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FAKE AND REAL PEOPLE IN BANKRUPTCY

Melissa B. Jacoby[*]

ABSTRACT

This essay explores the bankruptcy system's structural bias in favor of artificial persons—for-profit companies, non-profit enterprises, and municipalities given independent life by law—relative to humans. The favorable treatment extends to foundational issues such as the scope and timing of debt relief, the conditions to receiving any bankruptcy protections, and the flexibility to depart from the Bankruptcy Code by asserting that doing so will maximize economic value. The system's bias also contributes to the "bad-apple-ing" of serious policy problems, running counter to other areas of law that have deemed harms like discrimination to be larger institutional phenomena rather than merely the product of individual wrongdoing. The bankruptcy system cannot fully internalize the consequences of these choices. These factors make bankruptcy a less effective partner in the broader policy project of deterring, remedying, and punishing enterprise misconduct.

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INTRODUCTION

Ronald Tamecki's run of good fortune ran dry. His income plummeted due to health problems and irregular work opportunities.[1] He paid expenses using live checks sent in the mail by a credit card issuer. He and his spouse were estranged, living apart in different towns. Ronald had no assets to speak of other than a house of modest value that he built with his own hands years before. Creditors had no rights to the house or its value because Ronald and his wife owned the property in a form known as tenancy by the entirety.[2]

When Ronald filed a chapter 7 bankruptcy owing about $35,000, his credit card lender lodged no complaints.[3] Believing that Ronald was strategically delaying a divorce to retain the protection of the tenancy by the entirety and thus the home, a trustee assigned to the case asked a court to throw out the bankruptcy for lack of good faith. Ronald testified under oath that he did not wish to be divorced, that he sought to reconcile with his wife. Nonetheless, the bankruptcy court dismissed Ronald's case. Ronald appealed all the way up to the United States Court of Appeals for the Third Circuit, and a majority of the panel upheld the dismissal.[4] Ronald's modest house built with his own hands and picture-

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[1] Facts generally drawn from Tamecki v. Frank (*In re* Tamecki), 229 F.3d 205 (3d Cir. 2000).

[2] 11 U.S.C. § 522(b). *See generally* Marie T. Reilly, *In Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 394, 411 (2009); Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 889–90 (2006).

[3] *Tamecki*, 229 F.3d at 205–06.

[4] *Id.* (applying 11 U.S.C. § 707(a)).

imperfect personal life disqualified him from a fresh start in the American bankruptcy system.

When enterprises use bankruptcy, they count on a reception dissimilar to that greeting Ronald Tamecki, one that exalts economics and value maximization. Indeed, a subsidiary of Johnson & Johnson, deemed not to be in financial distress by the Third Circuit and thus ineligible for bankruptcy, refiled a second chapter 11 case mere hours after its first case was dismissed.[5] Companies repurpose bankruptcy—a public system designed for debt cancellation and restructuring voluntary loans—hoping to say goodbye to the civil justice system and jury trials. Whereas tort law reflects objectives of deterrence, behavior modification, and expression of particular social values, the bankruptcy system makes different choices, at least when it comes to artificial persons. Other enterprises use bankruptcy to sell themselves quickly, hoping to insulate savvy buyers from the consequences of prior bad acts.

When a company uses bankruptcy in the aftermath of scandal and widespread wrongdoing, bankruptcy runs the risk of contributing to a "bad apple-ing" effect: allocating fault to a small number of humans while functionally cleansing other people, fake and real. In so doing, bankruptcy can disrupt the project of deterring, remedying, and punishing serious corporate misconduct. Are the benefits of bankruptcy worth these costs?

I. FAKE BANKRUPT PEOPLE

By "fake person," I do not mean avatars or bots or artificial intelligence or people who have undergone comprehensive cosmetic surgery. I mean corporations, limited liability companies, and their near and distant cousins that exist as a privilege of American business associations law. Fake personhood is the building block of enterprise: your local butcher, a multinational conglomerate, a charity, a church, a hospital, a city, or even a sewer system. All of these entities can file for bankruptcy under some circumstances; all are treated differently from, and better than, humans to some degree.

[5] *See* Chapter 11 Voluntary Petition, *In re* LTL Mgmt., LLC, No. 23-12825 (Bankr. D.N.J. Apr. 4, 2023), ECF No. 1 (refiling the case); Debtor's Statement Regarding Refiling of Chapter 11 Case, *In re* LTL Mgmt., LLC, No. 23-12825 (Bankr. D.N.J. Apr. 4, 2023), ECF No. 3 (discussing the decision to refile).

In many areas of the law, the term "person" encompasses more than humans.[6] The same is true in bankruptcy.[7] Although the great majority of filings involve humans as debtors, a wide range of people can be debtors in the American bankruptcy system. The remainder involve for-profit entities, non-profit entities, and municipalities.[8] These latter categories legally exist as autonomous entities by virtue of business association law, typically state law. Most of these enterprise bankruptcies do not involve publicly held companies.[9] And although business bankruptcy is often shorthanded as "corporate bankruptcy," many enterprises are built on forms other than the corporation, such as limited liability companies.[10]

In other areas of law, fake people are culpable actors. Various areas of law use respondeat superior to hold companies responsible for employment discrimination or other wrongs.[11] Insurers issue policies for corporate tort liability.[12] Although they cannot go to prison, corporations can be accused and

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[6] Carliss Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 813, 818–19 (2018); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1677 (2015).

[7] 11 U.S.C. § 101(41) ("The term 'person' includes individual, partnership, and corporation . . . .").

[8] *See* ADMIN OFF. OF U.S. CTS., *Bankruptcy Statistics Data Visualizations,* U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data (last visited Feb. 5, 2023).

[9] The aggregate number of commercial bankruptcy filings in the United States in recent years is greater than the total number of publicly held companies. *See* Vartika Gupta, Tim Koller & Peter Stumpner, *Reports of Corporates' Demise Have Been Greatly Exaggerated*, MCKINSEY & CO. (Oct. 21, 2021), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/reports-of-corporates-demise-have-been-greatly-exaggerated; *see also* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 455–56 (2017) (noting decline in IPOs in recent years and declining exchange listings); *id.* at 457–58, figures 1, 2 (declining fraction of publicly listed firms as percentage of all firms and declining listed firm per capita).

[10] The corporation/LLC distinction can be relevant in bankruptcy. *See, e.g.*, Michelle M. Harner & Jamie Marincic, *The Naked Fiduciary*, 54 ARIZ. L. REV. 879, 891, 893–94 (2012); Theresa J. Pulley Radwan, *Members Only: Can a Trustee Govern an LLC when Its Member Files for Bankruptcy*, LOY. L.A. L. REV. 1, 10–12 (2019). Sometimes the impact surprises lawyers and parties. *See* Beskrone v. OpenGate Cap. Grp. (*In re* Pennysaver), 587 B.R. 445, 464 (Bankr. D. Del. 2018) ("The extension of fiduciary duties to non-directors, non-managers, and non-members is seemingly in conflict with LLC policy."); Off. Comm. of Unsecured Creditors v. Comvest Grp. Holdings, LLC (*In re* HH Liquidation), 590 B.R. 211, 284 (Bankr. D. Del. 2018) ("[T]he Committee has no standing to pursue the breach of fiduciary duty claims against the LLC Debtors.").

[11] Miriam Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1113 (2016); Erin E. Meyers & Joni Hersch, *Employment Practices Liability Insurance and Ex Post Moral Hazard*, 106 CORNELL L. REV. 947, 971 (2021).

[12] *See generally* Meyers & Hersch, *supra* note 11, at 957.

convicted of crimes.[13] Corporations can commit tax fraud.[14] That does not mean these legal fields treat fake and real people exactly the same.[15] Yet these areas of law recognize that personhood is not all benefits without obligations.

Bankruptcy law and practice more fundamentally resist treating fake people as culpable actors capable of independent wrongdoing. In addition to acting as a form of bias relative to humans that is detrimental to the bankruptcy system, this attitude makes bankruptcy an unreliable partner in the broader societal project of deterring, punishing, and remedying serious corporate misconduct.

The Bankruptcy Code (the "Code") includes integrity-promoting features that are supposed to apply to large enterprises. Bankruptcy law requires extensive disclosures.[16] It authorizes tools to investigate past wrongdoing, including in ways that could bring more money into the bankruptcy estate.[17] The Code authorizes the subordination of the repayment rights of misbehaving claimants whose actions harmed the creditor body.[18] A debtor's board is supposed to lose much of its governance authority to a trustee upon evidence of gross mismanagement or other wrongdoing.[19] Businesses in bankruptcy are not supposed to be shielded from consequences for ongoing illegal activity.[20] Through creditor governance rights and priority rules, chapter 11 tempers the leverage of a company's equity holders.[21] Oversight by a federal court and a government watchdog from the Department of Justice is supposed to bring a

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[13] Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 3 (2010); Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1346–47 (2007). According to the United States Sentencing Commission, the number of federal crime sentences for enterprises has declined significantly in the past decade; "organizational offenders" are a tiny proportion of all federal defendants, and most such organizational offenders are of smaller size. *See* U.S. SENTENCING COMM'N, THE ORGANIZATIONAL SENTENCING GUIDELINES: THIRTY YEARS OF INNOVATION AND INFLUENCE 13 (Aug. 2022), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf.

[14] JACOB MERTENS, *§ 55:81 Corporate Tax Fraud*, *in* MERTENS LAW OF FEDERAL INCOME TAXATION (Aug. 2022 update).

[15] Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 287–88 (2021) (collecting sources on two-tiered criminal justice system and positing role of lack of reporting of corporate crime statistics as contributor).

[16] 11 U.S.C. §§ 521, 1125.

[17] 11 U.S.C. §§ 544, 547, 548.

[18] 11 U.S.C. § 510 (equitable subordination).

[19] 11 U.S.C. § 1104(a).

[20] 11 U.S.C. § 362(b)(4).

[21] 11 U.S.C. § 1102 (authorizing appointment of committee to represent unsecured creditors); 11 U.S.C. § 1129(b)(2)(B) (imposing absolute priority rule to limit rights of shareholders unless a supermajority of creditors support the plan).

level of comfort to all counterparties and the public. It is no surprise that scholars have long identified *some* protections for tort claimants in chapter 11.[22]

In real life, these integrity-promoting elements tend to get muted in large business bankruptcy cases. As discussed below, the deference shown to big businesses, and to their allies and restructuring professionals, stands in contrast with the treatment of individual debtors.

II. BANKRUPTCY'S BIAS

A. *Debt Cancellation*

A 1934 Supreme Court case used the term "the honest but unfortunate debtor" to identify which debtors are worthy of debt relief under bankruptcy law.[23] The debtor was a real person named William Hunt. *Local Loan v. Hunt* has been cited thousands of times.[24]

Although permanently stopping debt collection is a federal bankruptcy superpower, debt cancellation has never been absolute for humans. Section 523 of the Code contains the primary list of debts that cannot be canceled under current law.[25] Some debts on the list are hard to explain or defend. But a core set of the exceptions reflect that the fresh start inherently must give way to deterring and remedying matters such as serious fraud, defalcation, or willful and malicious injury.[26]

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[22] *E.g.*, Troy A. McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012); Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59 (2014); *see also* S. ELIZABETH GIBSON, FED. JUD. CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS AND BANKRUPTCY REORGANIZATIONS (2000); S. ELIZABETH GIBSON, FED. JUD. CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (2005).

[23] Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Several subsequent Supreme Court opinions use the same language. *See* A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 42 n.110 (1999) (first citing Cohen v. De La Cruz, 523 U.S. 213, 217 (1998); then citing Grogan v. Garner, 498 U.S. 279, 287 (1991); and then citing Brown v. Felsen, 442 U.S. 127, 128 (1979)). Ed Boltz reminds me that the language was previously found in Daniel Defoe's work. *See* DANIEL DEFOE, *Of Bankrupts, in* AN ESSAY UPON PROJECTS (Henry Morley ed., Cassell & Co. 1887) (1697).

[24] As of March 21, 2023, Westlaw reported 4,481 citations, 1,786 of which are from courts and over a thousand of which are from law review articles.

[25] 11 U.S.C. § 523(a).

[26] *See* 11 U.S.C. § 523(a)(2), (4), (6). The justification for these exceptions to discharge does not necessarily warrant the expansive interpretation the Supreme Court has given to section 523(a)(2), such as in Bartenwerfer v. Buckley, 143 S. Ct. 665 (2023) (debtor's culpability irrelevant due to doctrine of vicarious liability), and Husky Int'l Electronics v. Ritz, 578 U.S. 356 (2016) (no false representation required).

Fresh starts are important to humans for a long list of reasons, including relief from suffering, promoting class mobility, and reducing the need for other state supports.[27] Artificial persons do not inherently need a fresh start. There is an unlimited supply of them, waiting to be born, via submission of a few forms and fees to the government. In Delaware alone, day in and day out, hundreds of additional LLCs are created.[28]

Yet, for fake people like corporations, bankruptcy law tends not to condition debt relief on being honest but unfortunate. That distinction is reinforced through many channels; for example, real person cases are systematically audited by the Department of Justice, whereas fake person cases are not.[29] Bankruptcy's exceptions to discharge apply only to an "individual debtor," a term that excludes corporations and other fake people.[30] In chapter 7, companies get no discharge in any event.[31] But bigger fake people tend to seek bankruptcy relief in chapter 11, which does permit debt cancellation, with virtually no exceptions.[32]

Nothing requires that the exceptions to discharge be identical for individuals and artificial persons, of course. And the human/corporate distinction in the scope of debt relief carries over from earlier bankruptcy law.[33] The fact that the distinction has a history does not mean it is beyond reproach, especially given

[27] *See* Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. CHI. U. L.J. 557, 563 (2009) (discussing the impact of consumer debt).

[28] *See 2020: Annual Report Statistics*, DEL. DIV. OF CORPS., https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf (last visited Feb. 5, 2023) (reporting over 180,000 new LLCs formed in calendar year 2020 alone, and nearly 250,000 business entities of any kind).

[29] 28 U.S.C. § 586(f); *Debtor Audit Information*, U.S. DEP'T OF JUST, https://www.justice.gov/ust/debtor-audit-information (last updated Mar. 3, 2023) (setting forth procedure to contract with outside companies to audit individual debtor cases in chapters 7 and 13 as required by the 2005 amendments to the Bankruptcy Code).

[30] 11 U.S.C. § 523(a) (applicable to individuals); 11 U.S.C. § 1141(d) (providing only narrow tax exception to discharge for non-individual debtors). The Fourth Circuit recently held that this distinction works out differently under a new subchapter of the Code, subchapter V, for very small businesses. *See* Cantwell-Cleary Co. v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022) (interpreting section 11 U.S.C. § 1192). Subchapter V does not distinguish between individuals and business debtors, but at least one court has posited that the distinction may justify different outcomes when interpreting the new law. *In re* Offer Space, LLC, 629 B.R. 299, 310 (Bankr. D. Utah 2021).

[31] 11 U.S.C. § 727(a)(1).

[32] 11 U.S.C. § 1141(d) (providing only narrow tax exception to discharge for non-individual debtors). Chapter 9 similarly permits a discharge for municipalities. 11 U.S.C. § 944(b). *But see Cleary Packaging*, 36 F.4th 509 (in case of small businesses under new separate part of chapter 11, interpreting section 11 U.S.C. § 1192 to make exceptions to discharge applicable).

[33] Am. Serv. Co. v. Henderson, 120 F.2d 525, 529–30 (4th Cir. 1941) (provision barring discharge of debts arising from willful and malicious injuries applied only to individuals not to corporations in a reorganization).

that other areas of law render fake people responsible actors in ways bankruptcy resists.[34]

Some scholars note that a fake person can bring about consequences only with the acts or omissions of real people.[35] Why, though, would bankruptcy law use this observation so differently from criminal, employment discrimination, tax, and constitutional law? And why, then, would it be permissible to use an enterprise bankruptcy to shield the most culpable human actors on the side through non-consensual third-party releases?[36] In any event, the ability of fake people to use bankruptcy to cancel legal obligations arising from bad acts puts more pressure on other areas of law, especially criminal law, to step up—even as scholars are skeptical that criminal law is the optimal tool.[37]

Courts have justified other fake/real people distinctions in bankruptcy law (for example, the limited scope of the chapter 7 means test for individuals holding primarily consumer debts) by noting that bankruptcy courts have the authority to scrutinize the propriety of cases filed under any chapter. In other words, they might accomplish similar objectives without access to the restrictions Congress imposed on individual chapter 7 debtors.[38] Yet, that rationale fails to address the expressive function of elements such as exceptions to discharge: to convey that remedying certain harms is more important than complete relief from legal obligations.

Promotion of reorganization is perhaps the most common justification for broad debt cancellation for corporations.[39] That's how courts overseeing the A.H. Robins bankruptcy justified the distinction once upon a time in the 1980s. The A.H. Robins case was an early mass tort bankruptcy. The company failed to recall or warn women about defective and dangerous intrauterine devices for years. Aware that individuals could not have discharged the legal obligations

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[34] *See supra* notes 11–15 and accompanying text.

[35] Milhailis E. Diamantis, *Functional Corporate Knowledge*, 61 WM. & MARY L. REV. 319, 338 (2019); Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. INST. L. REV. 757, 772 (2005).

[36] Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1062, 1169–71 (2022).

[37] Baer, *supra* note 13, at 2–3.

[38] *See, e.g.*, Stewart v. U.S. Trustee (*In re* Stewart), 215 B.R. 456, 463 (B.A.P. 10th Cir. 1997) (noting as one of the rationales supporting its holding that the Bankruptcy Code does not impermissibly discriminate against consumer debtors, noting that courts have long had the power to respond a debtor wrongly filed in any chapter of the Bankruptcy Code).

[39] Brubaker, *Corporate Discharge Exception*, *supra* note 35, at 761, 764 (citing and agreeing with legislative history concerned that exceptions to discharge for corporations will undercut prospects of reorganization by reducing finality and certainty).

that A.H. Robins would cancel in its chapter 11, women harmed by the IUD complained about bankruptcy law's bias. The courts' rejection of their argument was grounded not only in the distinction's history, but finding a rational basis for the distinction: limiting debt cancellation for businesses would generate "undesirable uncertainty" and undermine a company's ability to reorganize.[40]

Pro-reorganization reasoning has always been simple to utter but hard to operationalize meaningfully. Where does the logic stop? Could it be used to rob a bank or flout environmental laws or require employees to work for no compensation? Don't some of these principles apply to human debtors too?[41]

There is nothing inherently preferable about reorganization of a fake person over its liquidation. The objectives are instrumental. Reorganization is supposed to prevent the destruction of viable firms and value and enhance the potential for creditor repayment. Its champions often mention the many jobs that will be saved. How sure does one have to be that the predicted employment benefits will come to fruition?[42] Who will do the close study weighing any of the instrumental benefits against the costs of undermining tort law and other legal corporate responsibility?

Another argument used to justify a broad discharge for enterprise bankruptcies is to promote equality among creditors and limit de facto priorities among creditors.[43] Equality promotion sounds great, but business bankruptcy law is unserious about it, as I explore more in other work.[44] In any event, it is hard to see why these kinds of objectives justify letting companies pick and choose what debts they want to cancel, however incurred, especially considering the potential costs to the legal system (reputationally and otherwise) and to society.

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[40] Beard v. A.H. Robins Co., Inc., 828 F.2d 1029, 1031–32 (4th Cir. 1987) (denying argument that statutory disparity was equal protection violation).

[41] *See generally* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987) (analyzing discharge of debts in consumer bankruptcy).

[42] For an analysis of when job saving justifies traditional reorganizations, see Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461 (2016) (job saving is not good justification for chapter 11 reorganization when the unemployment rate is low or workers have good alternative prospects). For skepticism about job-saving through quick going-concern sales, see George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 281 (2002). *See generally* Chrystin Ondersma, *Employment Patterns in Relation to Bankruptcy*, 83 AM. BANKR. L.J. 237 (2009) (studying public companies).

[43] Ralph Brubaker, *Corporate Discharge Exceptions*, *supra* note 35, at 761.

[44] *E.g.*, Melissa B. Jacoby, *Unbundling Business Bankruptcy Law*, 101 N.C. L. REV. (forthcoming 2023); *see also* David A. Skeel Jr., *The Empty Idea of "Equality of Creditors,"* 166 U. PA. L. REV. 699, 716, 721, 732 (2018).

A further justification for full debt cancellation is that big enterprises can evade exceptions to discharge in any event, thanks to sophisticated legal advice and the development of alternative restructuring approaches, such as standalone going-concern sales.[45] Congress did not provide such loopholes, however; repeat-player professionals and their clients created them.[46] Furthermore, the argument that well-advised debtors will find a workaround anyway might lead to some uncomfortable places. Members of the Sackler family, beneficiaries of the OxyContin opioid fortunes, hoped for a full legal release of OxyContin-related liability through the bankruptcy system without filing for bankruptcy themselves, and without reckoning with the exceptions to discharge that apply to individuals.[47] Does that mean Congress should authorize cancellation of all willful and malicious debts of wealthy individuals?

Apart from scope, bankruptcy discriminates in the *timing* of debt cancellation in favor of fake people. Chapter 11 cancels the debts of businesses as soon as courts confirm their reorganization plans, whether or not they finish those plans.[48] Individual debtors who endeavor to undertake repayment plans get debt relief typically only if they make it all the way to the end.[49] When courts dismiss the cases of humans for failure to make all the plan payments, those debtors get neither a discharge nor a refund for the cost of this process.[50]

Bankruptcy law imposes different line-item fees for debt relief depending on the nature of the debtor. To be entitled to a discharge, humans must buy financial education packages from a limited set of options in the private sector.[51] The obligation applies even to financially literate filers, notwithstanding that the

[45] Brubaker, *Corporate Discharge Exception*, *supra* note 35, at 770–71.

[46] *See* Kuney, *supra* note 42; George W. Kuney, *Let's Make it Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1270 (2004).

[47] Gerald Posner & Ralph Brubaker, *The Sacklers Could Get Away with It*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html.

[48] 11 U.S.C. § 1141(d)(1)(A). One narrow exception arises in the relatively new small business provisions in subchapter V of chapter 11. If the court confirms a plan over the objection of a class of dissenting claims, then the discharge is deferred. *Id.* § 1192.

[49] 11 U.S.C. §§ 1328(a), 1141(d)(5)(A). While there are historical reasons to limit the duration of chapter 13 plans, the time limits generate other disparate impact. For example, while a chapter 11 debtor can restructure a mortgage and repay it over decades, to the extent a chapter 13 debtor can modify a mortgage at all, she generally is limited to five years. 11 U.S.C. § 1322(d).

[50] Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017) ("Study after study, including this one that relies on the most recent available data, has found that only about one-third of consumers who enter chapter 13 complete their repayment plans and therefore receive a discharge of remaining unsecured debts.").

[51] 11 U.S.C. §§ 727, 1328.

empirical case for the effectiveness of financial education is mixed at best.[52] Many companies go bankrupt following questionable choices: financial, legal, ethical, and otherwise. The federal government doesn't insist on schooling them.[53] Fake people do pay plenty of money (or, rather, their creditors do) for the privilege of reorganizing in bankruptcy, including a quarterly fee to the bankruptcy watchdog.[54] But access to debt relief and cancellation is not expressly conditional on the continued payment of those fees.

On the front end, the eligibility of real people for bankruptcy depends on buying private non-profit credit counseling briefings, whatever problems led them to bankruptcy's door.[55] If debtors seek the most streamlined form of bankruptcy, chapter 7, they must complete complicated paperwork, including forms meant to determine if their case is an "abuse" of the bankruptcy system, including an assessment of financial condition.[56] Chapter 11 has no insolvency requirement for businesses. Business debtors sometimes are challenged for lack of good faith, and occasionally such challenges are successful.[57] But it takes an extreme set of facts (and a lengthy trial, and sometimes appeals) to get there, and rarely will the largest companies be the ones to be shown the exit.[58] As mentioned at the outset of this article, even when a court decides a chapter 11 case must be dismissed, some companies dare to believe they know better and try again.[59] While the second case may ultimately get dismissed as well, the debtor, and sometimes even deep-pocketed third parties, will get significant bankruptcy protection through the automatic stay in the meantime.

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[52] Lauren Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197 (2008); Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557 (2001); Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549 (2005).

[53] Smaller enterprises are likewise exempt from requirements for individuals such as credit counseling, but as discussed later, bankruptcy law treats them in other ways more like real people than larger fake people.

[54] 28 U.S.C. § 1930(a)(6).

[55] 11 U.S.C. § 109.

[56] 11 U.S.C. § 707(b); U.S. CTS., OFFICIAL FORM 122A–1, CHAPTER 7 STATEMENT OF YOUR CURRENT MONTHLY INCOME (2019), *available at* https://www.uscourts.gov/sites/default/files/b_122a-1.pdf; U.S. CTS., OFFICIAL FORM 122A-1SUPP, STATEMENT OF EXEMPTION FROM PRESUMPTION OF ABUSE UNDER § 707(b)(2) (2019), *available at* https://www.uscourts.gov/sites/default/files/form_b122a-1supp.pdf.

[57] *In re* Nat'l Rifle Ass'n, 628 B.R. 262, 283 (Bankr. N.D. Tex. 2021) (evaluating totality of circumstances and finding "that the NRA's bankruptcy petition was not filed in good faith but instead was filed as an effort to gain an unfair litigation advantage in the NYAG Enforcement Action and as an effort to avoid a regulatory scheme. This constitutes cause for dismissal under section 1112(b)(1) of the Bankruptcy Code").

[58] *See* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 973 (1991) (noting public company bankruptcies do not get dismissed even when they have same features that lead to dismissal in other cases).

[59] *See* Debtor's Statement Regarding Refiling of Chapter 11 Case, *supra* note 5.

Big businesses in chapter 11 also routinely delay filing important public documents that the law requires, even while the businesses demand that the case proceed on a fast track.[60] Failure to submit timely paperwork is a path to dismissal in consumer cases.

B. *Protections of Solvent Third Parties*

The Code generally matches the scope of protection against collection with the debtor that is the center of the bankruptcy case. An individual debtor generally cannot use her own bankruptcy to protect other people from debt collection. If an individual is jointly liable on a debt with someone that did not file for bankruptcy, the individual will have to file chapter 13 to get *temporary* protection for the co-debtor, and even then, jump through many hoops to achieve this protection.[61] Chapter 13 involves more attorneys' fees (albeit also the ability to spread them over time), and a three-to-five-year obligation to devote every penny of disposable income to a repayment plan and the costs of its administration.[62] On the fake person side, officers and inhabitants of a municipality, such as a city or county, get temporary protection if that municipality goes bankrupt under chapter 9 of the Bankruptcy Code.[63]

As for chapter 11, the Code authorizes releases of third-party liability to third-party creditors under only limited circumstances, in cases with asbestos claims.[64] The efforts to achieve permanent protection of third parties in headline-grabbing cases comes not from Congressional directive (or from clear Constitutional authority under the bankruptcy clause), but creative and pragmatic advocacy.[65]

While third-party release requests are not new, the demands for their use in high-profile cases have become more brazen.[66] While in early mass tort cases a

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[60] Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014) (discussing routine grants of extensions on schedules even when sale of the entire company is on a fast track); Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 278, 283 (2022) (discussing unauthorized shortening of notice periods, and failure to file schedules and statement of financial affairs at all in super-fast-track prepackaged bankruptcy).

[61] 11 U.S.C. § 1301 (authorizing and imposing various conditions on co-debtor stay).

[62] 11 U.S.C. § 1325.

[63] 11 U.S.C. § 922 (protecting officers and inhabitants of the debtor).

[64] 11 U.S.C. § 524(g).

[65] *See* Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 976–77 (2022); Simon, *supra* note 36, at 1154.

[66] For a prediction of this pattern, see Brubaker, *Aggregation of Mass Tort Litigation*, *supra* note 65, at 961.

main tortfeasor would be the debtor in the bankruptcy, deeper-pocketed and more culpable parties tend not to be the actual debtors in many of the modern cases. Some profitable enterprises create subsidiaries to hold selected liabilities and send them into bankruptcy to manage litigation risk.[67]

Even enterprises that don't construct entities for the express purpose of bankruptcy keep their deepest-pocketed entities from being debtors in bankruptcy while hoping for many of the same temporary and permanent protections. The Boy Scouts of America *national* organization, with minimal employees and assets, is what formally filed for bankruptcy.[68] Its *local councils*—responsible for training and oversight and safety, closest to the information about sexual abuse complaints, and holders of many of the assets—did not. Because the local councils made contributions to the trust to compensate survivors, the confirmed plan, upheld by a federal district court on appeal, gives them the equivalent of a discharge, even with respect to non-consenting survivors.[69] I am not aware of individual debtor bankruptcies achieving such a result.

C. Govern Thyself

Ronald Tamecki's bankruptcy case was dismissed not because a creditor complained, but because a trustee did. Bigger businesses generally encounter no trustee because chapter 11 contains a presumption against their appointment.[70] That presumption has gotten stronger as creditors perceive trustees as contrary to their interests, further affecting the ability of bankruptcy to temper misconduct.[71] Management typically can stay in place even in the aftermath of a scandal by appointing private restructuring professionals to company boards

[67] Alex Wolf & James Nani, *Asbestos Bankruptcies Facing Fresh Challenges after J&J Ruling*, BLOOMBERG BANKR. L. (Mar. 8, 2023), https://news.bloomberglaw.com/bankruptcy-law/asbestos-bankruptcies-facing-fresh-challenges-after-j-j-ruling (discussing bankruptcies of Bestwall, designed to manage Georgia-Pacific asbestos liabilities; DBMP, designed to manage liabilities of CertainTeed; and other examples).

[68] Volunteer Petition [of Boy Scouts of America] for Non-Individuals Filing for Bankruptcy, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Feb. 18, 2020), ECF No. 1. The national organization's authority to file in Delaware was premised on first filing a petition for a tiny subsidiary that was venued there. Volunteer Petition [of Delaware BSA, LLC] for Non-Individuals Filing for Bankruptcy, *In re* Boy Scouts of Am., No. 20-10342 (Bankr. D. Del. Feb. 18, 2020), ECF No. 1.

[69] Nat'l Union Fire Ins., Co. v. Boy Scouts of Am. (*In re* Boy Scouts of Am.), No. 22-11237, 2023 WL 2662992 (D. Del. Mar. 28, 2023) (upholding bankruptcy court's confirmation of Boy Scouts chapter 11 plan that includes nonconsensual releases of liability for nondebtors like the local councils).

[70] 11 U.S.C. § 1104.

[71] Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715 (2018). Sometimes even a request for a trustee will constitute a default under the debtor-in-possession financing agreement, which means the creditors' committees' professionals may not get paid if they pursue such a path.

and hiring chief restructuring officers; as others have explained, those steps are hardly equivalent to a trustee or other governance components of chapter 11 as written.[72]

Consider Harvey Weinstein and The Weinstein Company ("TWC"), an entertainment firm whose harassment and assault cover-ups were exposed on the front page of the New York Times in October 2017.[73] TWC filed for chapter 11 in March 2018, barely a month after the New York Attorney General ("NYAG") announced the results of its investigation into violations of human rights law, anti-discrimination law, denial of equal protection under state civil rights law, and illegal business conduct. Like some private civil actions, the NYAG complaint alleged that those in power at TWC repeatedly failed to investigate notwithstanding red flags [74] and "deliberately looked the other way or took actions that enabled H.W. to retaliate against employees who complained of misconduct."[75] TWC allegedly used female employees, including executives, not only to recruit additional women for sexual encounters but to carry out stereotypical chores.[76] Unlike the news reporting, which focused on assaults of famous actors (non-employees) at film festivals and the like, the NYAG investigation highlighted the toxic environment the company fostered for its employees who lacked public profiles.

Apart from the toxic and misogynistic workplace, commercial creditors of TWC complained bitterly about TWC's management. The company had been in financial trouble on and off since its inception and had poorly handled the fallout of the news reporting.[77] Apparently, TWC was unable to locate Harvey

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[72] *See* A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 917 (2009); Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083, 1113–14 (2022).

[73] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[74] Complaint, at 24–25, People v. Weinstein Co., No. 450293 (N.Y. Sup. Ct. 2018), NYSCEF No. 1. On at least one occasion, human resources sent a complaint to the Chief Operating Officer (Glasser) with a note that said "we need to discuss a settlement and NDA" rather than requesting an investigation. Confidentiality was not honored; complaints were shared with H. Weinstein, and human resources representatives expressed resignation about the likelihood of retaliation. "On not a single occasion was H. Weinstein subject to a formal investigation or to restrictions on his behavior or adverse employment consequences, as a result of any complaint." *Id.* at 25.

[75] *Id.* at 24.

[76] *Id.* at 14–15; *see also id.* at 21. ("Several of TWC's female creative executives were exposed to and required to facilitate HW's sex life as a condition of employment.").

[77] *See* Jacoby, *supra* note 44.

Weinstein's personnel file.[78] TWC's own descriptions of its path to bankruptcy in court papers reflected chaos: a large number of vacant positions, lack of internal legal counsel, refusal of others in the industry to engage with the company, and loss of half of the board.[79] According to the CEO of Lantern Capital that acquired the company, "The Weinstein Co. was one of the worst-managed companies I've ever seen. They had no financial controls, no legal controls . . . . It was an 'inmates ran the asylum' type of scenario."[80] The CEO had his own reasons for reverse puffery, of course, but the description is consistent with other accounts.[81]

Notwithstanding this litany of difficulties, TWC continued to govern itself in bankruptcy without challenge. If someone requested a trustee, the lender would have the right to pull the funding, keeping the company afloat until the anticipated sale of the company to a private equity firm.[82] Although TWC had hired a chief restructuring officer, a common move, the CRO's expertise was debt restructuring and quick sales, and he served at the pleasure of the TWC board run by Harvey Weinstein's brother and longtime business partner Robert Weinstein.[83] Legacy board members remained, with a few additions, and Robert Weinstein led the company through the most consequential phase of the bankruptcy. However pragmatic the choice to avoid a trustee, that choice sent, and sends, a message.

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[78] Tatiana Siegel, *New York's Attorney General Opens up on Suing Weinstein, Beating Trump, and Poking Facebook*, HOLLYWOOD REP. (Apr. 13, 2018, 6:30 AM), https://www.hollywoodreporter.com/news/general-news/eric-schneiderman-talks-beating-trump-court-suing-weinstein-more-1100948/.

[79] *See* Jacoby, *supra* note 44.

[80] Barry Shlachter, *The Real Story of How a Dallas Investor Bought The Weinstein Co.*, D MAG. (Aug. 8, 2019, 10:57 AM), https://www.dmagazine.com/publications/d-ceo/2019/august/the-real-story-of-how-a-dallas-investor-bought-the-weinstein-co/.

[81] I review the company's financial history in Jacoby, *supra* note 44.

[82] [Debtor's] Motion to Approve Debtor in Possession Financing, at 21, *In re* Weinstein Co. Holdings, LLC, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), ECF No. 11 (making it an event of default for a trustee to be appointed, citing 8.01 of credit agreement); Debtor in Possession Loan and Security Agreement, at 65, *In re* Weinstein Co. Holdings, LLC, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), ECF No. 76-3 (section 6.19) (obligating TWC to retain professional advisors and investment bank selected by Robert Weinstein and the board); *id.* at 71 (section 8.01(b)) (making violation of many specific covenants an event of default); *id.* at 72–73 (section 8.01(f)) (providing that the filing of any motion seeking appointment of trustee or examiner is an event of default).

[83] Order Authorizing the Debtors to (I) Retain and Employ FTI Consulting, Inc. to Provide the Debtors Interim Management Services, (II) Designate Robert Del Genio as Chief Restructuring Officer and (III) Designate Luke Schaeffer as Chief Strategy Officer Nunc Pro Tunc to the Petition Date, at 8, *In re* Weinstein Co. Holdings, LLC, No. 18-10601 (Bankr. D. Del. Apr. 23, 2018), ECF No. 296-1 (updating terms of engagement letter).

D. Flex in the Joints

The disparity in treatment between humans and entities is further fueled by the reality that larger enterprises are given significant leeway to depart from the Code as written.

Starting but not ending with the delay in submission of mandatory disclosures mentioned earlier,[84] the weakening of bankruptcy's transparency norm in larger chapter 11 cases makes fake people less accountable. Some mass tort settlements eventually generate potentially important public repositories of information.[85] Even if that is a predicted outcome of a mass tort bankruptcy, all too often, there are roadblocks to information access while the key decisions are being made and the outcome of the case remains contested. The tools include overuse of the Code's authorization of sealing public records[86] and expansive protocols that condition access to documents on non-disclosure.

Large enterprises also are given running room to unbundle and extract bankruptcy's perks stripped of integrity-promoting features, which I have called "bankruptcy *à la carte*."[87] Linking arms with a lender and an acquirer, bankrupt companies enter bankruptcy insisting on a quick-going concern sale stripped of the intended chapter 11 protections. Some companies melt themselves prior to bankruptcy, and then use the resulting mess to justify off-Code demands.[88] As one judge observed, he "might as well leave his or her signature stamp with the debtor's counsel or go on vacation or shift attention to consumer cases where the law may still mean something."[89]

The funding model of the bankruptcy system fuels these practices. If chapter 11 debtors have no money to pay for the integrity-promoting parts of the process, those elements get dropped in favor of salvaging value. Occasionally even the United States Supreme Court pushes back on the pragmatic arguments

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[84] *See supra* note 60 and accompanying text.

[85] *See generally* Alexandra D. Lahav, *The Knowledge Remedy*, 98 TEX. L. REV. 1361 (2020); Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345 (2022); Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 HARV. L. REV. 757, 765–66 (2023) (calling for public to receive accounting on whether firm has engaged in successful remediation).

[86] 11 U.S.C. § 107.

[87] *See* Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 416 (2021) (adopting the term "bankruptcy *à la carte*"); Jacoby, *supra* note 44 (elaborating on phenomenon). *See generally* Jacoby & Janger, *supra* note 59, at 862 (focusing on quick going concern sales); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 75 FORDHAM L. REV. 361 (2022) (applying concept of bankruptcy *à la carte*).

[88] *In re* Humboldt Creamery, No. 09-11078, 2009 WL 2820610, at *2 (Bankr. N.D. Cal. Aug. 14, 2009) ("[I]t is easy enough for the debtor to unplug the freezer prior to bankruptcy.").

[89] *Id.*

restructuring lawyers make for why they need to write their own rules.[90] But those admonitions tend to be narrowly construed, inspiring work arounds instead of wake-up calls to rethink the norms of practice.

Consumer debtors and their creditors rarely are afforded such opportunities to unbundle the law or propose an off-Code option. As just one example in contrast to the practices above, if someone needs to cure a default on a home mortgage in bankruptcy, for example, she must pay every extra cent to old credit card bills for three to five years—no de facto *à la carte* bankruptcy for humans.[91]

That doesn't mean consumer bankruptcy cases adhere perfectly to the Code (given the structure and language of the Code, that probably would be impossible, no thanks to the messiness of the 2005 amendments)[92] or to the assumptions and obligations imposed by courts of appeal and the Supreme Court.[93] Courts have accommodated some innovation among consumer bankruptcy lawyers in how they get paid, lest many financially distressed individuals lack access to bankruptcy relief.[94] Courts were involved in managing home mortgage delinquency through loss mitigation mediation during the global financial crisis, even though the Code generally does not require lenders to accept home mortgage modifications.[95]

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[90] *See, e.g.*, Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017).

[91] *See* Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261 (2008); Melissa B. Jacoby, *The Legal Infrastructure of Ex Post Consumer Debtor Protections*, 38 FORDHAM URB. L.J. 75 (2011).

[92] Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 ("The problems with the 2005 Act are breathtaking. There are typos, sloppy choices of words, hanging paragraphs, and inconsistencies. Worse, there are largely pointless but burdensome new requirements, overlapping layers of screening, mounds of new paperwork, and structural incoherence.").

[93] *See* Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875 (2015).

[94] *In re* Prophet, 639 B.R. 664, 676 (Bankr. D.S.C. 2022) (holding that bifurcated fee agreements were not per se prohibited by local rules of procedure and remanding for further evaluation); *In re* Brown, 631 B.R. 77 (Bankr. S.D. Fla. 2021) (setting forth conditions under which courts in this district would approve bifurcated fee agreements but prohibiting factoring of attorneys' fees). Consistent with the thesis of this article, however, making the system accessible to financially distressed individuals has not been a priority of the federal judiciary, as most famously demonstrated in United States v. Kras, 409 U.S. 434 (1973) (holding that due process does not require a federal district court to waive a bankruptcy filing fee for indigent individuals); *see also* Donald L. Swanson, *Some Bankruptcy Law History: Debtor Benefits Are Always a Tough Sell (Part III, The Bankruptcy Code)*, MEDIATBANKRY BLOG (Jan. 24, 2023), https://mediatbankry.com/2023/01/24/some-bankruptcy-law-history-debtor-benefits-are-always-a-tough-sell-part-iii-the-bankruptcy-code/ ("It appears that, when debtor-benefits language in the Bankruptcy Code is anything but clear and precise, the justices are open to analytic gymnastics for ruling against or minimizing those benefits for individual debtors.").

[95] For a critique of the underlying prohibition on principal residence mortgage modification, see Abbye Atkinson, *Modifying Mortgage Discrimination in Consumer Bankruptcy*, 57 ARIZ. L. REV. 1041 (2015).

Yet, the life cycle of such emergency accommodations may not be parallel. In big business cases, practices that entered on a wave of emergency can become firmly lodged.[96] Whether that is right or wrong, creative application of bankruptcy power may not work the same in consumer bankruptcy.

To offer one example, in early 2022, a bankruptcy court in a district popular for loss mitigation mediation held that enough is enough:

> [Loss mitigation] was never intended to become a de facto right or a new form of bankruptcy protection. Today, loss mitigation has morphed into an institutionalized process not supported by the Bankruptcy Code. It now seemingly exists not for the purpose originally intended but rather for the benefit of professionals, trustees, and institutions, often to the economic detriment of the creditors.[97]

The court continued: "[t]his was always a temporary administrative solution. There is nothing in the Code which permits a bankruptcy court to forcibly restructure a residential mortgage."[98] The court went on to say that cases filed "solely to participate in the loss mitigation process will be subject to swift motions to dismiss."[99]

I do not point out this decision to criticize it on the merits or to speak in favor of that district's particular mortgage modification program—only to suggest that institutional actors have internalized the Congressional message that consumer bankruptcy requires the running of a tight ship. That vibe seems not to apply in bigger enterprise cases.

Disparity in flexibility is amplified by rules determining *where* a bankruptcy case should be filed. Individuals of modest means tend not to have venue choices. Plus, if an individual debtor has recently moved and has any assets of note, her case may get challenged for some sort of pre-bankruptcy planning, leading to dismissal of the case, denial of the property exemption, and more.[100]

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[96] Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. REG. 651, 653 (2020) (observing that the "extraordinary inducements found in DIP loans" thought to be associated with the Global Financial Crisis are "generally unrelated to the broader economic conditions that have been cited to justify judicial approval").

[97] *In re* Tcherneva, 638 B.R. 676, 681 (Bankr. E.D.N.Y. 2022).

[98] *Id.* at 689.

[99] *Id.* at 681.

[100] Juliet M. Moringiello, *Distinguishing Hogs from Pigs: A Proposal for a Preference Approach to Pre-Bankruptcy Planning*, 1 AM. BANKR. INST. L. REV. 103, 109 (1998); *see also, e.g.*, Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 399–400 (2005); 11 U.S.C. § 522(b)(3), (o), (p).

For big enterprises, pre-bankruptcy planning, including where to file the case, is not only tolerated but expected. Lawyers can, and thus do, search out the districts that might offer the most advantageous law and practices and figure out ways to get their cases to those places; lawyers active in large cases have been known to quip that it would be malpractice to do otherwise.

Federal venue law as written by Congress sets the foundation for this disparity. Title 28 of the U.S. Code allows a business debtor to select from multiple options focusing on its own convenience and preferences rather than other parties.[101] A big company even can follow a tiny, and relatively young, subsidiary into a particular venue that the enterprise otherwise could not access.[102] The same venue law typically leaves individuals of modest means just one choice of venue.[103] In some situations, the most convenient courthouse for individual debtors (or, perhaps, their lawyers) is in technically the "wrong" district; if discovered, the government watchdog (the United States Trustee in most districts, and the Bankruptcy Administrator in Alabama and North Carolina) is likely to challenge the filing and ask for the case to be transferred.[104]

E. Exceptions

Although the bankruptcy system, and the Code, tend to be more flexible with fake people (and occasionally their lawyers) than real people, that tendency is not absolute. For example, whereas the lawyers for chapter 11 debtors-in-possession, standing in for a trustee, must meet the definition of disinterested in order to be retained and paid out of the bankruptcy estate, the lawyers for individuals in chapter 13 are not held to this standard.[105] Also, the Code authorizes sanctions if a creditor willfully violates the automatic stay and

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[101] 28 U.S.C. § 1408 (allowing the debtor to choose to file in any district which contains its domicile, residence, principal place of business, principal assets). Courts have interpreted domicile to be place of incorporation.

[102] 28 U.S.C. § 1408(2) (so-called affiliate venue rule). Federal venue law permits other parties to seek a transfer. but parties bear significant financial costs and legal risks by going down that path. *See* 28 U.S.C. § 1412 ("A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.").

[103] *See* 28 U.S.C. § 1408(1) (domicile or residence).

[104] *E.g.*, *In re* Ross, 312 B.R. 879, 881–84, 892 (Bankr. W.D. Tenn. 2004) (holding that debtors, who resided in Mississippi and Arkansas, could not keep their cases in Tennessee); Opinion and Order Transferring Case at 2–3, *In re* Zagaroli, No. 18-50524, 2018 WL 3486767, at *1 (Bankr. M.D.N.C. July 18, 2018) ("This Court is continuing its position of following the majority of courts in holding that the venue requirements of 28 U.S.C. § 1408 are mandatory, not optional" and transferring case to Western District of North Carolina).

[105] 11 U.S.C. § 327(a) (requiring disinterestedness, but not for lawyers representing chapter 13 debtors); 11 U.S.C. § 330(a)(4)(B) (discussing compensation for debtor's council in chapter 13 with no reference to disinterested status).

pursues collection during the bankruptcy case.[106] The language is limited to "an *individual* injured . . . ."[107] That is not a protection for fake people. Nonetheless, the United States Court of Appeals for the Fourth Circuit could not accept this distinction; surely, said the court, Congress meant to protect fake people too.[108]

The Code also provides and enforces property exemptions for individual debtors and not fake people.[109] Exemption policy is typically associated with both humanitarian and instrumental objectives. It would be cruel to leave a family with no pots or pans or utensils, goes the rationale, but also, stripping a family of everything makes it less likely they could resume the kind of productivity American society favors.[110]

Although debtor-creditor law does not give property exemptions to fake people, fake people fulfill their asset partitioning needs under business associations law as well as international asset protection strategies. Businesses can pledge assets as collateral to a particular creditor and render them out of reach to unsecured creditors. Structures like securitization render assets bankruptcy-remote, bolstered by state commercial laws meant to deter bankruptcy courts from recharacterization.[111] Going further, certain lawyers have advised firms facing products liability or other such allegations to put their "legacy liabilities" into subsidiaries separate from their assets and send them into in bankruptcy, with the aspiration to also protect the larger enterprise.[112]

III. FROM BINARY TO SPECTRUM

Identifying a fake-real-person binary serves an important rhetorical function at the very least. Favoring artificial persons over real people is itself a form of legal bias. Peeling back more layers reveals a spectrum of scrutiny of bankrupt

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[106] 11 U.S.C. § 362(k).

[107] *Id.*

[108] *See* Budget Serv. Co. v. Better Homes of Va., 804 F.2d 289, 292 (4th Cir. 1986) ("[S]anctions are not limited to the relief of an 'individual' in the literal sense. The Bankruptcy Code does not define the word individual. We agree that it seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the section, and we construe the word 'individual' to include a corporate debtor."). For a case holding otherwise, see Maritime Asbestosis Legal Clinic v. LTV Steel Co., 920 F.2d 183, 186–87 (2d Cir. 1990) (applying provision only to natural persons).

[109] *See* 11 U.S.C. § 522 (providing exemptions for the "individual debtor").

[110] *See* Howard, *supra* note 41, at 1077.

[111] *E.g.*, U.C.C. § 9-318 (AM. L. INST. & UNIF. L. COMM'N 2010).

[112] Wolf & Nani, *supra* note 67.

people. For example, the bankruptcy system treats small fake people more like humans, with more scrutiny, than like their giant fake person counterparts.

Small business bankruptcy law has been in some flux in this regard. From 2006 to 2020, the Code reflected distrust toward the all-too-human smallest businesses that tried to reorganize in chapter 11, imposing hurdles that probably decreased the odds of plan confirmation.[113] A new subchapter of chapter 11, the Small Business Restructuring Act (SBRA), which became effective in 2020, cut back on that skepticism.[114] Still, the SBRA reinforces the stronger connection between the smallest businesses and humans. For example, SBRA cases include a mandatory trustee, albeit one that would not replace management.[115]

Combining bankruptcy with the backdrop of scrutiny from other law, the resulting taxonomy might look something like this:

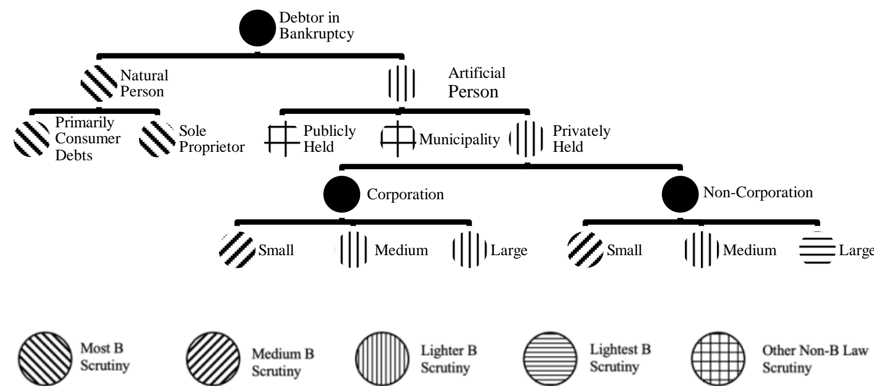

Figure 1: Levels of Scrutiny/Distrust

IV. IMPLICATIONS OF THE BINARY AND SPECTRUM FOR BAD APPLE-ISM

Many parts of the legal world treat big corporations preferentially to individuals of modest means. Even with that backdrop, bankruptcy lands in a different place from other fields like criminal law, constitutional law, and

[113] Brook Gotberg, *Reluctant to Restructure: Small Businesses, and SBRA, and COVID-19*, 95 AM. BANKR. L.J. 389, 407–11 (2021).
[114] *See id.* at 409–11.
[115] *See* 11 U.S.C. § 1183.

employment discrimination law by all but disclaiming the corporation's capacity as a culpable actor and preferring that misconduct be associated with individuals. This approach goes against the most advanced thinking about employment discrimination and similar phenomena.[116]

Unable to fully internalize the consequences of its choices, bankruptcy thus may encourage bad apple-ism more generally. It not only allows an enterprise access to an array of extraordinary tools beyond the reach of honest but unfortunate financially distressed consumers, but functionally cleanses the credentials of enablers of enterprise-wide problems.

Recall again, as just one example, The Weinstein Company bankruptcy. TWC filed for chapter 11 shortly after the NYAG investigation revealed a toxic institutional culture for women employees. From the beginning to the end of the case, parties and the court tended to refer to Harvey Weinstein, not the company, as the perpetrator of bad acts.[117] Longtime executive and board chair Robert Weinstein was permitted to helm TWC through the bankruptcy's most consequential phase. A plan of liquidation wiped out not only Robert Weinstein's equity interest in TWC but also his personal liability for sexual misconduct claims. He disclaimed liability and did not venture an apology.[118]

[116] *See* Vicki Shultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 26 (June 18, 2018) ("[H]arassment is a widespread institutional problem that cannot be solved by firing or punishing harassers one by one."); Lesley Wexler, Jennifer K. Robbenholt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 51, 90 (bringing down powerful individual men does not bring about meaningful institutional change).

[117] *E.g.*, Transcript of Telephonic Hearing Re: Fifth Amended Joint Chapter 11 Plan of Liquidation, at 116–17, *In re* Weinstein Co. Holdings, LLC, No. 18-10601 (Bankr. D. Del. Jan. 27, 2021) ECF No. 3207 (referring to victims of Harvey Weinstein and Harvey Weinstein's "terrible conduct").

[118] Forty-five people filed valid misconduct-related claims in the TWC case. Of those who voted, eight voted against the plan that would release Robert Weinstein but provide insurance funds to pay claims. Report of the Official Committee of Unsecured Creditors Concerning Sexual Misconduct Claims Ballots and Declaration of Debra I. Grassgreen in Support Thereof, at 6, 8, *In re* Weinstein Co. Holdings, LLC, No. 18-10601 (Bankr. D. Del. Jan. 7, 2021), ECF No. 3159. The plan treated claims against Harvey Weinstein differently, preserving an option for claimants to take less money from the insurance funds and pursue (the likely judgment-proof and incarcerated) Harvey Weinstein directly. Several federal district courts already had dismissed claims against Robert Weinstein that arose from hotel room and film festival incidents over a long period of time (including some preceding the creation of TWC). *E.g.*, Order and Opinion Denying in Part and Granting in Part Defendant's Motion to Dismiss, at 1-2, 9, Geiss v. Weinstein Co. Holdings, LLC, No. 17-9554 (S.D.N.Y. Apr. 18, 2019), ECF No. 278 (dismissing claims against all directors, including Robert Weinstein); Opinion & Order, at 1–2, Canosa v. Ziff, No. 18-cv-04115 (S.D.N.Y. Jan. 28, 2019), ECF No. 152 (dismissing claims against all directors, including Robert Weinstein); Opinion and Order, at 1, David v. Weinstein Co., LLC, No. 18-5414 (S.D.N.Y. Dec. 19, 2019), ECF No. 198 (dismissing claims against Robert Weinstein). But that did not affect the viability of other claims, especially those based on employment discrimination and civil rights theories. *E.g.*, Decision and Order, at 1, 4, 11, Rehal v. Weinstein, No. 151738/2018 (N.Y. Sup. Ct. May 13, 2019), NYSCEF No. 38 (rejecting, among other things, Robert Weinstein's arguments that *Canosa* should be dispositive, and that he and

During the TWC bankruptcy, Robert Weinstein accrued production credits and made entertainment industry commitments,[119] and after departing from TWC announced the founding of Watch This Entertainment, a "boutique development and production company" that included at least one other former TWC executive.[120] Indeed, when he was supposedly pouring all of its efforts into saving TWC as chair of the board,[121] his new company was already in the works.[122] He continues to profit directly from earlier TWC films.[123]

In addition, the private equity firm that bought TWC during its bankruptcy remained intertwined with some of TWC's prior executives and investor connections.[124] For example, a legacy TWC board member removed from his

Harvey Weinstein had separate professional domains and worked from separate offices). However, Rehal consented to the release of Weinstein in TWC's bankruptcy plan.

[119] *See Bob Weinstein*, IMDB, https://www.imdb.com/name/nm0918424/?ref_=ttfc_fc_cr4 (last visited Mar. 8, 2023).

[120] Etan Vlessing, *Bob Weinstein Reemerges With New Company and Animated Pick 'Endangered'*, HOLLYWOOD REP. (Oct. 11, 2019, 1:10 PM), https://www.hollywoodreporter.com/news/general-news/bob-weinstein-launches-new-production-company-partners-tea-leoni-animated-pic-1247095/.

[121] *See* Transcript of Hearing on First-Day Motions, at 12*, In re* Weinstein Co. Holdings, LLC, No. 18-10601 (Bankr. D. Del. Mar. 22, 2018), ECF No. 86 (Robert Weinstein and other board members "devoted themselves to navigating TWC to the soft landing that its creditors, employees, and other claim holders deserve"); *see also id*. ("[The] board has done everything in its power to steer this ship in the right direction since the revelations of October 2017.").

[122] *See* U.S. Trademark Application Serial No. 8770737 (filed Dec. 4, 2017). He filed two extensions, in December 2018 and July 2019.

[123] *See In re* Weinstein Co. Holdings, LLC, No. 18-10601, 2021 WL 3572843, at *2–4 (Bankr. D. Del. Aug. 12, 2021). A year later, the District Court affirmed this ruling. Memorandum Opinion, Spyglass Media Grp., LLC v. Weinstein, (*In re* Weinstein Co. Holdings, LLC), No. 21-1151, 2022 WL 3226317 (D. Del. Aug. 10, 2022). The Third Circuit dismissed a further appeal. *In re* TWC Liquidation Tr., No. 1-21-cv-01151, 2022 WL 18673909 (3d Cir. Oct. 26, 2022).

[124] These included longtime TWC and Miramax executive Irwin Reiter, who worked with the Weinstein brothers for decades and became known as the "Deep Throat" of the *New York Times* investigation of the company. *See* Brent Lang, *Former Weinstein Co. Exec Irwin Reiter Forms Consulting Firm*, VARIETY (Nov. 30, 2018, 12:59 PM), https://variety.com/2018/film/news/irwin-reiter-consulting-firm-1203066481/. *See generally* JODI KANTOR & MEGAN TWOHEY, SHE SAID (2019). Reiter started his own consulting firm, and later agreed to provide assistance to Lantern "in all forms of finance, accounting and participation." By January 2019, he identified himself as Executive Vice President for Accounting and Financial Reporting for Lantern Entertainment. Essentially, he continued doing for Lantern what he did for TWC and for the Weinsteins' prior company, Miramax. Declaration of Irwin Reiter in Support of Omnibus Objection of Lantern Ent. LLC to (I) Supplemental Objection and Joint Motion of SLP Contract Counterparties to Clarify Sale Order; (II) Mot. of Executory Cont. Counterparties for Order Confirming That Counterparties' Agreements Have Been Designated by Lantern for Assumption and Assignment; and (III) the Official Committee of Unsecured Creditors' (A) Objection to Supplemental Notice Of Filing of List of Assumed Contract Pursuant to Sale Order and (B) Joinder to the Motion of Executory Contract Counterparties for Order Confirming that Counterparties' Agreements Have Been Designated by Lantern for Assumption and Assignment, at 2, Lantern Ent. LLC v. Bruce Cohen Prods. (*In re* Weinstein Co. Holdings, LLC), No. 18-10601 (Bankr. D. Del. Jan. 7, 2019), ECF No. 1940.

post once the sale to Lantern Capital had closed became a strategic investor in this acquirer's enterprise.[125]

Right before the bankruptcy, TWC fired David Glasser, the Chief Operating Officer and President after he was implicated in the NYAG investigation of TWC's toxic culture.[126] Glasser moved on, working with longtime Harvey Weinstein collaborator Ron Burkle to raise $300 million to form a new media company, 101 Studios.[127] 101 Studios also took on former TWC executives.[128] In 2020, The Hollywood Reporter announced Glasser's 101 Studios had struck a deal with Sports Illustrated, giving the studio access to the brand's archives as well as to produce future products, calling it the studio's "highest-profile deal to date."[129] Implicitly holding Glasser harmless for his work with TWC and the Weinstein brothers, news reports referred to 101 Studios as an "industry newcomer."[130]

Those involved in the TWC case may identify a variety of rational reasons the chips fell as they did. The point here is not to recast blame, but to consider

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[125] *See* Press Release, Lionsgate, Lionsgate Enters into Strategic Alliance with Spyglass Media Group (July 15, 2021), *available at* http://investors.lionsgate.com/press-releases-and-events/press-releases/2021/07-15-2021-210556940 (listing Tarak Ben Ammar as a strategic investor).

[126] Ryan Faughnder, *David Glasser Was the Weinstein Co's 'Third Brother.' Will Firing Be Enough to Save The Business?*, L.A. TIMES (Feb. 18, 2018), https://www.latimes.com/business/hollywood/la-fi-ct-david-glasser-weinstein-20180218-story.html. As late as 2019, the new New York attorney general, Letitia James, was still seeking information about Glasser's role in TWC's workplace.

[127] Pamela McClintock, *David Glasser Says He's Raised $300 Million for Post-Weinstein Studio*, HOLLYWOOD REP. (Jan. 22, 2019, 5:45 PM), https://www.hollywoodreporter.com/news/general-news/david-glasser-says-hes-raised-300-million-post-weinstein-studio-1178237/; Gene Maddaus, *David Glasser to Launch $300 Million Shingle with Ron Burkle's Backing*, VARIETY (Jan. 22, 2019, 5:45 PM) ("marks a fresh start for Glasser"), https://variety.com/2019/biz/news/david-glasser-ron-burkle-101-studios-1203114830/.

[128] Pamela McClintock, *David Glasser's 101 Studios Names James Allen Head of Acquisitions*, HOLLYWOOD REP. (Apr. 15, 2019, 7:01 AM) (former TWC president David Hutkin became COO of 101 Studios), https://www.hollywoodreporter.com/news/general-news/david-glassers-101-studios-names-james-allen-head-acquisitions-1202051/; Trey Williams, *David Glasser's 101 Studios Production Company Sets New Executive Leadership*, THE WRAP (Mar. 29, 2019, 3:37 PM), https://www.thewrap.com/david-glassers-101-studios-production-company-sets-new-executive-leadership/ (identifying former TWC executives Laurent Oaknine and Ennis Hensley as part of 101 Studios leadership).

[129] Mia Galuppo, *David Glasser's Studio Nabs Sports Illustrated Film and TV Rights for New Venture*, HOLLYWOOD REP. (May 5, 2020, 10:00 AM), https://www.hollywoodreporter.com/business/business-news/david-glassers-101-studios-abg-launch-sports-illustrated-studios-1293324/. 101 Studios also identified the television show *Yellowstone*, the film *Burden*, and a new project based on a best-selling book, *Under the Influence*, as production projects. Rick Porter, *TV Series Based on Anheuser-Busch Family in the Works*, HOLLYWOOD REP. (Oct. 2, 2019, 9:00 AM), https://www.hollywoodreporter.com/tv/tv-news/yellowstone-producer-developing-anheuser-busch-family-saga-tv-1244850/.

[130] *See* Jason Guerrasio, *From Harvey Weinstein's 'Bullying' Demands to Martin Scorsese's Last-Minute Rescue: Inside the Resurrection of 'The Current War'*, BUS. INSIDER (Oct. 22, 2019, 9:24 AM), https://www.businessinsider.com/inside-last-harvey-weinstein-movie-the-current-war-2019-10.

the broader impact. Bankruptcy's conceptualization of fake and real people makes it easier to blame particular individuals rather than on broader groups and institutions that actively contribute to discrimination, distribution of harmful products, and other social ills.

V. What Now?

If nothing else, this Essay shines a light on an underdiscussed element of the American bankruptcy system. Many people following the high-profile bankruptcy cases of big enterprises might be unaware that the flexibility and relief afforded to debtors and profitable third-parties are not universal attributes of American bankruptcy policy, either written or as applied. Experts working within the bankruptcy system (and some academics) tend to be siloed. They may not have cross-over awareness about the spectrum of generosity and scrutiny in the system where they make their livelihood.

This Essay is also a call to be more deliberate in future "reform" of bankruptcy, whatever the institutional pathway that reform takes. As I see it, discretion and flexibility tend to operate regressively in this system (fake/real, race, sex, class). That assessment leads me to favor a rule of law approach wherever one falls on the generosity/scrutiny question, suggesting that at least some legislative changes are necessary to rebalance the system. Effective debt relief for individuals should be the system's first and foremost objective. If anything, the system should be more generous to individuals and small businesses than big enterprises, and courts should worry more about strategic uses of bankruptcy in big enterprise cases than in cases of individuals of modest means.[131]

Conclusion

The gap in treatment between fake and real people is baked into the structure of bankruptcy law, and, overall, seems to have grown in the decades since the Third Circuit denied Ronald Tamecki bankruptcy relief. Bankruptcy gives companies many benefits of personhood without the corresponding obligations faced by real people of modest means. Whatever the justifications for this distinction, the bankruptcy system has turned out to be an unreliable participant

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[131] *See* ELENA BOTELLA, DELINQUENT 165 (2022) (discussing how moral concerns about repayment of debt contributes to underuse of bankruptcy by financially distressed consumers).

in a broader project of managing and deterring enterprise misconduct in its many dangerous forms. These choices have consequences.