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A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy

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A NEW DEAL FOR DEBTORS: PROVIDING PROCEDURAL JUSTICE IN CONSUMER BANKRUPTCY

PAMELA FOOHEY

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A NEW DEAL FOR DEBTORS: PROVIDING PROCEDURAL JUSTICE IN CONSUMER BANKRUPTCY

PAMELA FOOHEY*

Abstract: Across the criminal and civil justice systems, research regarding procedural justice shows that people’s positive perceptions of legal processes are fundamental to the legal system’s effectiveness and to the rule of law. Approximately one million people file bankruptcy every year, making the consumer bankruptcy system the part of the federal court system with which the public most often comes into contact. Given the importance of bankruptcy to American families and the credit economy, there should exist a rich literature theorizing and investigating how people’s perceptions of consumer bankruptcy’s procedures advance the system’s goals. Instead, bankruptcy’s procedures have received strikingly little scholarly attention. This Article begins to fill this significant gap by combining procedural justice and related research with what is known about the people who file bankruptcy to craft a theory of consumer bankruptcy’s procedural deficiencies. If consumer bankruptcy is procedurally bankrupt, as this Article posits, then the “fresh start” delivered to struggling households is not nearly as fresh as presumed, hampering people’s return to their communities and to the credit economy. As such, this Article proposes two sets of changes to the consumer bankruptcy process—one modest and one more drastic. Both of these new deals for debtors promise to enhance people’s perceptions of bankruptcy’s procedural justice and thereby the legitimacy of the system.

INTRODUCTION

Processes and procedures matter. In law, procedures really matter. Procedures protect individuals’ rights,¹ and procedural missteps can result in the ex-

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pulsion of an entire case from the legal system.² Such results deliver order and convey integrity. Research shows that across the criminal and civil justice system, litigants value process and are more likely to respect courts' decisions when they think that the courts settled their disputes by way of a fair method, even if they do not agree with the decisions.³

In particular, people benefit from legal proceedings' ability to allow them to face their accusers, confront wrongdoers, and engage in "deliberative interaction" with their communities and with society.⁴ Courtroom hearings, arbitration proceedings, and mediations let individuals "vent their feelings, present their side of the story," and discuss "what can be done to restore a sense of justice."⁵ This interaction is part of what is termed the "expressive value" of law and legal proceedings,⁶ which connects with people's perceptions of their standing within society⁷ and with their emotional reactions to major life events.⁸

"Procedural justice"—feeling that one has a voice, is respected, and is before a neutral and even-handed adjudicator—thereby brings legitimacy to the legal system,⁹ leading some to argue that legal procedures are more important

¹ For example, criminal procedures include the right to trial by jury, to counsel, and to confront and cross-examine witnesses. See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1155 (1998) (noting doctrines of criminal procedure).

² An interesting example is the City of Harrisburg's chapter 9 bankruptcy case. After the Bankruptcy Court for the Middle District of Pennsylvania dismissed the City's petition for failure to meet the Bankruptcy Code's eligibility requirements to be a chapter 9 debtor, the City filed an appeal with the District Court for the Middle District of Pennsylvania, but missed the filing deadline by three days. The District Court dismissed the appeal. *City of Harrisburg, Pa. v. AFSCME Dist. Council 90*, No. 1:11-BK-06938MDF, 2012 WL 315403 (M.D. Pa. Feb. 1, 2012).

³ See generally Edgar Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 177 (Austin Sarat et al. eds. 1998) (discussing procedural justice); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94–112 (1990) (noting how people's experiences during proceedings influence perceptions of legitimacy).

⁴ Michael Wenzel et al., *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375, 376–77 (2008).

⁵ See *id.*; *infra* notes 94–119 and accompanying text (discussing voice and perceptions of procedural justice).

⁶ See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1414–27 (2000) (overviewing the expressive dimensions of law); *infra* notes 120–206 and accompanying text.

⁷ People naturally view themselves as occupying a distinct position within society's social groups, and people's social identity can yield a sense of belonging, pride, and self-esteem. See Henri Tajfel, *Social Identity and Intergroup Behavior*, 13 SOC. SCI. INFO. 65, 69 (1974) (discussing social identity); Tom Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913, 913–14 (1996) (noting that people seek to be well-regarded group members); *infra* notes 120–140 and accompanying text (discussing social standing and the legal system).

⁸ See *infra* notes 141–206 (discussing the emerging field of law and emotions).

⁹ Procedural justice generally refers to the perceived fairness of procedures. See Tyler et al., *supra* note 7, at 914 (defining procedural justice). See generally E. ALLAN LIND & TOM R. TYLER, THE

than substantive law.¹⁰ At the very least, research shows that procedural justice is crucial to the rule of law and fundamental to the legal system's operation and effectiveness.¹¹

The bankruptcy system is an integral part of the American legal system. About one million people file consumer bankruptcy every year.¹² Cumulatively, these cases seek to discharge billions of dollars in debts and to grant a "fresh start" to the individuals and families who file that hopefully will allow them to regain their financial footing and re-enter the credit economy.¹³ Based on the number of petitions filed each year, the consumer bankruptcy system is by far the part of the federal court system with which people most often come into contact.¹⁴ Likewise, every year, thousands of larger corporations and small businesses seek to use the bankruptcy system to reorganize, with the hope of curing defaults, getting back on track, and preserving value and jobs.¹⁵

Given the importance of the bankruptcy system to American families and to the economy, there should exist a rich literature theorizing and empirically investigating how people's perceptions of bankruptcy's procedures advance the bankruptcy system's goals. Yet the procedures that govern bankruptcy cases have received strikingly little scholarly attention. Procedural justice theory has

SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (providing an overview of factors that lead people to assess procedures as fair); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) (establishing the foundations of procedural justice).

¹⁰ See Jeremy Lever, *Why Procedure Is More Important Than Substantive Law*, 48 INT'L & COMP. L.Q. 285, 285 (1999) (arguing that procedural rules affect the outcome of cases more than substantive law).

¹¹ See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 666–68 (2007) (linking the rule of law to procedural justice).

¹² U.S. COURTS, CASELOAD STATISTICS DATA TABLES [hereinafter CASELOAD STATISTICS], <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [https://perma.cc/BK3N-4XRL]. This rough estimate is based on nonbusiness bankruptcy cases commenced between 2008 and 2017, as reported in Table F-2. Nonbusiness bankruptcy filings peaked in 2010 at about 1.5 million and steadily declined to a low of approximately 765,000 in 2017. See *id.* (providing consumer bankruptcy filing numbers).

¹³ The phrase "fresh start" comes from *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). See *infra* notes 20–27 and accompanying text (discussing why people are granted the discharge).

¹⁴ See CASELOAD STATISTICS, *supra* note 12 (detailing the number of people filing for consumer bankruptcy). Every year, the number of bankruptcy cases filed is about twice the number of other cases filed in federal court. See generally U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [https://perma.cc/4ZKU-DAH4].

¹⁵ For example, there were 6,350 business chapter 11 filings in 2017. CASELOAD STATISTICS, *supra* note 12. See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 776–77, 787–89 (1987) (discussing competing theories of business bankruptcy).

only recently begun to be applied to bankruptcy, and it appears that the theory has been applied only in the business bankruptcy context.¹⁶

That consumer bankruptcy's procedures have remained unanalyzed from a procedural justice perspective is a serious oversight. The individuals who file bankruptcy may be more likely than business debtors to look to their cases' processes and outcomes to assess their place in society and to deal with emotions arising from serious events in their lives that contributed to their need to file. Research shows that consumer debtors overwhelmingly identify as middle-class, struggle to pay their debts for years before they turn to bankruptcy, are severely overindebted when they file, report being pushed to file by creditors' and debt collectors' actions, and state that they felt shame for needing to file.¹⁷ Once they muster the strength to file, these people may look to their cas-

¹⁶ See generally *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 56–67 (2011) (statement of Melissa B. Jacoby discussing venue laws applicable to chapter 11 cases); Pamela Foohey, Jevic's *Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128 (2018), <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1845/93WLRO128.pdf> [<https://perma.cc/W98N-P2M2>] (detailing how a recent Supreme Court decision may be relied on by bankruptcy judges to provide more procedural justice in chapter 11); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715 (2018) (noting issues of procedural justice in chapter 11 cases filed by large corporations); Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After Jevic*, 93 WASH. L. REV. 631 (2018) (arguing that a recent Supreme Court decision has severe implications for process in addition to substantive corporate bankruptcy law). Literature about consent and control in chapter 11 also is related to issues of process and procedural justice. See, e.g., Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663 (2009) (discussing consent in the context of bankruptcy); Diane Lourdes Dick, *The Bearish Bankruptcy*, 52 GA. L. REV. 437 (2018) (exploring the use of debtor-in-possession financing to gain control of restructuring and shut out other stakeholders); Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 BYU L. REV. 759 (critiquing chapter 11's emphasis on speed and efficiency); Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673 (2018) (discussing value-allocation in bankruptcy); Edward J. Janger & Adam J. Levitin, *One Dollar, One Vote: Mark-to-Market Governance in Bankruptcy*, 104 IOWA L. REV. 1857 (2019) (discussing how the market for bankruptcy claims affects procedure in chapter 11); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004) (arguing that bankruptcy is a type of civil procedure); Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795 (2004) (discussing creditor control in the recovery process). Scholars also have discussed the importance of process to value maximization in chapter 11. See generally Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007) (finding that recoveries in bankruptcy reorganizations were significantly higher than those in going concern sales); Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839 (2004) (criticizing the "control rights" theory of modern chapter 11 bankruptcies); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 728 (2010) (arguing that the Chrysler bankruptcy did not constitute good bankruptcy practice).

¹⁷ See Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 225–26, 236–41 (2018) [hereinafter Foohey et al., *Sweatbox*] (detailing how long people spend struggling with debts prior to filing bankruptcy and their paths to filing); *infra* notes 56–89 and accompanying text. For this Article's purposes, overindebted means an "inability to repay all debts in full in the near future." A. Mechele Dickerson, *Over-Indebtedness*,

es, in part, as a way to publicly confirm their self-worth.¹⁸ Indeed, if consumer debtors did not expect their cases to speak to their standing within society, their perceptions of the bankruptcy system would differ starkly from people's views of every other part of the American legal system.

This Article seeks to fill the gap in the literature by combining procedural justice theory and related research with what is known about the people who file bankruptcy to evaluate the state of consumer bankruptcy's procedural justice and, based on this assessment, to propose changes to consumer bankruptcy's procedures to strengthen its capacity to achieve the system's goals. Current literature about consumer bankruptcy's mechanics focuses almost exclusively on why people should be afforded a discharge of most of their debts—that is, the system's goals.¹⁹ But if people do not receive what they expect from the bankruptcy process, they may not maximize the discharge's theorized benefits, meaning that the system may not function as expected and may be in need of revisions.

The most pervasive justification for affording people a “fresh start” is that this relief allows them to remain economically productive members of society.²⁰ Bankruptcy's discharge ensures that they continue working, spending, and borrowing, thereby promoting the credit economy.²¹ Importantly, this view of the bankruptcy process does not focus on how people's experiences in bankruptcy shape their view of themselves, and, concomitantly, the bankruptcy system's legitimacy.

the *Subprime Mortgage Crisis, and the Effect on U.S. Cities*, 36 FORDHAM URB. L.J. 395, 396 n.1 (2009).

¹⁸ See *infra* notes 120–206 and accompanying text (discussing emotions and filing bankruptcy).

¹⁹ Not all debts are discharged in bankruptcy. See *infra* notes 94–119 and accompanying text.

²⁰ Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 140, 148–53 (2004) (overviewing the competing justifications put forth for the consumer bankruptcy system).

²¹ See, e.g., KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 99 (1997) (“[W]e want debtors to be able to *continue* borrowing if they put themselves in the position to be able to repay what they owe their creditors.”); Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 53 (2002) (“The fresh start policy prevents pauperism and idleness.”); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1085 (1987) (“[M]andating [conditional debt relief] comes down to a diminution of the goal of economic productivity.”); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1433 (1985) (describing the economic benefits of allowing people to discharge their debts in terms of human capital); Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68 (2006) (discussing the “new opportunity in life” that supposedly accompanies the fresh start); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 492 (1997) (“[Americans] need the chance to remain productive members of society, not driven underground or into joblessness by unpayable debt.”). Relatedly, the bankruptcy process is viewed as an educational experience during which people acquire financial knowledge that will assist them in managing debts going forward. See Howard, *supra*, at 1060 (discussing bankruptcy as an educational tool).

The discharge also is seen as a form of social insurance. The bankruptcy system catches individuals who, because of an incomplete social safety net, have taken on debt to pay necessary expenses, such as healthcare.²² Similarly, shifting the risk of default to creditors should incentivize creditors to lend with more discretion, which will decrease the risk of default and, with it, consumers' use of bankruptcy.²³

Finally, some scholars have justified the "fresh start" on a humanitarian basis. Society's sanctioning of a law that relieves debtors of burdensome debts evidences both creditors' and society's compassion and virtue.²⁴ Forgiving debtors may have "restorative" benefits for creditors, debtors, and society broadly.²⁵

²² See, e.g., Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1072–73 (2004) (linking social programs and the typical consumer who files bankruptcy to suggest that these people initially self-finance their safety nets with credit cards); Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 129–31 (2005) (noting that bankruptcy is an "insurer of last resort"); Melissa B. Jacoby, *Collecting Debts from the Ill and the Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 233–35 (2001) (describing bankruptcy as an important part of the health care finance system); Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 591 (2009) ("In the absence of savings, a living wage or public assistance, credit becomes what enables many families to survive.").

²³ See Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981–83 (1981) (discussing discharge as allocating risk of loss between debtor and creditor); Jackson, *supra* note 21, at 1426 (noting that discharge "leaves the determination of whether to extend credit to creditors . . . who are better able, by observing individual debtors or by employing specific contractual covenants, to monitor individuals' consumption of credit"); John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 431–34 (discussing why it is more efficient to shift risk of default to creditors). See generally Shu-Yi Oei, *Taxing Bankrupts*, 55 B.C. L. REV. 375 (2014) (defending the priority of tax claims in bankruptcy due, in part, to the fact that the government is less able to manage the risk of debtor default).

²⁴ See, e.g., GROSS, *supra* note 21, at 93–94 (articulating the discharge as "forgiveness"); Heidi M. Hurd, *The Virtue of Consumer Bankruptcy*, in A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 217, 217–18 (Ralph Brubaker et al. eds., 2012) (articulating "a new positive theory" of the discharge that posits that debt forgiveness is "about achieving and expressing personal virtue—not that of creditors or of debtors . . . but of our own, as citizens of a just and wealthy society"); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for the Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 519–21 (1991) (positing that consumer bankruptcy law is grounded in a "natural law theory of morality" that combines "attributes of social, distributive, and commutative justice, existing in harmony as a humanitarian response to the financially downtrodden"); Jacoby, *supra* note 22, at 239 (noting the altruistic basis of the discharge). Thomas Jackson's theories for the discharge of debts, premised on "volitional and cognitive justifications," can be viewed in a humanitarian light: they are premised on the idea that debtors collectively would want society to allow them to be relieved from debts they incurred without fully thinking the deals through because of "impulse control" issues and cognitive defects. See generally Jackson, *supra* note 21, at 1405–18 (discussing justifications for the discharge).

²⁵ See GROSS, *supra* note 21, at 94 (linking forgiveness and restoration); see also Hurd, *supra* note 24, at 218 ("When debtors are rightly forgiven, it is under circumstances in which all those to

The humanitarian theory offers insights into the role of forgiveness in society through the legal system that procedural justice and related theories consider.²⁶ Assessing procedural justice in the context of bankruptcy, however, requires additional focus on debtors. Also, applying procedural justice theory's tenets to consumer debtors does not necessarily lead to the conclusion that debtors are "wrongdoers" who need the discharge's forgiveness to "regain self-esteem."²⁷ On the contrary, research about the people who file bankruptcy suggests that some seek to assert their never lost self-esteem through their bankruptcy cases.²⁸

More fundamentally, evaluating the consumer bankruptcy process through the lens of procedural justice and related theories does not seek to explain why bankruptcy provides the discharge. Rather, it explains what people expect to gain from the bankruptcy system, the receipt of which should encourage them to maximize the discharge's benefits.²⁹ Understanding how people anticipate their bankruptcy cases will proceed is essential to knowing if the discharge actually is being used to produce its theorized benefits. By linking several strands of research relevant to, but previously not applied to, consumer bankruptcy, this Article describes a way in which people can benefit from bankruptcy that is not reflected in its procedures. This sets the stage for crafting proposals to strengthen consumer bankruptcy's procedures, which, in turn, should enhance how America's credit economy operates.

This Article's examination of consumer bankruptcy's procedures is descriptive and normative. To situate the Article, Part I reviews consumer bankruptcy's mechanics and examines which people actually file bankruptcy. Part II sets forth the Article's theoretical framework grounded in procedural justice theory and people's expression of social standing and emotions through the legal system. It then applies this framework to consumer bankruptcy to analyze people's perceptions of bankruptcy's procedures.

Part II concludes by asserting that consumer bankruptcy, in effect, is procedurally bankrupt. Its current procedures bear almost none of the hallmarks of

whom their debts are owed *ought* to forgive their debts, and all those to whom the costs of their default are passed *ought* to be willing to shoulder those losses.").

²⁶ See GROSS, *supra* note 21, at 98–103 (linking the discharge and theories of criminal law, particularly the restorative justice and dignity rationales).

²⁷ *Id.* at 94.

²⁸ See *infra* notes 120–206 and accompanying text.

²⁹ The theory developed in this Article is distinct from Donald Korobkin's theory about how bankruptcy is performative, as put forth in *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124 (2003). To the extent that this Article's discussion draws on the performance inherent in legal proceedings, it does so in connection with the social benefits that debtors believe they will receive from the bankruptcy process, not what society requires of debtors. See *id.* at 2127–28 (discussing legal scholars' exploration of performativity).

the legal processes that litigants and the public find to provide procedural justice, the opportunity to affirm social standing, and the chance to deal with the emotions that arise from legal problems. In addition, the profile of the people who file bankruptcy from Part I suggests that consumer debtors should highly value finding procedural integrity in bankruptcy. Participating in a process they view as procedurally deficient may negatively impact their motivation to make the most of their cases' outcomes.

In light of this conclusion, Part III proposes two "new deals" for consumer debtors that are designed to address the system's procedural justice deficiencies. One proposal takes a more modest approach based on the idea that a few small changes to consumer bankruptcy's procedures are more legislatively feasible. The other proposal abandons the constraint of legislative feasibility and reimagines the consumer bankruptcy system. As a bonus, both proposals address other long-standing problems with the consumer bankruptcy system that have hampered its ability to deliver the fresh start to struggling households. The Article closes by offering an empirical framework to further test consumer bankruptcy's procedural justice.

I. A PRIMER ON THE CONSUMER BANKRUPTCY SYSTEM

People file bankruptcy based on what benefits they think the system will provide them. It is thus important to understand how the consumer bankruptcy system works and who files bankruptcy. This Part first provides a primer on the consumer bankruptcy system's mechanics and then details research about who files bankruptcy.³⁰

A. How People Are Granted the Discharge

Debtors initiate almost all consumer bankruptcy cases in the United States,³¹ and most consumer debtors file with the help of an attorney.³² Consumers predominantly file under two "chapters" of the Bankruptcy Code: chapter 7 and chapter 13.³³ Each of these chapters can be thought of as providing for a particular deal between debtors and their creditors.

³⁰ See *infra* notes 31–89 and accompanying text.

³¹ See Foohey et al., *supra* note 17, at 226 (providing an overview of bankruptcy).

³² See *id.* at 229 (finding that 90.1% of all debtors in a sample of households who filed chapter 7 or 13 between 2013 and 2016 employed an attorney to file their bankruptcy cases).

³³ Consumers also may file chapter 11, which provides for reorganization of debts. See ELIZABETH WARREN ET AL., *THE LAW OF DEBTORS AND CREDITORS* 294 (7th ed. 2014) (discussing consumer chapter 11 filings). The vast majority of people file chapter 7 or 13. For example, in 2015, 819,760 nonbusiness bankruptcy petitions were filed and 1,111 of them were chapter 11 petitions. See CASELOAD STATISTICS, *supra* note 12 (depicting bankruptcy petitions in 2015). The discussion thus focuses on chapters 7 and 13.

People who file chapter 7 receive a relatively speedy discharge of most of their debts in exchange for surrendering their assets to a bankruptcy trustee, who sells those assets and distributes the proceeds to the debtor's creditors.³⁴ In practice, more than 90% of consumers' chapter 7 cases are "no asset" cases, meaning that there are no assets for the trustee to sell.³⁵ The reason for this is two-fold. First, because state law and the Code protect ("exempt") certain assets from liquidation, such as some clothing and household items, many debtors are allowed to retain all of their assets to effectuate their fresh start.³⁶ Second, many people have pledged most of their assets as collateral to their creditors; pledged ("secured") assets are not available for liquidation by the bankruptcy trustee.³⁷

Most debtors who file chapter 7 are granted a discharge within six months of filing and do not go to court or meet the bankruptcy judge.³⁸ All debtors who file are required to sit for a hearing conducted by the bankruptcy trustee, however, during which the trustee questions them about their finances and creditors also may question the debtors.³⁹ In both chapter 7 and chapter 13 cases, bankruptcy trustees are almost always private attorneys who serve as trustees through appointment to particular cases by the Department of Justice's United States Trustee Program.⁴⁰ This program also employs full-time attor-

³⁴ See Jean Braucher, Dov Cohen, & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 394 (2012) (describing chapter 7).

³⁵ See *id.* (defining "no asset" cases); Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) (finding that 93% of people who filed under chapter 7 in 2007 entered bankruptcy with no distributable assets).

³⁶ See 11 U.S.C. § 522 (2012) (listing federal exemptions); Braucher et al., *supra* note 34, at 394 (discussing exemptions).

³⁷ See Braucher et al., *supra* note 34, at 394 (discussing secured creditors); Jiménez, *supra* note 35, at 801 (noting that "[s]ecured creditors are the real winners in the bankruptcy game").

³⁸ See Braucher et al., *supra* note 34, at 394, 425 n.12 (describing chapter 7 and noting that bankruptcy judges only conduct hearings when disputes arise); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 153 (2011) [hereinafter Porter, *The Pretend Solution*] (noting that the chapter 7 discharge rate exceeds 95%).

³⁹ See 11 U.S.C. § 343 (requiring debtors to attend the hearing); Katherine Porter, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 1, 1–2 (Katherine Porter ed., 2012) [hereinafter Porter, *Driven by Debt*] (describing this hearing).

⁴⁰ See DEP'T OF JUSTICE, PRIVATE TRUSTEE INFORMATION [hereinafter PRIVATE TRUSTEE INFORMATION], <https://www.justice.gov/ust/private-trustee-information> [<https://perma.cc/EJ6X-NNNZ>] (describing the role of private trustees in the bankruptcy system); DEP'T OF JUSTICE, U.S. TRUSTEE PROGRAM, <https://www.justice.gov/ust> [<https://perma.cc/7999-Z2XZ>] (describing the U.S. Trustee Program). In the six judicial districts of Alabama and North Carolina, bankruptcy administrators similarly oversee the administration of chapter 7 and 13 cases. See U.S. COURTS, TRUSTEES AND ADMINISTRATORS, <http://www.uscourts.gov/services-forms/bankruptcy/trustees-and-administrators> [<https://perma.cc/4JKD-PUAK>] (discussing bankruptcy administrators). Because these administrators' duties are substantively similar to private trustees' roles, this Article's discussion of chapter 7 and 14 trustees includes bankruptcy administrators.

neys, known as United States Trustees, who supervise private trustees and ensure the bankruptcy system's overall efficiency and integrity.⁴¹

The hearings during which trustees question debtors are called the "meeting[s] with creditors" or "341 meetings" after the controlling Code section.⁴² They are recorded, may be remembered by debtors "as one of the most painful moments of their lives,"⁴³ and are the foremost means by which debtors tell the story of how they ended up in bankruptcy. These meetings effectively are consumer debtors' "day in court."

In contrast, chapter 13 is a lengthy and more complicated proceeding. In exchange for a discharge of most of their debts, people must devote all of their disposable income for three to five years to paying their creditors through a repayment plan approved by the bankruptcy court.⁴⁴ Debtors receive the discharge only after they make all payments required under the plan.⁴⁵ Like debtors who file chapter 7, chapter 13 debtors are unlikely to go to court or meet the bankruptcy judge. Instead, their attorneys handle the court hearings. These debtors' day in court also is the 341 meeting, which proceeds in the same way as in a chapter 7 case.⁴⁶

People may file chapter 13 for a variety of reasons. Chief among these reasons is that chapter 13 allows debtors to retain all their assets, regardless of whether those assets are exempt or secured,⁴⁷ such as their homes.⁴⁸

The Code also moderates access to chapters 7 and 13, in part to assure that only honest but unfortunate debtors are afforded a fresh start.⁴⁹ Following

⁴¹ See PRIVATE TRUSTEE INFORMATION, *supra* note 40 (describing the role of private trustees in the bankruptcy system).

⁴² See 11 U.S.C. § 341 (requiring and describing the meeting with creditors).

⁴³ Porter, *Driven by Debt*, *supra* note 39, at 2; see Nathalie Martin, *Poverty, Culture and the Bankruptcy Code: Narratives from the Money Law Clinic*, 12 CLINICAL L. REV. 203, 214 (2005) (describing the palpable nervousness and shame of people seeking to file bankruptcy).

⁴⁴ See Braucher et al., *supra* note 34, at 394 (describing chapter 13).

⁴⁵ See *id.*

⁴⁶ 11 U.S.C. § 341; see Porter, *The Pretend Solution*, *supra* note 38, at 117–18 (discussing the mechanics of chapter 13, including the role of the bankruptcy trustee).

⁴⁷ See *supra* notes 36–37 and accompanying text.

⁴⁸ See Braucher et al., *supra* note 34, at 395 ("It is widely believed among consumer bankruptcy specialists that a client's desire to save a home is the most common reason for filing Chapter 13 . . ."); Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, "No Money Down" Bankruptcy, 90 S. CAL. L. REV. 1055, 1063 n.37 (2017) [hereinafter Foohey et al., "No Money Down"] (explaining when debtors may retain encumbered property in chapter 7); Porter, *The Pretend Solution*, *supra* note 38, at 133–36 (reporting that almost 90% of chapter 13 debtors indicated that keeping their house was a very important goal when filing for bankruptcy, and that, for over 50% of the debtors, it was their most important goal).

⁴⁹ The Code's provisions regarding access to bankruptcy can be viewed as a response to the "moral hazard" problem that accompanies lending. See Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 293 (2010) (discussing how credit economies rely on debtors' promises that they will pay back funds extended and how the law must incentivize repayment).

the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),⁵⁰ the Code does this by using a “means test” that evaluates a debtor’s ability to repay creditors based on monthly income, expenses, and outstanding debts.⁵¹ If the means test’s formula deems a debtor’s monthly income less expenses sufficient to repay a large enough portion of outstanding debts, the debtor must file chapter 13 or not at all.⁵² Although one of the stated purposes of the means test is to curtail perceived abuses of bankruptcy by people who supposedly could pay their debts by requiring these debtors to file chapter 13,⁵³ it has not resulted in a shift in the relative percentage of households filing chapter 7 and 13.⁵⁴ Section B explains the reasons for this by detailing exactly which individuals and families file bankruptcy.⁵⁵

B. Who Files Bankruptcy?

The means test and other provisions of BAPCPA that made bankruptcy more expensive and time consuming were enacted in response to popular conceptions of when and why people file bankruptcy.⁵⁶ BAPCPA’s proponents painted a picture of profligate and cunning consumers who filed “bankruptcies of convenience” after racking up unwarranted expenses that they never intend-

⁵⁰ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 707, 119 Stat. 23 (2005). BAPCA had an effective date of October 17, 2005. *Id.*

⁵¹ 11 U.S.C. § 707(b)(2) (2012).

⁵² See Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 352–53 (2008) (discussing the means test); Porter, *The Pretend Solution*, *supra* note 38, at 119 (providing further analysis on the means test); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 EMORY BANKR. DEV. J. 1, 1–2 (2001) (foreseeing that BAPCPA would leave debtors with “the Hobson’s choice of foregoing bankruptcy relief altogether or attempting to ‘repay their creditors . . .’ in a chapter 13 repayment plan”).

⁵³ See A. Mechele Dickerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT’L L.J. 135, 144–45 (2008) (noting that BAPCPA evidences a policy closer to the “concept of an ‘earned’ rather than ‘fresh’ start”); Lawless et al., *supra* note 52, at 351–52, 378 (discussing which debtors BAPCPA’s means test was meant to target); *infra* note 56 and accompanying text.

⁵⁴ See Porter, *The Pretend Solution*, *supra* note 38, at 116, 119 (overviewing filing statistics).

⁵⁵ See *infra* notes 56–89 and accompanying text.

⁵⁶ See Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 183–87 (2016) (overviewing BAPCPA’s changes to the Bankruptcy Code that “appeared likely to impair the consumer bankruptcy system’s ability to function”); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 27 (2012) (noting BAPCPA’s goals).

ed to pay.⁵⁷ Proponents linked supposed strategic filings to a purported drastic decline in bankruptcy's stigma.⁵⁸

For example, as synthesized by Mechele Dickerson, the typical filer is nothing short of a "bankruptcy queen"—

the owner of a multi-million dollar exempt mansion, [who] charges lavish trinkets on a Visa card (or takes a cash advance from the credit card to fund a gambling trip to Reno), then cavalierly files for bankruptcy rather than selling the exempt assets, curtailing spending habits, or working to repay the credit card debt.⁵⁹

Those who championed this characterization went so far as to claim that the "rising tide of bankruptcy filings" caused by this cavalier spending cost every hardworking, billpaying, upstanding family \$400 a year.⁶⁰

None of the claims made by BAPCPA's supporters were substantiated by evidence, including the claims that bankruptcy's stigma had declined,⁶¹ and that rising filings cost every family \$400 annually.⁶² Rather, decades of empirical research about the people who file bankruptcy show that most people turn to bankruptcy for help after experiencing shocks to income or expenses, with job loss, divorce, and medical expenses underlying the vast majority of filings.⁶³ Most of these data come from the Consumer Bankruptcy Project (CBP),

⁵⁷ See Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376–77, 391 (discussing debates about BAPCPA); see also Foohey et al., *Sweatbox*, *supra* note 17, at 229–32 (discussing the debates leading up to BAPCPA); Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1371–78 (2008) (overviewing the "strategic behavior" model of bankruptcy and the debates that led to BAPCPA's passage).

⁵⁸ See A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1891–92 (2006) (noting that BAPCPA's supporters "suggest[] that debtors lacked integrity because they no longer felt any personal obligation to pay debts they could afford to repay"); Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 214 (2006) ("The primary justification for this wholesale revision of the accessibility of the consumer bankruptcy system has been the repeated claim that the extraordinary increase in bankruptcy filings is the consequence of declining stigma.").

⁵⁹ A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 48–49 (1999).

⁶⁰ Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. 77, 77 (2004) [hereinafter Warren, *Phantom*].

⁶¹ See Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435, 463–79 (2013) (interviewing people who filed chapter 7 about bankruptcy's stigma); Sullivan et al., *supra* note 58, at 218 (arguing that bankruptcy's stigma likely increased, not decreased, over time).

⁶² Warren, *Phantom*, *supra* note 60, at 77, 79–80.

⁶³ See, e.g., TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 2* (2000) (noting that five sources of financial stress lead to bankruptcy); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 81 (2003) ("Nearly nine out of ten families with children cite just three reasons for

the long-term, multi-researcher effort that investigates the people who file bankruptcy.⁶⁴

Data from the CBP further show that the households that file bankruptcy predominately are middle-class, based on education, occupation, and home ownership, even if their current incomes are not consistent with middle-class status.⁶⁵ What distinguishes households that file bankruptcy from their non-filing counterparts is debt and an accompanying lack of resources to deal with debts. In the CBP's latest iteration, the median household entered bankruptcy with a little over \$100,000 in debts, compared to a median monthly income of about \$2,650.⁶⁶ Assuming (unrealistically) that these households committed all of their income to repaying their debts, it would take them about two and a half years to do so.⁶⁷

CBP data also have long shown that people struggle to pay their debts for years before they turn to bankruptcy courts for help. The CBP asks debtors: "Before you filed bankruptcy, how long did you seriously struggle with your debts?"⁶⁸ In the latest iteration, which includes people who filed between 2013 and 2016, two-thirds of households reported struggling with their debts for two or more years, and almost one-third (30%) reported struggling for five or more years.⁶⁹ On average, people reported that they struggled for more than three years before filing.⁷⁰

Additionally, the length of people's pre-bankruptcy struggles has increased. In the CBP's prior iteration, which included debtors who filed in

their bankruptcies: job loss, family breakup, and medical problems."); Lawless et al., *supra* note 52, at 378–79 (discussing whether post-BAPCPA filing data support the "strategic actor" vision of debtors or the view that "exogenous shocks" drive filings).

⁶⁴ Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook launched the CBP in the 1980s. See Robert M. Lawless & Angela Littwin, *Local Legal Culture from R2D2 to Big Data*, 96 TEX. L. REV. 1353, 1353–54 (2018) (discussing the CBP). The other co-principal investigators on the CBP's current iteration are Robert Lawless, Katherine Porter, and Deborah Thorne. For details about the CBP, see Foohey et al., "No Money Down," *supra* note 48, at 1071–74 (discussing the origin of the CBP). I am a co-principal investigator on the CBP's current iteration.

⁶⁵ See Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 25, 36–38 (Katherine Porter ed., 2012) ("People in bankruptcy . . . reflect a class status that is much like their [middle-class] counterparts around the country."); Foohey et al., *Sweatbox*, *supra* note 17, at 234–35; Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 370 (2009) (noting that consumer bankruptcy filing rates "are most common in zip codes with many households with incomes between \$30,000 and \$60,000"—that is, the middle class).

⁶⁶ See Foohey et al., *Sweatbox*, *supra* note 17, at 234–35 (describing the lengthy struggles of debtors in the "sweatbox").

⁶⁷ This calculation is based on the debt-to-income ratio of people in the CBP's current iteration. See *id.* at 239 tbl.1.

⁶⁸ *Id.* at 235–36.

⁶⁹ *Id.*

⁷⁰ *Id.* at 236.

2007, households reported struggling for an average of just under two and a half years.⁷¹ In the span of just one decade, people have indicated that they waited ten months longer to file bankruptcy.⁷² And this is a continuation of a trend. In the CBP's iteration in 2001, about one-third of debtors indicated that they struggled for two or more years prior to filing bankruptcy.⁷³

In short, people do not file soon after experiencing the financial shocks that ultimately land them in bankruptcy court. During the years that they try to pay their mounting debts, CBP data show that the people who eventually file bankruptcy try to work with their creditors by selling or pawning property to pay their debts. These people also go without necessities, such as food, utilities, and, perhaps most concerning, medical attention and other healthcare-related expenses.⁷⁴ While they struggle, they report enduring sleepless nights and arguments with spouses about how to deal with their financial situations.⁷⁵

Also, a majority of debtors indicate that pressure from debt collectors influenced their eventual filings.⁷⁶ The longer people report struggling, the more likely they are to say that pressure from debt collectors pushed them to file bankruptcy.⁷⁷ Among those people who struggle with their debts for two or more years, more than 80% cite pressure from debt collectors as a reason for their filings.⁷⁸ And the longer people struggle, the more likely they are to arrive in bankruptcy court with a lien attached to their real property⁷⁹ or to have an actual debt collection action filed against them before filing.⁸⁰ Still, when peo-

⁷¹ *Id.* at 236–37.

⁷² *Id.* at 236.

⁷³ *Id.* at 237. The increase in time that people report struggling between the 2001 and 2007 iterations of the CBP likely is connected in large part to BAPCPA's enactment. See Lawless et al., *supra* note 52, at 353 (noting that the means test effectively was “a barricade, blocking out hundreds of thousands of struggling families indiscriminately”).

⁷⁴ Foohey et al., *Sweatbox*, *supra* note 17, at 241–44.

⁷⁵ See Deborah Thorne, *Women's Work, Women's Worry? Debt Management in Financially Distressed Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 136, 136–38, 140–43, 151–52 (Katherine Porter ed., 2012) (investigating how debt is experienced as more stressful by women); Porter, *The Pretend Solution*, *supra* note 38, at 142–44 (noting that “[b]y the time they file bankruptcy, debtors have often endured months of dunning and threats of legal action,” and discussing how that causes stress and arguments).

⁷⁶ Foohey et al., *Sweatbox*, *supra* note 17, at 245–46.

⁷⁷ *Id.* at 246.

⁷⁸ See *id.* at 245 tbl.4 (reporting that 81.2% of debtors who struggled for more than two years prior to filing, versus 69.7% of debtors who struggled for less than two years, cited pressure from debt collectors as a reason for their bankruptcy filings).

⁷⁹ See *id.* at 239 tbl.1 (reporting that 66.4% of debtors who struggled for more than two years prior to filing, versus 50.9% of other debtors who struggled for less than two years and who owned homes, arrived at bankruptcy court with an involuntary lien against their home).

⁸⁰ See *id.* (reporting that 50.3% of debtors who struggled for more than two years prior to filing, versus 35.6% of other debtors, had a collection action filed against them prior to filing).

ple, particularly those who struggle the longest, eventually turned to bankruptcy courts for help, about 65% indicate that they felt shame upon filing.⁸¹

Nationwide on average, two-thirds of households file chapter 7 and one-third file chapter 13.⁸² The reason that these percentages have remained steady through BAPCPA's passage and the introduction of the means test relates in large part to the financial situations of households that file bankruptcy. Based on the means test, almost 90% of debtors who file chapter 13 are eligible to file chapter 7.⁸³

Research shows that the chapter a household files has to do with the culture of filings in the debtor's judicial district,⁸⁴ the debtor's race,⁸⁵ and when the debtor must pay attorney's fees.⁸⁶ Tellingly, interviews with debtors reveal that many do not even consider the trade-offs between filing chapter 7 and chapter 13.⁸⁷

Bankruptcy thus is a "last refuge" for stressed and struggling individuals and families, and filing is not a carefully thought out, long-planned decision.⁸⁸ Instead, declining income, selling property, dealing with debt collection calls, being sued over delinquent debts, watching involuntary liens attach to homes, and managing stress converge prior to people's bankruptcy filings. Accounting for these dynamics is key to evaluating what people expect from the bankruptcy system's procedures. The next Part combines this knowledge about the people who file bankruptcy with research about what people seek from the legal system to assess consumer bankruptcy's procedures.⁸⁹

⁸¹ See *id.* at 249 (finding that 71.1% of debtors who report struggling with debts for two or more years, versus 61.8% of other debtors, indicated that they felt shame upon filing bankruptcy).

⁸² See Braucher et al., *supra* note 34, at 396 (reporting that the 2010 national average of chapter 13 petitions was 31.7% of all bankruptcy petitions); Foohey et al., "No Money Down," *supra* note 48, at 1063 n.36 (noting that 34.4% of the sampled cases filed in 2013–2014 were chapter 13 cases).

⁸³ See ELIZABETH WARREN ET AL., *supra* note 33, at 258, 276–80 (discussing the means test and chapter 7 eligibility).

⁸⁴ For instance, in 2010, the percentage of consumers who filed under chapter 7 versus 13 varied drastically across the United States, from a low of 4.9% filing under chapter 13 to a high of 74.1% filing under chapter 13. See Braucher et al., *supra* note 34, at 396 (discussing these statistics). Scholars link these variances to "local legal culture." *Id.* at 395–97.

⁸⁵ See generally *id.* (establishing that black debtors are more likely to file chapter 13 than other similarly situated debtors); Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. INSTITUTIONAL & THEORETICAL ECON. 174 (2017) (finding that black households in Chicago are more likely to file chapter 13, in part because of parking tickets).

⁸⁶ See generally Foohey et al., "No Money Down," *supra* note 48 (finding that some debtors appear to file under chapter 13 because they can pay attorney's fees over time rather than upfront and linking that outcome to racial disparities in regional chapter 13 filing rates).

⁸⁷ See Porter, *The Pretend Solution*, *supra* note 38, at 119 (noting that of interviewed debtors who file under chapter 13, "only about half (47%) of all debtors even considered Chapter 7").

⁸⁸ See Foohey et al., *Sweatbox*, *supra* note 17, at 255 (finding that bankruptcy is not a "first resort" for debtors).

⁸⁹ See *infra* notes 90–224 and accompanying text.

II. IS CONSUMER BANKRUPTCY PROCEDURALLY BANKRUPT?

The legal system's procedures carry meanings, in part providing ways for people to assert their identities. Procedures shape people's confidence in courts, their willingness to defer to judicial decisions, and their view of their place in communities and society. This Part applies the lessons of procedural justice, the expressive function of procedures, and the emotions surrounding legal proceedings to the consumer bankruptcy system.⁹⁰ Through this analysis, this Article crafts a theory of how the people who seek bankruptcy protection view the system that they turn to for help. How consumer debtors experience bankruptcy courts almost certainly affects how they enter the credit economy after bankruptcy, which in turn impacts the economy as a whole.

Section A introduces how people's perceptions of legal procedures' integrity shape their view of legal proceedings. It then applies those insights to assess whether people will find their bankruptcy cases procedurally sound.⁹¹ After concluding that consumer bankruptcy's current procedures lack the hallmarks of procedural justice, Section B turns to research about how people use the legal system to confirm their social standing and to deal with their emotional reactions to problems. This allows for an assessment of whether the faults in consumer bankruptcy's procedural justice impact people's motivation to strengthen their financial positions after emerging from bankruptcy. This Section concludes that bankruptcy's procedures likely matter greatly to the people who file.⁹² Finally, Section C draws upon my interviews with people who placed their small businesses in bankruptcy to provide some empirical evidence that supports my conclusion that consumer bankruptcy presently is procedurally bankrupt.⁹³

A. Assessing Consumer Bankruptcy's Procedures

1. The Value of Legal Process

In the legal system, processes take on extra significance. Litigants often are as or more concerned about a proceeding's perceived fairness than its ultimate outcome.⁹⁴ That people care deeply about the process by which their cases and problems are handled, apart from the product of that process, may seem

⁹⁰ See *infra* notes 94–224 and accompanying text.

⁹¹ See *infra* notes 94–119 and accompanying text.

⁹² See *infra* notes 120–206 and accompanying text.

⁹³ See *infra* notes 207–224 and accompanying text.

⁹⁴ See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132 (2011) (noting that research has “provided robust empirical evidence that individuals care deeply about the fairness of the process by which decisions are made, apart from considerations about the outcome of the decision”); *supra* note 3 and accompanying text.

counterintuitive. But study after study has found that people place a high value on procedural justice.⁹⁵

People's perceptions of procedural justice influence how they think about and whether they accept the outcomes of legal proceedings. If people view the procedure that led to the outcome as fair, they are more likely to be satisfied with the outcome and adhere to it going forward, even if the outcome is unfavorable to them.⁹⁶ Similarly, when people perceive legal procedures as just, they also are more likely to view the institution that adjudicated the outcome as legitimate.⁹⁷ This is not to say that people are indifferent to a proceeding's outcome. Rather, believing that one received fair treatment influences that person's willingness to accept the proceeding's outcome independent of the effect that the proceeding's fairness had on the outcome.⁹⁸

Assessments of procedural justice hinge on several aspects of the process: whether people (1) believe that they had a voice and chance to be heard, (2) perceive that they were treated with dignity and respect, (3) feel that the decisionmaker sincerely considered their case, and (4) observe the forum as neutral and even-handed.⁹⁹ The opportunity to be heard—that is, participation—is the

⁹⁵ See Hollander-Blumoff, *supra* note 94, at 132–34 (providing an overview of these studies); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 119 (2000) (discussing these studies).

⁹⁶ See, e.g., LIND & TYLER, *supra* note 9, at 66–83 (discussing how people evaluate outcomes); TYLER, *supra* note 3, at 94–112 (discussing how people's experiences during legal proceedings influence their perceptions of outcomes' legitimacy); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3–4 (overviewing social psychology research about the effects of people's perceptions of procedural justice); Tyler, *supra* note 11, at 664–65 (“Studies show that people continue to adhere to fair decisions over time . . .”).

⁹⁷ See, e.g., TYLER, *supra* note 3, at 161–63 (discussing “the procedural basis of legitimacy”); Hollander-Blumoff, *supra* note 94, at 134 (noting research that “procedural justice is an important component of individuals' judgments about” legal systems' legitimacy); Tyler, *supra* note 11, at 664–70 (providing an overview of research that identifies “procedural justice and trust as the key antecedents of the willingness to defer to legal authorities”).

⁹⁸ See Hollander-Blumoff & Tyler, *supra* note 96, at 5 (“[P]rocedural justice has a separate and independent effect on how people feel about their results, apart from how fair or how good the outcome is.”). Because research is interested in people's *perceptions* of procedural justice, it necessarily focuses on individuals' *subjective* perceptions of fairness, rather than what system architects anticipated to be the processes' effects. See Hollander-Blumoff, *supra* note 94, at 134 (noting this focus).

⁹⁹ See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 138–43 (Mark P. Zanna ed., 1992) (providing an overview of these four factors); Hollander-Blumoff, *supra* note 94, at 135 (noting that these four factors are often cited); Tyler, *supra* note 11, at 665 (outlining four elements, “participation, neutrality, treatment with dignity and respect, and trust in authorities,” that “generally shape reactions to courts”). See generally THIBAUT & WALKER, *supra* note 9 (establishing the foundations of procedural justice).

most important factor in people's assessments of procedural justice.¹⁰⁰ Believing that one has a voice affects evaluations of respect, trust in authorities, and neutrality.¹⁰¹ Feeling heard includes speaking for oneself or being present while an attorney speaks on one's behalf.¹⁰² The opportunity for participation is so crucial that the positive effects of feeling heard can accrue even when people understand that their participation will have little effect on the ultimate ruling.¹⁰³

People also are concerned with the trustworthiness of the authorities overseeing the adjudicatory process.¹⁰⁴ An authority's legitimacy turns on whether the authority is perceived to act in a fair manner, which again relates to a litigant's opinion about the judicial process's fairness.¹⁰⁵ Importantly, trust in authorities intersects with people's perceptions about what a proceeding's outcome conveys about their social standing.¹⁰⁶

Finally, the four factors people rely on to assess whether they received procedural justice in their own dealings with the judicial system also are the

¹⁰⁰ See, e.g., Hollander-Blumoff, *supra* note 94, at 135 (linking participation with control and noting that "perceptions about control over process are an important determinant of whether people feel that procedural justice has occurred"); Tyler, *supra* note 11, at 663 (noting the importance of having a "day in court"); Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 487–89 (2010) (reporting that voice has the "strongest influence").

¹⁰¹ See, e.g., JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 4 (2016) (noting the importance of "[t]he opportunity to recount one's own story of an injury" in conjunction with procedural justice and the tort system); Hollander-Blumoff & Tyler, *supra* note 96, at 5–6 (linking trust with having a voice); Lind, *supra* note 3, at 179–81 (observing that people care about voice because they want to know that the decisionmaker is fully informed, which influences the trust in authorities necessary for people to accept the ultimate decision).

¹⁰² See Donna Shestowksy, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 673–78 (2014) (discussing litigants' preferences for participation of attorneys); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 447–50 (2010) (discussing relationships among voice, participation, and acceptance of outcomes in mediations).

¹⁰³ See Tyler, *supra* note 95, at 121 (noting that having a voice allows people to feel they are participating). See generally E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990) (discussing the results of a research study into the role of participation in subjective feelings of fairness). Nonetheless, if people believe they are being manipulated, they may respond with "extremely negative reactions." Lind, *supra* note 3, at 187.

¹⁰⁴ See Tom R. Tyler & Peter Degoey, *Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* 331, 333–34 (Roderick M. Kramer & Tom R. Tyler eds., 1996) (discussing how trust in authorities is "the strongest predictor of evaluations of the fairness of decision-making procedures" and impacts people's acceptance of decisions).

¹⁰⁵ See Hollander-Blumoff, *supra* note 94, at 137–38 (linking an authority's legitimacy with the process's perceived fairness).

¹⁰⁶ See *id.* (linking an authority's legitimacy with litigants' dignity and social standing).

four key factors that the general public uses to assess courts as institutions.¹⁰⁷ That is, the public stakes its faith in legal institutions' decisions, in part, on procedure: whether they believe that courts allow for participation, respectful treatment, even-handed consideration, and neutrality.¹⁰⁸

2. Consumer Bankruptcy's Procedural Justice

Procedural justice is important for two main reasons applicable to consumer bankruptcy. First, proceedings perceived as just lead to acceptance and deference to the resulting judicial decisions. In consumer bankruptcy, the pertinent decisions are whether to grant discharge or whether to confirm a repayment plan that hopefully will lead to discharge.¹⁰⁹ Regardless of the outcome, every debtor's financial life continues past the bankruptcy case's conclusion. The extent to which debtors accept their cases' outcomes may affect their motivation to make efficient use of the fresh start and to reenter the economy—that is, to effectuate the policies underlying the consumer bankruptcy system.¹¹⁰

Second, perceptions of the consumer bankruptcy process also may affect how the public views the legitimacy of granting overindebted individuals the opportunity to obtain a discharge. This likewise may impact the ability of the consumer bankruptcy system to achieve its policy goals, and may affect whether the overindebted households that will benefit from receiving a discharge of debts will be inclined to use the system.

Given what people generally know about the legal system—learned through conversations with friends and family, television, books, and other media—it can be posited that most people think that after a household files bankruptcy, the debtors will sit before a judge and explain why they are asking to be excused from paying their debts. Given society's overall disapproval of overindebtedness, people probably expect that debtors will be required to de-

¹⁰⁷ See Tyler, *supra* note 11, at 665 (discussing the general public's assessment of legal institutions on the basis of perceptions of procedural justice).

¹⁰⁸ See Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 233–34 (2001) (finding that public confidence and trust in state courts depends on people's assessments of the fairness of state courts' procedures); *supra* note 99 and accompanying text (outlining these four factors).

¹⁰⁹ See *supra* notes 31–54 and accompanying text.

¹¹⁰ See Hollander-Blumoff & Tyler, *supra* note 96, at 7 (discussing the perceptions of procedural justice and noting that “[l]ess command and control is needed, and individuals can rely more on self-regulation in settings where authorities act in procedurally fair ways”); *supra* notes 20–28 and accompanying text. This observation aligns with the dignitary theory of procedural justice, which argues that fair processes are most valuable because they enforce norms about dignity and acceptable interactions among citizens. See Hollander-Blumoff, *supra* note 94, at 138–40 (discussing two primary theories of procedural justice, the instrumental approach and the dignitary approach, and noting other theories).

clare that they cannot pay back what they owe, that they are unable to live up to their financial and social obligations, and that their predicament, simply put, is hopeless. Again, given the vilification of overindebtedness, debtors likely anticipate having the chance to impugn their creditors for not working with them to make payments affordable, for not agreeing to refinance home loans, or for simply extending them too much credit.

Most people—both consumer debtors and the general public—also probably think that creditors will be present during these hearings and will have the right to cross-examine debtors, similar to what people see on television shows involving the criminal justice system.¹¹¹ People consequently may believe that creditors will hear debtors' stories. Those households that file bankruptcy may anticipate—perhaps fear—what their creditors may ask or say in response.

The actual bankruptcy process that consumer debtors encounter bears little resemblance to the procedure that people likely anticipate. Recall that chapter 7 and chapter 13 are distinct substantively.¹¹² But, the commonalities between the two proceedings are the most significant to people's perceptions of bankruptcy's procedures.

Most debtors never appear in court before the bankruptcy judge and generally have little to no voice during their bankruptcy proceedings. Besides their attorneys, the only judicial "officials" who debtors physically see are bankruptcy trustees. Debtors typically meet with trustees once, at the 341 meeting, for ten minutes to half an hour, depending on the chapter and on the case's complexity.¹¹³ At these meetings, most debtors are not confronted by their creditors, though debtors may mention their creditors in their discussions with trustees.¹¹⁴ Thus, most debtors never have the opportunity to speak to bankruptcy judges or to their creditors directly nor to observe their attorneys doing so on their behalf.¹¹⁵

This presents a problem. The 341 meeting almost certainly does not provide an adequate substitute for what people anticipate they will experience or what procedural justice research calls for in a legal proceeding's process. Stated succinctly, the consumer bankruptcy system appears to be procedurally bankrupt.

¹¹¹ The Sixth Amendment grants people the right to confront their accusers in criminal proceedings. U.S. CONST. amend. VI. The lay public may believe that this right is universal and be shocked to find out it does not apply in civil and administrative proceedings.

¹¹² See *supra* notes 31–54 and accompanying text.

¹¹³ See *supra* notes 39–43, 46 and accompanying text for a discussion of 341 hearings. The approximate timing comes from my observations of dozens of 341 hearings.

¹¹⁴ This is based upon my observations of dozens of 341 hearings.

¹¹⁵ Recall that people's perceptions of procedural justice involve *being present* while attorneys speak with judges or other officials. See *supra* note 102 and accompanying text.

If debtors do not feel that they have a voice or that they can trust the authorities overseeing their cases—judges and trustees—then they may question whether these authorities sincerely considered their financial problems. For those debtors who do not receive a discharge or fail to complete their repayment plans, not having had the chance to speak with the judge and to be heard by their creditors may negatively affect their ability to move forward post-dismissal as they try to restructure their financial lives on their own. Even debtors who receive discharges or confirmation of their repayment plans may find bankruptcy's procedures lacking and become disillusioned. Importantly, all debtors may discuss their experiences during their cases with others, potentially disseminating information that persuades other households in need of the discharge not to file bankruptcy. More broadly, this information may spread a negative view of the consumer bankruptcy system and of the federal judiciary.

That people could become disheartened even if they receive a discharge or plan confirmation also matters because the fresh start is simply that—a start. After the discharge and during their repayment plans, people need to continue to work to manage their finances and economic lives. This is not an easy task.¹¹⁶ Maintaining the fresh start is difficult, even for people who try their hardest.¹¹⁷ That only one-third of chapter 13 debtors complete their plans and thus receive a discharge demonstrates how challenging it can be to stay afloat financially after filing bankruptcy.¹¹⁸

Even so, it may not be critical to consumer bankruptcy's effectiveness for debtors to feel that they had an opportunity to be heard by an authority who they view as legitimate. What people expect from the procedures of other parts of the justice system may not translate to consumer bankruptcy. People may want a discharge of their debts and not much more. But if people expect more, then consumer bankruptcy's lack of procedural justice may damage the system's effectiveness. In not receiving what they expect from the bankruptcy process, research suggests that debtors will be less likely to accept their cases' outcomes and to work to make the best use of the discharge.

Section B begins by providing an overview of research regarding how people assert and affirm their social standing and deal with their emotions through the legal system. It then applies this research to the people who file

¹¹⁶ See *supra* note 63 and accompanying text.

¹¹⁷ See Sara S. Greene, Parina Patel, & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032–33 (2017) (giving an overview of statistics about chapter 13 case dismissal); Porter & Thorne, *supra* note 21, at 70 (finding from a survey of households that filed chapter 7 that within one year after discharge, one-quarter of the households were struggling to pay routine bills and one-third of the households' overall financial situation had worsened since filing bankruptcy).

¹¹⁸ See Greene et al., *supra* note 117, at 1042–43 (calculating the average nationwide chapter 13 repayment plan completion rate).

bankruptcy to assess how crucial consumer bankruptcy's procedures are to the system's success.¹¹⁹

B. Expression Through the Consumer Bankruptcy System

1. Social Standing

Legal rules express social norms and serve significant social purposes apart from directly controlling people's behavior.¹²⁰ The actions of judges, government officials, and citizens acting through participation in the public and private legal systems also express society's view of the accused offender and presumptive victim in the situations presented, similarly communicating social norms. These observations are based on theories about the legal system's expressive functions.¹²¹ This Article's theory of consumer bankruptcy's procedural justice is concerned with one strand of the legal system's expressive function—the significance of punishment or a finding of fault of an accused offender to a victim's social standing.

This understanding of the legal system's expressive value is most clearly refined in the context of criminal law. When a prosecutor takes action against an accused, and the accused receives a sentence at the hands of a judge or jury, the victim and members of society perceive that outcome as denunciation of the offender's actions.¹²² Punishment expresses “disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”¹²³ It thus carries the “symbolic significance” of moral condemnation of the offender.¹²⁴

¹¹⁹ See *infra* notes 120–206 and accompanying text.

¹²⁰ See Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, 50 PSYCH. LEARNING & MOTIVATION 101, 102 (2009) (“[T]he law prescribes and proscribes morally laden behaviors, but it also unabashedly attempts to shape moral attitudes and beliefs.”); Timothy R. Holbrook & Mark D. Janis, *Expressive Eligibility*, 5 U. CAL. IRVINE L. REV. 973, 975–76 (2015) (applying this variety of expressive theories of law to the patent system); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–24 (1996) (“Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.”).

¹²¹ For a more complete overview, see Adler, *supra* note 6, at 1414–27 (describing the expressive theories of punishment).

¹²² See JOEL FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970) (discussing moral condemnation through legal punishment); Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 20–22 (Wesley Cragg ed., 1992) [hereinafter Hampton, *An Expressive Theory*] (discussing how the message sent by criminal punishment is about the “moral relationship among human beings”); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597–98 (1996) (discussing the expressive theory of criminal punishment).

¹²³ FEINBERG, *supra* note 122, at 98.

¹²⁴ *Id.*; see Kahan, *supra* note 122, at 593 (“Punishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.”).

Criminal punishment's symbolic significance links directly to a victim's social standing. A person's view of her social standing, including where she stands in relation to others in her social group and to society at large, is integral to fulfilling her "need to belong."¹²⁵ Assessment of social standing encompasses two social group dimensions: "within groups" and "between groups."¹²⁶ People view themselves as belonging to a particular social group, their "ingroup," and compare their "ingroup" to other social "outgroups" to assess how their group stands "between groups" in society.¹²⁷

A person's ingroup itself carries a positive or negative connotation, determined by comparing its prestige to the prestige of relevant outgroups: positive discrepancies result in high prestige and negative discrepancies result in low prestige.¹²⁸ Because people generally value a "positive social identity,"¹²⁹ they will strive to enhance their group's position, or, at the very least, maintain their group's social identity.¹³⁰ A necessary corollary of this observation is that when their social identity is threatened, people will seek to assert and confirm their social status and their group's relative position in society.¹³¹

¹²⁵ Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1086 (2007); see Tom R. Tyler & Heather J. Smith, *Justice, Social Identity, and Group Processes*, in THE PSYCHOLOGY OF THE SOCIAL SELF 223, 223 (Tom R. Tyler et al. eds., 1999) ("[G]roups both define who people are and tell them how to evaluate what they are worth."); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497 (1995) (discussing affiliating with other people); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355–56 (1997) ("[P]eople seek *esteem*: the good opinion or respect of others.").

¹²⁶ See Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS 7, 15–16 (Stephen Worchel & William G. Austin eds., 1986) (providing an overview of social identity and social comparison); Bilz & Nadler, *supra* note 120, at 122–23 (discussing the aspects of social standing).

¹²⁷ See Tajfel & Turner, *supra* note 126, at 15 (conceptualizing a group "as a collection of individuals who perceive themselves to be members of the same social category, share some emotional involvement in this common definition of themselves, and achieve some degree of social consensus about the evaluation of their group and of their membership in it").

¹²⁸ See *id.* at 16–17 ("The evaluation of one's own group is determined with reference to specific other groups through social comparisons in terms of value-laden attributes and characteristics."); John C. Turner & Rina S. Onorato, *Social Identity, Personality, and the Self-Concept: A Self-Categorization Perspective*, in THE PSYCHOLOGY OF THE SOCIAL SELF, *supra* note 125, at 11, 18 (discussing comparisons of ingroup and relevant outgroups).

¹²⁹ Bilz, *supra* note 125; see Tajfel & Turner, *supra* note 126, at 16–17 (discussing how positive and negative discrepancies may lead to competitive acts among social groups).

¹³⁰ See Wenzel et al., *supra* note 4, at 383 ("Status and power are inherently relative or competitive.").

¹³¹ See *id.* (discussing how "victims distinguish psychologically between themselves and the offender").

In the context of crime, as argued by Jean Hampton, an offender's actions may degrade and demean the victim, imperiling the victim's social standing.¹³² Even if the offender's actions do not inflict harm or suffering on the victim, the victim may lose status within her ingroup because "inherent in a criminal's action is the message that the victim is not worth enough for him to treat her better."¹³³ Others may share the victim's sense of social standing loss.¹³⁴ Consequently, the victim will be motivated to reclaim her social standing.¹³⁵

Besides potentially morally condemning the accused, prosecution provides "a referendum on the social standing and worth of the victim," allowing the victim to objectively assess her social standing through the eyes of others.¹³⁶ If a judge or jury of the victim's peers punishes the accused, the victim may conclude that society believes that the message of the offender's action about her value and social worth were incorrect, restoring her social standing. But if a judge or jury does not punish the accused, the victim may conclude that her community disdains her, that the accused's actions were appropriate, and that she belongs to a less prestigious ingroup.¹³⁷

The same holds true for third-party observers of criminal proceedings. Research shows that when an accused is punished, community members' perceptions of the victim's worth improve, but that when the accused escapes punishment, community members respect and value the victim less.¹³⁸

¹³² See Hampton, *An Expressive Theory*, *supra* note 122, at 6 (distinguishing degradation from feeling demeaned); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992) (noting that some actions are "an affront to the victim's value or dignity").

¹³³ Hampton, *An Expressive Theory*, *supra* note 122, at 12.

¹³⁴ See Kenworthy Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1233–37 (2004) (discussing how robbery victims report that feelings of being violated are more detrimental to them than the actual material loss and describing the effects of victimization on third parties).

¹³⁵ See Bilz, *supra* note 125, at 1086–87 ("[People] aspire to be well-regarded members of the groups to which they do belong, and they value their group having high standing compared to other groups.").

¹³⁶ See *id.* at 1088–89 ("Social status is, by definition, *social*.").

¹³⁷ See *id.* at 1088 (discussing punishment as it relates to social standing); Kahan, *supra* note 122, at 598 (providing similar discussion).

¹³⁸ See Carolyn L. Hafer, *Why We Reject Innocent Victims*, in THE JUSTICE MOTIVE IN EVERYDAY LIFE 109, 109, 113–14 (Michael Ross & Dale T. Miller eds., 2011) (finding that if an accused is not punished, third parties tend to disassociate themselves from the victim); Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358, 361–62, 385–86 (2016) [hereinafter Bilz, *Testing*] (discussing this empirical evidence and demonstrating that, in the eyes of others, criminal punishment of an accused increases the victim's social standing, while failure to punish decreases the victim's social standing); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 313–14 (2002) (finding that victims who believe that the criminal justice system failed them feel rejected by their community and society).

Similarly, when a private citizen seeks to hold an accused offender accountable through a legal proceeding, and a judge or jury does so, this sends a message about what society thinks of the offender's actions, the offender, and the victim. Tort verdicts or even a sincere apology from a perpetrator to the victim conveys information about the wrongfulness of the accused's behavior, thereby communicating to the victim that she is a valued member of society.¹³⁹ As with the theory of the expressive function of criminal law, empirical research shows that plaintiffs' goals in civil litigation transcend monetary concerns and include aims that are expressive and communicative, such as acknowledgement of harm and admissions of fault.¹⁴⁰

2. Emotions

Part of seeking confirmation of social standing is dealing with the emotions that arise from the actions and circumstances that bring people to the judicial system. Indeed, research increasingly explores emotions' connection with the legal system.¹⁴¹ Emotions are described as "engagements with the world."¹⁴² People's emotions both affect how they act and manifest as cognitive and physiological states.¹⁴³

¹³⁹ See ROBBENOLT & HANS, *supra* note 101, at 19 (noting that public judgment can "communicate to an injured party that he is a respected member of the community" and that an apology can provide accountability from the accused); Alan Strudler, *Mass Torts and Moral Principles*, 11 LAW & PHIL. 297, 316–17 (1992) ("[T]he tort system, when it works well, constitutes a conventional device by which an injurer may be compelled to express regret to his victim."); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2086 (1998) (connecting punitive damages "with their historical origins in affronts to the honor of the victims").

¹⁴⁰ See, e.g., AUSTIN SARAT & WILLIAM FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS* 93 (1995) (finding that litigants turn to the judicial system for validation that they have received unjust treatment); Tamara Relis, "*It's Not About the Money!*": *A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 706–07 (2007) (recounting findings from interviews with parties and attorneys involved in sixty-four medical malpractice cases); Wenzel et al., *supra* note 4, at 377 ("Victims seem to place less importance on material restoration than 'emotional restoration.'").

¹⁴¹ For foundational works in this field, see generally SUSAN A. BANDES, *THE PASSIONS OF LAW* (1999) (discussing the role emotions play within the justice system); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161 (2012) (discussing the field of law and emotion); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485 (2011) (proposing a model for management of judicial emotions); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006) (proposing six interrelated subfields within law and emotion).

¹⁴² Robert C. Solomon, *Emotions, Thoughts, and Feelings: Emotions as Engagements with the World*, in *THINKING ABOUT FEELING: CONTEMPORARY PHILOSOPHERS ON EMOTIONS* 76, 76 (Robert C. Solomon ed., 2004). See generally Dacher Keltner & Jennifer S. Lerner, *Emotion*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 317 (Daniel T. Gilbert et al. eds., 2010) (discussing how emotions are social).

¹⁴³ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 297 (1996) ("Emotions motivate behavior."); Emily Kidd White, *Till Human*

“Psychologists generally identify eight basic emotions: anger, anticipation, disgust, fear, joy, sadness, surprise, and trust.”¹⁴⁴ Other literature identifies several other major emotions, including guilt and shame. Of these emotions, anger, guilt, shame, and disgust stand out as relevant to consumer debtors’ decisions to use the bankruptcy system.¹⁴⁵ This Article focuses on these emotions in part based on my prior study of consumers’ complaints about financial product and service providers filed through the Consumer Financial Protection Bureau (CFPB)’s complaint mechanism.¹⁴⁶ With consumers’ permission, the CFPB publishes the narratives that consumers write in connection with their complaints.¹⁴⁷ The emotions that people use to describe their debt problems during a time when they could file bankruptcy are particularly relevant to understanding the feelings that people may bring with them into the bankruptcy system. Of note, these narratives strongly display consumers’ anger and frustration.¹⁴⁸

Anger is the emotion most often associated with criminal and civil justice. It arises when a person feels insulted or hurt in a significant way.¹⁴⁹ Feeling angry hinges on presuppositions about proper behavior and what constitutes respect—that is, social norms.¹⁵⁰ If people are not treated according to expected norms, they will question their social status.¹⁵¹ Anger presses people to

Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims, 3 J.L. RELIGION & ST. 201, 204 (2014) (discussing the affective and cognitive states of emotions).

¹⁴⁴ See Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177, 189 (2017) [hereinafter Foohey, *Calling on*] (discussing basic and major emotions).

¹⁴⁵ See *id.*; Kahan & Nussbaum, *supra* note 143, at 276 (listing major emotions).

¹⁴⁶ See generally Foohey, *Calling on*, *supra* note 144 (discussing how understanding emotions can improve the CFPB).

¹⁴⁷ See CONSUMER FIN. PROT. BUREAU, CONSUMER COMPLAINT DATABASE, <https://www.consumerfinance.gov/data-research/consumer-complaints/> [<https://perma.cc/P4EB-4TWD>] (publishing the narratives of certain consumers).

¹⁴⁸ Foohey, *Calling on*, *supra* note 144, at 195. I also focused on sadness and fear when analyzing the narratives. *Id.* at 189–91.

¹⁴⁹ See RICHARD S. LAZARUS, EMOTION AND ADAPTATION 217–34 (1991) (discussing anger); Richard S. Lazarus, *Progress on a Cognitive-Motivational-Relational Theory of Emotion*, 46 AM. PSYCHOLOGIST 819, 828 (1991) (noting that insult is the primary instigator of anger); Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 533 (2001) (discussing research showing that disrespect leads to anger and aggression).

¹⁵⁰ People expect to be treated with more respect by ingroup members than outgroup members, and being treated with disrespect by ingroup versus outgroup members provokes different responses. Miller, *supra* note 149, at 539 (noting that outgroup offenses provoke a “How dare they?” response and ingroup offenses provoke a “How could they?” response).

¹⁵¹ See *id.* at 533 (linking disrespect and “social imbalance”).

defend their status and reinforce what they believe is appropriate behavior, restoring their self-esteem and achieving closure.¹⁵²

For example, in the context of crime, an injustice perpetrated against a victim triggers anger. Drawing from this anger, the victim retaliates to restore self-esteem and educate the offender about proper social relations.¹⁵³ Punishment of the offender provides for the censure that corrects “the moral-symbolic meaning of the offense.”¹⁵⁴

Guilt and shame, two distinct but related “self-conscious” emotions, also are intertwined with people’s sense of self and social standing.¹⁵⁵ Self-conscious emotions require individuals to have a “sense of self as well as a set of standards” by which they assess their own behavior as successful or failed.¹⁵⁶ A person feels guilt when she evaluates her action or behavior as failing and focuses on what about her specific behavior transgressed an important social norm.¹⁵⁷ With shame, a person negatively evaluates herself as a whole as failing.¹⁵⁸ Guilt thus focuses on the action, whereas shame focuses on the person.¹⁵⁹ Although the same situation can elicit guilt and shame, shame is a more social emotion, is regulated through community standards, and is linked with a person’s social image and feelings of social devaluation.¹⁶⁰

¹⁵² See Kahan & Nussbaum, *supra* note 143, at 347–48 (discussing anger, social norms, and status); Miller, *supra* note 149, at 534, 540–41 (linking anger with self-esteem and perceptions of injustice); Arne Roets & Alain Van Hiel, *An Integrative Process Approach of Judgment and Decision Making: The Impact of Arousal, Affect, Motivation, and Cognitive Ability*, 61 PSYCHOL. REC. 497, 499–500 (2011) (discussing closure as a motivator in decision making).

¹⁵³ See Miller, *supra* note 149, at 540–42 (discussing the goals of retaliation); Wenzel et al., *supra* note 4, at 380 (“[V]ictims seek revenge to restore their honor and their self-image.”).

¹⁵⁴ Wenzel et al., *supra* note 4, at 379.

¹⁵⁵ Michael Lewis, *Self-Conscious Emotions*, 83 AM. SCIENTIST 68, 68 (1995).

¹⁵⁶ *Id.*; see Jessica L. Tracy & Richard W. Robins, *Putting the Self into Self-Conscious Emotions: A Theoretical Model*, 15 PSYCHOL. INQUIRY 103, 105 (2004) (noting that people experience self-conscious emotions when they are aware they have succeeded or failed to live up to an ideal).

¹⁵⁷ See Fabrice Teroni & Julien A. Deonna, *Differentiating Shame from Guilt*, 27 CONSCIOUSNESS & COGNITION 725, 727 (2008) (“[G]uilt is tied to some specific behavior.”).

¹⁵⁸ See *id.* (defining shame).

¹⁵⁹ See Foohey, *Calling on*, *supra* note 144, at 191 (differentiating shame and guilt); Raffaele Rodogno, *Shame, Guilt, and Punishment*, 28 LAW & PHIL. 429, 432–33 (2009) (discussing the difference).

¹⁶⁰ See LAZARUS, *supra* note 149, at 240–47 (distinguishing guilt and shame); Paul Gilbert, *Evolution, Social Roles, and the Differences in Shame and Guilt*, 70 SOC. RES. 1205, 1208 (2003) (“Shame relates to the competitive dynamics of life, linked to social standing and personal reputations.”); Margaret E. Kemeny et al., *Shame as the Emotional Response to Threat to the Social Self: Implications for Behavior, Physiology, and Health*, 15 PSYCHOL. INQUIRY 153, 154 (2004) (discussing studies regarding the link between shame and social status); Teroni & Deonna, *supra* note 157, at 729 (linking shame and community standards).

The behavioral consequences of guilt and shame also differ. Guilt drives people to try to repair the wrongs associated with it.¹⁶¹ Shame encourages people to hide so as to preserve their social standing.¹⁶² Nonetheless, people may act in the face of shame with “reparative and conciliatory behavior” to avoid an unwanted lower social status or to escape stigmatization.¹⁶³ Stigma can strongly influence feelings of shame, particularly depending on which cultural values are marked as worthy of stigmatizing others for their nonconformity.¹⁶⁴ The shame associated with stigmatization may provoke anger, which may prompt people to act to eliminate present and future feelings of shame.¹⁶⁵

Finally, disgust intersects with anger, guilt, and shame. Disgust arises when people confront something revolting,¹⁶⁶ and creates a desire to change or withdraw from a situation or person.¹⁶⁷ Like guilt and shame, disgust is a “moral” emotion.¹⁶⁸ People may find others (or themselves) disgusting if they violate a social or moral code.¹⁶⁹ Disgust can be felt as a self-condemning emotion whereby people want to purge themselves of what they find revolting to “reestablish dignity.”¹⁷⁰

Disgust also links with shame’s response to others’ disapproval, a disapproval possibly grounded in disgust for what they have done, such as not pay

¹⁶¹ See Gilbert, *supra* note 160, at 1205–06 (describing guilt as “evol[ing] from a care-giving and ‘avoiding doing harm to others’ system”); Tracy & Robins, *supra* note 156, at 103 (discussing research regarding the behavioral outcomes of guilt and shame).

¹⁶² See LAZARUS, *supra* note 149, at 243–44 (distinguishing the “action tendencies” of guilt and shame and noting that “shame makes us want to hide”).

¹⁶³ See Teroni & Deonna, *supra* note 157, at 735 (discussing the differences between shame and guilt). See generally Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 28 J. COMMUNITY PSYCHOL. 191 (2010) (discussing what makes some rape survivors withdraw from criminal investigations versus what makes other survivors continue to participate after reporting their assaults).

¹⁶⁴ See Gilbert, *supra* note 160, at 1215–19 (discussing how shame and stigma are linked with cultural values). See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963) (linking stigma, social identity, personal identity, and group alignment).

¹⁶⁵ See Gilbert, *supra* note 160, at 1225 (“Shaming people can lead to various unhelpful defensive emotions.”); James Gilligan, *Shame, Guilt, and Violence*, 70 SOC. RES. 1149, 1149–52, 1159–60 (2003) (noting that researchers often provoke anger in experiments by insulting—that is, shaming, people).

¹⁶⁶ See LAZARUS, *supra* note 149, at 259–62 (discussing disgust).

¹⁶⁷ See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 1–2 (1997) (overviewing disgust); Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 808–09 (2015) (noting that disgust shapes decision making through goal activation).

¹⁶⁸ See Jonathan Haidt, *The Moral Emotions*, in *HANDBOOK OF AFFECTIVE SCIENCES* 852, 853 (R.J. Davidson et al. eds., 2003) (“Moral emotions are the emotions that respond to moral violations or that motivate moral behavior.”); MILLER, *supra* note 167, at 1–2 (discussing how disgust “is a moral and social sentiment”).

¹⁶⁹ Haidt, *supra* note 168, at 855–61 (categorizing emotions).

¹⁷⁰ *Id.* at 857–58; see MILLER, *supra* note 167, at 34–35 (associating disgust with self-loathing).

their debts, which itself creates social inequality.¹⁷¹ People often react to their perceived social inequality by trying to distance themselves from the traits within themselves that caused their disgust.¹⁷²

Overall, across anger, guilt, shame, and disgust, one of people's main responses is to try to distance themselves from the emotion. Distancing themselves from these feelings should increase people's perceptions of their relative social standing. As such, as with other legal proceedings, overindebted individuals may look to the bankruptcy process to help them deal with these emotions and assert their social standing.

3. Debts' Diminished Social Standing and Heightened Emotions

For the one million people who file bankruptcy every year,¹⁷³ their financial situations undoubtedly prompt them to consider using bankruptcy to gain a fresh start. Aside from how bankruptcy discharge's benefits accrue to the fullest extent possible, bankruptcy's procedures should align with how people actually use the system. People's mindset when they file bankruptcy shapes what they seek from their cases, including as expressive and emotional matters. Understanding this mindset is central to evaluating the effects of consumer bankruptcy's seeming lack of procedural justice.

Research about who files bankruptcy provides clues as to people's outlook on their situations as they enter the bankruptcy system.¹⁷⁴ Most significantly, consumer debtors report struggling for years to pay their debts prior to filing.¹⁷⁵ Despite having tried to pay their debts by forgoing necessities and employing a wide range of coping mechanisms, they have landed in a state of stressful overindebtedness marred by calls from creditors and debt collectors.¹⁷⁶

People facing ostensibly insurmountable debts may find themselves disgusted by their financial situations. They may feel guilty and ashamed about their social offense of being unable to pay their debts. People also may be angry at the creditors who seemingly allowed them to get into such dire financial

¹⁷¹ See MILLER, *supra* note 167, at 34–35 (noting that “[d]isgust works first and if it fails shame will be the consequence” and linking “sociomoral” disgust and social inequality); June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOL. 345, 353 (2007) (linking shame and feeling disgust “for a bad, defective self”).

¹⁷² See MILLER, *supra* note 167, at 34 (“In disgust we wish to have the offensive thing disappear by the removal of either ourselves or it; in shame we simply want to disappear.”); Lerner et al., *supra* note 167, at 809 (noting that studies show that disgust makes people more likely to choose to switch to something unknown rather than keep something disgusting).

¹⁷³ See *supra* note 12 and accompanying text.

¹⁷⁴ See generally *supra* notes 56–89 and accompanying text.

¹⁷⁵ See *supra* note 69 and accompanying text.

¹⁷⁶ See *supra* notes 73–77 and accompanying text.

situations, and then dunned them with calls to collect debts that they increasingly had little hope of being able to pay.

Because of debtors' financial situations, during the months leading up to their bankruptcy filings, most unsecured creditors cannot collect on delinquent debts unless the debtors agree to pay or the creditors go to court to receive judgments that allow them to attach debtors' property, such as orders to garnish debtors' bank accounts or wages.¹⁷⁷ Data from the CBP show that creditors file such actions to collect on debts, secured and unsecured.¹⁷⁸ These actions likewise may incite anger, particularly if people are unable to pay their expenses because of the garnishment.¹⁷⁹

Debt collection, both in and out of court, may also add to people's guilt. Every call is an instance in which debtors are unable to live up to their obligations. Regardless of how boorishly debt collectors treat them, people generally want to pay.¹⁸⁰ As one debt collector observed:

It is a big misconception that people don't want to pay. When the debtors do the screaming, and the ducking out, and the complaining, it's just them lashing out because they can't pay If you called people up and they had ten grand in the bank, they would pay instantly.¹⁸¹

Being unable to pay is an act of failure, an act that transgresses the important social norm of paying back one's debts. Debtors' lashing out and complaining, as noted by this debt collector, likely arises from people's guilt and disgust when faced with the inability to pay debts. Similarly, garnishment orders are statements issued by judicial authorities that households are unable to

¹⁷⁷ See Richard M. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 622–24 (2006) (overviewing garnishment and describing a garnishment order as “forcing the third party to pay a portion of these assets to the creditor instead of the debtor”); Mann & Porter, *supra* note 49, at 309–10 (discussing garnishment).

¹⁷⁸ See *supra* notes 79–80 and accompanying text.

¹⁷⁹ See John Infranca, *Safer Than the Mattress? Protecting Social Security Benefits from Bank Freezes and Garnishments*, 83 ST. JOHN'S L. REV. 1127, 1127 (2009) (noting that a “brief interruption” in access to social security benefits via garnishment can make “it difficult, if not impossible, for a beneficiary to purchase food, pay rent, and provide for basic medical needs”).

¹⁸⁰ See Sousa, *supra* note 61, at 464–68 (quoting from interviews with consumer debtors about wanting to pay back their debts); Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 83 (2006) (discussing how people attempt to pay back their debts); Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971–72 (2010) (noting that people continue to pay their mortgages “even when they are hundreds of thousands of dollars underwater and have no reasonable prospect of recouping their losses”).

¹⁸¹ See JAKE HALPERN, *BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD* 95–96 (2014) (quoting a debt collector and further noting that most collectors heeded this observation and strove to empathize and thereby “marry the debtor”).

live up to their obligations. People may view these orders as public affirmations of their failure, creating feelings of guilt, shame, and anger.

People also may become disillusioned with their creditors and the consumer credit industry more generally. The 2008 financial crisis brought calls for reforms aimed at curbing deceitful behavior by banks and other financial institutions.¹⁸² Popular narratives about who is to blame for individuals' financial failures also shifted. Rather than attribute overindebtedness solely to consumers' actions and character flaws, financial institutions increasingly bore negative labels, such as peddlers of "financial weapons of mass destruction," as characterized by Warren Buffet.¹⁸³

Such feelings about the economic system's role in overindebtedness are not unique to the 2008 financial crisis. History has often pitted households that spend for personal and family purposes against their creditors.¹⁸⁴ These conflicts are described as part of "class formation, with an indebted lower class and a more powerful creditor higher class."¹⁸⁵ Perceptions about this lower-class status may influence how people think about using the legal system's substantive law or the system's procedures.¹⁸⁶

Research further shows that indebtedness, particularly debts so large that they impact how people live their everyday lives, brings a perceived lower-class status. That is, people experience overindebtedness as a distinct "lower" and stigmatized social class.¹⁸⁷ Importantly, overindebtedness plunges some individuals and families into this lower social class. Although overindebted-

¹⁸² See Charles Eisenstein, "Don't Owe. Won't Pay." *Everything You've Been Told About Debt Is Wrong*, YES! MAG. (Aug. 20, 2015), <http://www.yesmagazine.org/issues/the-debt-issue/don-t-owe-won-t-pay-charles-eisenstein-debt-20150820> [<https://perma.cc/YD7F-7GUC>] (discussing the crisis).

¹⁸³ BERKSHIRE HATHAWAY INC., 2002 ANNUAL REPORT 15 (2003); see CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 3–8 (2016) (referring to many financial products as "weapons of math destruction" that can reinforce existing inequalities).

¹⁸⁴ See Teresa A. Sullivan, *Debt and the Simulation of Social Class*, in A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT, *supra* note 24, at 36, 48 (noting the "long history" of debtor/creditor conflicts); Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 THEORETICAL INQUIRIES L. 323, 339 (2006) (noting that "the 1960s marked a huge shift in attitudes toward debt problems" that resulted in higher tolerance for taking on debts and for people who encountered problems with their debts).

¹⁸⁵ Sullivan, *supra* note 184, at 48.

¹⁸⁶ See William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 401 (1994) (noting that bankruptcy may serve as a "vehicle for delivering the elusive goal of consumer justice" when other consumer protection laws fall short).

¹⁸⁷ See Stephen E.G. Lea et al., *The Psychology of Debt in Poor Households in Britain*, in A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT, *supra* note 24, at 151, 152 (discussing data); Sullivan, *supra* note 184, at 48 (highlighting the "loss of social status, sometimes in severe ways" that is historically associated with debt).

ness transcends socio-economic class,¹⁸⁸ people who for much of their lives identified as middle-class make up the vast majority of the consumers who ultimately file bankruptcy.¹⁸⁹

To appreciate the perceived severity of this loss of social status, consider the predominant factors that lead the people who file bankruptcy to become overindebted: job loss, divorce, and health problems.¹⁹⁰ In all likelihood, most people do not consider any of these causes of their overindebtedness to be within their control. No one wants to get sick.¹⁹¹ Despite nationwide divorce rates, (presumably almost) no one enters into a marriage planning to divorce.¹⁹² And although people's behavior and skills can lead to job loss, shifts in the economy and declining average duration of employment with a particular employer have become the chief drivers of job loss.¹⁹³

Overindebtedness further hampers these individuals' ability to lift themselves back into the "higher" middle socio-economic class to which they formerly belonged.¹⁹⁴ Given this, those who eventually file bankruptcy may feel trapped in the stigmatized and shameful state of overindebtedness. Although this stigma and shame may make some people withdraw from society as they

¹⁸⁸ See Lupica, *supra* note 22, at 587 ("The tension between the desire and resistance to consume is felt by consumers at all levels of the class spectrum.").

¹⁸⁹ See *supra* notes 64–65 and accompanying text.

¹⁹⁰ See *supra* note 63 and accompanying text.

¹⁹¹ This statement excludes people suffering from Münchausen syndrome, which itself is a disease. See Richard Gunderman, *When People Seem to Want to Be Sick*, THE ATLANTIC (June 11, 2003), <http://www.theatlantic.com/health/archive/2013/06/when-people-seem-to-want-to-be-sick/276745/> [<https://perma.cc/878K-QECT>] (describing Münchausen syndrome).

¹⁹² For instance, the divorce rate for first marriages in America is between 41% and 49%. See ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, at 14 (2011), <http://www.census.gov/prod/2011pubs/p70-125.pdf> [<https://perma.cc/8FXE-9XLU>] (discussing divorce statistics from first marriages based on the couple's race).

¹⁹³ See Jacob S. Hacker, *The Middle Class at Risk*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, *supra* note 39, at 218, 223–25 (noting that changes in employment began prior to the recession and discussing the growth of "income instability" among American households); Braucher, *supra* note 184, at 332 (noting that fewer unions and more competitive labor markets have increased job insecurity).

¹⁹⁴ See Lupica, *supra* note 22, at 563 ("[O]verindebtedness . . . thwarts class mobility."); Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 1006 (2012) [hereinafter Porter, *The Damage*] ("Other important endowments that may be altered as a result of overindebtedness are education, job training, and health."); Anuj K. Shah et al., *Some Consequences of Having Too Little*, 338 SCL. 682, 684–85 (2012) (discussing how not having enough money to pay for basic expenses can lead people to borrow even more). If these individuals slip out of the mainstream banking, they may encounter even more difficulties in regaining their middle-class status simply because they now pay more for most financial services. See MEHRSA BARADARAN, HOW THE OTHER HALF BANKS 9–10 (2015) (noting how lack of access to financial services "makes it even more difficult for [the poor] to escape poverty").

deal with a loss of self-esteem,¹⁹⁵ overindebtedness caused by events and circumstances beyond one's control may not necessarily prompt feelings of shame to the point of lowering one's self-esteem.

Research shows that when people blame themselves for the negative outcomes in their lives, they are likely to experience low self-esteem, but when they attribute their failures to others and outside forces, such as prejudice, they can protect their self-esteem.¹⁹⁶ Given this, people who turn to bankruptcy may react to their financial situations in a way that encourages them to take stock of what is happening around them.¹⁹⁷ In considering their circumstances, they also may tend toward disgust, including reviling at their overindebtedness, and experiencing it as something from which they want to distance themselves.

When combined with their stewing anger at creditors, instead of retreating into their shame, some middle-class debtors may lash out toward their creditors, resolving to refute "illegitimate" debts.¹⁹⁸ Indeed, the belief that some debts are less legitimate than others dovetails with perceptions that debt is ubiquitous to the point of being systemic and inescapable. People thus may view their own crushing debts as even more out of their control, again pushing them toward feelings of anger and disgust. People will likely direct this disgust toward their creditors and the economic system. This disgust thus should further urge people to distance themselves from their creditors.

In sum, consumer debtors do not simply enter bankruptcy for the discharge; rather, their pre-bankruptcy experiences set them up to be paradigms for the expressive value theory of people's use of the legal system. The people who file bankruptcy are positioned to want the legal process to assist them in "clearing the air" about their financial lives in addition to clearing their debts.

¹⁹⁵ See, e.g., Jennifer Crocker & Hart Blanton, *Social Inequality and Self-Esteem: The Moderating Effects of Social Comparison, Legitimacy, and Contingencies of Self-Esteem*, in *THE PSYCHOLOGY OF THE SOCIAL SELF*, *supra* note 125, at 171, 172–73 (linking stigma and self-esteem); Hugh F. "Trey" Daly III et al., *Into the Red to Stay in the Pink: The Hidden Cost of Being Uninsured*, 12 *HEALTH MATRIX* 39, 43 (2002) (discussing medical debt and quoting one interviewee, "I am ashamed to take my kids to the physician because I think they know I owe thirty-five dollars"); Terrell A. Hayes, *Stigmatizing Indebtedness: Implications for Labeling Theory*, 23 *SYMBOLIC INTERACTION* 29, 29, 33 (2000) (interviewing participants in Debtors' Anonymous and discussing labeling, stigma, and shame connected with overindebtedness); Porter, *The Damage*, *supra* note 194, at 1011–12 (positing a link between debt burdens and self-esteem).

¹⁹⁶ See Crocker & Blanton, *supra* note 195, at 177–79 (synthesizing research about attributions of disadvantage). See generally KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (1999) (interviewing the "working poor" in New York).

¹⁹⁷ See Mann & Porter, *supra* note 49, at 313 (discussing the "ostrich defense" employed by some people who blame outside forces before they turn to the bankruptcy system).

¹⁹⁸ See Eisenstein, *supra* note 182 (discussing the concept of "illegitimate" debts).

4. What People Want from Consumer Bankruptcy's Procedures

With this background, now consider what social and emotional benefits people may anticipate from the bankruptcy process. Debtors should be particularly interested in what bankruptcy's procedures may allow them to convey to their communities and what the procedures' outcomes communicate about their social standing. Through the bankruptcy process, they may desire to assert and assess their social status, confirm their "ingroup," and reinforce their position in society, including through their discussions with the bankruptcy judge and their creditors.¹⁹⁹

To assert what they believe is their true social standing, debtors may want to tell their stories and explain the origin and progression of their financial situations.²⁰⁰ Doing so will allow them to distance themselves from the disgust they feel, to vent anger, and to work through lingering shame from the stigma of overindebtedness.²⁰¹ Publicly telling their stories also may allow people to feel that they are taking control of their financial futures.²⁰²

Consumer debtors' bankruptcy case outcomes likewise should be important to them because of what the outcomes communicate about social standing. To put bankruptcy's outcomes in the context of the criminal and civil justice systems, to a debtor, the discharge or plan confirmation order is akin to punishment of the accused criminal or a verdict for the plaintiff in a civil action.²⁰³ The order acknowledges that the debtor merits forgiveness and relief from the stress and stigma of crushing debts.²⁰⁴ It also represents an opportunity to reenter the economy and to have enough funds and mental energy to participate in social life, as debtors did before encountering the unanticipated events that led to unmanageable debts. Further, those debtors who are frustrat-

¹⁹⁹ See *supra* note 127 and accompanying text.

²⁰⁰ See *supra* notes 73–77 and accompanying text.

²⁰¹ See Foohey, *Calling on*, *supra* note 144, at 205–06 (noting that "storytelling can help people deal with stress, loss, and pain, and make sense of what has happened").

²⁰² That people who have filed bankruptcy report that they are very careful with credit post-discharge may lend support for this observation. See Katherine Porter, *Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors*, 18 AM. BANKR. INST. L. REV. 1, 2 (2010) (reporting that the pattern of debtors' post-bankruptcy credit usage reflects self-restraint).

²⁰³ Bankruptcy cases' procedural posture places debtors in the position of bringing the legal action that effectively flips the role of plaintiff and defendant as understood in most civil legal proceedings. This account, of course, contrasts with the traditional conception of debtors as "offenders" whom society forces creditors to forgive. See Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1231–33, 1240–42 (2010) (detailing the history of allowing people to discharge their debts that began with criminal prosecutions, prisons, and hangings).

²⁰⁴ This may be thought of as the other side of the moral imperative to grant individuals relief from crushing debt that some have posited as a normative reason for allowing discharge. See *supra* note 24 and accompanying text.

ed with creditors' and debt collectors' actions or the credit industry in general may see the discharge or plan confirmation order as a condemnation of those actions.

Stated in the terms of research about social status and groups,²⁰⁵ a consumer debtor may consider the bankruptcy court's order a public statement that she does not belong in the "lower" social group marred by debt. Instead, her correct "ingroup" is the more prestigious middle class to which she previously belonged. Likewise, as with criminal and civil proceedings, if the bankruptcy judge denies the debtor a discharge or if the debtor fails to complete the chapter 13 plan, the debtor may decide that her true place within society is in the less prestigious social class of the chronically indebted.²⁰⁶

In short, separate from any financial benefits, people likely anticipate that the bankruptcy process and its outcome will serve as a referendum on their social standing. Thus, there is good reason to think that whether people who use the bankruptcy system will heed and gain the most benefit from their repayment plans and discharges depends in part on their ability to have a voice during their cases. Stated differently, the lessons of research about procedural justice and the legal system's expressive value should apply just as forcefully to consumer bankruptcy as to other parts of the justice system.

C. *What We Know About Bankruptcy's Procedural Justice*

There exists almost no empirical research directly into the social and emotional impetuses that inform this Article's theory of the importance of bankruptcy's procedural justice. Most of the relevant research comes from the CBP. Because the CBP focuses on who files bankruptcy and why people file at a more macro level, its data are useful for developing the theory, but not for confirming the theory's validity.

Nonetheless, there is some relevant research from business bankruptcy, the results of which support this Article's theory. As part of my project studying the chapter 11 cases filed by religious nonprofits—mainly Christian churches—I interviewed forty-five leaders who put their churches and reli-

²⁰⁵ See *supra* notes 120–140 and accompanying text.

²⁰⁶ Some people file bankruptcy multiple times. See Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 245–47 (2015) (providing data regarding repeat filers). Some of these debtors may file repeatedly as a strategic matter. Some may file twice because of an issue with their first case, such as a missed deadline. *Id.* at 252–57. And some debtors may file more than once because they do not agree with the outcome of their prior case or cases—that is, they file again to reassert their social standing one more time.

gious schools into chapter 11 proceedings between 2006 and 2013.²⁰⁷ During these interviews, in part to assess what they expected from the bankruptcy process, I asked the leaders if anything about their bankruptcy cases surprised or stood out to them.²⁰⁸

Pastors and other interviewees are business leaders, not consumer debtors. Even so, these interviewees' reactions to their organizations' bankruptcy cases offer a useful vantage point to assess this Article's theory because religious non-profits' bankruptcy filings show similarities to consumer bankruptcy filings. Most notably, the timing of the filings tracks that of individuals, not businesses.²⁰⁹ My interviews also revealed that pastors and other leaders think about the decisions to place their organizations in bankruptcy in ways very similar to how consumer debtors decide to file bankruptcy.²¹⁰

When asked if anything about the bankruptcy case surprised or stood out to them, leaders spoke most often of their determination to use bankruptcy to get back on solid financial ground in the face of creditors' relentless and unfair demands. For example, one leader believed that bankruptcy "would give us clout, get us in position to survive, recover, all of that . . . [and n]ow we're protected by the legal system so that people can't take advantage of us."²¹¹

Another leader stated: "[W]e had a sense of hope and relief [upon filing] because we felt we had a shot At least we weren't going to just roll over

²⁰⁷ I define a "religious nonprofit" or "religious organization" as any organization whose operations are motivated in a meaningful way by faith-based principles. See generally Pamela Foohey, *Bankrupting the Faith*, 78 MO. L. REV. 719 (2013) (discussing the differences between religious organizations and small businesses with respect to bankruptcy); Pamela Foohey, *When Faith Falls Short: Bankruptcy Decisions of Churches*, 76 OHIO ST. L.J. 1319 (2015) [hereinafter Foohey, *When Faith Falls Short*] (researching the bankruptcy decisions of churches through a series of interviews). In conducting these interviews, I relied on a semi-structured interview protocol. See Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 50 HOUS. L. REV. 1079, 1092–93 (2017) [hereinafter Foohey, *Lender Discrimination*] (discussing interview methodology). Chapter 11 provides for the reorganization of a business. See U.S. COURTS, CHAPTER 11—BANKRUPTCY BASICS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (<https://perma.cc/4YAJ-W9HJ>) (discussing chapter 11).

²⁰⁸ To preserve anonymity, I identify each interviewee based on a randomly assigned interview ID number. Interview scripts and transcriptions are on file with the author.

²⁰⁹ Foohey, *When Faith Falls Short*, *supra* note 207, at 1338–39.

²¹⁰ For example, the leaders drew on the same psychological tactics to overcome bankruptcy's stigma and shame as consumer debtors interviewed by other scholars. *Id.* at 1352–59. Most of the interviewed leaders were from organizations with predominately African American members, which aligns with the demographics of the churches that have filed under chapter 11 over the last decade. Foohey, *Lender Discrimination*, *supra* note 207, at 1090. In prior work, I argued that the disparity between the demographics of churches and similar congregations nationwide that file bankruptcy relates to inequalities in financial institutions' lending practices to churches. See generally *id.* (discussing lender discrimination with respect to black churches).

²¹¹ Telephone Interview with Leader 159, at 4 (May 7, 2015) (original on file with author).

and play dead. We were ready to fight.”²¹² That pastor also discussed how the church’s creditor had foreclosed on the church’s building, promoting a battle in state court. The pastor had hoped that the state court would treat them fairly, but did not believe this occurred. Moving to bankruptcy court, “federal court,” as the pastor emphasized, would bring “justice” and “treat [the church] right,” which included “our day in court.”²¹³ When the judge ordered the pastor to mediate with the church’s creditor instead of hearing from church members in court, the pastor perceived that to mean that the judge was denying the church a voice in the proceeding: “We never get to tell our story What we wanted was to come in there and have our day in court.”²¹⁴ The mediation resulted in a plan that allowed the church to keep its building. Yet the church’s pastor still believed that justice was not served, demonstrating the primacy of debtors’ perceptions about the procedural fairness over substantive outcomes.

Other leaders also spoke of longing to take part in the proceedings, even if that merely meant being present in the courtroom: “I wanted to be there [in court] every time. But I was advised that our presence wasn’t needed. I felt that I would love to have been there to see the judge.”²¹⁵ Part of this leader’s desire to be in court was “[t]o look in the face of our—not accusers—but our assassins, because I look at [creditors], I have no hate, I have no disdain, I feel sorry for them.”²¹⁶ Another leader echoed this sentiment: “We really wanted to have our day in court so that [the alleged wrongdoing on behalf of a bank employee] could come out.”²¹⁷

In contrast, those leaders who had more positive experiences appeared before judges or at least attended hearings. One leader noted that “[the judge] listened to all the information and I really liked him.”²¹⁸ Further, as found in other legal contexts, a favorable outcome was not necessary to leaders’ perceptions that the bankruptcy process was fair. As one leader stated: “[The judge] was fair and just. There were things that wouldn’t work. I mean, we didn’t win every battle. We lost some of it. But that’s only because that’s the way it works in the court of law.”²¹⁹

Overall, leaders’ comments evidence how some debtors experience the bankruptcy process. Leaders looked for and expected proceedings to give them a voice and help them resolve their organizations’ financial problems in a neu-

²¹² Telephone Interview with Leader 176, at 5 (Aug. 24, 2015) (original on file with author).

²¹³ *Id.* at 5, 6, 9.

²¹⁴ *Id.* at 6, 8.

²¹⁵ Telephone Interview with Leader 55, at 8 (May 6, 2013) (original on file with author).

²¹⁶ *Id.*

²¹⁷ Telephone Interview with Leader 166, at 4 (June 23, 2015) (original on file with author).

²¹⁸ Telephone Interview with Leader 161, at 5 (May 8, 2015) (original on file with author).

²¹⁹ Telephone Interview with Leader 158, at 6 (May 6, 2015) (original on file with author).

tral forum, even if the ultimate outcome was not what they had hoped for at the outset.

These interviews support this Article's theory that consumer debtors look to bankruptcy for more than merely a discharge. They provide even more reason to theorize that if people have a voice during their bankruptcy cases, they will be more likely both to experience the proceedings as fair²²⁰ and to view the outcomes as legitimate and as definitive statements on their social standing.²²¹ If so, they should be more likely to make the best use of the discharge and to speak well of the bankruptcy system. If not, they may remain angry, disgusted, guilty, and ashamed,²²² and more so than if they had the opportunity to speak with the judge and their creditors. And this may hamper the bankruptcy system's effectiveness,²²³ negatively impacting how people re-enter the credit economy, which, in turn, could affect how the credit economy functions. With these harmful outcomes in mind, the next Part proposes two "new deals" for debtors that alter consumer bankruptcy's procedures with the goal of increasing its procedural justice.²²⁴

III. A NEW DEAL FOR DEBTORS: REFORMING CONSUMER BANKRUPTCY TO PROVIDE PROCEDURAL JUSTICE

This Article's theory of consumer bankruptcy's procedural justice has normative implications for the system and advances our understanding of how consumer bankruptcy works in action, on the ground.²²⁵ That scholars previously have not linked procedural justice and expressive theories of law with consumer bankruptcy likely relates to bankruptcy's historical roots in criminal law, the unique procedural posture of debtors simultaneously initiating cases while asking for forgiveness, and the primacy of debates about bankruptcy's stigma to recent discussions about changing consumer bankruptcy laws.²²⁶ In particular, that debates have focused on bankruptcy's stigma likely led scholars to overlook the importance of research regarding how people can experience their overindebtedness as a threat to their social status. This research, in large part, animates the connection among procedural justice, expression through participation in the legal system, and bankruptcy.

²²⁰ See *supra* notes 94–108 and accompanying text.

²²¹ See *supra* notes 120–140 and accompanying text.

²²² See *supra* notes 141–172 and accompanying text.

²²³ See *supra* notes 109–119 and accompanying text.

²²⁴ See *infra* notes 225–270 and accompanying text.

²²⁵ See Rebecca L. Sandefur, *When Is Law in Action?*, 77 OHIO ST. L.J. FURTHERMORE 59, 59 (2016), https://kb.osu.edu/bitstream/handle/1811/76310/OSLJ_Furthermore_V77_059.pdf [<https://perma.cc/EE5Z-23CK>] (noting the distinction between "law in the books" and "law in action").

²²⁶ See *supra* notes 120–224 and accompanying text. See generally Kadens, *supra* note 203.

Considering this research together also provides an insight into one long-standing question about who uses the consumer bankruptcy system. Filing bankruptcy is largely a middle-class phenomenon.²²⁷ Although middle-class households are more likely to have asset and debt profiles that make bankruptcy a useful financial option,²²⁸ their finances alone cannot fully explain why middle-class households are overrepresented among consumer debtors.²²⁹ That people expect the bankruptcy process to serve as a referendum on their social status may especially encourage middle-class households to file, skewing the people who file to those with middle-class backgrounds.

Turning to the theory's normative implications, the foremost lesson from the above analysis is that to enhance perceptions of consumer bankruptcy's procedural justice, debtors must have a more robust opportunity to interact with decisionmakers. This Part proposes two ways to alter consumer bankruptcy to provide debtors with the chance to feel heard.²³⁰ The proposal detailed in Section A is modest, whereas Section B's proposal re-envisioning the system more radically. In addition to providing debtors with more of a voice, both proposals address other long-standing issues with the consumer bankruptcy system that have hampered its ability to deliver the fresh start and help debtors get back on their feet.²³¹

A. *New Deal #1: Replacing the 341 Meeting with a Court Appearance*

The first proposal for altering consumer bankruptcy's procedures assumes a goal of minimally changing current bankruptcy laws and processes while still enhancing people's perceptions of the system's procedural justice. From a leg-

²²⁷ See *supra* note 65 and accompanying text.

²²⁸ The ability to pay attorney's and filing fees also likely factors into who ultimately files bankruptcy. See Foohey et al., "No Money Down," *supra* note 48, at 1059 (discussing how some people file a "no money down" chapter 13 case in which they pay zero dollars in attorney's and filing fees upfront and instead pay all fees through their chapter 13 plans, thus bypassing the need for sufficient funds to pay fees at the time of filing); Mann & Porter, *supra* note 49, at 319–24 (investigating how the timing of tax refunds and paychecks influences filing patterns).

²²⁹ There is no evidence that middle-class households are subject to garnishment orders at a higher rate than other households or that middle-class households receive more dunning from creditors than other households. See Foohey et al., *Sweatbox*, *supra* note 17, at 249–54 (discussing debt collection).

²³⁰ See *infra* notes 232–270 and accompanying text.

²³¹ Both of these proposals are meant to apply to consumer cases filed under chapter 7 and chapter 13 instead of business cases filed under chapter 7 or chapter 11, consumer cases filed under chapter 11, and consumer cases that accompany business filings. These cases are more procedurally and substantively complicated and, as such, in these instances debtors (or debtors' management) already have opportunities to appear before the bankruptcy judge. Whether these opportunities are adequate remains an open question.

islative standpoint, this goal should make sense. A few small changes are easier to enact.

A straightforward “new deal for debtors” that promises to give consumers more of the voice they likely crave is to substitute the 341 meeting for a court appearance during which the bankruptcy judge questions the debtor. The appearance can happen in person, telephonically, via video conference, or through an online interface.²³² This proposal requires only a few changes to consumer bankruptcy’s procedures and to the Bankruptcy Code.²³³ As a bonus, it will address current issues with bankruptcy trustees’ payment and attorney’s fees.

The court appearance will enable debtors to tell the story of their financial troubles and to explain why they need a repayment plan or bankruptcy’s discharge to the ultimate judicial decisionmakers—bankruptcy judges. Judges, in turn, can question debtors about their petitions, schedules, and other filings, similar to what bankruptcy trustees presently do during 341 meetings. As an added benefit, this procedure will allow judges to adjust their in-court and written comments dynamically to account for what they are hearing and seeing. Consequently, debtors may perceive judges’ responses to them as richer, bolstering their perceptions of bankruptcy’s procedural justice.

In addition, this procedure will replicate much of what currently happens at 341 meetings, eliminating the need for these meetings, while also allowing judges to assume some of trustees’ duties, particularly those of chapter 7 trustees. At present, trustees’ examinations of debtors during 341 meetings are crucial to the bankruptcy system’s functioning and integrity.²³⁴ Often through no fault of debtors, petitions, schedules, and other filings contain mistakes. 341 meetings allow trustees to identify errors and omissions.²³⁵ Requiring judges to question debtors will permit them to identify mistakes and omissions material

²³² See generally AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* (2017) (proposing an online remedy system to expand consumers’ access to remedies).

²³³ See 11 U.S.C. § 341 (2012) (requiring the 341 hearing).

²³⁴ See, e.g., Martha Hallowell & Elizabeth Ziegler, *The Standing Trustee’s Critical Role in Section 341 Meetings of Creditors*, U.S. DEP’T OF JUSTICE (2015), https://www.justice.gov/ust/file/nactt_201509.pdf/download [<https://perma.cc/CV5J-VDDU>] (discussing trustees and 341 meetings); Cara O’Neill, *The Meeting of Creditors in Chapter 13 Bankruptcy*, NOLO, <https://www.nolo.com/legal-encyclopedia/341-meeting-creditors-chapter-13.html> [<https://perma.cc/P4PY-SLKA>] (describing what to expect at a 341 meeting); Bobby Wilbert, *Debtor Who Failed to Disclose \$5,000 in Lockbox Received Discharge Since UST Failed to Show Requisite Intent*, NAT’L ASS’N OF CONSUMER BANKR. ATT’YS (Sept. 13, 2017), <https://www.nacba.org/debtor-failed-disclose-5000-lockbox-received-discharge-since-ust-failed-show-requisite-intent/> [<https://perma.cc/9KBY-QRVZ>] (detailing the story of how a chapter 7 trustee found funds during a 341 meeting that led to the debtor amending its schedules to disclose the additional property).

²³⁵ Based on my observations of 341 meetings, trustees tell debtors and their counsel in a minority of cases to amend their schedules to account for small errors or omissions.

to debtors' cases. As with 341 meetings now, in most cases, if the judge or another party, such as a creditor, finds necessary corrections or amendments, the debtor's attorney can file revisions, to be reviewed by the judge.

Bankruptcy trustees still should have the opportunity to talk with debtors, which can be achieved by allowing trustees to cross-examine debtors when they appear. In allocating some of trustees' current duties to judges, however, trustees' role necessarily will shift. Recall also that chapter 7 and chapter 13 trustees usually are private attorneys appointed by United States Trustees (USTs), and that USTs' responsibility is to monitor the efficiency and integrity of the bankruptcy system.²³⁶ To fulfill that duty, USTs may choose to review any bankruptcy case, file motions, appear in court, and cross-examine debtors.²³⁷ That USTs already play a role in policing the consumer bankruptcy system means that their obligations also can shift in light of a new procedure in which judges have a more outwardly prominent role.

These shifts should result in a net benefit to the consumer bankruptcy system's functioning, particularly in chapter 7 cases, in which compensation currently poses challenges for the private attorneys retained as trustees. At present, chapter 7 trustees are compensated in two ways. They receive \$60 from the debtors' filing fee,²³⁸ and they receive a sliding-scale commission based on the non-exempt assets they identify and sell on behalf of the debtor's creditors.²³⁹ Because more than 90% of consumer chapter 7 cases are no asset,²⁴⁰ trustees usually make \$60 per filing. If the bankruptcy judge waives the filing fee, the trustee makes nothing.²⁴¹ As a result, trustees have an incentive to aggressively look for non-exempt assets, even though they will make very little in the vast majority of cases. Trustees make so little from administering chapter 7 cases that, on balance, they report losing money acting as trustees,²⁴² money they make up partly with the occasional asset case and partly by lever-

²³⁶ See *supra* notes 40–41 and accompanying text.

²³⁷ See 28 U.S.C. § 586 (2012) (describing the duties of the U.S. Trustee); Scott Riddle, *The U.S. Trustee Wants to Review My Case! Should I Be Worried?*, GA. BANKR. LAW NETWORK, <https://www.gabankruptcylawyersnetwork.com/2014/09/the-u-s-trustee-wants-to-review-my-case-should-i-be-worried/> [<https://perma.cc/CNS9-L9RY>] (discussing why a U.S. Trustee might review a case).

²³⁸ See Cara O'Neill, *How Do Bankruptcy Trustees Get Paid?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-bankruptcy-trustee-paid.html> [<https://perma.cc/RN2L-FJVJ>] (noting the flat fee collected by chapter 7 trustees).

²³⁹ See *id.* (overviewing the chapter 7 trustee's sliding scale commission on money collected from selling assets).

²⁴⁰ See *supra* note 35 and accompanying text.

²⁴¹ See O'Neill, *supra* note 238 (discussing chapter 7 trustee compensation).

²⁴² See Lupica, *supra* note 56, at 104–06, 109–10 (discussing how bankruptcy attorneys reported losing money serving as chapter 7 trustees).

aging their roles as trustees to get client referrals. In effect, at present, serving as a chapter 7 trustee is a loss leader.²⁴³

Because chapter 7 trustees are under extreme time and money constraints, 341 meetings run very short—an average of about ten minutes.²⁴⁴ Trustees often time the meetings and strive to keep them as short as possible, occasionally conducting a meeting in under three minutes.²⁴⁵ But absent discussions with their attorneys, 341 meetings are typically the only opportunities for people to tell their stories of financial failure. In many instances, conducting these meetings so that debtors have sufficient opportunities to speak will require trustees to devote much more time to each meeting and to alter or augment their typical lines of questioning. Although trustees can organize 341 meetings such that debtors will feel they have a voice, trustees' current compensation structure makes doing so infeasible.²⁴⁶

With a revised procedure that places the burden of identifying debtors' mistakes primarily on bankruptcy judges, chapter 7 trustees no longer will have to spend hours reviewing cases and holding 341 meetings. Bankruptcy judges, in part relying on their clerks, will take on many of those duties. This should make the baseline of \$60 that chapter 7 trustees make per case more appropriate in light of the actual work required. If there exist assets to sell, judges can order trustees to do so, and trustees can continue to collect the prescribed sliding scale commission from those sales. If a trustee suspects that the debtor's estate includes saleable assets, even if the petition and schedules suggest otherwise, the trustee can cross-examine the debtor to identify assets to sell. And USTs can provide another check on chapter 7 cases, similar to their current role. Cumulatively, debtors' filings should receive the same scrutiny while allowing them to appear and speak before the bankruptcy judge.

In contrast to chapter 7 trustees, even with a new procedure that requires bankruptcy judges to examine debtors, chapter 13 trustees will need to retain many of their current duties. At present, chapter 13 trustees' primary responsibilities are to review proposed plans, recommend whether judges should approve plans, distribute payments made under plans, and monitor debtors' ad-

²⁴³ See *Chapter 7 Bankruptcy Trustee Fees*, BANKR. LAW NETWORK, <http://www.bankruptcy.lawnetwork.com/chapter-7-bankruptcy-trustee-fees/> [<https://perma.cc/X35F-Q3BB>] (commenting on why attorneys would serve as trustees); Riddle, *supra* note 237 (commenting that no asset cases are “probably a loss leader”).

²⁴⁴ See *supra* note 113 and accompanying text.

²⁴⁵ This observation comes from a post from July 2018 on a Facebook group for consumer bankruptcy attorneys in which a chapter 7 trustee posted pictures of timers, boasted that the trustee had conducted three meetings under three minutes that afternoon, and asked for others to post the shortest time it had taken them to conduct a 341 meeting. Screenshots of the original post are on file with the author.

²⁴⁶ See *supra* notes 238–243 and accompanying text.

herence to plans.²⁴⁷ They also examine debtors at 341 meetings.²⁴⁸ These duties are sufficiently time-consuming that serving as chapter 13 trustees comprises all or most of these private attorneys' businesses.²⁴⁹ Chapter 13 trustees make money by taking a percentage of plan payments, up to 10%, as their compensation.²⁵⁰ It is common knowledge among bankruptcy practitioners that this cut is enough to allow chapter 13 trustees to make low six-figure salaries and to hire associate attorneys and staff.²⁵¹

Under the revised procedure, bankruptcy judges will assume the lion's share of chapter 13 trustees' responsibilities in reviewing petitions and schedules so they can question debtors. Judges also may question debtors and their attorneys about repayment plans, similarly lightening chapter 13 trustees' load in reviewing these plans. But the trustees' primary role of collecting plan payments and monitoring debtors' adherence to plans will remain. And, like chapter 7 trustees, chapter 13 trustees may want to cross-examine debtors about petitions, schedules, and proposed plans.

Beyond speaking with a bankruptcy judge and trustee, some debtors may want their creditors to be present when they appear in court. Compelling creditors to appear, however, presents problems. Most creditors will recover so little in consumer bankruptcy cases, even if they are owed significant amounts of money, that appearing in court will cost them more than the recovery they will realize.²⁵² As presently conceived, bankruptcy trustees' duties partly account for creditors' anticipated lack of participation.²⁵³

Although some debtors initially may ask that their creditors be present, creditor participation ultimately may not be necessary. Debtors will be able to tell their stories to judges and trustees, the judicial officials who will decide whether debtors receive the discharge or who will confirm their repayment plans. In telling their stories, if necessary, debtors will be able to indict their creditors or otherwise discuss their relationships with their creditors. Indeed, the bankruptcy judge embodies the court as an institution issuing the ruling that speaks to the debtors' social standing. Debtors and the public should be

²⁴⁷ See generally EXEC. OFFICE FOR U.S. TRS., U.S. DEP'T OF JUSTICE, HANDBOOK FOR CHAPTER 13 STANDING TRUSTEES (Oct. 1, 2012), https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook_Ch13_Standing_Trustees_2012.pdf [<https://perma.cc/Y8JD-HUQ2>] (describing the duties of chapter 13 standing trustees).

²⁴⁸ See *id.* at 3–7; *supra* notes 31–54 and accompanying text.

²⁴⁹ See O'Neill, *supra* note 238 (discussing chapter 13 trustee compensation).

²⁵⁰ See *id.*

²⁵¹ See Lupica, *supra* note 56, at 101–02 (discussing chapter 13 trustee compensation).

²⁵² See Jiménez, *supra* note 35 (finding that 93% of people who filed under chapter 7 in 2007 entered bankruptcy with no distributable assets).

²⁵³ In chapter 11, the Code provides for the appointment of an official committee of unsecured creditors to advance all unsecured creditors' interests. 11 U.S.C. § 1102 (2012).

most concerned with the legitimacy of the bankruptcy judge and the procedure, not necessarily with whether debtors will be confronted by or be able to confront their creditors during the proceeding that supports this legitimacy.²⁵⁴

Finally, this new procedure, of course, comes with costs. Replacing 341 meetings with court appearances will require debtors and bankruptcy courts to invest more resources in the process. If they want to appear in person, debtors will need to travel to federal courthouses, which in some circumstances will be located more than a hundred miles from where debtors live. In contrast, 341 meetings are held at a greater number of locations and typically are closer to debtors' residences. Providing ways for debtors to appear telephonically, via video, or through an online interface will defray these costs while preserving the procedural justice benefits that accrue with the court appearance.

Debtors also will have to spend more time in court discussing their finances and their need for the discharge than they presently do in 341 meetings. That people will spend more time telling their story is a feature of the new procedure, and likely integral to improving perceptions of consumer bankruptcy's procedural justice. But this may require people to take more time off from work to travel and otherwise appear than they currently do to attend 341 meetings. Nonetheless, considering that procedural justice research shows that people value the opportunity to tell their stories, the time difference most likely is not material to debtors, particularly with phone, video, or online appearance options that reduce costs.

Debtors may be more worried about the additional fees that their attorneys almost certainly charge to represent them during court hearings, regardless of whether debtors' appearances are in person or via technology. Consumer bankruptcy attorneys already face significant time demands relative to the fees they charge their cash-strapped clients.²⁵⁵ Of more concern for the new procedure, almost all consumer bankruptcy attorneys require their clients to pay all fees for assisting with chapter 7 cases prior to filing because of Code provisions regarding payment of their fees.²⁵⁶ As my CBP co-investigators and I have discussed in prior work, these demands have resulted in attorneys creating a fee structure that seems to shift certain households from filing chapter 7 to filing chapter 13, despite chapter 7 being the better financial choice.²⁵⁷ Any addition to attorney's fees may further affect households' chapter choice decisions. Although attorneys still will need to charge more, in revising bankrupt-

²⁵⁴ See *supra* notes 94–108 and accompanying text.

²⁵⁵ See Lupica, *supra* note 56, at 117–21 (discussing attorneys' reports about how much they charge for chapter 7 and chapter 13 cases and how long they spend working on each case).

²⁵⁶ See Foohey et al., "No Money Down," *supra* note 48, at 1066 (providing Code sections).

²⁵⁷ See *generally id.* (discussing why debtors may be pushed by attorneys to file under a different chapter than would be most effective for them).

cy's procedures, the Code sections governing attorney's fees can be updated simultaneously to allow debtors to pay fees over time. This is a more reasonable payment structure for cash-strapped debtors.

Bankruptcy judges also will need to devote more time to preparing for and overseeing hearings, which will place monetary burdens on the bankruptcy system. But if the consumer bankruptcy system is to deliver procedural justice to debtors in the way it currently is conceived, these added costs are unavoidable. Besides, as a matter of fostering positive perceptions of the legal system, the enhancement to the bankruptcy system's integrity and effectiveness should more than offset the extra investment.

B. New Deal #2: Transforming Consumer Bankruptcy into an Administrative Proceeding

The second proposed "new deal for debtors" that promises to enhance consumer bankruptcy's procedural justice abandons the assumption that the system's current laws and process should remain as intact as possible. Although proposing a few smaller changes almost certainly is more legislatively feasible in the short term, more radically reconfiguring the consumer bankruptcy system presents an efficient way to improve the system's procedural justice and effectiveness over the long term. Indeed, the first proposal with minimal changes to existing procedure brings concerns about higher attorney's fees and additional burdens on the federal courts.

A way to navigate both of these concerns is to take cues from 341 meetings and from the history of the consumer bankruptcy system. Meeting locations are more widespread than bankruptcy courthouses, meaning that debtors need to travel shorter distances. Meetings also are relatively short, though presently too short.²⁵⁸ The Bankruptcy Reform Act of 1978,²⁵⁹ which enacted the present-day Bankruptcy Code (as updated by BAPCPA), dramatically altered the structure of the bankruptcy court system. Prior to the Code, under the 1898 Bankruptcy Act,²⁶⁰ bankruptcy cases were adjudicated by bankruptcy referees, who were overseen by district judges and courts.²⁶¹ Bankruptcy refer-

²⁵⁸ See *supra* notes 238–245 and accompanying text.

²⁵⁹ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1979). The Act became effective as of October 1, 1979.

²⁶⁰ 1898 Bankruptcy Act, 30 Stat. 544 (1898).

²⁶¹ See Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 12 (2012) (noting that at "[t]he end of the nineteenth century . . . modern bankruptcy came into being with its system of referees appointed by district courts").

ees were the equivalent of today's bankruptcy judges, but with fewer powers.²⁶²

For the purpose of reimagining consumer bankruptcy to enhance its procedural justice, the key takeaway from the bankruptcy referee system is that it can be conceptualized as a hybrid of today's bankruptcy courts and an administrative agency. In fact, at the same time as the referee system came into being, Congress was creating administrative agencies to oversee private disputes.²⁶³ Instead of the system that eventually became the modern bankruptcy courts, Congress could have put into place an administrative agency to oversee bankruptcy cases, either both consumer and business cases or only consumer cases. And, at present, the consumer bankruptcy docket looks more like that of an administrative agency than a federal court.²⁶⁴

Rather than take bankruptcy courts, bankruptcy judges, and the Code as given, drawing from this history, the current consumer bankruptcy system can be replaced with an administrative agency that runs administrative courts which oversee the revised bankruptcy laws that govern consumer debtors' discharges.²⁶⁵ The agency's exact contours and the accompanying laws are open to development. But the agency, its process, and the "deal" offered to debtors should include a few important elements.

Procedurally, the new system must engender feelings of trust and integrity in debtors and the public. To achieve this, as procedural justice research teaches, debtors must have the opportunity to tell their stories of overindebtedness to the ultimate decisionmakers overseeing the proceedings. This opportunity can come in different forms—in person, via telephone or video conference, or through an online interface.

For people who want to appear in person before the administrative court officer, the agency can provide a hearing that operates very much like 341 meetings, but with the clear requirement that debtors have a sufficient chance

²⁶² See Carl Felsenfeld, *A Comment About a Separate Bankruptcy System*, 64 *FORDHAM L. REV.* 2521, 2524 (1996) (referring to referees as "the predecessors of today's bankruptcy judges" and noting that referees were seen as "officer[s] of the court without independent judicial authority").

²⁶³ See Baird, *supra* note 261, at 12 (using the Interstate Commerce Commission as an example of administrative agencies formed at the same time the bankruptcy referee system was being discussed); Felsenfeld, *supra* note 262, at 2523 (noting that "the United States is the only country with separate bankruptcy courts").

²⁶⁴ See Baird, *supra* note 261, at 15 (discussing bankruptcy court dockets' similarity to administrative agency dockets); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 *UCLA L. REV.* 384, 386–87 (2012) (noting how bankruptcy courts are anomalous).

²⁶⁵ As with the prior proposal, this idea is meant to apply to individuals and households that seek to discharge some of the debts they accumulated primarily for household and personal use, not people who run small businesses or who want the more flexible, albeit complicated, discharge through chapter 11. See *supra* note 231.

to tell their stories. To address concerns about how far people must travel to attend the hearings, they should be held in locations across the country, though the administrative agency itself can have fewer offices nationwide.

In addition, replacing federal bankruptcy courts with an administrative agency presents the opportunity to affirmatively encourage hearings conducted by telephone or via video conference, which will reduce costs. It also allows for the design of a system that relies heavily on online interfaces for people to submit materials and write narratives, similar to the CFPB's consumer complaint mechanism.²⁶⁶ Courts across America increasingly use online interfaces to facilitate the resolution of simple disputes, such as parking tickets, contract issues, and some divorces.²⁶⁷ These courts' initiatives have proven to be cost-effective and to increase people's access to justice.²⁶⁸ Updating consumer bankruptcy's technology is a natural extension of these initiatives that similarly should enhance procedural justice.

The revised consumer bankruptcy system's substantive laws must address concerns about people's ability to retain counsel and to understand how their cases will proceed and how they will receive the discharge. Simplifying bankruptcy laws will make it easier for attorneys to represent debtors and for debtors to represent themselves, particularly combined with consumer-friendly online interfaces to submit materials.

One way to reduce consumer bankruptcy's substantive complexity is to provide for only one chapter under which the typical consumer with household debts can file. This chapter should collapse chapter 7 and chapter 13, retaining each chapter's most useful provisions and jettisoning troublesome elements. Versions of this idea have been raised occasionally during the past several decades as scholars have exposed and confirmed flaws in the Code's chapter 7 and 13 structure.²⁶⁹ A single chapter can easily retain key elements of both chapters—a relatively fast discharge of unsecured debts and longer-term agreements for secured debts, such as houses and automobiles.²⁷⁰

Ultimately, regardless of the exact changes to the consumer bankruptcy system, the benefits of strengthening consumer bankruptcy's procedural justice should more than offset the costs of requiring consumers to appear in some

²⁶⁶ See *supra* notes 146–147 and accompanying text.

²⁶⁷ See generally Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 BUFF. L. REV. 89 (2019) (discussing courts' online dispute resolution initiatives).

²⁶⁸ See *id.* at 90, 93–94 (discussing the effectiveness of online dispute resolution procedures).

²⁶⁹ See, e.g., David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 56 (2004) (discussing Elizabeth Warren's *The New Economics of the American Family* and noting that “[c]hapter 13 has never worked as expected” and that “the most sensible solution would be to combine chapter 7 and chapter 13 into a single chapter”). See generally William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989).

²⁷⁰ See *supra* notes 94–119 and accompanying text.

way before the judicial official who will decide whether they receive the discharge. Procedural justice research, combined with what we know about the people who turn to bankruptcy for help, strongly suggests that consumer debtors crave more of a voice during their bankruptcy cases. In turn, providing financially struggling households with richer opportunities to feel heard promises to strengthen people's post-bankruptcy experiences and bolster their re-entry into the credit economy.

CONCLUSION: TESTING BANKRUPTCY'S PROCEDURAL JUSTICE

Across the legal system, people use legal procedures and outcomes to assess their value as members of society and to deal with the emotions arising from serious events in their lives. Facing debts to the point of being unable to repay absent a miracle is disastrous and a threat to people's social identities. Research regarding procedural justice and the expressive value of legal proceedings suggests that people want bankruptcy to provide a public referendum that allows debtors to reaffirm their social standing (which has been tarnished by their overindebtedness) and, relatedly, to cope with the negative emotions arising from their financial situations and interaction with creditors.

Although some data exist in support of this Article's theory of consumer bankruptcy's lack of procedural justice, to fully assess the hypotheses that underlie the theory, researchers must undertake more targeted empirical studies of the system. These studies should involve people struggling with their debts and assess the lived experience of overindebtedness, including how people think about their creditors and the options they have to regain their financial footing. Qualitative, semi-structured interview-based research, as has been undertaken in the context of bankruptcy's stigma,²⁷¹ will likely provide useful data to begin to understand what people think they will receive from bankruptcy's procedures. Follow-up or separate studies similarly should ask debtors after they have completed their bankruptcy cases whether bankruptcy's procedures lived up to their expectations, and if not, about the effect of the disconnect between their expectations and reality.

Likewise, questionnaire-based studies drawing from pools of overindebted consumers and similar pools of non-indebted consumers should yield insights into people's thoughts about dealing with overindebtedness and perceptions of bankruptcy's procedures. As used to assess procedural justice and expressive theories of law in other contexts, these studies can employ hypothetical vignettes to reveal people's thoughts and feelings. One of the keys to these studies, of course, will be to identify groups of people to survey. Given the link

²⁷¹ See generally Sousa, *supra* note 61 (conducting interviews with debtors regarding bankruptcy's stigma); Thorne & Anderson, *supra* note 180 (noting that most debtors have a desire to pay).

between debt collection pressures and people's decisions to file bankruptcy, state court debt collection proceedings offer a place to begin this research.

It is difficult to overstate the importance of understanding how people assess the fairness and legitimacy of the consumer bankruptcy system. The bankruptcy system is by far the part of the federal court system that people most often use. We know very little about what people expect to gain from the bankruptcy process beyond the obvious financial benefits. Given that research shows that people view the outcomes and proceedings of other parts of the legal system as referendums on their social status, people very likely view the bankruptcy system, in part, as a place to assess and assert their social standing. If consumer bankruptcy truly is procedurally bankrupt, then the "fresh start" delivered through the discharge and through repayment plans is not as fresh as presumed. This realization has important consequences for people's return to their communities and to the credit economy. It is crucial now to assess and refine this Article's theory of consumer bankruptcy's procedural justice deficiencies, and then act to reform the deal that consumer debtors receive through the bankruptcy system.