Chapter 7 proceedings).

19. See Dalié Jimenez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) (finding that ninety-three percent of Chapter 7 debtors had no nonexempt assets).

Alternatively, the debtor may choose to reorganize her debts under Chapter 13,<sup>20</sup> where the debtor keeps both exempt and nonexempt assets.<sup>21</sup> In exchange, the debtor must complete a bankruptcy court-approved Chapter 13 plan in which the debtor devotes a portion of future disposable income to the repayment of her creditors over a three- or five-year period.<sup>22</sup> Generally, the court will grant a discharge of eligible debt only if the debtor successfully completes her multi-year Chapter 13 plan.<sup>23</sup>

### *B. Discharge and the “Fresh Start”*

The discharge of debt is the crux of the fresh start principle, which has at its heart a set of consequentialist justifications. In his seminal article on the normative foundation of the fresh start principle, Professor Thomas Jackson reasoned that the non-waivable right of discharge in bankruptcy is properly premised on twin defects in human nature, one volitional and one cognitive, and on the externalities engendered by a waivable discharge right.<sup>24</sup> As to the volitional justification, Jackson described individuals as comprised of two personalities: an “impulse personality” that prioritizes “current gratification” and a “rational self” that prioritizes “postponed gratification . . . in accordance with the individual’s entire set of wants and desires.”<sup>25</sup> Yet Jackson observed that even the impulse personality “will nevertheless favor a rule that requires [it] to defer gratification.”<sup>26</sup> For this reason, the “tendency of individuals to desire external restraints on their impulses provides a basis for” favoring “a socially imposed rule” that subordinates the tendency of the impulse personality and instead “enforce[s] the hypothesized decisions of the [ ]

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20. 11 U.S.C. §§ 1301–1330 (2012).

21. Exempt property is property that under state law cannot be attached for the repayment of debt. The Bankruptcy Code includes a set of exemptions that debtors may select, provided that the debtor’s state permits the filer to select the federal exemptions. 11 U.S.C. § 522.

22. 11 U.S.C. § 109(e) (2012).

23. 11 U.S.C. § 1328(a). Most Chapter 13 filings are dismissed before the debtor receives a discharge, which has caused some to question the efficacy and value of Chapter 13. *See* Porter, *supra* note 18, at 116 (stating that Chapter 7 “account[s] for about two-thirds of consumer filings in recent years”).

24. *See* Jackson, *supra* note 10, at 1418.

25. *Id.* at 1408.

26. *Id.* at 1408 & n.47 (quoting Mark Crain, Thomas Deaton, Randall Holcombe & Robert Tollison, *Rational Choice and the Taxation of Sin*, 8 J. PUB. ECON. 239, 244 (1977)) (studying the behavior of pigeons who “[w]hen offered a choice between [a] small [and] immediate reward and a large delayed reward” will choose the small reward. However, when “offered the choice now to restrict . . . future choices so that they can only select the large delayed reward, [the pigeons] will do so”).

fully rational sel[f].”<sup>27</sup> In the bankruptcy context, the non-waivable bankruptcy discharge causes creditors to “monitor borrowing.”<sup>28</sup> Jackson argued that because this monitoring limits the impulse personality’s tendency to incur debt without reasonable consideration of the future ability to repay it, the discharge “might be the best means to assist individuals in controlling impulsive credit decisions.”<sup>29</sup>

As to the cognitive justification, Jackson described a world in which individuals suffer from “systematic failures in their cognitive processes,” which cause them to “make choices in which they consistently underestimate future risks.”<sup>30</sup> The problem is one of “incomplete information” rather than irrational behavior.<sup>31</sup> These “incomplete heuristics” cause individuals to make present decisions that “do[ ] not give due regard to . . . long-term desires and goals,”<sup>32</sup> in turn causing individuals to “underestim[ate] the risks that their current consumption imposes on their future well-being.”<sup>33</sup> Thus, Jackson concluded that absent some means of regular and widespread self-correction, the non-waivable discharge provides a beneficial corrective mechanism.

Lastly, Jackson argued that the bankruptcy discharge helps to limit externalities that arise from unmanageable debt—debt that a debtor might “systematically ignore” absent a non-waivable discharge rule.<sup>34</sup> For example, Jackson noted that the debtor’s dependents might suffer from the debtor’s decision to forgo a right to discharge unmanageable debts.<sup>35</sup> He also described a social cost attendant to the potential loss of the debtor’s individual productivity: “Requiring debts to be paid out of future income may lead an indebted individual to devote more of his energies and resources to leisure, a consumption item that his creditors cannot reach.”<sup>36</sup> In other words, a debtor who, without relief, must devote her wages to the repayment of unmanageable debt has little incentive to go out into the world and be productive. This is because she would get no benefit from the fruits of

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27. *Id.* at 1408–09.

28. *Id.* at 1409. As the parties who now bear the risk of loss in a bankruptcy proceeding, creditors then have the incentive to make sure that they do not lend to borrowers whose risk of default is too high. *Id.* at 1409–10.

29. *Id.* at 1409–10.

30. *Id.* at 1410.

31. *Id.*

32. *Id.* Jackson defines heuristics as “tools that individuals employ in processing and assessing information.” *Id.* at 1411.

33. *Id.* at 1411–12.

34. *Id.* at 1418.

35. *Id.* at 1419.

36. *Id.* at 1420.

her labor, and in turn she can force the creditor to “bear . . . the costs of [her] decision to substitute leisure for wages.”<sup>37</sup> This loss of productivity in turn is costly to society to the extent that the debtor’s performance of her job has “a social utility that [her wage does] not fully reflect.”<sup>38</sup>

From an economic perspective, Professors Barry Adler, Ben Polak, and Alan Schwartz have further advanced a theory of the fresh start framed in terms of optimal ex ante and ex post efficiencies.<sup>39</sup> They argue that the optimal discharge in consumer bankruptcy would promote two ex ante goals and two ex post goals. As an ex ante matter, the bankruptcy discharge “insure[s] consumers, to the extent possible, against bad income realizations and . . . reduce[s] moral hazard in connection with lending agreements.”<sup>40</sup> As an ex post matter, the discharge allows debtors to voluntarily exchange their right to their own future income “for the [creditors’] right to retain nonexempt assets” and “not excessively [to] lien a debtor’s human capital.”<sup>41</sup>

Taken together, Jackson’s conception of the normative goals of the fresh start and Adler, Polak, and Schwartz’s economic theory of bankruptcy utility suggest that the fresh start is important because the individual who is overburdened with debt is unable to live a productive life and take socially optimal risks that facilitate meaningful participation in the market.<sup>42</sup> From this vantage point, bankruptcy law balances the risk that too much debt will unduly limit productivity ex post against the risk that too much debt relief will unduly encourage risky behavior ex ante.

Thus, discharge in consumer bankruptcy functions to free the debtors who would otherwise be so hampered by unmanageable debt that they would stop contributing to society in a meaningful way.<sup>43</sup>

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37. *Id.* at 1422.

38. *Id.*

39. *See* Adler, Polak & Schwartz, *supra* note 14, at 586–87.

40. *Id.* at 608.

41. *Id.* at 609.

42. *See, e.g.*, A. Mechele Dickerson, *America’s Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 40 (1999) (examining a practical approach to bankruptcy); Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 726 (1980) (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 65 (1973)). From the creditor’s perspective, bankruptcy provides an orderly resolution of outstanding debts in which similarly situated creditors can be assured of equal and fair treatment. *See, e.g.*, Jackson, *supra* note 10, at 1395–96 (arguing that a fresh start policy is consistent with creditors’ needs).

43. *See, e.g.*, Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 414 (2005) (“The fresh start principle captures the notion that substantive relief should be

The optimal scope of bankruptcy discharge rights, then, encourages the debtor to take socially beneficial risks by providing a mechanism to reset her financial life when unmanageable debt interferes with a productive and participatory life.<sup>44</sup>

## II. ON CATEGORICAL NONDISCHARGEABILITY

In light of the fresh start principle, it is a well-established tenet of current bankruptcy law that the right to a discharge should be interpreted broadly.<sup>45</sup> Notwithstanding this norm and its significance to the fresh start principle, there are certain debts that are categorically nondischargeable. This exceptional treatment is in tension with the fresh start principle because, from the outset, certain debtors whose debts are categorically nondischargeable are prevented from bankruptcy relief regardless of how debilitating the debt may be.<sup>46</sup> Rather, concerns about the restrictive and destructive power of unmanageable debt fall away as against alternate concerns about misconduct, public policy, and sometimes federalism, all of which have functioned to support categorical nondischargeability. On closer view, however, these analytical frames—misconduct, public policy, and federalism—are incoherent as applied, insofar as they do not shed light on why certain debts are treated exceptionally as nondischargeable and why others are not.

### A. *Exceptions to Discharge*

Debts that are excepted from a bankruptcy discharge are principally codified in Section 523(a) of the Bankruptcy Code.<sup>47</sup> As

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afforded in the form of forgiveness of existing debt, with relinquishment by the debtor of either existing nonexempt assets or a portion of future income, in order to restore the debtor to economic productivity.”).

44. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“[Bankruptcy] gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.” (emphasis omitted)); Dickerson, *supra* note 42, at 40.

45. *E.g.*, *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) (“In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed . . . .”); *Ryan v. United States (In re Ryan)*, 389 B.R. 710, 713–14 (B.A.P. 9th Cir. 2008) (“[E]xceptions to discharge are interpreted strictly against objecting creditors and in favor of debtors.”); *Kuper v. Spar (In re Spar)*, 176 B.R. 321, 326 (Bankr. S.D.N.Y. 1994) (“[E]xceptions to discharge must be . . . liberally construed in favor of the honest debtor.”).

46. *See Pardo & Lacey, supra* note 43, at 417–18 (“Any exception to discharge, of course, encroaches upon the fresh start principle.” (citing H.R. DOC. NO. 93-137, pt. 1, at 3–4)).

47. 11 U.S.C. § 523(a) (2012).

enacted in 1978, Section 523(a) originally included nine types of categorically nondischargeable debt stemming from: (1) certain taxes; (2) fraud, false pretenses, or false representation; (3) liabilities that the debtor did not list; (4) fraud or defalcation of a fiduciary, embezzlement or larceny; (5) domestic support obligations; (6) willful and malicious injury to property or person; (7) fines, fees, and forfeitures; (8) certain student loans; and (9) liabilities that the debtor did not list in a previous bankruptcy proceeding.<sup>48</sup> Over the last four decades, the list has grown to include a hodgepodge of twenty-one types of debt,<sup>49</sup> including debts incurred to pay fines or penalties imposed under federal election law;<sup>50</sup> debts stemming from certain condominium association fees;<sup>51</sup> debts stemming from filing fees and court costs or expenses that a court assesses on a prisoner filing a civil action, proceeding, or appeal;<sup>52</sup> and debts for certain types of loans owed to a pension, profit-sharing, or stock bonus plan under the Tax Code.<sup>53</sup>

The conventional wisdom is that categorically nondischargeable debts are treated as such because they fall into three broad categories: they stem from debtor misconduct; they implicate an issue “thought to be particularly important,” “where the public policy at issue outweighs the debtor’s need for a fresh start”; or they represent some “mixture of both.”<sup>54</sup> In addition, federalism concerns have also animated bankruptcy policy as to categorical nondischargeability.<sup>55</sup> The treatment of penal debt—which includes debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees,<sup>56</sup> and interest—exemplifies how these

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48. 11 U.S.C. § 523(a) (1978).

49. COLLIER ON BANKRUPTCY, *supra* note 11, ¶ 523.01.

50. 11 U.S.C. § 523(a)(14B) (2012).

51. *Id.* § 523(a)(16).

52. *Id.* § 523(a)(17).

53. *Id.* § 523(a)(18).

54. BAIRD, *supra* note 12, at 53–54; DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 51 (3d ed. 2001); *see also* Grogan v. Garner, 498 U.S. 279, 287 (1991) (observing that creating categorically nondischargeable debts strikes a balance between protecting innocent parties and not rewarding bad actors); Scott F. Norberg, *Contract Claims and the “Willful and Malicious Injury” Exception to the Discharge in Bankruptcy*, 88 AM. BANKR. L.J. 175, 178 (2014) (stating that “§ 523(a) precludes the discharge of certain categories of debts, owed to a particular creditor, including debts for ‘willful and malicious injury’ and other debts for dishonest or other culpable misconduct”).

55. *See Grogan*, 498 U.S. at 283–84 (discussing that both state and federal law govern aspects of the bankruptcy proceeding); Kelly v. Robinson, 479 U.S. 36, 49 (1986) (“This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.”).

56. *See Developments in the Law—Policing*, *supra* note 1, at 1727 (describing usage fees in the criminal context, including arrest, adjudication, and incarceration costs).

frames have worked to justify categorical nondischargeability in the Bankruptcy Code.

### *B. Orienting Examples*

Public policy, misconduct, and federalism, either singularly or in some combination, have functioned to frame the exceptional treatment of other nondischargeable debts in consumer bankruptcy. For example, misconduct and public policy justifications have underpinned the exceptional treatment of student loans, which are listed among Section 523(a)'s list of nondischargeable debts.<sup>57</sup> They are conditionally dischargeable in that a debtor must bring an adversarial proceeding in the course of a bankruptcy filing to establish that the repayment of the loan would constitute an "undue burden" prospectively on the debtor.<sup>58</sup> The apparent challenge of succeeding in meeting this standard, however, renders student loans practically nondischargeable.<sup>59</sup>

Student loans first became nondischargeable in bankruptcy in the mid-1970s just before the Bankruptcy Reform Act of 1978 replaced the existing bankruptcy law with the Bankruptcy Code.<sup>60</sup> Student loans were dischargeable under the bankruptcy laws until 1976 when amendments to the Higher Education Act made federally insured and guaranteed student loans nondischargeable.<sup>61</sup> These changes were suggested by the Bankruptcy Commission, convened by Congress in 1970 to study and suggest changes to the 1898 Act, as amended. The Bankruptcy Commission's report, issued in 1973, reflected its concern that students were increasingly abusing the student loan system by discharging loans in bankruptcy.<sup>62</sup> By one account: "The Commission . . . reacted viscerally to anecdotal evidence of recent graduates who had obtained discharges of their student loans without any attempted repayment and in the absence of extenuating circumstances."<sup>63</sup> This, even though a General Accounting Office study revealed that "less than one percent of federally insured student loans were discharged in bankruptcy."<sup>64</sup> Nevertheless, the Bankruptcy

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57. 11 U.S.C. § 523(a)(8).

58. See Pardo & Lacey, *supra* note 43, at 418.

59. See Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. C.R. & SOC. JUST. 215, 271 (2014).

60. See Pardo & Lacey, *supra* note 43, at 419.

61. *Id.* at 420–21.

62. *Id.*

63. *Id.* at 420.

64. *Id.*

Commission's concerns about potential student abuse and its desire "to reinstate public confidence in the bankruptcy system" motivated the commission to recommend this exceptional treatment of student loans.<sup>65</sup> Congress adopted this approach in the Bankruptcy Code.

Misconduct, public policy, and federalism have also framed the categorical nondischargeability of certain tax debt and debts that have been incurred through some fraud. With respect to tax debt, for example, state income taxes (along with federal income taxes) are dischargeable only under certain circumstances. In order to be dischargeable, the tax must become due at least three years before the bankruptcy filing date, the tax must be assessed within 240 days of the filing date,<sup>66</sup> and the return must have been filed at least two years before the bankruptcy filing date.<sup>67</sup>

### *C. Penal Debt as a Principal Example*

Similarly, penal debt is included in the list of twenty-one nondischargeable debts enumerated in Section 523(a)(7). Specifically, the statute excepts from discharge, "criminal and civil fines, penalties, and forfeitures, that are payable to and for the benefit of a governmental unit,<sup>68</sup> and that are not imposed for pecuniary purpose."<sup>69</sup> In *Kelly v. Robinson*, the Supreme Court further concluded that under Section 523(a)(7), any monetary condition that a court imposes in any part for a penal purpose is also nondischargeable, including state restitution obligations that are calculated based on the actual loss to the victim.<sup>70</sup> Thus, almost any legal financial obligation that can be characterized as penal in nature may be deemed

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65. *Id.* at 420–21.

66. 11 U.S.C. § 507(a)(8)(A)(ii) (2012).

67. 11 U.S.C. § 523(a)(1)(B)(ii) (2012).

68. The Code defines a "governmental unit" as:

United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27) (2012).

69. 11 U.S.C. § 523(a)(7). The text of Section 523(a)(7) provides:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . .

70. See *Kelly v. Robinson*, 479 U.S. 36, 50–53 (1986); COLLIER ON BANKRUPTCY, *supra* note 11, ¶ 523.13.

nondischargeable even if under the plain text of Section 523(a)(7) it should be dischargeable.

### 1. The Historical Treatment of Penal Debt in Bankruptcy

The bankruptcy law has arguably not always treated penal debt in this way. The Bankruptcy Act of 1898, which was the first lasting bankruptcy legislation passed by Congress, did not expressly limit the discharge of penal debt. Section 63 of the 1898 Act described the types of debts that were eligible to be paid in the bankruptcy proceeding.<sup>71</sup> These debts included a “fixed liability” plus interest existing at the time that the petition was filed even if payment was not yet due, provided that the liability was “founded upon provable debts reduced to judgments after the filing of the petition.”<sup>72</sup> Under Section 57 of the 1898 Act, creditors purporting to hold a claim against the debtor’s estate were required to “prove” the claim before it would be “allowed” in the bankruptcy proceeding, i.e., eligible for payment from the debtor’s estate.<sup>73</sup> However, the 1898 Act expressly disallowed “[d]ebts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture . . . except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose.”<sup>74</sup> This meant that these debts were not eligible for payment out of the debtor’s estate.

The 1898 Act, however, also listed a set of four types of debts that were categorically nondischargeable, so-called “debts not affected by a discharge.”<sup>75</sup> These were: (1) federal, state, and municipal tax debts; (2) debts stemming from a judgement based on fraud, obtaining property by false pretenses or willful misrepresentation, or willful and malicious bodily or property injury; (3) debts that were not “scheduled” soon enough to permit the creditor the opportunity to prove them per Section 63; and (4) debts incurred through fraud, embezzlement, misappropriation, or defalcation of the debtor in his capacity as an officer or fiduciary.<sup>76</sup> Debts owing to federal and state governments, including penal debts, were not included in the list.<sup>77</sup> This omission

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71. Bankruptcy Act of 1898, § 63, ch. 541, 30 Stat. 544, 562–63 (repealed 1978).

72. *Id.*

73. *Id.* § 57(d). Creditors could prove their claims by submitting a sworn and signed written statement describing the claim, the consideration exchanged for the claim, any collateral securing the debt underpinning the claim, any payments made on the debt, and the actual amount of the claim (that is, how much the debtor allegedly owed the creditor). *Id.*

74. *Id.* § 57(j).

75. *Id.* § 17.

76. *Id.*

77. *See Kelly v. Robinson*, 479 U.S. 36, 44 (1986).

was perhaps consistent with the historical view that debts owing to the federal sovereign were simply not affected by a bankruptcy proceeding.<sup>78</sup> Yet it was unclear whether this view of nondischargeability extended to the sovereign states. Nevertheless, some courts interpreted the 1898 Act to understand the omission of penal debt from the list of nondischargeable debts to mean that penal debts owing to both the federal and state sovereigns were nondischargeable in bankruptcy under this sovereign exception theory.<sup>79</sup>

In *In re Moore*, the leading case interpreting the treatment of penal debt under the 1898 Act,<sup>80</sup> the District Court for the Western District of Kentucky heard an appeal from a decision of the bankruptcy referee<sup>81</sup> concluding that a penal debt was discharged in a bankruptcy proceeding.<sup>82</sup> On April 6, 1901, Moore was convicted of “keeping and maintaining a nuisance in the nature of a disorderly house” and fined \$400.<sup>83</sup> Moore filed a bankruptcy petition and was adjudged bankrupt. The Commonwealth of Kentucky filed a claim for \$400 against the bankruptcy estate, but the bankruptcy trustee argued that the state’s claim was not a provable debt under the 1898 Act. In other words, the claim was neither eligible to be paid from the estate nor did it survive the discharge.<sup>84</sup>

The district court concluded that while the plain text of the 1898 Act could support this interpretation, it could not have been Congress’s intention to permit the bankruptcy law to usurp the will of

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78. See, e.g., *United States v. Herron*, 87 U.S. 251, 254 (1873) (concluding that the government was “not bound by the general words in the insolvent law,” and that if Congress intended to provide for the discharge of a surety bond guaranteeing “the faithful performance of duty by a public officer,” it would have said so expressly in the law); *United States v. King*, 26 F. Cas. 788, 790 (C.C.D. Pa. 1801) (No. 15,536) (“[W]e are of opinion, that debts due to the United States are not within the provisions of the bankrupt law; but that the debtor, his lands and effects, present and future, are liable to actions and remedies for the recovery, as before the passing of [the bankruptcy] act.”). The *Herron* Court further opined that a rule providing for the discharge of debt owed to the government “would, in all probability, lead to great loss to the public treasury and to great public embarrassment.” *Herron*, 87 U.S. at 263–64.

79. See *In re Moore*, 111 F. 145, 147 (W.D. Ky. 1901) (“[I]n the United States the states and national government are not bound by a general statutory provision whereby any of their prerogative rights, titles, or interests will be impaired, unless by express words or irresistible implication.”).

80. See *id.* at 148.

81. See, e.g., Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1170–71 (2015) (describing the referee system under the 1898 Act).

82. See *In re Moore*, 111 F. at 147.

83. *Id.* at 145–46.

84. *Id.* at 146.

the states to impose unavoidable criminal liability.<sup>85</sup> For the court, “[T]o rule otherwise would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare.”<sup>86</sup> Moreover, the court opined that: “The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditor, as such, and not to punishments inflicted pro bono publico for crimes committed.”<sup>87</sup> Thus, the court reinstated the debt, concluding that only an express legislative act could properly limit the rights and interests of the sovereign, here the state.<sup>88</sup>

Not all contemporary courts adopted the *In re Moore* court’s approach. Two years before, in *In re Alderson*, the District Court for West Virginia considered “whether or not a judgment obtained by a state upon a criminal prosecution is a provable debt, and, if so, whether or not the state has a prior lien upon the estate of the bankrupt.”<sup>89</sup> The debtor in that case owed fines imposed upon his conviction for unlawful retailing. The court noted that because Section 63 clearly defined a provable debt in terms of whether the liability was “evidenced by a judgment,” Alderson’s penal debt, which was established by a criminal judgment, fell into this category.<sup>90</sup> In addition, the court concluded that Section 17’s explicit reference to governmental debts, namely tax debt, as being nondischargeable suggested that Congress did not intend to accord similar treatment to any other category of debt owed to a government entity, including penal debt.<sup>91</sup> Thus, Alderson’s penal debt was discharged. The *In re Moore* court’s approach took hold, however, and the majority of courts considering the issue concluded that penal debt was nondischargeable in bankruptcy. Congress ultimately followed suit, codifying this interpretation in Section 523(a)(7) of the Bankruptcy Reform Act of 1978 (“Bankruptcy Code”), which replaced the 1898 Act.

## 2. *Kelly v. Robinson*

Less than ten years after the passage of the Bankruptcy Code, the Supreme Court decided *Kelly v. Robinson*,<sup>92</sup> which extended the

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85. *Id.* at 149 (“It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace such judgments as the one referred to; but it is well settled that there may be cases in which such literal construction is not admissible.”).

86. *Id.* at 150.

87. *Id.*

88. *Id.*

89. *In re Alderson*, 98 F. 588, 589 (D.W. Va. 1899) (internal quotation marks omitted).

90. *Id.*

91. *Id.*

92. 479 U.S. 36 (1986).

reach of Section 523(a)(7) to state restitution obligations. In *Kelly*, Carolyn Robinson was convicted of welfare fraud in Connecticut after she wrongfully received approximately \$9,000 in welfare benefits. The state court imposed a suspended prison sentence and five years of probation. As a condition of her probation, Robinson was required to pay restitution to the state Office of Adult Probation, paying \$100 per month for the entire five-year term of her probation.<sup>93</sup> The next year, Robinson filed a Chapter 7 bankruptcy petition in which she listed the restitution obligation as a debt. Despite being notified by the bankruptcy court of the filing, the state probation agency did not file a proof of claim or an objection to the discharge of the restitution obligation. The bankruptcy court granted a discharge to Robinson, at which point Robinson had paid just \$450 in restitution.

Three years later, after Robinson received a letter from the state probation office indicating that it considered the restitution obligation to be nondischargeable under the Bankruptcy Code, Robinson returned to the bankruptcy court seeking a declaration that the restitution obligation was in fact discharged.<sup>94</sup> The bankruptcy court sided with the state probation office, reasoning that the restitution obligation was not a “debt” as defined under the Code and that even if it was a debt, it was a nondischargeable criminal fine or fee under Section 523(a)(7). The district court affirmed, adopting the bankruptcy court’s reasoning, but the Second Circuit Court of Appeals reversed. Like the *In re Alderson* court, the appeals court reasoned that the restitution obligation was merely a “debt” under the Code and that the state probation office waived its opportunity to collect on its debt from the bankruptcy estate by not filing either a claim or an objection to the discharge.<sup>95</sup>

The Supreme Court reversed the Second Circuit, expressing “serious doubts” about whether Congress meant to include criminal penalties in the Code’s general definition of debt.<sup>96</sup> In reaching its decision, the Court described the statutory treatment of criminal fines and penalties in the 1898 Act. The Court noted that as a textual matter, “the most natural construction of the [1898] Act . . . would have allowed criminal fines and penalties to be discharged in bankruptcy.”<sup>97</sup> Yet notwithstanding the “clear statutory language,” the Court noted that most lower courts subsequently declined to

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93. *Id.* at 39–41.

94. *Id.*

95. *Id.* at 42–43.

96. *Id.* at 50.

97. *Id.* at 44–45.

discharge criminal fines and penalties in order to avoid interfering with the states' ability to enforce their criminal laws<sup>98</sup> and extended this reasoning to restitution obligations that were imposed as a part of a criminal sentence.<sup>99</sup> Thus, the Court observed, Congress passed the Bankruptcy Code "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders" notwithstanding that the statute was "drafted with considerable care and specificity."<sup>100</sup>

Ultimately, the *Kelly* Court decided that it did not need to reach the question of whether a restitution obligation was a "debt" under the Bankruptcy Code, and it held that Section 523(a)(7) itself "preserves from discharge *any* condition a state criminal court imposes as part of a criminal sentence," including Kelly's probation-based restitution obligation.<sup>101</sup> The Court rooted its decision largely in federalism concerns, specifically its determination to keep bankruptcy law from interfering with the penal objectives and interests of the states. Consequently, notwithstanding the traditional compensatory nature of restitution, Justice Powell wrote that "the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant."<sup>102</sup>

Justice Marshall dissented from the majority's opinion on two grounds. First, he argued that restitution, even though partly penal in nature, is patently pecuniary in nature because it is "intended to compensate victims for their injuries," and to restore "the victim as far as possible, to the position that [he] would have been in if the original criminal act had never occurred."<sup>103</sup> Thus, the restitution obligation at issue was imposed merely as "compensation for actual pecuniary loss" to the state agency and was dischargeable under the express language of Section 523(a)(7).<sup>104</sup> Second, Justice Marshall agreed with the lower court that the restitution obligation was merely a "debt" under the Bankruptcy Code for which the state probation office had a right to payment. He reasoned that in passing the Bankruptcy Code, Congress meant to provide a broad and "meaningful discharge" to debtors, citing legislative history that showed that, in its passage of the Bankruptcy Code, Congress hoped to rectify the "incomplete" relief afforded to

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98. *Id.* at 45–46.

99. *Id.* at 46.

100. *Id.*

101. *Id.* at 50 (emphasis added).

102. *Id.* at 52.

103. *Id.* at 55–56 (alteration in original) (internal quotation marks omitted).

104. *Id.*

debtors under the 1898 Act.<sup>105</sup> For Justice Marshall then, “Congress plainly intended that fines, penalties, and forfeitures be deemed debts eligible to participate in the distribution of the bankruptcy estate, and the statute provides explicitly for that participation.”<sup>106</sup>

### 3. Post-*Kelly* Jurisprudence and Statutory Amendment

As one commentator noted, the *Kelly* Court “[e]ssentially . . . found [nondischargeability of fines, penalties, and civil forfeiture under Section 523(a)(7)] satisfied by a single factor—characterization of the debtor’s obligation as a penal sanction.”<sup>107</sup> Indeed, many courts have interpreted *Kelly* broadly to mean that any financial obligation imposed as part of a sentence or in accordance with a judgment is nondischargeable even if, as a textual matter, the obligation does not meet the requirements of Section 523(a)(7).<sup>108</sup> For example, restitution obligations that are payable to private individuals (rather than payable to and for the benefit of the governmental entity)<sup>109</sup> and some “usage fees”<sup>110</sup> (like the actual cost of prosecution that are not on their face a fine, penalty, or a forfeiture) are nondischargeable in some jurisdictions.<sup>111</sup>

For example, in *Richmond v. New Hampshire Supreme Court Committee on Professional Conduct*, a New Hampshire attorney was disciplined for violating the state’s rules of professional conduct.<sup>112</sup> He was sanctioned and ordered to reimburse the state committee on professional conduct for the *actual* cost of bringing the disciplinary proceedings. Richmond filed a Chapter 7 petition, and the state committee on professional conduct sought to have the debt declared nondischargeable under Section 523(a)(7). Both the bankruptcy court and the district court concluded that the costs were nondischargeable, and the First Circuit Court of Appeals agreed.<sup>113</sup> In reaching its

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105. *Id.* at 56–57 (quoting H.R. REP. NO. 95–595, at 180 (1977)).

106. *See id.* at 58.

107. *See* Howard, *supra* note 13, at 39.

108. *See, e.g.,* City of Philadelphia v. Gi Nam (*In re Gi Nam*), 273 F.3d 281, 287 (3d Cir. 2001) (“Kelly, therefore, stands for the proposition that § 523(a)(7) excepts from dischargeability some penal sanctions that technically are neither fines nor penalties nor forfeitures.”).

109. Troff v. Utah (*In re Troff*), 488 F.3d 1237, 1240 (10th Cir. 2007) (citing *Kelly*, 479 U.S. at 53).

110. *See Developments in the Law—Policing, supra* note 1, at 1727 (describing usage fees in the criminal context, including arrest, adjudication, and incarceration costs).

111. *See, e.g.,* Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct, 542 F.3d 913, 920 (1st Cir. 2008) (listing cases reaching this result in the attorney discipline context); *see also* State Bar of Cal. v. Findley (*In re Findley*), 593 F.3d 1049, 1052 (9th Cir. 2010).

112. *Richmond*, 542 F.3d at 915.

113. *See id.* at 916–18.

decision, the court of appeals noted that it was “irrelevant that the New Hampshire Supreme Court has, in other contexts, stated that attorney disciplinary proceedings are not, strictly speaking, punitive in nature.”<sup>114</sup> Instead, the court reasoned that even though the cost imposed represented the actual amount of money that the state spent in Richmond’s case, the amount was nonetheless more punitive than pecuniary because its primary purpose was “to deter attorney misconduct, protect the public and to rehabilitate the attorney.”<sup>115</sup> Accordingly, the costs were similar in nature to the restitution obligation at issue in *Kelly* and consequently nondischargeable under Section 523(a)(7).<sup>116</sup>

Other courts have taken a more textual approach to Section 523(a)(7) after *Kelly*, limiting its reach notwithstanding that the debt incurred was rooted in the court’s intention to punish the debtor. In *Hughes v. Sanders*, the Sixth Circuit Court of Appeals considered whether damages stemming from a malpractice judgment against an attorney, which were calculated based on actual loss and payable to the private plaintiff, were nondischargeable under Section 523(a)(7).<sup>117</sup> In the underlying malpractice action, the district court had found the attorney-defendant in contempt of court for “abus[ing] the judicial process” and had imposed the judgment with some penal motivation to vindicate the integrity of the court.<sup>118</sup> The court of appeals “reluctantly” concluded that even though “the judgment [wa]s a default judgment entered by the district court in part as a sanction for Sanders’s inexcusable and unprofessional conduct[, that fact did] not change the judgment’s compensatory character.”<sup>119</sup> Thus, the debt was not excepted from discharge under Section 523(a)(7).

For its part, Congress has signaled its approval of *Kelly* by broadening the scope of nondischargeability of penal debt in Chapter 7. As a part of the sweeping Violent Crime Control and Law Enforcement Act of 1994, Congress made restitution obligations

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114. *Id.* at 918. The court opined that the state supreme court likely chose not to characterize the disciplinary proceedings as criminal because “enhanced due process protections and notice requirements would likely apply, a result that the New Hampshire Supreme Court might wish to avoid.” *Id.*

115. *Id.* at 921.

116. *Id.*; see also *U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) (concluding that “so long as the government’s interest in enforcing a debt is penal, it makes no difference that injured persons may thereby receive compensation for pecuniary loss” (emphasis omitted)).

117. 469 F.3d 475, 479 (6th Cir. 2006).

118. *Hughes v. Sanders*, No. 204CV744, 2005 WL 1490534, at \*1 (S.D. Ohio June 23, 2005), *aff’d*, 469 F.3d 475 (6th Cir. 2006).

119. *Hughes*, 469 F.3d at 479.

imposed for violations under Title 18 expressly nondischargeable.<sup>120</sup> Unlike fines, penalties, and forfeitures in Section 523(a)(7), this new Section 523(a)(13) does not require any inquiry into whether the government or a private party is the payee or beneficiary of the restitution or whether the restitution is compensatory in nature. Thus, as a textual matter, all federal restitution obligations imposed under Title 18 are expressly nondischargeable in bankruptcy.<sup>121</sup> Congress, however, did not codify *Kelly's* holding to make state restitution obligations expressly nondischargeable.

To a lesser degree, penal debt is nondischargeable in Chapter 13 as well. In exchange for committing some of their future income to the repayment of their debts, Chapter 13 filers are able to discharge some debts that are nondischargeable in a Chapter 7.<sup>122</sup> Thus, the range of nondischargeable debts in Chapter 13 is smaller than in Chapter 7 due to this so-called “superdischarge” available to Chapter 13 filers.<sup>123</sup> Nondischargeability, however, still factors into a Chapter 13 proceeding. Per Section 1328(a), Chapter 13 filers cannot discharge several of the debts listed in Section 523(a), including certain tax debts;<sup>124</sup> debts incurred through false pretense, false representation, or fraud;<sup>125</sup> domestic support obligations;<sup>126</sup> student loans to the extent they are nondischargeable in a Chapter 7 proceeding;<sup>127</sup> and a “restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.”<sup>128</sup>

Restitution obligations were not initially excluded from discharge in Chapter 13. In *Pennsylvania Department of Public Welfare v. Davenport*, the Supreme Court considered whether a criminal restitution obligation was dischargeable under Section 1328(a).<sup>129</sup> The Davenports were convicted of welfare fraud and

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120. 11 U.S.C. § 523(a)(13) (2012) (“A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . for any payment of an order of restitution issued under title 18, United States Code.”); Pub. L. No. 103-322, 108 Stat 1796.

121. See COLLIER ON BANKRUPTCY, *supra* note 11, ¶ 523.13.

122. See Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 173 (2005). Professor Jacoby points out, however, that after the 2005 amendments to the Bankruptcy Code, “[d]ebtors who finish chapter 13 repayment plans no longer will have earned a substantially broader ‘superdischarge’ than chapter 7 debtors.” *Id.*

123. See 11 U.S.C. § 1328 (2012).

124. *Id.* § 1328(a)(2).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* § 1328(a)(3).

129. See Pa. Dep’t. of Pub. Welfare v. Davenport, 495 U.S. 552 (1990).

ordered to pay restitution to the state probation department, who would then forward those payments to the Pennsylvania Department of Welfare, the victim of the Davenports' fraud. The Davenports filed a Chapter 13 petition and sought a declaration that the restitution obligation was dischargeable. The state agencies did not file a claim, and the bankruptcy court approved the Davenports' Chapter 13 plan, which included the restitution debt as a dischargeable debt.<sup>130</sup>

The Supreme Court held that the restitution obligation was dischargeable in the Chapter 13 proceeding.<sup>131</sup> Leaving *Kelly* intact, Justice Marshall, who had dissented in *Kelly*, took a textual approach to conclude that Congress did not intend to limit the discharge of criminal restitution in Chapter 13 to the same extent that it apparently did in Chapter 7. He reasoned that the restitution at issue was merely a "debt," as that is defined under the Bankruptcy Code<sup>132</sup> as a "liability on a claim."<sup>133</sup> And a "claim" is defined as a "right to payment."<sup>134</sup> Justice Marshall reasoned that, unlike in *Kelly*, where the Court decided that Section 523(a)(7) dischargeability turned on the *purpose* of the obligation (i.e., whether the legal financial obligation is imposed for a penal purpose), here "the language employed to define 'claim' in [the Code] makes no reference to purpose."<sup>135</sup> Justice Marshall further reasoned that, while pre-Code judicial practice supported the *Kelly* Court's conclusion that Section 523(a)(7) nondischargeability applies to all obligations imposed in any part for a penal purpose, Congress intended to limit the exceptions to discharge applicable in a Chapter 13 case by offering Chapter 13 filers access to the superdischarge in exchange for the repayment of some of their debts in a Chapter 13 plan.<sup>136</sup> Thus, for Justice Marshall, the superdischarge, coupled with the Code's broad definition of debt, indicated Congress's intent to make restitution obligations dischargeable under Chapter 13.<sup>137</sup>

Justice Marshall was mistaken. Congress immediately superseded *Davenport* a few months after it was decided, amending Section 1328(a) to make nondischargeable, "any debt for restitution

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130. *Id.* at 555–57.

131. *Id.* at 564.

132. *Id.* at 557–60.

133. 11 U.S.C. § 101(12) (2012).

134. *Id.* § 101(5)(A).

135. *See Davenport*, 495 U.S. at 559.

136. *Id.* at 563–64 ("Congress secured a broader discharge for debtors under Chapter 13 than Chapter 7 by extending to Chapter 13 proceedings some, but not all, of § 523(a)'s exceptions to discharge.")

137. *Id.* at 564.

included in a sentence on the debtor's conviction of a crime."<sup>138</sup> Congress further expanded the scope of nondischargeable penal debt by adding "criminal fine[s]" to Section 1328(a) in 1994.<sup>139</sup>

#### 4. Framing Penal Debt as Nondischargeable

As described above, penal debt of all stripes is largely nondischargeable in consumer bankruptcy. This treatment has similarly been justified with reference to the public policy and misconduct concerns as complemented by further reference to federalism principles. In this last Subsection, I describe the operation of those frames in the specific context of penal debt before critiquing them in Part IV.

The public's interest in punishment, deterrence, and the rehabilitation of law-breakers has served as an important reason why penal debt should not be discharged in bankruptcy.<sup>140</sup> The *In re Moore* court articulated this view in reaching its conclusion that the penal fine at issue was nondischargeable in bankruptcy. Even though, by the court's own admission, the 1898 Act was equivocal on the issue as a textual matter. The court opined: "It seems to me that to rule [that the debt was dischargeable in bankruptcy] would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare."<sup>141</sup> For the *In re Moore* court, it was wrongheaded to conclude that Congress would have sanctioned federal bankruptcy law interfering with the well-being of the public in this way.<sup>142</sup>

Similarly, in *Kelly*, the Supreme Court expressed concern that a pro-discharge interpretation of the statute would impinge on the state's prerogative to serve the public interest through economic sanctions. The Court worried that the prospect of discharge of penal debt might force a state prosecutor "to defend state criminal judgments in federal bankruptcy court."<sup>143</sup> The Court reasoned:

This prospect, in turn, would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems. We do not think

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138. See 11 U.S.C. § 1328(a)(3) (2012); The Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended at 42 U.S.C. 10606) (enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789).

139. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (adding "or a criminal fine" to the language of Section 1328(a)(3)).

140. See, e.g., *Love v. Scott (In re Love)*, 442 B.R. 868, 872 (Bankr. M.D. Tenn. 2011).

141. *In re Moore*, 111 F. 145, 150 (W.D. Ky. 1901).

142. *Id.*

143. *Kelly v. Robinson*, 479 U.S. 36, 49 (1986).

Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges.<sup>144</sup>

Further, in characterizing the restitution obligation at issue there as essentially penal in nature (if not technically so because it was calculated based on the actual amount fraudulently received by the debtor), the Court focused on the public's interest in all aspects of a judgment. It was appropriate to view the restitution order as non-pecuniary because "criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation."<sup>145</sup> Moreover, "restitution orders imposed in such proceedings operate 'for the benefit of' the State" and "are not assessed 'for . . . compensation' of the victim" as is required for nondischargeability under Section 523(a)(7).<sup>146</sup> The Court thus concluded that because "[t]he sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State[, t]hose interests are sufficient to place restitution orders within the meaning of § 523(a)(7)."<sup>147</sup>

Other courts have followed this focus on public policy. For example, the First Circuit Court of Appeals relied on public policy in holding that the costs of an attorney ethics proceeding were nondischargeable. In *Richmond v. New Hampshire Supreme Court Commission on Professional Conduct*, the costs associated with the attorney disciplinary proceeding at issue were by statute calculable based on the *actual* amount that the state supreme court spent in its action against the debtor.<sup>148</sup> Nonetheless, the court rejected the debtor's argument that the debt was pecuniary (and so dischargeable under the plain terms of Section 523(a)(7)). The court reasoned that costs associated with "quasi-criminal"<sup>149</sup> attorney disciplinary actions are nondischargeable because "deterrence, rehabilitation and protection of the public" motivate these actions.<sup>150</sup> Thus, even though the court acknowledged that the New Hampshire Supreme Court had itself stated that "attorney disciplinary proceedings are not, strictly speaking, punitive in nature,"<sup>151</sup> the court concluded that "[i]t is clear that the costs assessed in New Hampshire disciplinary proceedings are not 'purely compensatory,'" and the "cost assessments serve both

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144. *Id.* at 49–50.

145. *Id.* at 52–53.

146. *Id.* at 53 (alteration in original).

147. *Id.*

148. *See* 542 F.3d 913 (1st Cir. 2008).

149. *Id.* at 919.

150. *Id.* at 920.

151. *Id.* at 918.

to deter attorney misconduct and to help rehabilitate wayward attorneys.”<sup>152</sup>

Finally, moral concerns about limiting the discharge privilege to honest debtors who have not incurred their debt through some misconduct have also guided the analysis of the penal debt exception to discharge. Honesty is an important general value in consumer bankruptcy, and it is axiomatic in bankruptcy policy that the privilege of a discharge is not available to the dishonest debtor.<sup>153</sup> Historical views of people who could not pay their debts were that those debtors were moral failures and/or had engaged in some misconduct that brought them to their present destitute condition.<sup>154</sup> Thus, bankruptcy law initially developed as a means of assisting creditors in collecting their due from these perceived reprobates and equalizing distribution amongst similarly situated creditors, with little to no concern for the well-being of the debtor.<sup>155</sup> On this view, the honesty of the debtor in the administration of the proceeding was particularly important because the debtor’s candor was integral to ensure that creditors received their due under the law from the debtor’s estate.<sup>156</sup>

Complete disregard for the debtor’s welfare, however, was not conducive to an efficient recovery for the debtor’s creditors. As it became apparent that the bankruptcy proceeding would go much better if the debtor was cooperative, some concession to the debtor was necessary to encourage candid participation.<sup>157</sup> Hence, the discharge of debts developed in part as a carrot offered to the debtor in exchange

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152. *Id.* at 920 (“Rehabilitation and deterrence are the same public functions that were at issue in *Kelly*.”).

153. *See, e.g.,* *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (“[I]n the same breath that we have invoked this ‘fresh start’ policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the ‘honest but unfortunate debtor.’”); 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, 239 (2002) (“Providing a discharge to honest and unfortunate debtors has long been understood to be an important function of our bankruptcy system.”).

154. *See* Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1613–16 (2011).

155. *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857, 857 (1982), revised and reprinted in CORPORATE BANKRUPTCY: ECONOMIC AND LEGAL PERSPECTIVES 39, 39 (Jagdeep S. Bhandari & Lawrence A. Weiss eds., 1966) (“[T]his discharge-centered view of bankruptcy is correct neither from an historical perspective nor from a realistic appraisal of the presence and operation of most of the provisions in the federal bankruptcy laws over the years.”).

156. *See* Moringiello, *supra* note 154, at 1613.

157. *See* Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1308 (2010) (“Modern American bankruptcy has largely solved the cooperation problem by . . . increasing the availability of discharge . . .”).

for the debtor's candid participation.<sup>158</sup> And, in the Bankruptcy Code, the debtor's honesty and candor in the bankruptcy proceeding itself remains a prerequisite to a discharge<sup>159</sup> along with honesty at the time that the debt was incurred.<sup>160</sup> With respect to the latter, only those debtors who find themselves in financial distress, notwithstanding purportedly honest behavior, can get relief from the bankruptcy court.<sup>161</sup>

Understood through this lens, Section 523(a)(7) purports to limit discharge on debt incurred through misconduct as evidenced by liability for breaking the law. In other words, Congress and courts have relied on actual liability for misconduct as a proxy for dishonesty with respect to criminal and civil fines, penalties, and forfeitures.<sup>162</sup> As explained by one court: “[B]ecause discharge in bankruptcy is not intended to be a haven for wrongdoers, [debtors] may not discharge ‘a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and [that] is not compensation for actual pecuniary loss[.]’ ”<sup>163</sup> Thus, misconduct forms an important basis for the current treatment of penal debt in bankruptcy.

Federalism principles have also animated nondischargeability policy related to penal debt. For example, the *In re Moore* court refused to conclude that federal bankruptcy law could supplant the state's desire to sanction behavior that the state deemed inconsistent with the best interests of its constituents.<sup>164</sup> And federalism concerns similarly underpinned the Court's decision in *Kelly* to expand the

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158. See Moringiello, *supra* note 154, at 1613–16.

159. 11 U.S.C. § 727(a)(2)–(a)(7), (d) (2012); Moringiello, *supra* note 154, at 1613; see e.g., *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (denying a debtor the right to convert his case from a Chapter 7 to a Chapter 13 proceeding because he had misrepresented the value of his home during the proceeding).

160. See 11 U.S.C. § 727(b) (permitting court to deny a discharge for cause); see also Moringiello, *supra* note 154, at 1612–16 (“The Code's sections are explicit in requiring both administrative and moral compliance from the debtor, thus granting relief only to the ‘honest but unfortunate’ debtor.”).

161. Moringiello, *supra* note 154, at 1615 (“[T]here is some bad behavior that renders a debtor unworthy of bankruptcy relief.”).

162. *Ryan v. United States (In re Ryan)*, 389 B.R. 710, 713 (9th Cir. 2008):

A second, countervailing policy consideration is a historic deference, both in the Bankruptcy Code and in the administration of prior bankruptcy law, to excepting criminal sanctions from discharge in bankruptcy. Application of this policy is consistent with a general recognition that, “[t]he principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’ ”

(quoting *Marrama*, 549 U.S. at 367 (emphasis omitted)).

163. U.S. Dep't. of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995) (third and fourth brackets in original).

164. *In re Moore*, 111 F. 145, 150 (W.D. Ky. 1901).

reach of nondischargeability in Chapter 7.<sup>165</sup> The Court cited *Younger v. Harris* for the proposition that bankruptcy law should not authorize federal courts to interfere with state criminal judgments, including restitution obligations.<sup>166</sup> In *Younger*, the Court considered whether a federal court could enjoin a state criminal prosecution where the defendant argued that the state law under which he was being prosecuted was unconstitutional as a matter of federal law.<sup>167</sup> The Court did not decide the case under the Anti-Injunction Act, which prohibits federal courts from enjoining state court proceedings except under a limited set of circumstances, including where Congress has expressly authorized such intervention.<sup>168</sup> Instead, the *Younger* Court decided that the injunction sought by Harris was unjustified as a matter of “Our Federalism.”<sup>169</sup> Thus, the *Younger* Court declined to parse the language of the apparently relevant statute in favor of relying on a more general policy of deference to state court proceedings.

The *Kelly* Court similarly declined to take a textual approach to decide whether the restitution obligation at issue was a “debt” under the Bankruptcy Code and whether it was nondischargeable per the plain terms of the statute. Instead, the Court stated:

Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly the fundamental policy against federal interference with state criminal prosecutions.<sup>170</sup>

The Court dismissed the debtor’s argument that the restitution obligation at issue was dischargeable for a technical reason, namely because the state did not enter an objection to the discharge of the debt.<sup>171</sup> The Court reasoned that this interpretation of bankruptcy law would unduly “force state prosecutors to defend state criminal judgments in federal bankruptcy court” and “[i]n some cases . . . lead

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165. See *Kelly v. Robinson*, 479 U.S. 36, 49 (1986); see also *Casey & Huq*, *supra* note 81, at 1184 (noting that “[b]ankruptcy legislation has long raised federalism concerns”); David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 330–34 (1999) (describing how federalism helped to shape the 1898 Act).

166. See *Kelly*, 479 U.S. at 46–47 (citing *Younger v. Harris*, 401 U.S. 37, 44–45 (1971)).

167. 401 U.S. at 38–41.

168. *Id.* at 54.

169. *Id.* at 43–44.

170. *Kelly*, 479 U.S. at 47 (quoting *Younger*, 401 U.S. at 46) (internal quotation marks omitted).

171. *Id.* at 49.

to federal remission of judgments imposed by state criminal judges.”<sup>172</sup> This outcome was untenable, and the Court relied on the general purpose and goals of the statute rather than reach a conclusion seemingly mandated by the text of the statute.<sup>173</sup>

### III. ASSESSING NONDISCHARGEABILITY’S ANALYTICAL FRAMES

On the surface, the public policy, misconduct, and/or federalism frames seem a reasonable normative justification as to why certain debts should be singled out for the exceptional treatment of categorical nondischargeability, even though such treatment might frustrate the fresh start principle. Yet, their value as a guiding light is deceptive for at least two reasons. First, on closer view, these frames offer an unintelligible means of understanding why as a conceptual matter some debts are categorically nondischargeable and why others are dischargeable. This is reflected by the fact that there is no satisfying distinction between currently nondischargeable debts and other debts that seem to implicate the very same misconduct, public policy, and/or federalism concerns, yet are readily dischargeable. In other words, the existing analytical framing of nondischargeability provides no account of why similar debts are treated dissimilarly along this dimension. Second, as an internal matter, in some circumstances these frames have been deployed simplistically, without reference to the sometimes complex set of circumstances under which that crushing debt might arise. This, in turn, limits bankruptcy relief for those debtors who find themselves carrying crushing yet nondischargeable debt. For this reason, we might consider rethinking our current nondischargeability policy in order to better align bankruptcy policy with its own normative orientation: the fresh start. This would require careful consideration of and accounting for any unintended consequences from a change in the nondischargeability rules.

#### *A. Misconduct, Public Policy, and Federalism and Dischargeability*

Some debts that implicate the same misconduct, public policy, and/or federalism concerns as penal debt or student loan debt are nonetheless fully dischargeable. For example, debts stemming from environmental harms like toxic dumping are dischargeable in a bankruptcy proceeding.<sup>174</sup> This is so even though environmental

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172. *Id.*

173. *Id.*

174. *See, e.g.,* Stanley M. Spracker & James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 BANKR. DEV. J. 85, 88 (1995).

harms and consequent financial liability implicate both the public policy frame—especially to the extent that “[i]mplicit in the environmental laws and paramount in the minds of their enforcers is the notion that economic enterprises must bear the external costs of environmental and public health protection”<sup>175</sup>—and the misconduct frame. Nevertheless, these debts would only be nondischargeable to the extent that an environmental judgment-creditor could shoehorn her claim into an existing category of nondischargeable debt, such as those stemming from willful and malicious injury to property.

For example, in *Ohio v. Kovacs*, the state of Ohio appealed a judgment by the lower courts that a cleanup order, as then converted to a payment obligation, was dischargeable in bankruptcy.<sup>176</sup> William Kovacs, the CEO of Chem-Dyne, “a 10-acre toxic waste dump classified by the government as the worst environmental hazard in Ohio and one of the worst in the nation,”<sup>177</sup> settled by stipulation and judgment entry a lawsuit brought by the state of Ohio alleging violations of state environmental laws.<sup>178</sup> Kovacs, who was personally liable, did not comply with the terms of the settlement, and the state court appointed a receiver to seize both the site and Kovacs’s assets. Kovacs then filed a bankruptcy petition to stay the actions of the receiver, preventing the seizure of his personal assets.<sup>179</sup> As neither side argued that the obligation fell within the list of exceptions to discharge under Section 523(a), the Court considered whether the judgment order was a “debt,” defined as a “liability on a claim,” and therefore eligible for discharge in bankruptcy. The Court concluded that “there is little doubt that the State had the right to an equitable remedy under state law and that the right [was] reduced to judgment in the form of an injunction ordering the cleanup.”<sup>180</sup> The Court affirmed the appellate court’s conclusion that the cleanup order as then converted into an obligation to pay money was in fact a “claim” and thus dischargeable in bankruptcy.<sup>181</sup> This was so even though the bankruptcy discharge came after Kovacs’s misconduct led to his environmental liability. Accordingly, one might conclude that public

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175. *Id.* at 87.

176. 469 U.S. 274 (1985).

177. Penny Chorlton, *Hamilton, Ohio, Struggles with Massive Toxic Waste Cleanup*, WASH. POST. (Nov. 3, 1982), [https://www.washingtonpost.com/archive/politics/1982/11/03/hamilton-ohio-struggles-with-massive-toxic-waste-cleanup/9144394a-5814-4cc7-afef-8be8695b25ac/?utm\\_term=.d7e5d2993e53](https://www.washingtonpost.com/archive/politics/1982/11/03/hamilton-ohio-struggles-with-massive-toxic-waste-cleanup/9144394a-5814-4cc7-afef-8be8695b25ac/?utm_term=.d7e5d2993e53) [<https://perma.cc/JF8U-FCRE>].

178. *Kovacs*, 469 U.S. at 276–77.

179. *Id.* at 276.

180. *Id.* at 278–79.

181. *Id.* at 283.

policy should mandate that individuals who cause such extreme external effects should not be free to discharge debt related to those harms, in part because the discharge frustrates the state's interests in regulating environmental harms within its borders.

This outcome epitomizes the inconsistency of the misconduct, public policy, and/or federalism framing of exceptions to discharge. It is unclear why debt stemming from environmental liability would be subject to discharge while penal debt is not when, as a matter of misconduct, public policy, and federalism, these categories of debt seem very similar. Indeed, contemporaneous accounts of the reckless behavior of Chem-Dyne and the resulting damage to local communities counsel in favor of nondischargeability.<sup>182</sup> Yet, bankruptcy law embraces one debt in its fresh start orientation and excludes the other.

Liability stemming from negligent and reckless tortious conduct arguably similarly implicates the misconduct, public policy, and federalism frames, yet unlike penal debts, these debts are readily dischargeable. For example, in *Kawaauhau v. Geiger*, the respondent-debtor filed for bankruptcy after a state court found him liable for medical malpractice.<sup>183</sup> In addition to the substandard care the respondent provided, he did not carry malpractice insurance that would have compensated the victim of his malpractice, whose leg was amputated above the knee as a result of the respondent's actions. The Court decided that liability stemming from negligent or reckless conduct was dischargeable in bankruptcy and that only liability from an intentional tort was categorically nondischargeable.<sup>184</sup> This, even though the case implicated the debtor's misconduct in incurring the debt, public policy regarding deterrence and more, and the state's interests in regulating the conduct of its medical professionals and compensating individuals from tortious conduct.

Thus, the juxtaposition of categorically nondischargeable penal debt and dischargeable environmental and tort liability exemplifies how the existing misconduct/public policy/federalism framework does little work to shed light on this divide between debts that look alike from a certain vantage point.

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182. See, e.g., Chorlton, *supra* note 177:

The Environmental Protection Agency says that unknown thousands of gallons were poured into massive open-air tanks and allowed to evaporate, broken open with pickaxes and left to drain or leak into the ground, or, as a last resort, tipped into the nearby Great Miami River, via a conveniently located canal.

183. 523 U.S. 57 (1998).

184. *Id.* at 61–64.

*B. Flawed Deployment of the Nondischargeability Frames*

The misconduct, public policy, and federalism frames also suffer from the overly simplistic way in which they have been deployed in complicated situations involving unmanageable debt. Penal debt again provides a lens into the diminished value of these frames as a mechanism for understanding why the fresh start principle should be subordinated in favor of a categorical approach to nondischargeability. Specifically, these frames do not make sense when considered in the context of the evolution of economic sanctions and other legal financial obligations as a state/local government funding mechanism and the regressive effects of these funding arrangements. As described below, this reality undermines existing public policy/misconduct/federalism framing particularly insofar as it subordinates the fresh start principle for a socioeconomic group struggling under the weight of unmanageable debt.

Penal debt is a particularly destructive problem borne of a complex set of social challenges. Profit-motivated justice systems, together with other defects in the justice system, leave entire communities of politically alienated and disempowered individuals in the throes of unmanageable debt spirals. Yet, premised on reference to simplified characterizations of misconduct, public policy, or federalism, bankruptcy law offers no relief, even though its normative mandate is to provide the debtor with a fresh start.<sup>185</sup> Indeed, in light of the expansion of economic sanctions and their use for nontraditional purposes related to government funding, paired with the reality of Ferguson-style administration of justice that focuses its crosshairs on the most vulnerable and economically disenfranchised individuals and communities, the existing nondischargeability analytical frames have little meaningful application.

The public policy rationale has resulted in an unduly under-inclusive bankruptcy policy vis-à-vis penal debt. With respect to punishment, assuming that proponents of deterrence theory are correct about the deterrent effect of sanctions, penal fees that are assessed for relatively innocuous violations of the law, like having too-tall grass, and that target poor and disenfranchised individuals because they are poor and disenfranchised, likely do little to deter misconduct in the traditional sense.<sup>186</sup> These fees are unlikely to

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185. See Jackson, *supra* note 10.

186. There is, of course, a well-developed literature on the virtues and failings of deterrence as a meaningful concept in criminal and civil liability. For the purposes of this Article, I assume that proponents of deterrence theory are correct about the deterrent effects of sanctions. See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 425 (1999):

achieve any of the goals of punishment because what they are truly punishing is poverty. Even a relatively low fine, if unaffordable, can result in catastrophic outcomes particularly when further punishment is meted out for the failure to pay those fines. In the same vein, there are no meaningful rehabilitative benefits when the practical result of incurring a penal fee is being too poor to pay the fine. In other words, while the core concern underlying the public policy rationale might make sense in some cases of criminal and civil fines, in other cases—such as where there is a court fee imposed to make up a shortfall in funding—the nondischargeability of penal debt achieves limited public benefit and instead unduly removes an important option that could address a significant debt problem that disproportionately affects poor people.<sup>187</sup>

Similarly, the misconduct rationale tracks notions of morality that do not account for problems with justice systems, such as the rise of profit-motivated over-regulation. Examples include the civil and criminal prohibition of relatively innocuous behavior, as exemplified by the “Manner of Walking in Roadway” violation in the Ferguson Municipal Code.<sup>188</sup> In that regard, current deficiencies in the criminal and civil justice system show that it is too simplistic a characterization to view alike every individual found liable for breaking the law as having engaged in misconduct. Indeed, many fines and penalties derive from civil offenses where morality and honesty have limited application. For example, in the case of Edward Brown of Jennings, Missouri, his fault was staying in his home of twenty-five years after the city had condemned it and letting his grass grow too high. It is likely that he did not comply with the law because,

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Deterrence theorists typically assess the efficiency of a punishment for its contribution both to “general deterrence,” which refers to the effect that punishing a particular offender has on the behavior of the population generally, and to “specific deterrence,” which refers to the impact of a punishment on the offender’s own behavior, a usage that brings the aim of incapacitation within the ambit of deterrence broadly understood.

*But see id.* at 418 (“[B]y leaching the meaning out of criminal law, deterrence rhetoric extinguishes a powerful resource for reshaping the social norms that construct unjust systems of status and privilege.”).

187. See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 775–76 (2010) (noting that in other contexts, bankruptcy courts often “resolve difficult, politically fraught disputes”).

188. See Complaint at ¶ 88, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. Feb. 10, 2016), <https://www.justice.gov/opa/file/823486/download> [<https://perma.cc/CTK3-E4HX>] [hereinafter *Ferguson Complaint*].

rather than being essentially dishonest, he had nowhere else to live but in that broken-down dwelling on his limited income.<sup>189</sup>

Selective and discriminatory enforcement in federal, state, and municipal justice systems also complicates the reliance on overly simplified and formalistic notions of misconduct based on civil and criminal liability. The Ferguson Report observed that “Ferguson’s law enforcement practices overwhelmingly impact African Americans.”<sup>190</sup> While African Americans made up sixty-seven percent of the population of Ferguson, between 2012 and 2014, they accounted for “85% of vehicle stops, 90% of citations, and 93% of arrests.”<sup>191</sup> Moreover, the Report also observed that the Ferguson Police Department “appears to bring certain offenses almost exclusively against African Americans,” such as “Manner of Walking in Roadway,” which carries a \$302 fine and “Failure to Comply,” which carries a \$527 fine.<sup>192</sup>

Professor Michelle Alexander has also described the degree to which race has unduly played a factor in who has been arrested and charged in the War on Drugs.<sup>193</sup> She describes how over-policing and the effective criminalization of poverty that developed in the wake of the War on Drugs disproportionately affected people of color.<sup>194</sup> Thus, “[a]lthough the majority of illegal drug users and dealers nationwide are white, three-fourths of all imprisoned for drug offenses have been

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189. See Joseph Shapiro, *Jail Time for Unpaid Court Fines and Fees Can Create Cycle of Poverty*, NASHVILLE PUB. RADIO (Feb. 9, 2015, 5:38 PM), <http://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty> [<https://perma.cc/8LE4-PRZ5>]; see also Press Release, Office of Public Affairs, Fact Sheet on White House and Justice Department Convening—A Cycle of Incarceration: Prison, Debt and Bail Practices (Dec. 3, 2015), <https://www.justice.gov/opa/pr/fact-sheet-white-house-and-justice-department-convening-cycle-incarceration-prison-debt-and> [<https://perma.cc/VM8D-FC6Z>] (“Low-income individuals with criminal justice debts may face difficult tradeoffs between paying their debt and purchasing other necessities, and those unable to pay can face incarceration, demonstrating the large human cost of these policies as well.”). See generally Roopal Patel & Meghna Philip, *Criminal Justice Debt: A Toolkit for Action*, BRENNAN CTR. FOR JUST. (2012), <https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf> [<http://perma.cc/GL5W-QRR9>].

190. See DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/D8AY-VG6M>] [hereinafter Ferguson Report]; see also Campbell Robertson, *A City Where Policing, Discrimination and Revenue Raising Went Hand in Hand*, N.Y. TIMES (Mar. 4, 2015), [http://www.nytimes.com/2015/03/05/us/us-details-a-persistent-pattern-of-police-discrimination-in-a-small-missouri-city.html?\\_r=0](http://www.nytimes.com/2015/03/05/us/us-details-a-persistent-pattern-of-police-discrimination-in-a-small-missouri-city.html?_r=0) [<https://perma.cc/VTR2-3HA7>].

191. See Ferguson Report, *supra* note 190, at 4.

192. See Ferguson Complaint, *supra* note 188, at ¶ 88; Ferguson Report, *supra* note 190, at 4.

193. See ALEXANDER, *supra* note 5, at 97–154.

194. *Id.* at 98–100.

black[] or Latino[.]”<sup>195</sup> Alexander further points out that police enforcement of the explosion of federal and state drug laws that took place in the 1980s and 1990s was directed “almost exclusively in poor communities of color, resulting in jaw-dropping numbers of African Americans and Latinos filling our nation’s prisons and jails every year.”<sup>196</sup> This 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.

Deficiencies in indigent defense further call into question the legitimacy of the misconduct frame.<sup>197</sup> Take, for example, the severe funding deficits in Louisiana that have led to the current crisis in indigent representation. It has been reported that indigent defendants have to “get in line” if they hope to have representation.<sup>198</sup> This has meant that many indigent defendants end up being convicted without representation, sometimes offering a guilty plea in exchange for a fine in order to avoid jail time. In these cases, the procedural deficiency means that a conviction is indicative of underfunding and poverty rather than culpability.<sup>199</sup> Indeed, without a “robust system of public defenders,”<sup>200</sup> it is deeply problematic to label these individuals as morally suspect by virtue of the conviction alone.<sup>201</sup> Instead, the

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195. *Id.* at 98.

196. *Id.*

197. See Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1057–66 (2013) (describing the ways in which the Supreme Court “has made [defense] counsel the sine qua non of legitimacy”). *But see id.* at 1066–73 (arguing that particularly in the context of low-level crimes, the presence of defense counsel is less significant where structural problems such as underfunding and large caseloads “have hollowed out the ability of individual defense counsel to make the system work fairly”).

198. Debbie Elliot, *Need a Public Defender in New Orleans? Get in Line*, NPR (Feb. 4, 2016), <http://www.npr.org/2016/02/04/465452920/in-new-orleans-court-appointed-lawyers-turning-away-suspects> [<https://perma.cc/JFU2-H3QG>]; see also, e.g., Carimah Townes, *Louisiana’s Budget Crisis Spells Doomsday for Justice in New Orleans*, THINKPROGRESS (Mar. 9, 2016), <http://thinkprogress.org/justice/2016/03/09/3757685/new-orleans-public-defense-crisis/> [<https://perma.cc/XFW5-ZQWC>].

199. See, e.g., ALEXANDER, *supra* note 5, at 84–86 (noting that most criminal defendants are indigent and describing how the lack of “meaningful legal representation” can result in guilty pleas when the defendant has not committed the charged crime).

200. Elliot, *supra* note 198.

201. See Birckhead, *supra* note 9, at 1638:

[M]any people with [legal financial obligations] find themselves entrapped in the criminal justice system because they lack the tools—such as a lawyer, transportation, or employment—necessary to successfully navigate it. When these individuals are convicted of a crime . . . it could be argued that they have not, in fact, been “duly convicted,” as “duly” is defined as “correctly, fairly, legitimately, as required, or rightfully.” They have also not been “duly” sentenced when such punishment includes financial obligations that these individuals have no viable means to meet.

conviction may reveal failures in the system and other social pathologies that tend to plague the disenfranchised rather than confirmation of misconduct. As Professor Alexandra Natapoff has observed in the context of deficiencies in misdemeanor adjudication:

Convictions are supposed to be reliable badges of personal guilt, and where offenses are serious and well litigated, convictions are indeed strong indicia of individual culpability. But as law and evidence lose their influence over outcomes, petty convictions lose that substantive content. At the bottom, where defendants are poorest and offenses pettiest, the criminal process is badly detached from the core legitimating precept of individual fault. This is in part an innocence problem: many misdemeanants are simply not guilty. But it is also a structural erosion, revealing a system that has become desensitized to individual culpability and therefore tolerates the imposition of criminal convictions for reasons other than actual guilt.<sup>202</sup>

Thus, although it may be reasonable to base bankruptcy policy on the normative principle that it should not “be a haven for wrongdoers”<sup>203</sup> (as the case of the drunk driver may exemplify), there is a spectrum of wrongdoing and misconduct in the law. A person chronically without resources who is cited for staying in his condemned home arguably exists at the opposite end of this spectrum than a person who drives drunk and seriously injures someone. If one accepts this as true, it makes the task of assigning the dishonest label to any individual who gets caught in the justice system a complicated and complex endeavor that the current analytical framing of penal debt in bankruptcy misses. So, while an individual who engages in willful, destructive behavior, like drunk driving, perhaps should get no relief from debt stemming from this misconduct, it is harder to conclude that all individuals who break the law and incur debt as a result must be made to pay that debt without relief. Yet, current bankruptcy law does not make that distinction.

Moreover, in cases where government financial motive that improperly burdens one group more than others drives a justice system, the misconduct frame is turned on its head, and we might worry more about the perverse incentives and misconduct of the creditor state and less about the purported misconduct of the debtor.<sup>204</sup> To that end, where state or municipal policing and adjudicative processes reveal a profit motive, it may very well be the actions of the state or municipality and its agents that should raise concerns about misconduct, which counsels in favor of dischargeability

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(footnotes omitted).

202. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012).

203. U.S. Dep’t. of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995).

204. See *Developments in the Law—Policing*, *supra* note 1, at 1733 (noting that “policing can be a source of revenue rather than a broad socialized public good”).

of debts that stem from these practices. Yet, bankruptcy policy's nominal focus on debtor misconduct categorically protects these state and municipal practices and prevents some subset of potentially deserving debtors from access to a back-end remedy of bankruptcy.<sup>205</sup>

The federalism frame has similar analytical limitations in this context as exemplified by Professor Margaret Howard's critique of the Court's federalism-based reasoning in *Kelly*.<sup>206</sup> She argues that the *Kelly* Court's deference to federalism principles is unwarranted in the bankruptcy context both as a matter of the Anti-Injunction Act and as a matter of *Younger* and its progeny, which have since extended the prohibition on federal injunctions to civil proceedings as well.<sup>207</sup> As to the Anti-Injunction Act, Howard observes that bankruptcy is an express exception to that statute's proscription on federal injunctions of state proceedings.<sup>208</sup> With respect to the application of *Younger* abstention in the bankruptcy context, she argues that abstention in "collection matters" is inappropriate given Congress's clear intent that bankruptcy law (and bankruptcy courts) engage with "an entire category of cases in which extraordinary circumstances exist to justify federal court intervention"; namely, where debts and debt collection, even stemming from violations of the law, are at issue.<sup>209</sup> She further argues that the civil rights context of *Younger* was integral to its holding and does not translate well in the bankruptcy context where jurisdiction on discharge is vested exclusively in federal courts. Specifically, the Court in *Younger* found it compelling that the defendant could have raised his federal constitutional claims in the state forum as a defense to the criminal charges. Howard argues that a debtor would have no similar occasion to raise bankruptcy discharge rights in a state forum.<sup>210</sup> Thus, "*Younger*'s policy justifications are . . . inapt" and without the "same resonance" in the bankruptcy context.<sup>211</sup> Moreover, the *Kelly* Court need not have worried about "impugning the competence of state courts" where the Constitution authorizes Congress to enable federal bankruptcy courts to intervene in state

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205. See Moringiello, *supra* note 154, at 1633–34 (discussing ways to address creditor misconduct in bankruptcy).

206. See Howard, *supra* note 13, at 52–54.

207. *Id.*

208. *Id.* at 3–5.

209. *Id.* at 17 (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 252 (4th Cir. 1993) (internal quotation marks omitted)).

210. *Id.* at 18–19 ("A state criminal proceeding being used primarily as a collection device . . . will not afford the debtor-defendant an equivalent opportunity to raise and present questions about the scope of his or her bankruptcy discharge.").

211. *Id.* at 18.

proceedings.<sup>212</sup> This is particularly true, she argues, where the “state proceeding has a collection purpose.”<sup>213</sup>

Yet, Howard’s critique does not fully address the limited application of the federalism frame because she only addresses how the Court has interpreted Section 523(a)(7) and does not question the provision itself. Even if the Court had parsed the statute and reached the conclusion that Howard argues the text requires, there is still the fact that the bare text of Section 523(a)(7) carves out a set of penal debts that are nondischargeable. In that regard, Congress too has implicitly relied on federalism principles by adopting wholesale into the Bankruptcy Code the judicially created exception to discharge.<sup>214</sup> As discussed above, this approach is rooted in the common law understanding of how debts owed to the sovereign were traditionally treated in a bankruptcy proceeding. The approach to federalism concerns and penal debts, however, is formalistic, and it is inconsistent with bankruptcy law policy which, at its heart, has an interest in a functional outcome—namely, the fresh start.

In that regard, Professor Melissa Jacoby’s close study and account of the Detroit bankruptcy process provides an example of how the bankruptcy court’s reliance on function over form helped the successful reorganization of overwhelming debts. Chapter 9 of the Bankruptcy Code governs municipal bankruptcies, and it prohibits the bankruptcy court from interfering with traditional municipal political powers without consent.<sup>215</sup> Jacoby’s study, however, shows how integral the bankruptcy judge’s interventions were to the city’s reorganization, notwithstanding the nominal federalism-based restrictions on the bankruptcy judge’s power in the municipal bankruptcy context.<sup>216</sup> The bankruptcy court’s “active case management, dealmaking and settlement promotion, team building, and [its] ‘court of the people’” approach helped Detroit to find its way, in a relatively short period of time, through a proceeding in which the complex and often competing interests at play threatened to doom a

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212. *Id.* at 19–20 (“Federal courts . . . cannot be seen as insulting the state courts when Congress, acting pursuant to its constitutional power, has constructed a system under which particular issues are given over to the protection of those federal courts. If this is an affront, Congress and the Constitution must share the blame.”).

213. *Id.* at 20. Howard makes several other critiques, including the *Kelly* Court’s refusal to parse the language of Section 523(a)(7). *Id.* at 39.

214. See H.R. REP. NO. 95-595 (1977).

215. See 11 U.S.C. § 904 (2012); Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 63 (2016).

216. Jacoby, *supra* note 215, at 72–100.

successful reorganization.<sup>217</sup> In that instance, the federal intervention was arguably necessary to handle the extreme crisis that Detroit faced.

Moreover, in other bankruptcy contexts, like in the case of state income taxes, federalism does not limit dischargeability of debts that implicate important state interests and prerogatives. From this perspective, it is less clear that state and local penal and collection objectives should be singled out for protection as a matter of federalism as compared to state tax policy, which is subordinated in favor of bankruptcy's fresh start policy.

As a matter of constitutional authority, Congress's prioritization of federalism concerns in its treatment of penal debt is plenary. Unlike in Commerce Clause cases,<sup>218</sup> Congress's authority to make a variety of state law debts dischargeable seems fairly clear because the Supremacy and Bankruptcy clauses give Congress broad authority to override state laws in bankruptcy.<sup>219</sup> As in the case of state income taxes, Congress does this in many places in the Bankruptcy Code.<sup>220</sup> When it comes to discharging penal debt however, Congress is reluctant to authorize federal intervention, as evidenced by its wholesale adoption of judge-made law into the Bankruptcy Code. But while courts might rightly or wrongly feel themselves constrained by abstention limits grounded in federalism, those limits are jurisdictional and not substantive. So it is curious that Congress would feel itself similarly constrained on federalism grounds as a matter of substantive bankruptcy law in light of its relatively

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217. *Id.* at 59, 70 (noting that Detroit's "financial troubles were decades in the making [and] intertwined with social and political challenges" and that "[a]lthough the bankruptcy looked intractable at the time of filing, Detroit tackled a lot in the next eighteen months").

218. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598 (2000) (holding legislation invalid because Congress had exceeded its authority to act under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (same).

219. *See* *Casey & Huq, supra* note 81, at 1160, 1197 (noting "the peculiar textual position of bankruptcy as the sole enumerated congressional authority to influence state-created property and contract interests" and separately that "Congress plainly has the power to alter state law rights when doing so serves a constitutional purpose"); Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 *YALE L.J.* 1150, 1176 (2016):

Though the parameters of congressional authority to regulate state policies through the Commerce Clause remain murky, the more specific nature of the Bankruptcy Clause has systematically been held to grant Congress substantial authority over the scope of bankruptcy proceedings, even where the results of those proceedings affect states or their subdivisions.

(footnotes omitted).

220. *Casey & Huq, supra* note 81, at 1192 (noting that the "central restructuring functions of bankruptcy" almost always involve private rights authorized and defined under state law).

clear constitutional mandate to impose on state law through its bankruptcy power.

Moreover, federalism concerns have not served as an absolute barrier to federal intervention in state and local processes where civil rights are at issue. While the Court has receded from this position in recent years (for example, in the voting rights context), the Court has still acknowledged that there might be instances in which federal intervention is appropriate, federalism concerns notwithstanding.<sup>221</sup> Here, policing for profit and other deficiencies in federal, state, and municipal justice systems have disproportionately impacted economically and socially disenfranchised communities and people of color, evoking some of the concerns in the bankruptcy context that have supported federal intervention in the civil rights context.

Finally, federal penal debt is also at issue given the proliferation of federal crimes and attendant mandatory fines in the last thirty years.<sup>222</sup> Scholars and commentators have documented this phenomenon and its effect on disenfranchised communities.<sup>223</sup> Federalism would be no barrier to a bankruptcy rule permitting their discharge. Congress would be imposing on its own penological prerogatives, rather than imposing on that of the states.

In sum, current problems in federal, state, and local justice systems, particularly the degree to which those problems are borne disproportionately by the most vulnerable communities, diminish the analytical capability of the misconduct/public policy frame as supplemented by the federalism frame. They do not account for changes in municipal funding schemes and other intractable problems in the administration of federal, state, and local justice systems that have regressive effects and a disparate impact on economically disenfranchised or otherwise vulnerable communities. If these frames do not meaningfully explain what is dischargeable and what is not, what is left is an arbitrary limitation that frustrates the normative concerns that underpin bankruptcy. Moreover, it does so at the expense of a community for whom penal debt is particularly destructive and consequently for whom debt relief is critical.

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221. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

222. See, e.g., *Ryan v. United States* (*In re Ryan*), 389 B.R. 710 (B.A.P. 9th Cir. 2008) (considering the dischargeability of penal debt imposed under federal law).

223. See, e.g., ALEXANDER, *supra* note 5, at 154–57; Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), <http://www.wsj.com/articles/SB10001424052748703749504576172714184601654> [<https://perma.cc/HXN8-FDTF>].

### C. *The Consequences of Penal Debt Nondischargeability*

That penal debt is largely nondischargeable in bankruptcy is significant in light of the rise of municipal funding through economic sanctions and its catastrophic effects in economically disenfranchised communities. Those crushed under the weight of penal debt will get no fresh start. Using Ferguson, Missouri, as a primary example, this Section describes the high stakes of penal debt in economically disenfranchised communities in order to show the incoherence of the existing nondischargeability frame.

In the wake of budget shortfalls that have persisted at both state and local levels at least since the onset of the Great Recession, many states and their municipalities have had to grapple with the question of how to fund the services they are tasked with providing to their constituents.<sup>224</sup> These general fiscal problems have overlapped with the rise of mass incarceration and increased policing over the last thirty years, which has strained at the seams the budgets of many state and local justice systems.<sup>225</sup> As a result, the states and their municipalities have come to rely increasingly on revenue from economic sanctions disproportionately imposed on economically vulnerable constituents to fund their justice systems and to some extent their general functions.<sup>226</sup>

These policies have resulted in a perverse set of incentives for state and municipal agents. Instead of deploying government officials and civil servants, like police officers and judges, to exercise their authority and power for the benefit of the public's well-being, profit-motivated criminal and civil justice policies "effectively turn[ ] courts, clerks, and probation officers into general tax collectors."<sup>227</sup> This in

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224. See, e.g., Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1130–51 (2014); see also Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 352 (2010) (briefly describing budget crises in various municipalities); Samir D. Parikh, *A New Fulcrum Point for City Survival*, 57 WM. & MARY L. REV. 221, 226–28, 230 (2015) (noting that the Great Recession revealed the "true extent of municipal [fiscal] destabilization").

225. See, e.g., Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1842–45 (2015) (describing the rise of mass incarceration since the early 1970s, which in turn "created untenable [financial] pressures on the criminal justice system").

226. See HARRIS, *supra* note 5, at 4–5 (describing how in the early 1990s, many states began codifying their financial penalties); Bannon, Nagrecha & Diller, *supra* note 7, at 7 (describing how Florida relies significantly on revenue from fees to fund many aspects of its criminal justice system as well as its general fund). For example, a recent study of the justice systems of fifteen states observed how eleven of those states have come to depend on economic sanctions that are imposed ostensibly to achieve traditional criminal justice goals but in reality "support general revenue funds, treasuries, or funds unrelated to the administration of criminal law." *Id.* at 30.

227. Bannon, Nagrecha & Diller, *supra* note 7, at 30.

turn causes government officials and civil servants “to act as collection agents, rather than impartial adjudicators or supervision officers concerned with public safety and rehabilitation.”<sup>228</sup>

The problems engendered by this profit-motivated policing, along with other defects in the administration of state and municipal justice systems, are perhaps most clearly exemplified in Ferguson, Missouri, where the killing of teenager Michael Brown by Ferguson police officer Darren Wilson in August of 2014 abruptly cast these issues into the national spotlight.<sup>229</sup> Although states and municipalities, particularly those in the South, had been using fines and fees to monetize the misfortunes and relative lack of power of poor blacks for over one hundred years,<sup>230</sup> Michael Brown’s fate brought to the fore the degree to which economically and socially disenfranchised communities continue to be preyed upon for financial gain by state and local institutions ostensibly tasked with promoting the public safety and welfare. These practices have resulted in overwhelming penal debt among those least able to pay it.<sup>231</sup>

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228. *Id.*; see also *Developments in the Law—Policing*, *supra* note 1, at 1734:

Coupling discretionary police power with an ability to raise revenue amplifies the pathologies that are perverting modern criminal justice. By enacting both more and broader criminal laws, legislatures have delegated immense power to police and prosecutors to choose which crimes to investigate, prosecute, and punish. When this discretion encompasses an ability to extract revenue, even more legislative power is delegated since these agencies can both avoid and override normal budgeting politics.

(footnote omitted); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015) (arguing that the reduction of penalties for minor offenses, such as the imposition of fines and fees as a punishment for a minor violation of the law, “functions as a kind of regressive tax, creating perverse incentives for low-level courts that increasingly rely on fines and fees to fund their own operations”).

229. See, e.g., Terrence McCoy, *Ferguson Shows How a Police Force Can Turn into a Plundering ‘Collection Agency,’* WASH. POST (Mar. 5, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/> [<https://perma.cc/NQ5Z-RYH3>].

230. See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 64–69 (2008) (describing the rise of the “misdemeanor convict leasing system” in the Reconstruction-era South and noting that “it significantly funded the operations of government by converting black forced labor into funds for the counties and states”).

231. See, e.g., Gwynn Guilford, *These Seven Charts Explain How Ferguson—and Many Other US Cities—Wring Revenue From Black People and the Poor*, QUARTZ (Aug. 28, 2014), <http://qz.com/257042/these-seven-charts-explain-how-ferguson-and-many-other-us-cities-wring-revenue-from-black-people-and-the-poor/> [<https://perma.cc/WJY2-6WV4>].

In its violent crackdowns on demonstrations since a white police officer shot 18-year-old Michael Brown in early August, Ferguson police revealed a fresh proclivity for abusing its citizens. However, the city’s finances suggest the St. Louis suburb’s criminal justice system has been stealthily exploiting residents—particularly those who are black or poor—for years.

The U.S. Department of Justice's investigation into the practices of the Ferguson Police Department to determine whether the City of Ferguson and Darren Wilson had violated Michael Brown's constitutional rights revealed how "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."<sup>232</sup> The City budgeted for increased revenue year over year from fines and fees associated with violations of the Ferguson Municipal Code. Accordingly, the report of the Department of Justice's findings ("the Report") concluded that the City "consistently set maximizing revenue as the priority" for the Ferguson Police Department.<sup>233</sup> The Report alleges that the Ferguson Police Department deployed its officers into the significantly poor communities with a City-endorsed mandate to maximize revenue from municipal fines and fees. As a result, "many officers [saw Ferguson] residents, especially those who live in Ferguson's predominantly African-American neighborhood, less as constituents to be protected than as potential offenders and sources of revenue."<sup>234</sup>

These practices yielded significant profits. In 2013, approximately \$2.6 million in fines and fees collected largely from traffic and "low-level municipal offenses" represented twenty-one percent of the City's total budget.<sup>235</sup> Moreover, the City's practices ensured that it alone would benefit financially from violations of the law. The Ferguson Police Department charged the majority of offenses for which it stopped individuals as municipal violations, even though state law cognate violations existed. This practice maximized the revenue coming directly to the City.<sup>236</sup> Having set up an atmosphere in which the residents were likely to violate the law by enacting a variety of ordinances proscribing a range of fairly innocuous behaviors, the City set an aggressive schedule of penal fines that were arguably disproportionate to the infraction. For example, the Report notes that in 2011, the fine for having too-tall grass was between \$77 and \$102 as compared to \$5 fine set by a surrounding municipality for a similar infraction.<sup>237</sup>

Similarly, the City's revenue-focused objective tainted the Ferguson Municipal Court's adjudication of these infractions. That

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232. Ferguson Report, *supra* note 190, at 2.

233. *Id.* at 9.

234. *Id.* at 2.

235. Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson over 'Debtors Prisons,'* NPR (Feb. 8, 2015), <http://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons> [<https://perma.cc/W6WW-KV65>].

236. See Ferguson Report, *supra* note 190, at 7.

237. *Id.* at 10.

court, having jurisdiction over violations of the Ferguson Municipal Code, resolved the charges brought under the code.<sup>238</sup> The court was authorized to impose fines, fees, and imprisonment when it found that an individual was guilty of violating the Ferguson Municipal Code.<sup>239</sup> Thus, the court “use[d] its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests.”<sup>240</sup> The Report observed that although authorized to impose a jail sentence of up to three months, “the court almost always impose[d] a monetary penalty payable to the City of Ferguson, plus court fees.”<sup>241</sup> Moreover, the court “routinely” issued arrest warrants when a charged individual failed to appear in court as scheduled or failed to pay a fine on time.<sup>242</sup> As a result, individuals charged under the Ferguson Municipal Code for violations that normally did not result in a jail sentence, nonetheless ended up facing municipal warrants, arrest, and jail time in addition to a run-up of costs related to the non-payment of the initial fine or fee.<sup>243</sup>

The Report concluded that Ferguson’s “emphasis on revenue generation” led to an atmosphere in which City leaders and officials ignored illegal police practices and the effect that these practices had on the disproportionately poor residents of Ferguson.<sup>244</sup> Ultimately, the Report tells a story of a municipality content to extract as much financial support and gain as possible from its residents, regardless of the grave impact these practices have on the well-being of its own vulnerable citizens. And, when people caught in this revenue-focused scheme could not pay, they were routinely jailed, even though the underlying offenses, such as traffic violations, did not mandate a custodial sentence.<sup>245</sup>

And this behavior appears to be widespread. There is powerful evidence that, like Ferguson, other municipalities have misused criminal and civil penal fines and fees to line their coffers, shaking down the poorest and most vulnerable residents in the process. In St. Louis County alone, municipalities alleged to have engaged in these types of practices include the towns of Bel Ridge, Florissant, and Pine

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238. *Id.* at 8.

239. *Id.*

240. *Id.* at 3.

241. *Id.* at 8–9.

242. *Id.* at 9.

243. *Id.*

244. *Id.* at 2.

245. *See, e.g.,* Shapiro, *supra* note 235.

Lawn.<sup>246</sup> For example, in 2013, the City of Pine Lawn—with an overwhelmingly African American population of 3,275, whose per capita income was \$13,000 per year—issued 5,333 tickets for various violations, which brought the total number of outstanding warrants to 23,457.<sup>247</sup> This means that in 2013, there were approximately seven outstanding warrants for each resident of Pine Lawn. Similar practices have been documented in Arizona,<sup>248</sup> California,<sup>249</sup> Colorado,<sup>250</sup> New York,<sup>251</sup> Pennsylvania,<sup>252</sup> Texas,<sup>253</sup> and Washington.<sup>254</sup> These practices have left ever-mounting penal debt in their wake. The consequences of this lingering penal debt are often devastating to individuals and communities, who are then continually exposed to arrest, incarceration, and their attendant collateral consequences.

The experience of sixty-two-year-old Edward Brown is instructive. The City of Jennings, Missouri, cited him for too-tall grass in his yard, for trespassing when he remained in his home of twenty-

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246. See Thomas Harvey et al., *ArchCity Defenders: Municipal Courts White Paper*, ARCHCITY DEFENDERS (2014), <http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/C8YR-5FRC>].

247. *Id.* at 12–13.

248. See *ACLU Challenges Civil Asset Forfeiture Laws in Arizona*, ACLU (July 22, 2015), <https://www.aclu.org/news/aclu-challenges-civil-asset-forfeiture-laws-arizona> [<https://perma.cc/66EY-VLP4>].

249. See *Above the Law: An Investigation of Civil Asset Forfeiture in California*, DRUG POL'Y ALLIANCE (Apr. 21, 2015), <http://www.drugpolicy.org/resource/above-law-investigation-civil-asset-forfeiture-california> [<https://perma.cc/9WHZ-6RQY>].

250. See *Limit Cities' Reliance on Revenue from Traffic Fines*, DENVER POST (May 15, 2015, 11:01 AM), <http://www.denverpost.com/2015/05/15/limit-cities-reliance-on-revenue-from-traffic-fines/> [<https://perma.cc/F8YV-RS8W>].

251. See Patrick McGeehan, *Police Slowdown Cost New York City an Estimated \$5 Million in Lost Fines*, N.Y. TIMES (Jan. 14, 2015), [http://www.nytimes.com/2015/01/15/nyregion/police-slowdown-cost-new-york-city-an-estimated-5-million-in-lost-fines.html?\\_r=0](http://www.nytimes.com/2015/01/15/nyregion/police-slowdown-cost-new-york-city-an-estimated-5-million-in-lost-fines.html?_r=0) [<https://perma.cc/MJ2T-QEJZ>].

252. See Scott Kelly, *Broken Justice: An Investigation of Civil Asset Forfeiture in Montgomery County*, ACLU OF PA. (Oct. 2015), [https://www.aclupa.org/files/1814/4526/3118/Broken\\_Justice\\_-\\_Montgomery\\_County\\_final.pdf](https://www.aclupa.org/files/1814/4526/3118/Broken_Justice_-_Montgomery_County_final.pdf) [<https://perma.cc/LZ7A-4FMQ>]; Scott Kelly, *Guilty Property: How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away with It*, ACLU OF PA. (June 2015), [https://www.aclupa.org/files/3214/3326/0426/Guilty\\_Property\\_Report\\_-\\_FINAL.pdf](https://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf) [<https://perma.cc/858K-LXWX>]; Scott Kelly, *Forfeiture in the Shadows: An Investigation of Civil Asset Forfeiture in Cumberland County*, ACLU OF PA. (Dec. 2015), [https://www.aclupa.org/files/2114/5010/9994/CumberlandCounty\\_Forefeiture\\_Report-Final.pdf](https://www.aclupa.org/files/2114/5010/9994/CumberlandCounty_Forefeiture_Report-Final.pdf) [<https://perma.cc/6473-AQPH>].

253. See Nick Sibilla, *Texas Town Earns 89 Percent of Its Revenue from Fines and Forfeitures*, INST. FOR JUST. (Aug. 21, 2014), <http://ij.org/action-post/texas-town-earns-89-percent-of-its-revenue-from-fines-and-forfeiture/> [<https://perma.cc/NMX3-X7LT>].

254. See *Lawsuit Challenges Benton County's Modern-Day Debtors Prison*, ACLU (Oct. 6, 2015), <https://www.aclu.org/news/lawsuit-challenges-benton-countys-modern-day-debtors-prison> [<https://perma.cc/F65J-YJMC>].

five years after the City had condemned it, and for failing to have his dog vaccinated for rabies. Mr. Brown, whose income was limited to \$488 per month in Social Security benefits and food stamps, could not pay the \$464 that he owed the City. He was jailed repeatedly for his failure to pay the fine, once for thirty days and another time for twenty days, and he ultimately lost his home.<sup>255</sup> One resident of Pagedale, Missouri—a city of approximately three thousand predominantly African American residents, approximately twenty-five percent of whom live below the poverty line—was fined for “petty violations” like chipped paint on her home and a loose screen door.<sup>256</sup> When she could not pay the outstanding penal debts associated with these violations, she was arrested for “[b]uilding code [v]iolation, contempt, and default.”<sup>257</sup> She ultimately took out a high-cost payday loan ostensibly to fix the violations and reduce her exposure to further arrests.<sup>258</sup>

In addition to the threat of incarceration, there are a host of devastating collateral consequences that result from lingering penal debt. For example, individuals who are imprisoned for not paying an outstanding debt must contend with the specter of job loss; the inability to meet other financial obligations while incarcerated, such

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255. Shapiro, *supra* note 189. Brown sued the city alleging various constitutional violations. In July 2016, the City settled the lawsuit, agreeing to pay \$4.7 million to approximately two thousand individuals who had been confined in the City’s jails because they could not pay fines and fees. Campbell Robertson, *Missouri City to Pay \$4.7 Million to Settle Suit over Jailing Practices*, N.Y. TIMES (July 15, 2016), [http://www.nytimes.com/2016/07/16/us/missouri-city-to-pay-4-7-million-to-settle-suit-over-jailing-practices.html?ref=collection/sectioncollection/us&action=click&contentCollection=us&region=rank&module=package&version=highlights&contentPlacement=7&pgtype=sectionfront&\\_r=0](http://www.nytimes.com/2016/07/16/us/missouri-city-to-pay-4-7-million-to-settle-suit-over-jailing-practices.html?ref=collection/sectioncollection/us&action=click&contentCollection=us&region=rank&module=package&version=highlights&contentPlacement=7&pgtype=sectionfront&_r=0) [https://perma.cc/CFG7-H3XR].

256. *Policing for Profit in St. Louis County*, N.Y. TIMES (Nov. 14, 2015), [http://www.nytimes.com/2015/11/15/opinion/sunday/policing-for-profit-in-st-louis-county.html?smid=tw-share&\\_r=0](http://www.nytimes.com/2015/11/15/opinion/sunday/policing-for-profit-in-st-louis-county.html?smid=tw-share&_r=0) [https://perma.cc/U5RE-N6MJ].

257. Complaint at 71, *Whitner v. City of Pagedale*, No. 4:15-cv-01655 (E.D. Mo. Nov. 4, 2015), 2015 WL 6746482; *Pagedale Municipal Fines: Class Action Lawsuit Challenges Policing for Profit in St. Louis Co. Municipal Court System*, INST. FOR JUST., <http://ij.org/case/pagedale-municipal-fines/> (last visited Jan. 20, 2017) [https://perma.cc/R37L-F2UP].

258. See *Policing for Profit in St. Louis County*, *supra* note 256 (noting that “[t]hese fines are an enormous hardship for the poor and for elderly homeowners on fixed incomes”). She is now part of a federal lawsuit on behalf of several residents against the City of Pagedale, Missouri, alleging that Pagedale officials “violat[ed] due process and excess-fines protections in the Constitution by turning its code enforcement and municipal court into ‘revenue-generating machines’ to go after residents.” Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. TIMES (Nov. 4, 2015), [https://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html?\\_r=0](https://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html?_r=0) [https://perma.cc/B8SP-DZ3Y]; see Complaint, *Whitner v. City of Pagedale*, No. 4:15-cv-01655 (E.D. Mo. Nov. 4, 2015), 2015 WL 6746482.

as child support;<sup>259</sup> the run-up of other debts while the individual is imprisoned, such as rent or utilities; and the loss of privileges, such as a driver's license, that are crucial to day-to-day life.<sup>260</sup>

Individuals who cannot pay penal debt also face extended loss of rights. Professor Ann Cammett has chronicled how “the problem of mounting criminal justice debt can also serve as an insurmountable obstacle to the resumption of voting rights and broader participation in society.”<sup>261</sup> She describes the rise of state laws that condition re-enfranchisement of felons on their repayment of outstanding penal debt.<sup>262</sup> For poor felons (who are the bulk of felons leaving imprisonment), penal debt is likely to go unpaid for a significant period time which may leave them indefinitely without the basic right to vote.<sup>263</sup>

Another significant consequence of outstanding penal debt has arisen in the wake of the Court's recent ruling in *Utah v. Strieff*.<sup>264</sup> In *Strieff*, a Utah police officer stopped the defendant without reasonable suspicion, and, after asking for the defendant's identification, discovered an outstanding warrant stemming from a “small traffic warrant.”<sup>265</sup> The police officer then searched Strieff and found drugs. Strieff moved to suppress the evidence because the police officer initially stopped him without reasonable suspicion. The Court held that the valid arrest warrant that stemmed from a traffic violation was enough to attenuate the connection between the unconstitutional stop and the discovery of contraband.<sup>266</sup>

In dissent, Justice Sotomayor predicted that the Court's decision would have grievous implications for the Fourth Amendment rights of any individual with an outstanding warrant.<sup>267</sup> In other words, the practical consequence of *Strieff* is that any person with a warrant, such as those routinely issued when penal debt remains unpaid, may now be subject to search and seizure even where there is no reasonable suspicion to authorize a constitutional stop.<sup>268</sup> This leaves individuals, and indeed whole communities (who cannot pay

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259. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 385–86 (2012).

260. See Bannon, Nagrecha & Diller, *supra* note 7.

261. Cammett, *supra* note 259, at 352.

262. *Id.* at 387–91.

263. *Id.*

264. 136 S. Ct. 2056 (2016).

265. *Id.* at 2065 (Sotomayor, J., dissenting) (quoting the record).

266. *Id.* at 2059 (majority opinion).

267. *Id.* at 2068–69 (Sotomayor, J., dissenting).

268. *Id.*

their penal debts, which in turn triggers the issuance of arrest warrants attendant to that unpaid debt), without appreciable Fourth Amendment protections.

Thus, the use of the misconduct, public policy, and federalism frames in the context of penal debt functions to deprive certain debtors of a fresh start. This outcome is suggestive of the ways in which the nondischargeability frames may embody certain tropes that don't map on to the realities of how debt is incurred in a set of complex social circumstances. Perhaps these complexities belie a hard and fast rule that denies a discharge for all debts of a certain essential nature without any further inquiry into how they came into being.

#### *D. Rethinking Nondischargeability?*

The categorical nondischargeability of certain debts in bankruptcy, including penal debt, has negative implications for bankruptcy's normative lodestar, the fresh start principle. The limited analytical value of the frames that animate the treatment of categorically nondischargeable debt in bankruptcy provides an opportunity to consider reorienting bankruptcy back to the fresh start. The penal debt example again provides a lens through which to consider how nondischargeability unnecessarily frustrates the fresh start principle.

In the specific context of penal debt, the burden on the fresh start is particularly compelling. For example, the externalities borne by the families and the communities of individuals burdened by penal debt are significant. The children of individuals imprisoned for being unable to pay off penal debt are left without their primary caretaker for unpredictable periods of time. This requires friends and family members to step in to care for these children, imposing additional costs, particularly in communities where penal debt is widespread.<sup>269</sup> These communities already struggle with limited economic resources, and, in this way, persistent penal debt further entrenches their economic disenfranchisement.

In addition, unpredictable jail time results in a significant loss of productivity and its attendant social benefit. Job loss resulting from incarceration for failure to pay debt was common in St. Louis County.<sup>270</sup> For example, one woman who was jailed for two weeks after failing to pay traffic-related fines described missing a job interview and falling behind on her studies to become a paralegal

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269. See, e.g., Balko, *supra* note 8.

270. *Id.*; see also Harvey et al., *supra* note 246, at 1–2.

while she was held in custody.<sup>271</sup> She reported that her disabled mother borrowed funds in order to get her daughter out of jail. In the aggregate, these types of outcomes likely represent a net loss in terms of productivity.

Finally, there is the issue of socially optimal risk-taking. The risk of being subjected to police contact that results in the imposition of a fine or fee was extremely high in Ferguson. At the end of 2014, seventy-five percent of the town's population (approximately sixteen thousand people) had outstanding arrest warrants, many for minor violations of the law.<sup>272</sup> For some unable to pay the attendant fines, this meant avoiding leaving their homes for fear of being arrested. Unmanageable penal debt then transforms mundane yet socially optimal behavior, like leaving one's house to go to work or to school, into particularly risky behavior. To the extent that bankruptcy law, without meaningful justification, does not provide a safety net for these risks, it perhaps upsets the balance between socially optimal ex ante risk-taking and ex post relief that the fresh start embodies.

Extrapolating from the penal debt example to consider the concept of categorical nondischargeability more generally, as it unduly encroaches on and limits a fresh start, we might conclude that instead of relying on categorical notions of nondischargeability as policing the limits of debt relief, we might instead focus on the condition of the debtor to function as a limit on when a discharge is appropriate. Indeed, with a recommitment to the fresh start principle that holds bankruptcy law accountable to its own normative orientation, we might better address the degree to which the existing nondischargeability approach engenders a class bias in bankruptcy access by making bankruptcy an option for debts common across the socioeconomic spectrum.

### *E. Rethinking Unintended Consequences?*

An important consideration in terms of a move away from categorical nondischargeability, either in the penal debt context specifically or as to all categories of nondischargeable debt more generally, is the degree to which such a change would lead to unintended consequences or result in undesirable ripple effects. We might worry that any benefits of increased discharge and a move away

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271. Balko, *supra* note 8.

272. Blake Ellis & Melanie Hicken, *One Year Later: Ferguson Is Still Pumping Out Arrest Warrants*, CNN MONEY (Aug. 6, 2015, 1:41 PM), <http://money.cnn.com/2015/08/06/news/ferguson-arrest-warrants/> [<https://perma.cc/72N6-LSP4>].

from categorical nondischargeability are outweighed by any increased costs to society resulting from, for example, reduced deterrence in the penal debt context. This, of course, depends on the degree to which fines or fees have a beneficial deterrent effect. Alternatively, we might understand an important benefit of such a change would be a realignment of municipal policies as related to fines and fees.

We might also worry that governmental actors, such as judges or prosecutors, who are authorized to exercise discretion in justice systems, might act differently if the law changed. That is to say, they might exercise their discretion in a way that is harmful to the very constituency that, at least in the penal debt context, increased dischargeability might help. This, of course, depends on the degree to which these actors might actually adjust in response to such a change. In the penal debt context, the likelihood of some default (i.e., failure to pay on time) has not seemed to result in judges imposing custodial sentences over economic sanctions where that is an option.

Ultimately, then, the likelihood of unintended consequences depends on how we first identify and then balance the relative costs and benefits of the fresh start on the one hand and the costs and benefits of the existing frames on the other. At a minimum, this Article hopes to spark conversation about how we think about the latter concern, which is to say how we think about and identify the costs associated with unrelenting debt, particularly as experienced by communities that can least bear the burden of permanent liability. In the end, it might be the case that existing consumer bankruptcy law, with its apparent class bias, is the best we can do to balance the tensions inherent between the fresh start and other policy concerns that animate categorical nondischargeability. Alternatively, we might begin to understand that current bankruptcy law is actually serving some alternate purpose other than the fresh start, and that the fresh start idea is, in fact, a relic of an earlier time in which debt was not ubiquitous in everyday life. These are all important considerations that exist beyond the scope of this Article and indeed demand further and more considered exploration.

#### IV. BANKRUPTCY AND SOCIAL UTILITY

The view presented above, that bankruptcy may have some significance in the lives of economically and socially disenfranchised people who struggle with debt, conceptualizes bankruptcy as having social utility and practical effects on group inequality. For example, in the penal debt context, bankruptcy law can serve as a counterbalance to municipal practices that take advantage of the relative political

weaknesses of economically and socially disenfranchised people. Municipalities have little incentive to treat fairly poor people who, as a group, have little political power to influence change in the system. If present practice is indicative of how change is likely to come, the poor must wait until a cellphone captures an act of state violence that is borne of a merciless system like the profit-motivated administration of justice that takes advantage of the disenfranchised. Then, unless the groundswell of external outrage motivates remediation, we are inclined to ignore or discredit the protestations of the afflicted in favor of stock responses about the sanctity of the police power.

While complex social problems, like those that engender crushing penal debt in economically disenfranchised communities, belie a simple fix from any one perspective, a bankruptcy regime that contemplates the discharge of penal debt can incentivize a change of behavior in institutional actors, such as police and municipal judges, who engage in practices that unduly burden their most vulnerable constituents with penal debt. This view is consistent with Professors Clayton Gillette and David Skeel's observations about the social utility of bankruptcy in the municipal context. Advocating for bankruptcy as a means of addressing faulty municipal governance, they remark, "Bankruptcy may . . . create political opportunities that did not previously exist. Indeed one benefit of permitting structural reform in bankruptcy may be that the existence of the option makes its exercise unnecessary since the locality may prefer to restructure on its own rather than risk external imposition."<sup>273</sup> In this instance, bankruptcy as a backstop to unmanageable penal debt might encourage municipalities not to hinge their financial fortunes on the backs of their most vulnerable constituents. This suggests broader questions of the social implications of bankruptcy that to date have not been afforded much scholarly attention, but which are not entirely novel. In 1970, Congress authorized the creation of a bankruptcy commission whose mandate was to study the existing law and suggest reforms to the system. The resulting report, issued in 1973 after three years of intensive study of several aspects of the bankruptcy system, noted that "the bankruptcy process is a funnel through which [to] pour a wide variety of problems that, however noneconomic in origin, are manifested in burdensome debts."<sup>274</sup> In understanding bankruptcy through this lens, there are several issues that require some exploration, like the inherent difficulty of accessing bankruptcy for

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273. Gillette & Skeel, *supra* note 219, at 1195.

274. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAW OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 74 (1973).

people who have few if any financial resources. Simply put, some of the administrative barriers that currently deter bankruptcy filers would have to fall. This broadening, however, is consistent with the evolution of bankruptcy as a tool that has become increasingly oriented toward serving an ever-broader range of socially situated individuals. It is also consistent with bankruptcy's role in many socially significant, debt-related issues of national significance, like the asbestos crisis. This Section addresses each in turn and closes with some thoughts on why bankruptcy courts might be appropriately suited to engage with debt problems, even when they arise in complex social circumstances.

### *A. On Problems of Access*

It is important to acknowledge, however, that a change in the law might accomplish little if one concludes that bankruptcy is a fundamentally improper mechanism for debt relief of this kind or that it has no practical utility. In this respect, there is the question of whether bankruptcy law is useful given its own apparent limitations and given the costs associated with filing a petition. Bankruptcy scholars have expressed substantial concerns about whether current bankruptcy law does any real work for the middle class, much less for economically disenfranchised groups. Bankruptcy scholars have also considered how the filing fee and other costs associated with bankruptcy limit access to a fresh start for indigent filers. To the extent that this is true, then a change in the law as to penal debt might accomplish little to nothing for the most vulnerable debtors.

Professors Katherine Porter and Deborah Thorne studied Chapter 7 bankruptcy filers in the year following their discharge.<sup>275</sup> Although sixty-five percent of those surveyed indicated that their financial situation had improved after receiving a discharge, more than twenty-five percent of filers indicated that their financial situation remained the same, and eight percent indicated that their financial situation was worse, notwithstanding the discharge.<sup>276</sup> Thus, Porter and Thorne concluded that “[t]he most fundamental assumption of consumer bankruptcy—that the fresh start results in a productive end—is suspect,” and that for many Chapter 7 filers, the discharge did little to nothing to ameliorate their financial distress.<sup>277</sup>

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275. Katherine Porter & Dr. Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006).

276. *Id.* at 87–88.

277. *Id.* at 88.

Katherine Porter also studied outcomes for Chapter 13 filers whose cases were dismissed before discharge. As the Consumer Bankruptcy Project has revealed that only about one third of Chapter 13 filings result in a discharge, this group of debtors accounts for the majority of Chapter 13 filers. Porter found that those debtors who filed under Chapter 13 in an attempt to save their homes from foreclosure ultimately lost those homes, and those debtors who filed in order to lower their unsecured consumer debt ended up owing more after failing to complete the Chapter 13 process.<sup>278</sup> Thus, Porter dubbed Chapter 13 a “pretend solution,” that “entrench[es] the status quo and discourage[s] efforts to argue that laws need to be improved.”<sup>279</sup>

By contrast, Professors Will Dobbie, Paul Goldsmith-Pinkham, and Crystal Yang studied the post-filing outcomes of Chapter 13 filers who received a discharge as against those unfortunate filers who did not.<sup>280</sup> While Porter describes the grim picture of financial health that dismissed Chapter 13 filers face, Dobbie, Goldsmith-Pinkham, and Yang note several positive outcomes for those individuals who received a discharge following a Chapter 13 filing, six to eight years after the discharge. For example, they observed that following the discharge, the Chapter 13 debtor had \$1,333 of unsecured debt in collections as compared to \$4,217 for the filer who did not receive a discharge.<sup>281</sup> In addition, the Chapter 13 filer who owned her home had a higher probability of keeping the home.<sup>282</sup> Dobbie, Goldsmith-Pinkham, and Yang also observed that in the five years following a discharge, the Chapter 13 filer was less likely to seek new credit and less likely to use revolving credit lines. The discharged Chapter 13 filer also enjoyed a higher credit score.<sup>283</sup> Thus, Dobbie, Goldsmith-Pinkham, and Yang reveal that bankruptcy has some significant value for those who are fortunate enough to get a discharge.

Professor Mechele Dickerson has also been critical of current bankruptcy laws and their ability to facilitate financial relief for all middle class filers. She notes that bankruptcy laws seem to benefit a specific demographic profile.<sup>284</sup> For example, this “Ideal Debtor” has access to funds to pay for a lawyer, both to engage in the pre-filing

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278. Porter, *supra* note 18, at 144–52.

279. *Id.* at 114.

280. Will Dobbie, Paul Goldsmith-Pinkham & Crystal Yang, *Consumer Bankruptcy and Financial Health 2* (Nat'l Bureau of Econ. Research, Working Paper No. 21032, 2015).

281. *Id.* at 2–3.

282. *Id.* at 3.

283. *Id.*

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

planning and to prepare the bankruptcy petition, and pay the filing fee.<sup>285</sup> The Ideal Debtor is also married and has little or no debts that are nondischargeable under Sections 523(a)(7) or 1328(a). She also has assets that are exempt and is the beneficiary of a spendthrift trust or other wealth-holding product that is not included in the bankruptcy estate.<sup>286</sup> In short, the “Ideal Debtor” is a high-wealth but low-income individual whose wealth is held in assets or forms that permit the filer to hold on to it through a bankruptcy proceeding.<sup>287</sup> Dickerson argues that this has resulted in a structural racial bias in the Code since, as a statistical matter, this Ideal Debtor is likely to be white and unlikely to be black or Hispanic.<sup>288</sup>

In the case of the poor individual with penal debt, however, even if it doesn’t mean a better financial life, a discharge might help to preserve the liberty of the debtor. The poor might be judgment proof so that commercial creditors have no leverage in collection. And conventional wisdom is that with no threat of collection comes no need for relief in the form of a discharge.<sup>289</sup> But the poor debtor might gain prolonged freedom and personal liberty or the advantage of a stay in collection proceedings while she figures out alternatives to dealing with penal debt from a discharge.<sup>290</sup> In addition, to the extent that penal debt stays with a debtor for life, it raises familiar concerns regarding the disincentivization of already-disenfranchised individuals from working and otherwise participating in their communities.<sup>291</sup>

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285. *Id.* at 1743–44.

286. *Id.*

287. *Id.* at 1744–45.

288. *Id.* at 1726–27.

289. *See, e.g.*, Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 290–91 (2010).

290. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2052–53 (1999) (“In addition, some judgment proof debtors who file for bankruptcy pro se would not have done so had they received proper advice.”); Daniel L. Skoler, *The Status and Protection of Social Security Benefits in Bankruptcy Cases*, 67 AM. BANKR. L.J. 585, 591 (1993):

Regardless of the foregoing, it remains a fact that an elderly or disabled debtor who has minimum assets and virtually all of whose income is derived from Social Security retirement, survivors, or disability insurance (RSDI) payments, or SSI payments, is “judgment proof” and may not cost-effectively be placed in bankruptcy.

This notion might raise concerns about bankruptcy as obstruction, where it is only the stay that the debtor is looking for.

291. *See, e.g.*, Colgan, *supra* note 9, at 291–92 (describing “[t]he cycle of economic sanctions, interest, collections, and incarceration” as “financially devastating,” in part because “[i]n many jurisdictions, criminal histories remain active or cannot be sealed so long as criminal debts are outstanding, which can impede the ability to find employment”); Jackson, *supra* note 10.

More fundamentally, even if penal debt was dischargeable in bankruptcy, the costs associated with filing bankruptcy present a threshold barrier to a discharge. A debtor who wants to file a bankruptcy petition must pay a filing fee of \$335 for a Chapter 7 case and a filing fee of \$310 for a Chapter 13 case.<sup>292</sup> The average cost of a bankruptcy attorney in a Chapter 7 case ranges from approximately \$900 to \$1,100 depending on jurisdiction and whether the case is an asset or no-asset case.<sup>293</sup> In other words, it costs money to get a discharge, and some people “can be too poor to go bankrupt.”<sup>294</sup>

Professors Ronald Mann and Katherine Porter have described the degree to which the filing fee and other costs associated with a bankruptcy filing—such as attorney fees—function as a barrier to optimal bankruptcy filings for low-income, low-asset debtors. Mann and Porter noted how few debtors who might benefit from a bankruptcy discharge actually file in any given year, and sought to discover why this is so.<sup>295</sup> Relying on data from the Consumer Bankruptcy Project, Mann and Porter observed that the most significant determinant of whether a debtor would file for bankruptcy was her ability to save enough money for the filing fee and for an attorney.<sup>296</sup> Thus Mann and Porter conclude that “excessive costs deter socially valuable bankruptcies,” and propose “a simplified administrative process that provides prompt relief [to low-income and low-asset filers] without the costs and delay of judicial process.”<sup>297</sup>

Since 2005, Chapter 7 bankruptcy filers have been eligible to file a petition *in forma pauperis*, in which the filing fee is waived.<sup>298</sup> In order to qualify, the filer must have an income that is below 150% of the federal poverty level.<sup>299</sup> Using data from the Consumer

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292. 28 U.S.C. § 1930(a) (2012); *United States v. Kras*, 409 U.S. 434, 435 (1973) (“The Bankruptcy Act and one of this Court’s complementary Orders in Bankruptcy impose fees and make the payment of those fees a condition to a discharge in voluntary bankruptcy.”); *Bankruptcy Court Miscellaneous Fee Schedule*, U.S. CTS. (Dec. 1, 2016), <http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule> [<https://perma.cc/RTS7-KNRK>]; *Filing Fees: Abbreviated Fee Schedule*, U.S. BANKR. CT. CENT. DIST. CAL. (Dec. 1, 2016), <http://www.cacb.uscourts.gov/filing-fees> [<https://perma.cc/7G6Q-N66R>].

293. See Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 68 (2012).

294. Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting on and Beyond United States v. Kras*, 2 AM. BANKR. INST. L. REV. 57, 57 (1994).

295. Mann & Porter, *supra* note 289, at 290 (citing Michelle White’s study that showed that of “a group of households in which bankruptcy relief would have afforded an economic benefit to about 15% of them, but only about 0.66–1% sought relief any given year”).

296. *Id.* at 292.

297. *Id.* at 293.

298. See Philip Tedesco, *In Forma Pauperis in Bankruptcy*, 84 AM. BANKR. L.J. 79, 79 (2010).

299. *Id.*

Bankruptcy Project, Philip Tedesco observed that few eligible filers petitioned the court to proceed *in forma pauperis*.<sup>300</sup> Although 43% of filers in the sample qualified for the fee waiver, just 5.8% applied. Moreover, debtors who were represented by an attorney were less likely to apply than debtors who filed *pro se*.<sup>301</sup> Tedesco further observed that most applications were granted, concluding then that *in forma pauperis* waivers are drastically underused in bankruptcy. Tedesco thus proposes a system in which filers that qualify may presumptively proceed *in forma pauperis* instead of the current system that requires these filers to petition the court.

Even if the filing fee could be waived, there is still the challenge of affording a lawyer to assist the indigent debtor in navigating the complex consumer bankruptcy system. The attorney's fee represents the most significant cost of a bankruptcy filing,<sup>302</sup> and having a lawyer in bankruptcy brings many benefits to filers, perhaps most significantly a decreased likelihood that the case will be dismissed. Professor Angela Littwin has observed that after the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act amendments, which significantly increased the administrative requirements of a bankruptcy filing, 17.6% of *pro se* Chapter 7 filers had their cases dismissed or converted to the more onerous Chapter 13, as compared to just 1.9% of represented filers.<sup>303</sup>

Yet, even *pro se* bankruptcy filers succeed in realizing benefits from the bankruptcy system. Professor Jason Iuliano conducted a study of filers who commenced an adversarial proceeding to have their student loan debt declared dischargeable.<sup>304</sup> He noted that most eligible debtors did not seek to have their student loans discharged, but of those who did and were successful, many filed *pro se*.<sup>305</sup> Notwithstanding these successes, I acknowledge that the cost burdens associated with filing might make bankruptcy prohibitive for the indigent individual who wants to discharge penal debt. On the other hand, if bankruptcy is an option, it might encourage attorneys who provide *pro bono* services to indigent clients in other contexts to fold bankruptcy into the set of substantive services provided.

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300. *Id.* at 80.

301. *Id.*

302. Lois R. Lupica, *The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases*, 18 AM. BANKR. INST. L. REV. 43, 48 (2010).

303. Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1971-72 (2011).

304. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 499 (2012).

305. *Id.* at 499, 507, 522.

*B. On Following the Trajectory of Bankruptcy Utility*

Critics of the current bankruptcy regime make a good point about its own internal and structural barriers to discharge. And these barriers would have to fall in order to improve the financially restorative value of bankruptcy to economically disenfranchised debtors. Yet, a movement in this direction is consistent with the evolution of our conception of American bankruptcy law's social utility. Beginning with an early creditor-focused posture, it has progressed to its current debtor-tolerant posture, which itself has evolved from a focus on the financial woes of the wealthy merchant class to the middle class. A move toward addressing the needs of the lower class is in line with this trajectory.

For example, the 1800 Act followed in the wake of the Panics of 1792 and 1797, which "caused widespread ruin and the imprisonment of thousands of debtors,"<sup>306</sup> many of whom were wealthy financiers and speculators who ran into financial troubles after risky, profit-seeking behavior.<sup>307</sup> Because imprisonment for debt was still a legitimate practice, many important men found themselves in jail because they could not pay their debts.<sup>308</sup> A bankruptcy law was a way to bring relief to those who had lost their liberty as a result.<sup>309</sup> Bankruptcy became a palatable, if highly contested, solution once the too-important-to-fail quality of a significant number of debtors became clear.<sup>310</sup> For example, Robert Morris, a founding father who helped to finance the Revolutionary War, found himself in debt in the late 1790s and was imprisoned for over three years in a Pennsylvania debtor's prison.<sup>311</sup> The 1800 Act was passed, in part, to give him relief.<sup>312</sup>

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306. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995). The 1841 Act followed the Panic of 1837 and the 1867 Act followed the devastation wrought by the Civil War.

307. *Id.* at 14–15; see also BRUCE H. MANN, REPUBLIC OF DEBTORS 102 (2002) ("The imprisonment of 'wealthy debtors'—and the deaths of some of them—confounded the normal expectations of social and economic status and altered the political dimensions of debtors' relief.").

308. MANN, *supra* note 307, at 99 (noting that "[t]he collapse of large scale speculation schemes in the 1790s resulted for the first time in the imprisonment of large numbers of what one might call 'wealthy debtors'").

309. See Tabb, *supra* note 306, at 14–15.

310. MANN, *supra* note 307, at 102 ("The imprisonment of 'wealthy debtors'—and the deaths of some of them—confounded the normal expectations of social and economic status and altered the political dimensions of debtors' relief."). *But see* Casey & Huq, *supra* note 81, at 1166 n.50 (noting that one of the reasons the 1800 Act was repealed just three years after its passage "was precisely that it benefited wealthy individual merchants such as Robert Morris").

311. See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 19–20 (1935).

312. *Id.*

The 1841, 1867, and 1898 Acts all ushered in increased debtor-centered innovations like the authorization of voluntary filing, expanded exemptions, and the discharge without creditor consent.<sup>313</sup> These changes moved bankruptcy toward the ordinary non-merchant individual in financial distress. Fast-forwarding to the modern times, bankruptcy law has come to occupy an important position in the social safety net for the middle class.<sup>314</sup> It offers relief for unmanageable debt that is often associated with the middle class, like medical debt, which itself invokes underlying complexities of social significance.

Over the last twenty-five years, the Consumer Bankruptcy Project, a longitudinal study of consumer bankruptcy filings, has shown that most consumer bankruptcy filers are middle class.<sup>315</sup> From this data, the founding principal investigators of the Consumer Bankruptcy Project wove a very powerful story about the importance of consumer bankruptcy to the financial health of the middle class and, as a consequence, to the health of the nation.<sup>316</sup> The justification for a robust consumer bankruptcy system is very much tethered to their observations. On the standard account, people who file for bankruptcy are normal members of the middle class who make up the “economic engine of [America]”<sup>317</sup> and are the “backbone of the Republic.”<sup>318</sup> Many of them, however, have run into serious financial hardship as a result of unavoidable and unexpected exogenous shock, such as a serious illness, income interruption, and marriage dissolution.<sup>319</sup> They are not simply profligate spenders looking for a convenient means to scrape away the residue of their debts.<sup>320</sup> Instead, in the midst of a confluence of awful circumstances, they have

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313. See Peter C. Alexander, *With Apologies to C.S. Lewis: An Essay on Discharge and Forgiveness*, 9 J. BANKR. L. & PRAC. 601, 604–08 (2000).

314. See, e.g., Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 138–39 (2005) (distinguishing between social insurance and social assistance programs, and suggesting that bankruptcy is a form of social insurance).

315. See SULLIVAN, WARREN & WESTBROOK, *supra* note 15, at 2.

316. *Id.*; see also, e.g., Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 536 (2006); Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367, 387–88 (2003); Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 401–03 (2004).

317. See Macon Phillips, *A Strong Middle Class Equals a Strong America*, WHITE HOUSE BLOG (Jan. 30, 2009, 10:02 AM), <https://obamawhitehouse.archives.gov/blog/2009/01/30/a-strong-middle-class-equals-a-strong-america> [<https://perma.cc/HP83-43CE>] (“Our road to economic recovery begins with restoring the prosperity of working families and small business owners.”).

318. See SULLIVAN, WARREN & WESTBROOK, *supra* note 15, at 1.

319. *Id.* at 2.

320. See, e.g., A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L. J. 243, 262–63 (2001).

turned to bankruptcy as a one-time solution through which they can find renewed financial life. Through this lens, consumer bankruptcy law can be viewed as an important tool:<sup>321</sup> it acts as a one-time safety valve to provide relief to the middle class—on whose financial health the country relies—in times of serious financial trouble.<sup>322</sup>

In presenting data from their seminal study of consumer bankruptcies, Professors Sullivan, Warren, and Westbrook observed that “bankruptcy is a middle class phenomenon.”<sup>323</sup> They noted that even though most of the filers had very low incomes at the time of filing,<sup>324</sup> they largely represented a cross section of the American middle class as based on indicators such as educational attainment, occupational status, and homeownership.<sup>325</sup> The authors noted that this picture of the typical bankruptcy filer was vastly different from the then-existing stereotype of a bankruptcy filer “as existing far below the middle class,” a stereotype that ostensibly worked against a favorable view of bankruptcy’s social utility.<sup>326</sup> Moreover, these middle class bankruptcy filers had fallen into financial problems after some exogenous shock to their lives, like a divorce or an illness.<sup>327</sup>

For example, unmanageable medical debt exemplifies debt that has an increasing significance on the financial well-being of the middle class. Some scholars and commentators have viewed bankruptcy as a means—if an imperfect one—of addressing the

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321. See, e.g., Feibelman, *supra* note 314, at 138–39.

322. See, e.g., Kenneth L. Karst, *Participation and Hope*, 45 UCLA L. REV. 1761, 1774 n.47 (1998) (“If . . . it takes a stable middle class, along with stable working-class jobs, to provide a sound foundation for democracy, then might it not be expected that a sharp decline in the fortunes of people in those middle-to-lower economic brackets would tend to destabilize the polity?”); see also Joe Biden, *Time to Put Middle Class Front and Center*, USATODAY (Jan. 30, 2009), [http://usatoday30.usatoday.com/printedition/news/20090130/column30\\_st3.art.htm](http://usatoday30.usatoday.com/printedition/news/20090130/column30_st3.art.htm) [<https://perma.cc/W6SB-ENU9>] (“A strong middle class equals a strong America. We can’t have one without the other.”).

323. See SULLIVAN, WARREN & WESTBROOK, *supra* note 15, at 27.

324. *Id.* at 63.

325. *Id.* at 27–74; see also Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 25, 25 (Katherine Porter ed., 2012). Warren and Thorne observed this same pattern of middle class filers in the 2007 iteration of the study. For example, bankruptcy filers in 2007 were more educated than filers in 1991 and were more educated than people in the general population. *Id.* at 30; see also Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1071–73 (2004) (suggesting that because of “income volatility,” income alone is not a relevant marker of middle class status among bankruptcy filers and that while other social safety net programs are designed for the lower classes, bankruptcy appears to provide a safety net for middle class individuals who may not qualify for other social safety net programs).

326. See SULLIVAN, WARREN & WESTBROOK, *supra* note 15, at 33.

327. *Id.*

problem.<sup>328</sup> Professors Melissa Jacoby, Teresa Sullivan, and Elizabeth Warren studied the connection between bankruptcy filings and medical debt in Phase III of the Consumer Bankruptcy Project, conducted in 1999.<sup>329</sup> The authors described previous studies of bankruptcy filings, observing that prior to the 1990s, medical debt did not appear to be a significant driver of bankruptcy filings.<sup>330</sup> By 1999, the authors reported that medical debt was pervasive in bankruptcy filings, even if not the apparent driver of the decision to file.<sup>331</sup> For example, 46.2% of bankruptcy filers in the sample indicated that they filed bankruptcy for a medical reason or that they had at least \$1,000 in medical bills.<sup>332</sup> In addition, consistent with the middle class story about bankruptcy filers, the authors observed that “there was no clear association between identifying a medical problems and being uninsured.”<sup>333</sup>

For Jacoby, Sullivan, and Warren, the data suggested that neither private healthcare insurance nor Medicare was sufficient to protect a significant portion of the middle class against a health crisis or catastrophic injury.<sup>334</sup> This conclusion was confirmed by data from the 2007 iteration of the Consumer Bankruptcy Project, which revealed that medical debt had become an even more significant problem for the middle class, as suggested by bankruptcy filings. By 2007, 69.1% of filers cited medical debt as contributing to their financial troubles as compared to the 46.2% previously recorded.<sup>335</sup>

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328. See, e.g., Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates Over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 375 (2001).

329. *Id.* at 376–77.

330. *Id.* at 378.

331. *Id.* at 387–88.

332. *Id.* at 389.

333. *Id.* at 399–401 (noting also that “nearly eighty percent of the bankrupt families had at least some health insurance coverage at the time of their bankruptcy filings . . . suggest[ing] that higher rates of insurance were coupled with higher rates of medically related financial problems”).

334. *Id.* at 405 (hypothesizing that the incidence of uncovered family members, inadequate coverage of medical costs, and “employment difficulties” might explain why medical insurance did not provide better insulation against extreme financial hardship caused by health problems).

335. David U. Himmelstein, Deborah Thorne, Elizabeth Warren & Steffie Woolhandler, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 744 (2009), [http://www.amjmed.com/article/S0002-9343\(09\)00404-5/pdf](http://www.amjmed.com/article/S0002-9343(09)00404-5/pdf) [<https://perma.cc/6RQE-CYC8>]; see also Christopher Tarver Robertson, Richard Egelhof & Michael Hoke, *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 HEALTH MATRIX 65, 76–77 (2008) (noting that between 1981, the first year of the Consumer Bankruptcy Project, and 2007, medical bankruptcies had “grown twenty-fold”). But see Melissa B. Jacoby & Mirya Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL’Y L. & ETHICS 239, 258–62 (2010) (describing resistance to the validity of these findings).

And, as was the case in 1999, “the mere fact of insurance” alone was not “synonymous with protection from financial risk arising from medical problems.”<sup>336</sup> Indeed, a 2013 study by a private personal finance group similarly found that financial distress from healthcare bills had become the primary cause of bankruptcy filings, as based on data from the U.S. Census, the Centers for Disease Control, bankruptcy filings, and a private healthcare foundation.<sup>337</sup>

In this state of the world, the bankruptcy system has been described as an important component of the middle class social safety net because it acts as “the insurer of last resort to [middle class] families and individuals who cannot pay health-care-related costs” and gives them “the opportunity to put the brakes on their slide out of the middle class.”<sup>338</sup> For example, President Obama’s economic agenda included the intention to: “[C]reate an exemption in bankruptcy law for individuals who can prove they filed for bankruptcy because of medical expenses. This exemption will create a process that forgives the debt and lets the individuals get back on their feet.”<sup>339</sup> And, bankruptcy law is attentive to this pervasive, largely middle class problem<sup>340</sup> because medical debt is generally dischargeable in bankruptcy.<sup>341</sup>

As in the case of medical debt, the conception of bankruptcy’s social utility has evolved to encompass the notion that bankruptcy law plays a significant role in helping individuals and entities to manage debt related to complex social issues. In that respect, viewing bankruptcy as a means of addressing the pathologies of penal debt, particularly as they ravage poor and economically and socially disenfranchised communities, is not as controversial as it might seem in the abstract and in line with its current evolution. Even though in

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336. Melissa B. Jacoby, *Individual Health Insurance Mandates and Financial Distress: A Few Notes from the Debtor-Creditor Research and Debates*, 55 U. KAN. L. REV. 1247, 1251 (2007).

337. See Dan Mangan, *Medical Bills Are the Biggest Cause of U.S. Bankruptcies: Study*, CNBC (June 25, 2013, 2:29 PM), <http://www.cnbc.com/id/100840148> [<https://perma.cc/866P-3AUN>].

338. Jacoby, Sullivan & Warren, *supra* note 328, at 410–11.

339. Jacoby & Holman, *supra* note 335, at 261 (noting that medical bankruptcy rates were part of President Obama’s rationale for healthcare reform).

340. See Jacoby, Sullivan & Warren, *supra* note 328, at 401 (speculating that lower class individuals without health insurance may not seek out medical care at all).

341. When contacted by the Washington Post to comment on Obama’s plan, Professor Melissa Jacoby noted that bankruptcy law generally did not expressly prohibit the discharge of medical debt, but may have that practical effect insofar as the 2005 Amendment “made it tougher for some consumers to eliminate debts under bankruptcy.” Sarah Rubenstein, *Obama Aims to Help Patients Wipe Away Medical Debts*, WALL ST. J. HEALTH BLOG (Jan. 7, 2009, 2:06 PM), <http://blogs.wsj.com/health/2009/01/07/obama-aims-to-help-patients-wipe-away-medical-debts/> [<https://perma.cc/U4PX-QY3S>].

this context there are neither prominent Americans nor the “fragile middle class” to serve as the sympathetic and familiar faces of the growing catastrophe of unmanageable penal debt, the problem of penal debt has reached crisis proportions among the nameless indigent.<sup>342</sup> And its consequences are increasingly borne by all classes. Ultimately, bankruptcy law should serve all debtors without reference to class status.

### *C. On Bankruptcy and Socially Relevant Debt Problems*

Moreover, bankruptcy has already played an important role in mitigating the fiscal fallout engendered by big social concerns. Professors Clayton Gillette and David Skeel have argued that bankruptcy is an appropriate means of correcting faulty municipal governance structures that “can exacerbate a city’s financial difficulties and stymie efforts to reverse a downward spiral.”<sup>343</sup> Gillette and Skeel argue that “fragmented local decision-making” is often the root of chronic municipal fiscal distress.<sup>344</sup> They contend that entrenched internal political commitments to existing governance structures that result in waste of municipal financial resources make municipal officials generally incapable of implementing the governance reforms necessary to help cities find lasting solutions to financial distress.<sup>345</sup> They argue that a bankruptcy court could properly serve as a “third party that has the authority to restructure governing institutions” in order to stem financial excess.<sup>346</sup>

For example, Gillette and Skeel argue that the decentralization of appointive powers of city officials, such as in the appointment process for a police chief, is often a source of fiscal instability.<sup>347</sup> They note “the link between effective policing and municipal financial health” and speculate that “the selection of the person charged with choosing among plausible policing strategies . . .

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342. See, e.g., HARRIS, *supra* note 5, at 151–52; Hon. Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does That Mean?*, 50 S.C. L. REV. 275, 276 (1999) (“Bankruptcy laws, by their nature, embody a compromise between fundamental, competing social and economic objectives. The nature of the compromise varies from time to time as public values and economic conditions dictate. Bankruptcy law is implemented by using both legal and equitable procedures.”); Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, ATLANTIC (July 5, 2016), <http://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/> [<https://perma.cc/K38Q-GJPU>].

343. See Gillette & Skeel, *supra* note 219, at 1184.

344. *Id.* at 1184–85.

345. *Id.* at 1189–90.

346. *Id.* at 1190.

347. *Id.* at 1187–88.

could significantly affect a municipality's fiscal stability."<sup>348</sup> For this reason, an appointment process that is centralized in the executive would have tangible fiscal benefits. Thus, a financially distressed city whose city charter splits this appointment authority between more than one governing institution would continually push the city toward financial instability. Under Gillette and Skeel's proposal, a bankruptcy judge with the authority to engage in governance reform "could induce revision of the city charter in a manner that defragmented municipal decision making by, for example, placing appointive power over the police department exclusively within the mayor's jurisdiction."<sup>349</sup>

For Gillette and Skeel, bankruptcy (conditioned on state and local consent to the reforms)<sup>350</sup> is a suitable solution for correcting structures in local governance that "tolerate[] financial decisions in which the benefits and costs of public expenditures are misaligned,"<sup>351</sup> even though preservation of state and local autonomy is one of the pillars of municipal reorganization under Chapter 9 of the Bankruptcy Code.<sup>352</sup> They acknowledge that their proposal might raise concerns that "the rights bankruptcy interferes with are so important that even meaningful state and local consent to reforms are not sufficient."<sup>353</sup> Yet Gillette and Skeel suggest that bankruptcy incursions into such an "inalienable" set of rights, like "[t]he right of a state to determine the governance structure of its cities," is proper because it addresses the "deep financial distress" engendered by the failure of "a city's democratic processes."<sup>354</sup> In other words, in their estimation, bankruptcy becomes relevant once fiscal distress is a consequence of a broader set of governance-related issues, even though bankruptcy has not traditionally been geared toward incentivizing change in municipal governance.

Similarly, in the business bankruptcy context, bankruptcy judges handle cases that involve national entities whose debt problems implicate social issues of national importance. For example, bankruptcy has become an accepted mechanism for addressing the financial crises stemming from mass torts that have led to national

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348. *Id.* at 1188.

349. *Id.* at 1190.

350. Under the Bankruptcy Code, the state must authorize a Chapter 9 filing as an initial matter. "[O]nly a municipality itself can invoke Chapter 9; creditors are prohibited from throwing a city into Chapter 9 involuntarily." *Id.* at 1211.

351. *See id.* at 1152.

352. 11 U.S.C. § 904 (2012); Jacoby, *supra* note 215, at 63.

353. *See* Gillette & Skeel, *supra* note 219, at 1215.

354. *Id.*

health crises. In the case of asbestos litigation, bankruptcy became a means of resolving the financial fallout from the massive health crisis caused by asbestos production and use.<sup>355</sup> In that context, bankruptcy provided an important and organized forum for asbestos companies to handle the large quantity of claims “without destroying the enterprise from which the compensation must come.”<sup>356</sup> It also binds existing and potential claimants to the terms of the asbestos bankruptcy trusts that have been formed in the course of the dozens of asbestos bankruptcy cases that have been filed.<sup>357</sup> Specifically, the amount that a claimant is to receive from an asbestos bankruptcy trust generally depends on a number of factors, including the nature of the illness and the funding of the trust.<sup>358</sup> With respect to those trusts that cannot guarantee one-hundred percent payment of a qualified claim, the claimant receives a percentage of the qualified claim.<sup>359</sup> The percentage is further limited by projections of future claims, so that an individual that is currently ill must accept less than her qualified claim if the trust anticipates that there may be more claims in the pipeline.<sup>360</sup> Thus, in addition to affecting whether a large company will stay in business—and all of the social concerns that flow from that determination—the bankruptcy court, in significant part, presides over the massive healthcare externalities engendered by the asbestos crisis. Indeed, according to Bankruptcy Judge Lifland who presided over the Johns-Manville bankruptcy, “The ‘Congressional purpose’ in enacting the [asbestos provisions of the] Code was to encourage resort to the bankruptcy process.”<sup>361</sup> And, by and large, we

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355. See 11 U.S.C. § 524(g) (2012).

356. David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1182 (2003) (discussing also mass torts related to the Dalkon Shield and breast implants, both significant women’s health problems).

357. S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 851–52:

In spite of the considerable financial contributions to the early trusts, it soon became apparent that new asbestos plaintiffs would receive, at best, pennies on the dollar for their claims. The dramatic expansion of asbestos tort litigation drove defendants into bankruptcy. These bankruptcies left the remaining defendants with considerably greater liability and sent lawyers searching for new defendants. This cycle continues to this day.

(footnotes omitted); Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, LEXISNEXIS (Dec. 11, 2013, 5:01 PM), <https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2013/12/11/asbestos-bankruptcy-trusts-a-2013-overview-of-trust-assets-compensation-amp-governance.aspx> [<https://perma.cc/ML83-P756>] (describing the asbestos trust process).

358. Scarcella & Kelso, *supra* note 357.

359. *Id.*

360. *Id.*

361. Brown, *supra* note 357, at 848.

have accepted the bankruptcy court's role in this national health crisis, even if the outcomes are imperfect.<sup>362</sup>

Similarly, in the wake of the Catholic Church sexual abuse crisis, Professor David Skeel speculated on whether bankruptcy would be an appropriate mechanism for the Church to address the many cases—and the consequent money judgments—brought against it by the victims of sexual abuse.<sup>363</sup> Skeel observed that, “bankruptcy has become an important forum for many social issues that cannot be easily resolved elsewhere,” and suggested that as in the mass tort context, bankruptcy might be a useful means of mediating between the conflicting interests of the Church and the victims of sexual abuse.<sup>364</sup>

#### *D. On Giving Discretion to the Bankruptcy Court*

Finally, as both an institutional and substantive matter, we might worry about vesting these decisions that have important social implications in the bankruptcy court. Bankruptcy courts do not enjoy Article III status, and the Supreme Court has on several occasions limited the powers and autonomy of the bankruptcy courts.<sup>365</sup> Professor Troy McKenzie has made a compelling case for the “broad powers [of bankruptcy judges] to adjudicate important disputes” even though they are not Article III judges. Specifically, he says that their appointment by Article III appellate judges coupled with the “almost nonexistent” market for promotion permits bankruptcy judges to enjoy a significant amount of autonomy from external political pressures.<sup>366</sup> Moreover, their position within the larger bankruptcy bar and community ensures that bankruptcy judges perform their duties with “professionalism, creativity, and nonideological adjudication.”<sup>367</sup> From this perspective, bankruptcy judges are checked by their “audience,”<sup>368</sup> the bankruptcy bar, which by and large promotes reasonable adjudication in part because “it has a professional interest in

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362. *Id.* at 852 (noting that new asbestos claimants often receive “pennies on the dollar”).

363. *See* Skeel, *supra* note 356, at 1181.

364. *Id.*

365. *See* *Stern v. Marshall*, 564 U.S. 462, 469 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59–61 (1982); *see also* *Casey & Huq*, *supra* note 81, at 1160; *McKenzie*, *supra* note 187, at 775–76.

366. *McKenzie*, *supra* note 187, at 795–96.

367. *Id.* at 747, 775–76. *But see* *Casey & Huq*, *supra* note 81, at 1200–01 (noting in the business bankruptcy context that “[h]owever skilled [bankruptcy judges] might be in discerning the going-concern value of an entity, there is no ex ante structural reason to expect bankruptcy judges to show sensitivity to federalism concerns” (emphasis omitted) (footnote omitted)).

368. *See* *McKenzie*, *supra* note 187, at 797–98.

maintaining the integrity of bankruptcy as a process, the status of the actors in that process, and the preservation of a certain ideal of bankruptcy law.”<sup>369</sup> With these checks in place, the bankruptcy court is institutionally capable of presiding over the discharge of penal debt.

There are several reasons why we might similarly feel comfortable entrusting this sort of discretion to the bankruptcy court. First, bankruptcy judges know how to deal with unmanageable debt incurred in a variety of circumstances, including circumstances that implicate important national concerns. Accepting Justice Marshall’s perspective that, at the end of the day, penal debt is merely an outstanding liability on a right to payment, owed like any other “debt” under the Code,<sup>370</sup> relying on a bankruptcy judge to assess whether the debt should be discharged falls squarely within the expertise of the bankruptcy court. Moreover, bankruptcy judges routinely and successfully deal with debt that relates to issues of social significance. For example, the recent spate of municipal bankruptcies in the cities of Detroit, Michigan, and San Bernardino, Stockton, and Vallejo, California, all have raised issues related to matters of public concern that have city-wide, state-wide, and national repercussions. To the extent that complex municipal problems have resulted in unmanageable debt, the bankruptcy court has been largely accepted as an appropriate locus to resolve the debt overhang caused by the underlying problems.

### CONCLUSION

Bankruptcy law regards certain debts as categorically nondischargeable in the name of a set of frames that, on closer view, do not truly help us to understand why these debts should be treated exceptionally while others that seem to implicate the same set of frames are readily dischargeable. Without a meaningful sorting mechanism, there is no satisfying means of justifying why the fresh start is subordinated for some debtors while others can discharge their similarly situated debts.

This line-drawing has significant consequences for the most vulnerable debtors, as is reflected in the penal debt context. 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

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369. *Id.* at 805.

370. 11 U.S.C. § 101(12) (2012).

further along the socioeconomic spectrum are dischargeable. This outcome is especially significant if one understands unmanageable debt as a subordinating force that, among other ills, hinders social mobility. From this perspective, then, one might recognize bankruptcy as more than a quasi-vestigial institution and reconsider bankruptcy's social significance to unmanageable debt that is borne of complex social problems and implicates issues of economic inequality.<sup>371</sup>

More generally, the categorical nondischargeability of debt in bankruptcy frustrates the animating principle of consumer bankruptcy—the “fresh start.” While it is nominally focused on permitting the debtor to reset her financial life, the fresh start, as it is currently understood in bankruptcy discourse, has important implications for society more generally. It is premised, at least in part, on the idea that it is more beneficial for all if the individual whose productivity is limited by overwhelming debt can return to a productive life in society and in the marketplace. This raises issues of the appeal of the fresh start as an orienting principle, at least in the consumer context. This Article does not fully engage with this broader set of normative questions, but functions as one step in that direction.

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371. One rejoinder might be that bankruptcy is not intended to serve this purpose; namely, that bankruptcy law is not intended to solve complicated social issues that are better addressed in other, perhaps more direct ways. Here, however, unmanageable debt is both an indication of a broader set of complicated social issues and *itself* a significant social issue, particularly for economically disenfranchised communities. And, where debt issues exist, bankruptcy is a valid part of the conversation.