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Discharge Discrimination

Nicole Langston*

Although the Bankruptcy Code is facially neutral, the consumer bankruptcy discharge provisions produce anomalies that run counter to bankruptcy's internal principles of not forgiving debt that is based on misconduct or that implicates a public policy concern. For example, the discharge provisions allow some individuals to discharge debt that stems from civil rights violations or tortious discrimination. In contrast, the Bankruptcy Code precludes some debtors from debt relief based on narrow views of misconduct or misconceptions about moral hazards. These individuals who file for bankruptcy owe debts that generally cannot be forgiven, like civil and criminal fees and fines and student loans. These loans are not always debts that stem from the debtor's misconduct or involve a moral hazard, but they still fit within this punitive classification of nondischargeable debt.

This Article adds to existing consumer bankruptcy scholarship by arguing that the anomalies in the bankruptcy nondischargeability provisions create unintended costs that are borne by economically marginalized individuals. The Bankruptcy Code works at cross-purposes with its internal principles of risk spreading and economic rehabilitation by preventing the discharge of penal debt and student loan debt. The inconsistent treatment of debt follows recognizable racial and socioeconomic lines of vulnerability and marginalization. To remedy these inconsistencies, this Article proposes targeted reforms to the bankruptcy discharge system and reintroduces the question of whether there should be nondischargeable debts.

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INTRODUCTION

Gerald Bruner was asleep in his vehicle when the Knoxville police woke him up and ordered him out of his car.¹ While he was being searched, Mr. Bruner was struck in the head by a police officer. Mr. Bruner fled, but off-duty police officers eventually caught him, hitting him in the head again with a flashlight.² As a result, Mr. Bruner suffered permanent brain damage and posttraumatic epilepsy.³ He won a federal civil rights lawsuit against the officers and was awarded \$100,000 in damages.⁴ But the bankruptcy court would have forgiven that award when the officers filed for Chapter 7 bankruptcy because civil rights judgments are dischargeable unless the plaintiff can prove that the conduct was

1. Bruner v. Taylor (*In re Taylor*), 72 B.R. 696, 697 (Bankr. E.D. Tenn. 1987).

2. *Id.*

3. *Id.* at 698.

4. *Id.*

“willful and malicious.”⁵ If, however, Mr. Bruner, a low-wage factory worker, hypothetically was assessed a criminal fine for fleeing from the police and then filed for bankruptcy, that fine would not be forgiven because penal debt—debt stemming from civil and criminal fines and penalties—is a categorically nondischargeable debt under the Bankruptcy Code (the Code) and cannot be forgiven.⁶

This example illustrates the dichotomy of bankruptcy debt relief provisions: some provisions make creditors holding certain claims, like civil rights judgments, bear the burden of preventing their discharge while others bar less-privileged debtors from relieving their personal debt. There are also instances where bankruptcy law allows employees’ monetary awards against their employers for unpaid wages, harassment, and discrimination to be discharged. In such cases, to prevent the discharge of these awards, the employees who hold these claims carry the burden of proving their employer acted willfully or maliciously. However, debt discharge provisions also force economically marginalized debtors who have student loan debts, for example, to carry the burden of proving that they deserve relief from these debts rather than putting the burden on the student loan servicer to prove that the debts should remain enforceable. Put succinctly, the legal framework of debt discharge, in practice, results in inconsistent outcomes and places unintended costs on marginalized individuals.

This Article argues that the anomalies in the consumer bankruptcy nondischargeability provisions create unintended costs that are borne by economically marginalized individuals. More broadly, through its examination of the inconsistent treatment of civil rights and employment protection debt compared to penal and student loan debt, this Article engages with larger questions of the costs of nondischargeability law.

Inside the bankruptcy system, we can see these inconsistencies in action in often overlapping ways. First, there is an economically marginalized group of people that are harmed by the bankruptcy system when the debts owed to them are discharged, or forgiven, in bankruptcy. This marginalized group is also more likely to carry debt that cannot similarly be forgiven in bankruptcy because of a purported public policy that certain types of debt, based on an individual’s misconduct or a concern about moral hazard, should not be forgiven. The effect

5. *Id.* at 698–99. Although this case does not have the final disposition of the debt (because the decision only discusses this issue at the summary judgment stage), it demonstrates how civil rights violations under 42 U.S.C. § 1983 are dischargeable.

6. “Criminal fines” are an exception to discharge. 11 U.S.C. § 523(a)(7) (“A discharge . . . of this title does not discharge an individual debtor from any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit.”); *see also* Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 919 (2017) (“‘Penal debt’—which includes debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees, and interest—is a significant problem borne disproportionately by over-policed and economically disenfranchised communities.”).

of this doubly harms economically vulnerable individuals. Second, however, there is a lack of sustained moral foundation for the public policy justification for misconduct debts because the application of the morality paradigm is not applied equally. Similarly, the moral hazard concerns driving the presumptive nondischargeability of student loan debt are based on misconceptions about why individuals file bankruptcy. These inconsistencies produce a double disadvantage for economically marginalized individuals and do not serve their purported public policy objectives. Thus, the bankruptcy system of discharge drives these unintended costs.

Discharge is, at its core, effectively debt forgiveness or debt relief. In the consumer bankruptcy system, debt discharges allow individuals who file bankruptcy to discharge most of their debt obligations while preserving future earning potential (“human capital”).⁷ In this way, the discharge allows debtors to economically reenter the marketplace. Debt discharge is thus a fundamental aspect of the “fresh start” colloquially associated with the bankruptcy system. Therefore, in consumer bankruptcy, most debts owed by people filing for bankruptcy can be forgiven. For instance, medical debt and credit card debt are typically dischargeable. There are, however, twenty-one types of debt that are categorically or presumptively nondischargeable, or unforgiveable, under bankruptcy law. Standard justifications for the exceptions to discharge are that these debts arose because of the debtor’s culpable conduct, implicate public policy concerns, or have a combination of both reasons for nondischargeability.⁸ These nondischargeable debts range from domestic support obligations and tax debts to civil and criminal fines and fees. Individuals who hold these debts are less likely to obtain a fresh start through the bankruptcy process because they bring with them debts that they will continue to owe after their bankruptcy case is closed.

The discharge of civil rights and employee protection judgments in the consumer bankruptcy system, examined together with the nondischargeability provisions, has not previously been detailed, examined, or named by scholars. Debtors that carry nondischargeable penal debt and student loan debt tend to be poor, people of color, and women. Plus, debtors—especially Black debtors—tend to file pursuant to the consumer bankruptcy chapter with the worst debt relief rates.⁹ In contrast, those individuals who benefit from a fuller debt relief in

7. Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE. L. REV. 515, 516 (1991) (“[Discharge] changes the legal relationship between a debtor and his former creditor and gives the debtor the beginnings of a fresh start by immediately freeing all or a portion of his future earnings potential (‘human capital’) from his past financial obligations.”); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1396 (1985) (“Our bankruptcy statutes have always taken ‘discharge’ to mean, essentially, that an individual’s human capital (as manifested in future earnings), as well as his future inheritances and gifts, are freed of liabilities he incurred in the past.”).

8. See DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 49–50 (7th ed. 2022) (discussing types of and motivations for Section 523 exceptions).

9. See *infra* Part II.C.

the bankruptcy system, like the police officer who violated Gerald Bruner's civil rights, can get a fresher start.

In past scholarship, Mechele Dickerson has probed how the Code's treatment of typical assets and debts, like retirement accounts and private school tuition, although race neutral, widens the benefit gap of filing bankruptcy and suggests that the "[i]deal [d]ebtor" who benefits the most from filing bankruptcy is a White debtor.¹⁰ Abbye Atkinson has also interrogated the lack of theoretical foundation for certain nondischargeability provisions, particularly penal debt, which harm poor debtors and debtors of color who are more likely to bring these debts into bankruptcy and not receive debt relief.¹¹

This inconsistent treatment of debt in the bankruptcy system and the unequal burden placed on certain debtors run counter to the overarching consumer bankruptcy goal of providing a rehabilitative fresh start. Rightsizing the discharge provisions to also provide debt relief for debtors carrying penal debt and student loan debt gives economically marginalized individuals more money to put back into the economy.

This Article proceeds in four parts. Part I provides examples of how individuals can use the consumer bankruptcy system to discharge monetary liability for their civil rights and employment law violations and how the creditors who hold these claims carry the burden of preventing the discharge of these debts. Part II sets forth the purpose of the bankruptcy discharge, the debt relief options available in the consumer bankruptcy system, and the policy concerns traditionally offered in support of the nondischargeability provisions. Part III criticizes the conventional assessment of nondischargeability and argues that the treatment of civil rights and employment law violations in bankruptcy, compared to the treatment of nondischargeable debt, is inconsistent and results in a double harm to economically marginalized individuals. Part IV proposes targeted reforms to the nondischargeability provisions to lessen the harm of the current system on those who are economically vulnerable. This Part argues that, at the very least, Congress should reform the Bankruptcy Code to eliminate the nondischargeability of penal and student loan debt. This Part also reintroduces the question of whether there should be any nondischargeable debts. This Part concludes by considering potential opposition to these reforms, including concerns about moral hazard, forgiving culpable conduct, deterrence, whether

10. A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1726–27 (2004) (“Because statistical data suggest that [W]hite people are more likely to fit the Ideal Debtor profile, race matters in bankruptcy [T]he demographic features of the individual most likely to benefit from a bankruptcy discharge, that is, the Ideal Debtor, contrasts those characteristics with the demographics of potential minority debtors, and concludes that the Ideal Debtor is likely to be [W]hite.”); A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 921 (2006) [hereinafter Dickerson, *Bankruptcy Reform*] (“[B]ankruptcy laws likely will continue to disproportionately benefit [W]hite debtors.”).

11. Atkinson, *supra* note 6, at 920 (“[U]nmanageable penal debt disproportionately sends the most economically vulnerable individuals into socially undesirable debt spirals.”).

bankruptcy reform is the best mechanism to correct these inconsistencies, and the risk of discharging debt owed to the government.

I.

THE INCONSISTENCIES IN ACTION

This Part provides case examples of the ways in which debtors can discharge their civil rights and employee protection violations in Chapter 7.¹² These violations can include money that bankruptcy filers owe others for civil rights abuses and a myriad of employment law offenses, including for unpaid wages, hostile work environment, discrimination, and sexual harassment claims. To prevent the discharge of these debts, the creditors bear the burden of convincing the court that these violations rise to the level of “willful or malicious.”¹³ The willful and malicious standard requires the creditor to show both that the debtor acted with the intent to injure the creditor and that the act was done maliciously.¹⁴

A. *Civil Rights Awards*

Civil rights judgments authorized under Section 1983 of the Civil Rights Act of 1871 are dischargeable under the Bankruptcy Code unless the holder of a civil rights award can prove the Section 523(a)(6) requirement that the debtor, in incurring the debt, acted willfully and maliciously.¹⁵ However, civil rights

12. This Article primarily focuses on discharge in Chapter 7 because it is the chapter that provides the best debt relief.

13. Chapter 13 requires a finding of willful *or* malicious action and personal injury to an individual or the death of an individual. *See* 11 U.S.C. § 1328(a)(4).

14. *See Kawaauhau v. Geiger*, 523 U.S. 57, 63 (1998).

15. *See, e.g., Chester v. Parker (In re Parker)*, 289 B.R. 779, 782 (Bankr. M.D. Ga. 2002) (“Congress decides which debts are nondischargeable in bankruptcy and has done so by creating [21] exceptions to discharge in Section 523(a). Certain taxes are among those exceptions. Liability for civil rights or constitutional violations are not.” (internal citation omitted)). Section 1983 of the Civil Rights Act of 1871 was enacted to provide individuals an avenue to pursue a civil action for monetary damages stemming from another individual, like a police officer or prison guard, who, in acting under the color of law, deprived the plaintiff of their rights. 42 U.S.C. § 1983; *see Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 665 (1978). For a plaintiff to obtain a monetary judgment, the plaintiff must first overcome qualified immunity and prove that the defendant’s conduct was unlawful. *See, e.g., Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Qualified immunity is an extremely high bar to protect public officials that, in practice, prevents most plaintiffs from even getting to a jury trial. *See James E. Pfander, Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1614–15 (2011) (detailing the difficulty of overcoming qualified immunity). Thus, in addition to already having to overcome the extremely high bar of qualified immunity to obtain a monetary judgment, a plaintiff may then have to overcome another high bar to prevent the discharge of that debt in bankruptcy. When the Bankruptcy Code was reformed in 2005, Congress contemplated adding the entire language of the Civil Rights Act under the nondischargeability provisions of Section 523(a) and making any monetary civil judgments arising under a civil rights violation nondischargeable, but it was ultimately excluded. *See H.R. Rep. 109-31*, at 421, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Apr. 8, 2005) (noting that Representative Jerrold Nadler introduced an amendment to the Bankruptcy Code that “would make debts arising from civil violation judgments

awards can oftentimes be granted with only a finding of negligence or recklessness.¹⁶ Therefore, the victims of these actions, when they become creditors in the bankruptcy court, carry an often insurmountable burden to prevent the perpetrator from discharging this debt. As a result, defendant-debtors frequently succeed in discharging their debts owed to plaintiff-creditors—an outcome that is readily apparent in cases involving police and correctional officer civil rights violations.

1. Police Civil Rights Violations

In *In re Taylor*, Gerald Bruner’s civil rights award could be forgiven when the police officers who beat him filed bankruptcy.¹⁷ In a 2018 case, a police officer similarly used the bankruptcy court to achieve debt relief for an excessive-use-of-force civil rights violation. In *In re Chavez*, the plaintiff-creditor alleged that he was filming the arrest of his friend on his cell phone when the officer slapped the phone out of his hand, told him to get on the ground, and pointed a taser at him.¹⁸ The plaintiff also testified that the officer instructed a police dog to attack him, and once the plaintiff was handcuffed, he was detained in a police vehicle for approximately two hours and verbally threatened by the officer.¹⁹ The plaintiff filed a civil rights lawsuit against the officer, and the federal district court awarded the plaintiff-creditor \$140,000 in punitive and compensatory damages.²⁰

Following this award, the officer-debtor filed Chapter 7. The plaintiff-creditor who was owed the \$140,000 award opened an adversary proceeding to determine whether the debtor’s actions met the standards under Section 523(a)(6). During this proceeding, the officer-debtor refuted the plaintiff’s testimony and claimed that he did not threaten the plaintiff-creditor and that he only deployed the police dog after the plaintiff tried to run away from him.²¹ The court allowed the officer’s discharge claim to survive summary judgment, reasoning that a reasonable trier of fact could find that the police officer “did not

nondischargeable. The amendment includes every civil rights violation listed in the Federal criminal code, any civil judgment arising under a civil rights violation, including a section 1983 action”).

16. See *Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding that a defendant can be held liable under Section 1983 upon a finding of recklessness or carelessness); see also Gary B. Brewer, *A Recklessness Standard for Punitive Damages in Section 1983 Actions*, 49 MO. L. REV. 815, 816 n.5 (1984) (citing cases that used the recklessness standard for claims under 42 U.S.C. § 1983); Thadd J. Llauro, *Civil Rights - 42 U.S.C. 1983 - The Actionability of a Negligent Deprivation of a Liberty Interest in Light of Daniels and Davidson*, 69 MARQ. L. REV. 599, 601 (1986) (discussing the use of the negligence standard for claims under 42 U.S.C. § 1983).

17. *Bruner v. Taylor (In re Taylor)*, 72 B.R. 696, 697 (Bankr. E.D. Tenn. 1987).

18. *Gorence & Oliveros, P.C. v. Chavez (In re Chavez)*, 614 B.R. 874, 890 (Bankr. D.N.M. 2020).

19. *Id.*

20. *Id.* at 881.

21. *Id.* at 890.

intend to cause injury to [the plaintiff-creditor] and/or that [the officer-debtor]'s actions were justified."²²

Consider a converse set of facts in this case. Hypothetically, if the plaintiff-creditor had been charged with fleeing from the police, and, based on this charge, was liable for penal debt, he would have been unable to file bankruptcy and obtain forgiveness for this debt because penal debt is categorically nondischargeable. The difference in debt relief between the officer's civil rights debt and the victim's penal debt does not comport with the purported analytical frames of misconduct and public policy that make socially immoral debt nondischargeable.²³

2. *Correctional Officer Civil Rights Violations*

Inside the prison system, the procedural dichotomy of the debt relief provisions is blatant. Correctional officers can use the bankruptcy system to discharge civil rights claims brought by incarcerated individuals. For example, an incarcerated person's civil rights judgment against a correctional officer based on a medical malpractice claim was deemed dischargeable because civil rights violations are dischargeable unless the incarcerated plaintiff-creditor meets the high standard set out in Section 523(a)(6).²⁴ In contrast, incarcerated individuals are often saddled with various debts that cannot be forgiven in bankruptcy because they fall under the discharge exception for penal debt stemming from court-imposed fees, costs, and expenses.²⁵ For example, in a 2010 case, a prison disciplinary board assessed a penalty on an incarcerated person after a failed attempt to commit suicide.²⁶ The person was required to reimburse the Wisconsin Department of Corrections for the ambulance and hospital treatment costs.²⁷ Unable to pay, the imprisoned debtor tried to obtain debt relief for the penalty in bankruptcy but was prohibited because the debt was determined to be

22. *Id.* at 891. As of this Article's publication date, the case is still pending, and it is yet to be determined whether the officer will be able to ultimately discharge his debt. However, a civil rights award held by another involved officer was deemed nondischargeable because the plaintiff-creditor was able to show that the officer acted willfully and maliciously. *See id.* at 889–90.

23. *Cf. Atkinson, supra* note 6, at 922 (arguing that when examining penal debt, the "analytical frames are incoherent to the extent that there is no clear distinction between currently listed debts that are excepted from discharge and other debts that seem to implicate the very same concerns yet are readily dischargeable").

24. *See, e.g., Chester v. Parker (In re Parker)*, 289 B.R. 779, 782 (Bankr. M.D. Ga. 2002) (finding that the debtor could discharge a pending civil rights complaint by a pro se person in prison for medical malpractice and explaining "Congress decides which debts are nondischargeable in bankruptcy and has done so by creating [21] exceptions to discharge in Section 523(a). Certain taxes are among those exceptions. Liability for civil rights or constitutional violations are not" (internal citations omitted)). Of note, claims brought by incarcerated individuals against correctional officers are generally less successful than civil rights violations against officers due to insufficient and improper pleading since most incarcerated persons bringing civil rights claims against correctional officers are pro se.

25. *See* 11 U.S.C. § 523(a)(7).

26. *In re Reimann*, 436 B.R. 564, 564 (Bankr. E.D. Wis. 2010).

27. *Id.* at 566.

nondischargeable as being in the nature of “fine, penalty, or forfeiture” under Section 523(a)(7) of the Code.²⁸

Similarly, individuals who are not incarcerated but who hold civil fines owed to government entities are prevented from discharging them in Chapter 7 bankruptcy by Section 523(a)(7) of the Code. Therefore, debtors who hold civil fines, such as traffic tickets, must proceed through a Chapter 13 repayment plan, the worst discharge chapter, to receive a superdischarge of their debt.²⁹ Edward Morrison and Antoine Uettwiller analyzed individual bankruptcy cases in Cook County, Illinois, and found that many debtors filed Chapter 13 bankruptcy because they held civil debts, mostly parking tickets, that were nondischargeable in Chapter 7.³⁰ These individuals were therefore able to achieve debt relief for some of their debt, but only if they filed under a more expensive and less successful bankruptcy chapter as compared to Chapter 7. Importantly, even this less effective superdischarge available to civil fines and fees does not apply to fines and fees that stem from penal debt. Therefore, the debtors that have fines for loitering, fleeing from the police, or failed suicide attempts have no remedy in the consumer bankruptcy system for debt relief.

B. Employer Actions and Employee Awards

Civil awards from employment lawsuits are similarly forgivable in bankruptcy. Employees sue their employers in civil court for a myriad of issues, including claims for unpaid labor, sexual harassment, discrimination, and hostile work environment. For example, the U.S. Equal Employment Opportunity Commission (EEOC) was established under the Civil Rights Act of 1964 to enforce civil rights laws against workplace discrimination.³¹ The EEOC forbids discrimination in every aspect of employment and provides monetary damages to a plaintiff that brings a successful EEOC lawsuit.³² Despite the EEOC laws, a debtor who has discriminated against an employee can have those monetary damages forgiven in bankruptcy since no Code provisions specifically prohibit the discharge of employment protection claims. As with civil rights awards, an

28. *Id.* at 567.

29. Robert M. Lawless & Angela Littwin, *Local Legal Culture from R2D2 to Big Data*, 96 TEX. L. REV. 1353, 1355; *see also* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, “No Money Down” *Bankruptcy*, 90 S. CALIF. L. REV. 1055, 1057 (2017) [hereinafter Foohey et al., *No Money Down*] (“More than 95% of people who file under chapter 7 receive a discharge. In contrast, a mere one-third of chapter 13 cases end in a completed repayment plan such that debtors receive a discharge.”). Therefore, Chapter 13 is the worse discharge chapter.

30. Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. INST. & THEORETICAL ECON. 174, 186–87 (2017) (finding that Black households in Chicago are more likely to file Chapter 13, in part because of parking tickets).

31. Title VII of the Civil Rights Act of 1964, Pub. L. 88-352.

32. *See* U.S. Equal Employment Commission, *Remedies for Employment Discrimination*, www.eeoc.gov/remedies-employment-discrimination [<https://perma.cc/S877-M69G>] (“Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.”).

employee holding an award for their employer's bad acts bears the burden of meeting the high standard for willful and malicious conduct set out in Section 523(a)(6) to prevent the discharge of their award. Many times, the employee cannot meet this standard, and the employer is able to use the bankruptcy system to discharge the employee's civil damages award, as explained in the following cases involving employer wage and discrimination awards.

1. *Employer Wage Awards*

In a 2017 case, an employer willfully circumvented minimum wage laws, falsified pay stubs by reporting incorrect hours worked, and retained portions of employees' tip earnings at a restaurant.³³ A federal district court granted the employees \$125,422 in damages, and the employer quickly filed Chapter 7 bankruptcy.³⁴ The bankruptcy court found that the employer-debtor had acted willfully under Section 523(a)(6) but concluded that the employee-creditors failed to show that their employer acted maliciously.³⁵ For that reason, the minimum-wage workers' unpaid wage award was discharged in their employer's bankruptcy.³⁶

In another case, a female employee tried to prevent the discharge of an award for failure to pay wages and retaliatory discharge after her employer filed Chapter 7.³⁷ In finding that the employee's failure to pay wages claim would be forgiven, the bankruptcy court explained that "[t]he mere failure to pay an obligation cannot be a willful and malicious injury in and of itself. . . . To hold that § 523(a)(6) is applicable to every failure to pay a debt, even in the absence of intentionally tortious conduct, would essentially render meaningless the protections afforded a debtor by the Bankruptcy Code, and vitiate its underlying purpose of providing relief to the 'honest but unfortunate debtor.'"³⁸ Therefore, the employee's award was discharged in her employer's bankruptcy.

2. *Employer Discrimination Awards*

A female employee similarly tried to prevent an employer from discharging a state administrative judgment awarding her damages for a disability discrimination claim.³⁹ The employee suffered from epilepsy, and her employer terminated her after she experienced a grand mal seizure.⁴⁰ The bankruptcy court, however, found that there was not enough evidence in the record to establish that the employer-debtor intended to cause the employee-creditor's injuries or that

33. *Wu v. Lin (In re Qiao Lin)*, 576 B.R. 32, 38 (Bankr. E.D.N.Y. 2017).

34. *Id.* at 39.

35. *Id.* at 62.

36. *Id.* at 66.

37. *Orr v. Marcella (In re Marcella)*, 463 B.R. 212, 215–16 (Bankr. D. Conn. 2011).

38. *Id.* at 220.

39. *Kotsopoulos v. Mater (In re Mater)*, 335 B.R. 264, 266 (Bankr. D.N.H. 2005).

40. *Id.*

the employer-debtor acted with malice, which is required to prevent a discharge under Section 523(a)(6).⁴¹ Therefore, the employee's disability award was discharged in her employer's bankruptcy. There are several other examples of cases where an employer discharged a monetary discrimination award through a consumer bankruptcy proceeding, including cases forgiving discrimination awards held by pregnant employees⁴² and an employee with HIV,⁴³ and cases forgiving racial discrimination awards in housing discrimination lawsuits.⁴⁴ All of these awards were debts stemming from employers' illegal acts for which employers were able to achieve debt relief through bankruptcy at the expense of their employees, who were often from socially and economically disadvantaged groups.

3. *Employer Hostile Work Environment Awards*

Employers can also discharge hostile work environment claims under the Code. In a 2010 case, a Black male employee claimed that his employer created a racially hostile work environment.⁴⁵ The employee claimed that he was threatened several times with a noose, including an employee stating that they "were going to hang [him] with the noose";⁴⁶ constantly called a racial slur; and told by his employer that he did not like Black people because they only get "money from the government to sell dope and buy cars."⁴⁷ The EEOC investigated the employee's claims and found that the evidence obtained during the investigation supported the allegations of a hostile work environment. The EEOC also found that the employee told the employer-debtor, the sole owner of the corporation where the employee worked, about the offensive language used by supervisors, but the employer-debtor did nothing.⁴⁸ The EEOC's

41. *Id.* at 267–68.

42. *See, e.g.,* Vieyra v. Etzel (*In re Etzel*), Ch. 13 Case No. 13-61353-11, Adv. No. 14-00001, 2014 WL 2810191, at *10 (Bankr. D. Mont. June 20, 2014) (finding that an employee who was fired because she was pregnant had not shown that her "[employer]'s conduct was willful, as opposed to merely reckless or reckless disregard, which would not be enough to except her debt from discharge"); *see also* Pretasky v. LeJeune (*In re Pretasky*), No. 91-01062-7, Adv. No. A-91-2108-7, 1991 WL 11002291, at *1 (Bankr. W.D. Wis. Oct. 18, 1991) (finding that the debtor-employer was free to litigate the issue of whether his conduct in discriminating against his pregnant employee was willful and malicious because "[t]o hold that a finding of sex discrimination by a state agency is identical to a finding of 'willful and malicious' under § 523(a)(6) by a federal bankruptcy court would be patently unfair to the debtor").

43. *Hamilton v. Nolan (In re Nolan)*, 220 B.R. 727, 730 (Bankr. D.D.C. 1998) (finding that the debtor-employer was not willful and malicious when the debtor-employer only acquiesced to the firing of the employee for his medical disability).

44. *Jones v. Graham (In re Graham)*, 191 B.R. 162, 164, 166 (Bankr. W.D. Mo. 1995) (finding that a housing discrimination suit did not come within the discharge exception); *Roberson v. Schwenn (In re Schwenn)*, 44 B.R. 746, 748 (Bankr. E.D. Wis. 1984) (same).

45. *Armentrout v. Fayette Sand & Gravel Inc. (In re Armentrout)*, Ch. 7 Case No. 06-71069-CMS-7, Adv. No. 06-70042-CMS, 2010 WL 60917, at *1 (Bankr. N.D. Ala. Jan. 5, 2010)

46. *Id.* at *4.

47. *Id.*

48. *Id.* at *2.

investigation found that the employee “did not feel he had the right to object or complain” and that the debtor “permitted inappropriate conduct which created and fostered a racially hostile environment.”⁴⁹ After an unsuccessful attempt to settle, the EEOC issued a Notice of Suit Rights, and the employee filed suit against the employer-debtor and his business in federal court.⁵⁰ Shortly thereafter, the employer-debtor filed Chapter 7 bankruptcy and attempted to discharge the hostile work environment claim.⁵¹ The employee-creditor commenced an adversary proceeding in the bankruptcy case, arguing that the debtor “intentionally and maliciously created a hostile and racially discriminatory environment” and thus should not obtain debt relief pursuant to Section 523(a)(6).⁵²

The bankruptcy court found that the employer-debtor created a hostile work environment.⁵³ In so finding, the court explained:

The Plaintiff is an older [B]lack man in his 60s. He grew up in a small town in the rural south. He grew up in a time where there were [W]hite-only restaurants, [W]hite-only buses, [W]hite-only schools, and [W]hite-only jobs. People in Plaintiff's position, a day-laborer with little education who performs unskilled labor, have very little power in a typical workplace, as they can be easily replaced. People in Plaintiff's position who grew up in a time of segregation have even less power as they are less inclined to act, having grown up in a time when African Americans had little power anywhere in the United States. In addition, this court would like to point out that Plaintiff grew up in a time where lynchings occurred, and a noose would have much more significance to him than to another man who grew up in the late 20th century after great strides had been made in the civil rights movement. In short, Plaintiff was placed in a situation where he was subjected to daily use of racial epithets and was also threatened with a noose by a person with authority over him during a work crawfish boil. Plaintiff, as a 60-year-old [B]lack man used to hearing the word “nigger” in a derogatory manner, did not perceive the repeated use of the word at the workplace as teasing and horseplay; to the Plaintiff, the racial epithets and the noose were both a symbol of racial hatred. Plaintiff's testimony that he was embarrassed, humiliated, and offended by this conduct is completely believable and understandable. The court finds that the frequency of the use of the racial epithets coupled with the severity of the noose incident created a situation that Plaintiff subjectively perceived to be hostile and abusive.⁵⁴

Despite these egregious facts, the Code does not include a nondischargeability provision for a hostile work environment civil rights claim. Therefore, an

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *8.

54. *Id.*

employee-creditor with such a claim still fails to meet the standards put forward in Section 523(a)(6). As the bankruptcy court explained in the instant case, under the U.S. Supreme Court's interpretation of Section 523(a)(6) in *Kawaauhau v. Geiger*, "nondischargeability takes a deliberate or intentional injury, not merely a deliberate and intentional act that leads to injury."⁵⁵ The bankruptcy court found that the employer-debtor *allowed* the employee-creditor to be subjected to a hostile work environment, but allowing a hostile work environment does not establish that the debtor himself intended to injure the plaintiff.⁵⁶ Therefore, the bankruptcy court concluded that the debtor's actions were not willful under Section 523(a)(6) and forgave the debt.⁵⁷

This is a debt stemming from someone's civil rights violation that the employer-debtor nonetheless was allowed to discharge in bankruptcy. The employee-creditor, a Black day-laborer with little education who performed unskilled work, was part of a socioeconomically marginalized group more likely to be subjected to hostile work environments. For similarly placed individuals, it is more likely for their civil rights monetary judgments to be discharged in bankruptcy. As noted above, these individuals also are likely to owe nondischargeable debts.

4. *Employee Sexual Harassment Awards*

Workplace sexual harassment claims are debts that can be forgiven in bankruptcy, absent a showing of intent.⁵⁸ In one such case, a woman was awarded \$430,233 in damages from a federal court after she was subject to years of a "regular, frequent, unwanted, uninvited, and abusive pattern of sexually charged behavior, lewd sexual comments, innuendo, propositions, jokes, and offensive physical contact including the touching of her body by [her manager] and his exposing his intimate and private body parts to her on one or more occasions."⁵⁹ The bankruptcy court granted debt relief to her manager for the sexual harassment award in his Chapter 7 case because the court stated that it "[could] not find that the Debtor intended to harm the [p]laintiff in any manner" because he "acted [only] with specific intent to advance his own prurient interests."⁶⁰ Although the court's reasoning justifying this debt relief seems to be an outlier among bankruptcy proceedings involving sexual harassment claims,⁶¹ it shines a light on what happens without a provision in the Code that prevents the discharge of debts like sexual harassment awards.

55. *Id.* at *12 (emphasis in original).

56. *Id.*

57. *Id.*

58. *Cf. id.* (stating that permitting a hostile work environment to exist is deplorable, but such a finding does not show an intent to injure the Title VII plaintiff).

59. *Sanger v. Busch (In re Busch)*, 311 B.R. 657, 660 (Bankr. N.D.N.Y. 2004).

60. *Id.* at 670.

61. This case is still good law. However, there have been several persuasive court opinions that have disagreed with the holding of *Busch*. See, e.g., *Basile v. Spagnola (In re Spagnola)*, 473 B.R. 518,

For example, in *In re Tompkins*, an employer-debtor was similarly able to discharge his employee's sexual harassment award after the employee achieved a \$26,000 settlement because "she was 'constantly subjected to unwanted sexual harassment, molestations, requests for sexual favors and other conduct of a sexual nature'" while working as a salesclerk at the employer-debtor's jewelry store in St. Thomas.⁶² The bankruptcy judge, however, found that the employee-creditor did "not produce[] sufficient evidence that the Debtor intended to cause her injury" and thus discharged the sexual harassment award.⁶³

Moreover, a judgment for domestic abuse can be discharged even if "the [d]ebtor act[s] in wanton and willful disregard of [the partner]'s rights." This is because "wanton and willful" is a lower standard than the intentional injury standard under Section 523(a)(6).⁶⁴

These examples show that bankruptcy debt relief disadvantages women, who are disproportionately subjected to sexual harassment in the workplace as compared to men, by allowing those with more privilege and power in society to discharge their obligations to women through the bankruptcy system.⁶⁵

* * *

These examples detail how creditors holding civil rights and employment law judgments carry the burden of preventing the discharge of these awards. The individual creditors who hold these judgments tend to belong to an economic group that, if they were to file bankruptcy, are more likely to carry debt into bankruptcy that cannot similarly be discharged, or the burden falls on the debtor to get the debt forgiven. This results in a double harm to this economically

523 (Bankr. S.D.N.Y. 2012) ("Stating that a debtor's intent to 'advance his own prurient interest' was not the same as intent to 'harm' a sexual harassment victim is parsing the Supreme Court's holding in *Geiger* too thin This Court declines to follow *Busch*.").

62. *Voss v. Tompkins (In re Tompkins)*, 290 B.R. 194, 196 (Bankr. W.D.N.Y. 2003).

63. *Id.* at 201–02.

64. *Grimando v. Viola (In re Viola)*, Ch. 7 Case No. 11-36565, Adv. No. 11-2583, 2013 WL 951394, at *3 (Bankr. D.N.J. Mar. 12, 2013) (holding that, for debt stemming from tortious assault and battery to be nondischargeable, "an intentional injury must also be shown under 11 U.S.C. § 523(a)(6) and is lacking on this record"). Although intimate partner violence can affect both men and women, women are more likely to be victims of domestic violence. *See, e.g., Fast Facts: Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> [<https://perma.cc/SRX3-N5RT>]. Therefore, the discharge of domestic violence judgments would disproportionately impact women.

65. Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (Nov. 20, 2017), <https://www.americanprogress.org/article/not-just-rich-famous/> [<https://perma.cc/WH7C-MSMX>] ("Women of color, in particular, often must confront the combined impact of racial, ethnic, and gender prejudice that can result in degrading stereotypes about their sexual mores or availability and increase their risk of being harassed."); *see also* Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 185 (2000–2001) ("[S]exual harassers statistically appear to disproportionately victimize women of color as compared to their representation in the labor force.").

marginalized group. The next Part explores bankruptcy policy that creates this anomaly.

II.

BANKRUPTCY POLICY AND DEBT RELIEF

Foundational to the consumer bankruptcy system is the fresh start for individuals that comes through debt relief.⁶⁶ However, the nondischargeability provisions that prevent debtors from discharging certain debts is in tension with the fresh start principle. These nondischargeability provisions ostensibly implicate either a public policy or the debtor who obtains the debt through the debtor's own misconduct. Further exploration of nondischargeability provisions, especially when compared to some of the civil rights and employee violations detailed above, indicates that these purported lenses for nondischargeability have not been applied consistently.

To understand how debt is forgiven in bankruptcy, it is also important to understand how the debt relief options available in different bankruptcy chapters operate and what policy reasons support the nondischargeability provisions. Bankruptcy scholars have been critical of the bankruptcy system because it steers more Black debtors into Chapter 13, which has lower discharge rates. This is in part based on the type of debt that Black debtors are more likely to carry into bankruptcy.⁶⁷ These debts can include nondischargeable debts that economically marginalized individuals are also more likely to hold. Scholars have challenged the analytical framework for the nondischargeability provisions that prevent debtors from receiving the full benefit of the bankruptcy discharge. This Part explores the bankruptcy system and these criticisms.

66. The phrase “fresh start” comes from *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“One of the primary purposes of the Bankruptcy Act is to ‘relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.’” (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915))); see also H.R. REP. NO. 95-595, at 128 (1977) (“Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge.”); Teresa A. Sullivan, *Debt and the Simulation of Social Class*, in *A DEBTOR’S WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT* 36, 48 (Ralph Brubaker, Robert M. Lawless & Charles J. Tabb eds., 2012).

67. Another reason suggested for Black debtors’ disproportionate use of Chapter 13 is bankruptcy attorneys’ implicit bias in steering more Black debtors than similarly situated non-Black debtors into Chapter 13. See Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 AM. BANKR. L.J. 623, 630 (2017) (“[A]ttorneys were likely to rate African American couples who expressed a preference for chapter 7 as lacking in good values and as less competent, relative to their ratings for other couples.”). In a study conducted by Jean Braucher, Dov Cohen, and Robert Lawless, researchers found that bankruptcy attorneys viewed hypothetical Black debtors “as having better values and being more competent when they expressed a preference for chapter 13 compared to [hypothetical White debtors], who were seen as having better values and being more competent when they wanted to file chapter 7, giving them a ‘fresh start.’” Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 393 (2012).

A. *The Centrality of the Bankruptcy Discharge*

Fundamental to the consumer bankruptcy system is the fresh start. The term “fresh start” was described by the Supreme Court in *Local Loan v. Hunt* as the concept of providing “to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”⁶⁸ One goal underlying the fresh start is “to restore the debtor to economic productivity.”⁶⁹ This represents a theory of economic rehabilitation, emphasizing that an individual who achieves a discharge of debts can reenter the economic marketplace and become (or resume being) a consumer-spending economic unit.⁷⁰

Although scholars disagree on the rationales behind the fresh start, “the significance of the fresh start policy to bankruptcy law is unequivocal.”⁷¹ Congress has similarly recognized the significance of the fresh start for the consumer debtor. Congressional debate surrounding the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) reform indicated that Congress put a premium on the fresh start for individual debtors. Some congressional leaders felt the fresh start was so paramount to the consumer bankruptcy system that they went so far as to say that “[t]he fresh start will be available to every American who needs it.”⁷² Other congressional leaders

68. *Local Loan Co.*, 292 U.S. at 244; *see also* *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (“[I]n the same breath that we have invoked this ‘fresh start’ policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the ‘honest but unfortunate debtor.’”); Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 239 (2001) (“Providing a discharge to honest and unfortunate debtors has long been understood to be an important function of our bankruptcy system.”).

69. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 414 (2005) (“The fresh start principle captures the notion that substantive relief should be afforded in the form of forgiveness of existing debt, with relinquishment by the debtor of either existing nonexempt assets or a portion of future income, in order to restore the debtor to economic productivity.”); *see also* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987) (advocating for a “functional economic theory of discharge: that discharge should be broadly available in order to restore the debtor to participation in the open credit economy, limited only as is necessary to prevent the skewing of economic decisions, whether to lend or to borrow, by the intrusion of irrelevant noneconomic factors”).

70. *See* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 121 n.31 (2017) (outlining the literature for the economic rehabilitation theory of discharge); *cf.* Jacoby, *supra* note 68, at 240 (“The traditional view tells us that, for a family with insurmountable debts, debt forgiveness is financial rehabilitation that enables the family to become an income-producing and consumer spending economic unit.”).

71. Byington, *supra* note 70, at 120–23 (2017) (describing the varying theories of the fresh start principle); *see also* JAY L. WESTBROOK, ELIZABETH WARREN, KATHERINE PORTER & JOHN POTTOW, *THE LAW OF DEBTORS AND CREDITORS* 306 (7th ed. 2014) (“[W]hile there is no serious challenge in this country to the fundamental idea of the discharge of debt, there has been hot debate over its scope.”).

72. SEN. JEFF SESSIONS, CONSIDERATION OF CONFERENCE REPORT ON H.R. 2415, 146 CONG. REC. H9826 (daily ed. Oct. 12, 2000) (“Everyone and anyone who becomes so flooded with and burdened with and overextended by reason of obligations for a variety of reasons, whether it be divorce or drinking or gambling or overextension of credit in many different forms, whatever the reason might

emphasized the fresh start but noted that the desire to give consumers a fresh start must also be balanced with “some accountability for those who can and should pay.”⁷³ Still, Congress noted that the fresh start was the “most important” theme in the consumer bankruptcy reform effort.⁷⁴ The Supreme Court, therefore, has repeatedly explained that Congress was intentional when it provided exceptions to discharge because Congress determined that repayment to creditors for a particular debt outweighed achieving a fresh start for the debtor.⁷⁵

The Court, emphasizing Congress’s desire to make the debt discharge available to most debtors, has also explicitly instructed bankruptcy courts to confine exceptions to discharge to only the exceptions plainly expressed in the Bankruptcy Code.⁷⁶ Bankruptcy courts have interpreted this to mean that exceptions to discharge are construed strictly against the creditor and in favor of the debtor.⁷⁷

B. Nondischargeability in Consumer Bankruptcy

Nondischargeable debt naturally infringes upon the central fresh start principle of bankruptcy discharge.⁷⁸ In response, Congress crafted the

be that someone became hopelessly indebted and found no reason to do anything except to file bankruptcy, that person, who I so overburdened will find at the hands of the bankruptcy system a fresh start.”); *see also* REP. PORTER GOSS, CONSIDERATION OF H.R. 975, 149 CONG. REC. H1981 (daily ed. Mar. 19, 2003) (“[F]or centuries American bankruptcy law has had the principle that if a person ever gets over their head in debt, they can cash in all their assets, pay off the debt that they can, and get a fresh start.”).

73. 146 CONG. REC. H9826, *supra* note 72.

74. REP. GEORGE GEKAS, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2001, 147 CONG. REC. H133 (daily ed. Jan. 31, 2001) (“The first theme, and the most important one, is that it is tailored to make certain that anyone who is so overwhelmed by debt, so swamped by the inability to pay one’s obligations that that individual after a good close look at his circumstances would be entitled to a fresh start, to be discharged in bankruptcy, to be free of the debts that so overwhelmed him.”).

75. *Bruning v. United States*, 376 U.S. 358, 361 (1964) (explaining that the Bankruptcy Code section containing the exceptions to discharge “demonstrates congressional judgment that certain problems—e.g., those of financing government—override the value of giving the debtor a wholly fresh start”); *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (“The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress ‘that the creditors’ interest in recovering full payment of debts in these categories outweigh[s] the debtors’ interest in a complete ‘fresh start.’” (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991))); *see also* Pardo & Lacy, *supra* note 69, at 417 (“In effect, society has determined that a debtor’s fresh start should not be absolute: Our interest in the repayment of certain types of debts outweighs our interest in forgiving debtors.”).

76. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) (“In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed . . .”).

77. *See, e.g., Ryan v. United States (In re Ryan)*, 389 B.R. 710, 713 (B.A.P. 9th Cir. 2008) (“[E]xceptions to discharge are interpreted strictly against objecting creditors and in favor of debtors.”); *Kuper v. Spar (In re Spar)*, 176 B.R. 321, 326 (Bankr. S.D.N.Y. 1994) (“[E]xceptions to discharge must be . . . liberally construed in favor of the honest debtor.”).

78. Pardo & Lacy, *supra* note 69, at 417–18 (“Any exception to discharge, of course, encroaches upon the fresh start principle.” (citing H.R. DOC. NO. 93-137, pt. 1, at 3–4)).

nondischargeable provisions where it determined that debtor accountability outweighed the importance of providing the debtor an economic fresh start. But what Congress accomplished does not reflect any coherent theory or rationale, and the public policies that Congress purports to endorse through these nondischargeability provisions are undermined by their unequal application across different types of debt.

Twenty-one debts are either categorically or presumptively nondischargeable, seemingly based on the idea that not all debt is worthy of forgiveness in bankruptcy.⁷⁹ The Supreme Court in *Grogan v. Garner* explained that Congress set apart these debts as nondischargeable because Congress determined that repayment to victims for a debtor's wrongdoing is more important than giving the perpetrators a fresh start.⁸⁰ For example, for debts based on fraud, the Supreme Court explained that "[it is] unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interests in protecting victims of fraud."⁸¹ Thus, the Supreme Court's articulation of the nondischargeability provisions as "protecting innocent parties" and "not rewarding bad actors" insinuates that consumer debtors who

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79. 11 U.S.C. § 523(a) (listing exceptions to discharge, including debt stemming from:
- (1) Certain tax or customs duties;
 - (2) Money obtained by false pretenses, false representation, or actual fraud;
 - (3) Liabilities not listed or scheduled under section 521(a)(1);
 - (4) Fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
 - (5) Domestic support obligations;
 - (6) Willful and malicious injury by the debtor to another entity or to the property of another entity;
 - (7) Fines, penalties, or forfeitures payable to and for the benefit of a governmental unit;
 - (8) Certain student loans;
 - (9) Death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
 - (10) Liabilities the debtor failed to list in a prior bankruptcy case;
 - (11) Any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;
 - (12) Malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution;
 - (13) Payment of an order of restitution under the criminal code;
 - (14) Payment of a tax that is non-dischargeable under paragraph (1); (14A) Payment of foreign taxes; (14B) Payment of fines or penalties under Federal election law;
 - (15) Certain domestic support obligations;
 - (16) Certain condominium association fees;
 - (17) Filing fees or court costs and expenses incurred from a prisoner filing a civil action, proceeding, or appeal;
 - (18) Certain loans owed to a pension, profit-sharing, stock bonus, or other plan under the Tax Code;
 - (19) Securities fraud.)

There are twenty-one non-dischargeable debts, grouped into nineteen categories of debt. *See also* COLLIER ON BANKRUPTCY 1 523.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016).

80. *Grogan*, 498 U.S. at 287 ("We think it unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interests in protecting victims of fraud.").

81. *Id.*

bring these debts into bankruptcy are “bad actors,” and the individuals to whom the debt is owed are “innocent parties” deserving of protection from the bankruptcy discharge.⁸² Some nondischargeable debts, therefore, are ostensibly debts held by “bad actors” who are not worthy of a fresh start in the bankruptcy system.⁸³ Indeed, presumptively nondischargeable debts fall into three categories that reflect an underlying policy rationale for nondischargeability: debts that stem from the debtor’s misconduct, debts that are “particularly important” because they implicate public policy concerns, or some combination of these categories.⁸⁴

For example, debts that are incurred because of a person’s fraudulent conduct are not forgiven in bankruptcy because these debts indicate the debtor acted with a degree of culpability.⁸⁵ Additionally, debts incurred because of death or injury to another while operating a motorized vehicle are not forgiven based on the theory that the debt stems from the debtor’s misconduct.⁸⁶ Penal

82. *Id.*

83. *See generally* 11 U.S.C. § 523(a); *see also* Pardo & Lacy, *supra* note 69, at 520 (“Among the most troubling aspects regarding the implementation of undue hardship is the notion that a judge, in making the determination of whether to discharge educational debt, will invariably impose his or her personal views on the proper role of bankruptcy, on the proper role of the fresh start, and on the type of debtor who is worthy of relief embodied in the Bankruptcy Code.” (emphasis added)).

84. Atkinson, *supra* note 6, at 928 (“The conventional wisdom is that categorically nondischargeable debts are treated as such because they fall into three broad categories: they stem from debtor misconduct; they implicate an issue ‘thought to be particularly important,’ ‘where the public policy at issue outweighs the debtor’s need for a fresh start’; or they represent some ‘mixture of both.’”); *see also* Scott F. Norberg, *Contract Claims and the “Willful and Malicious Injury” Exception to the Discharge in Bankruptcy*, 88 AM. BANKR. L.J. 175, 178 (2014) (“§ 523(a) precludes the discharge of certain categories of debts, owed to a particular creditor, including debts for ‘willful and malicious injury’ and other debts for dishonest or other culpable misconduct.”).

85. *See* 11 U.S.C. § 523(a)(2), (4); *see also* Theresa J. Pulley Radwan, *With Malice Toward One?—Defining Nondischargeability of Debts for Willful and Malicious Injury Under Section 523(A)(6) of the Bankruptcy Code*, 7 WM. & MARY BUS. L. REV. 151, 155–56 (2016) (noting that nondischargeable debts include “debts incurred as a result of the debtor’s wrongdoing”); Atkinson, *supra* note 6, at 930 (“Misconduct, public policy, and federalism have also framed the categorical nondischargeability of certain tax debt and debts that have been incurred through some fraud.”).

86. *See* 11 U.S.C. § 523(a)(9); *see also* Veryl Victoria Miles, *Interpreting the Nondischargeability of Drunk Driving Debts Under Section 523(a)(9) of the Bankruptcy Code: A Case of Judicial Legislation*, 49 MD. L. REV. 156, 156 (1990) (“In recent years, our society has been permeated by an impassioned and vociferous movement against drunk driving. This movement has been so effective and influential that it has provoked numerous and varied statutory responses from legislative bodies throughout the country. One of the most provocative responses is codified in section 523(a)(9) of the Federal Bankruptcy Code (the Code).”). Congress has also added categories of debt to the nondischargeability provisions in response to specific misconduct, like it did in 2002 when it added debts stemming from an individual’s violations of securities fraud law to the nondischargeability provisions in response to the Enron scandal. *Corporate Scandals Spawn Bankruptcy Code Amendment*, 39 BANKR. CT. DECISIONS WKLY. NEWS & COMMENT at 4 (Aug. 13, 2002) (“The Corporate and Criminal Fraud Accountability Act of 2002 . . . added a new exception to discharge – Section 523(a)(19). The new subsection makes an individual debtor’s debt non-dischargeable if it was incurred in violation of securities fraud laws.”); *see also* *Corporate Fraud: Where Should the Buck Really Stop? Corporate Fraud Perspective*, AM. BANKR. INST. (Nov. 1, 2002), <https://www.abi.org/abi-journal/corporate-fraud-where-should-the-buck-really-stop-corporate-fraud-perspective-2002#10> [<https://perma.cc/LKB4-V5W3>] (“[N]ot only do Americans want all persons who knowingly participate

debt is nondischargeable based on the theory that the debtor acted with a certain degree of culpability and based on a public policy of ensuring punishment and deterrence.⁸⁷

Sometimes there are economic policy reasons behind the nondischargeability provision that are not based on the debtor's morality or bad acts but rather depend on whether the burden of debt discharge may be spread among multiple creditors. This "risk spreading" justification exists where the creditor could reasonably spread the risk of default among multiple parties who owe the creditor money.⁸⁸ A classic example of this is credit card debt. Credit card companies can spread the risk of nonpayment by increasing interest rates for all customers to account for the risk that some individuals will not pay their credit card debt. Credit card debt is therefore dischargeable in bankruptcy.

Some tax debts are also categorically nondischargeable because they implicate public policy concerns.⁸⁹ However, the risk of nonpayment of tax debts can be spread across debtors like it is for credit card debt.⁹⁰ For example, if one taxpayer does not pay his debt, the government loses some, but not all, revenue. Although tax debt is initially nondischargeable, it can be discharged after a certain number of years.⁹¹

Student loan debt is presumptively nondischargeable, and a debtor with student loans carries the burden of proving that the debt creates an "undue

in the perpetration of a fraud through a corporation to be personally liable for the damage caused, but they also want that liability to be non-dischargeable in chapter 7 bankruptcy.").

87. Atkinson, *supra* note 6, at 940 ("The public's interest in punishment, deterrence, and the rehabilitation of law-breakers has served as an important reason why penal debt should not be discharged in bankruptcy.").

88. See Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 83 (1986) ("Viewed as insurance, the discharge could be said to perform the socially useful function of interpersonal risk spreading among debtors."); see also Shmuel Vasser, *Bankruptcy Meets Family Law: A Presumptive Approach to the Dischargeability of Equitable Distribution Awards*, 5 J. BANKR. L. & PRAC. 83, 101 (1995) ("Bankruptcy law in the United States is, in effect, an economic regulation. In essence, its principles are similar to the underpinnings of the insurance industry, that is, the spread of financial risks."); Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 362–63 (1982) ("Many creditors are able to procure insurance against bad-debt losses at reasonable cost. Others may self-insure by diversifying their risks, either by extending credit to a pool of debtors and spreading the risk among them or by engaging in diversified lending activities . . ."); Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 612–13 n.293 (2010) ("The risk of each borrower's future inability or unwillingness to pay is transferred to the lender for a premium implicit in the cost of the loan, and the lender pools that risk with other similar risks, thereby spreading losses among borrowers.").

89. Atkinson, *supra* note 6, at 930 ("Misconduct, public policy, and federalism have also framed the categorical non-dischargeability of certain tax debt."); see 11 U.S.C. § 523(a)(1).

90. William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade*, 77 YALE L.J. 228, 244 (1967) (arguing that "[t]he Government, drawing its revenue from the entire population, is in a better position to self-insure its risks than are private parties").

91. 11 U.S.C. § 507(a)(8)(A)(i).

hardship” to obtain discharge.⁹² However, this bar is very high. Although student loan debt can be spread among multiple individuals, the risk spreading public policy justification for dischargeability does not govern the treatment of this type of debt.⁹³ Its nondischargeability may instead reflect public policy concerns about the potential moral hazard facing students who stand to gain from discharging the loans in bankruptcy.⁹⁴

Conversely, a debt is nondischargeable if Congress wants to ensure that a creditor is compensated when the risk of default cannot be spread among multiple debtors. One prominent example is domestic support obligations (DSOs).⁹⁵ DSOs are generally nondischargeable debts partially because of public policy concerns that a debtor could use the bankruptcy system to avoid legitimate marital and child support obligations.⁹⁶

Congress has also amended the Bankruptcy Code to ensure that when the risk of DSO default cannot be spread, the debt cannot be discharged. In general, property settlement debts are dischargeable. But Congress added an exception in the 1994 Bankruptcy Reform Act that made property settlement debts nondischargeable if they are connected to divorce-related debts. Since there is

92. Dalié Jiménez & Jonathan Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. 132, 181 (2020) (“Concerned about fraud and abuse, Congress opted to treat student loan borrowers more harshly than other consumer debtors.”).

93. For an argument advocating student loan forgiveness based on the risk spreading rationale see Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 608 (2013) (“[T]here are strong theoretical and practical reasons to believe that the government as creditor may often be in a better position to evaluate the risk of education and spread that risk, and risk should therefore be shared more equally.”).

94. See 11 U.S.C. § 523(a)(8); Atkinson, *supra* note 6, at 929–30 (“[T]he Bankruptcy Commission’s concerns about potential student abuse and its desire ‘to reinstate public confidence in the bankruptcy system’ motivated the commission to recommend this exceptional treatment of student loans”); see also Jiménez & Glater, *supra* note 92, at 183 (“To discharge student loans, debtors must convince a judge that repaying the loan ‘would impose an undue hardship’ on them and their dependents.”).

95. See 11 U.S.C. § 523(a)(5); see also Veryl Victoria Miles, *The Nondischargeability of Divorce-Based Debts in Bankruptcy: A Legislative Response to the Hardened Heart*, 60 ALB. L. REV. 1171, 1173 (1997) (“The Reform Act is a comprehensive set of amendments to the Bankruptcy Code (Code) that includes several provisions designed to prevent bankruptcy relief from being used as a means of escaping alimony, child support, and other divorce-based financial obligations assessed against an individual under a divorce or separation decree. Its goal is to provide adequate support for children and a former spouse, or to provide a fair financial settlement of the marital assets between the divorced parties.”).

96. *Shaver v. Shaver*, 736 F.2d 1314, 1316 n.3 (9th Cir. 1984) (“The rationale for the exemption from discharge for support obligations is threefold: the protection of the spouse who may lack job skills or who may be incapable of working, the protection of minor children who may be neglected if the custodial spouse entered the job market, and the protection of society from an increased welfare burden that may result if debtors could avoid their familial responsibilities by filing for bankruptcy.” (emphasis added) (citing Madison Grose, Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96, 96–97 n.7 (1977)).

only one “payee” of this debt, the risk cannot be spread.⁹⁷ If the debtor does not pay the obligee, the obligee is left with nothing.

Notwithstanding these overarching principles, there are some debts stemming from civil rights or employment violations that are dischargeable even where dischargeability may incentivize misconduct and where risk spreading is not possible. For example, employers who owe money to employees for hostile work environment or workplace harassment claims can achieve debt relief in bankruptcy because there is not a specific provision in the Code that prevents discharge.⁹⁸ Similarly, there is not a provision in the Code prohibiting employers from seeking debt forgiveness for sexual harassment claims⁹⁹ or landlords from seeking relief for civil claims involving discrimination or failure to maintain a habitable living environment.¹⁰⁰ In all of these examples, the employer or landlord is the only person that owes the employee or tenant the debt, and the risk of default cannot be spread across multiple debtors. The employer or landlord’s debt in such cases stems from their moral culpability or “bad” acts. Yet all these debts can be forgiven, which undermines the alleged public policy justifications for nondischargeability of claims based on misconduct or inability to spread risk.

Because civil rights violations can typically be discharged, victims of these violations must use the Code’s “catchall” provision, Section 523(a)(6), to argue that bankruptcy courts should hold a particular debt nondischargeable.¹⁰¹ To do so, the individual holding the civil liability claim—that is, the creditor—must open an adversary proceeding in the debtor’s bankruptcy case.¹⁰² The catchall provision prohibits debt relief “for willful and malicious injury by the debtor to another entity or to the property of another entity.”¹⁰³

The Supreme Court in *Kawaauhau v. Geiger* held that only acts done with the intent to cause injury *and* done maliciously fall under the exception outlined in Section 523(a)(6).¹⁰⁴ *Geiger* involved a patient suing a doctor for medical

97. See Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981 (1981) (“A discharge system provides a technique for allocating the risk of financial distress between a debtor and his creditors.”); Harris, *supra* note 88, 362–63 (1982) (suggesting that creditors may be in a better position than debtors to spread the risk of default).

98. See *supra* Part I.B.

99. *Id.*

100. See, e.g., *Foreman v. Merino (In re Merino)*, No. 2:18-bk-21250-ER, Adv. No. 2:18-ap-01460-ER, 2020 WL 6949033, at *3 (Bankr. C.D. Cal. Sept. 25, 2020) (discharging a judgment against a landlord for failure to maintain habitable living conditions); *Jones v. Graham (In re Graham)*, 191 B.R. 162, 166 (Bankr. W.D. Mo. 1995) (discharging a judgment against a landlord for a housing discrimination claim).

101. See 11 U.S.C. § 523(a)(6).

102. An adversary proceeding is a subsidiary proceeding within the main bankruptcy case that deals with one issue.

103. 11 U.S.C. § 523(a)(6); see also Norberg, *supra* note 84.

104. *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (“The word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that non-dischargeability takes a deliberate or intentional *injury*, not merely a

malpractice attributable to the doctor's negligent or reckless conduct.¹⁰⁵ Because medical malpractice claims are not listed under Section 523 as categorically nondischargeable, the doctor's negligent or reckless conduct needed to satisfy the Section 523(a)(6) standard for the debt to be forgiven.¹⁰⁶ In deciding to forgive the doctor's medical malpractice debt because the doctor's actions failed to reach the requisite maliciousness, the Supreme Court emphasized that the only exceptions to debt forgiveness should be those clearly defined in the Code.¹⁰⁷

In sum, the consumer bankruptcy system has mechanisms that allow certain debtors to discharge their debt obligations but not others. Although the Code's dischargeability provisions are seemingly neutral, some debtors are more likely to carry nondischargeable debt into bankruptcy. The next Section discusses the different consumer bankruptcy chapters and why, as a result of implicit bias, debtors who carry nondischargeable debt into bankruptcy are more likely to file bankruptcy under the least forgiving chapter.

C. Consumer Bankruptcy Chapter Choice and the Debt-Benefit Gap

Although bankruptcy can provide a debtor relief from burdensome debt, the Code chapter within which an individual files sometimes dictates the degree of fresh start granted. In the consumer bankruptcy system, individuals generally choose between filing under two chapters for debt relief: Chapter 7 and Chapter 13.¹⁰⁸ Bankruptcy filers tend to prefer Chapter 7 because it has a higher success rate than Chapter 13. These differential success rates indicate that the neutrality of these chapters is merely illusory.

There are key differences between the two chapters that affect access to a fresh start. A debtor who files under Chapter 7 turns over all personal assets except for nonexempt assets, pays off the debt they can, and in exchange obtains debt relief.¹⁰⁹ This process is typically very quick and often will provide the most

deliberate or intentional *act* that leads to injury.”); *id.* at 63 (“[T]he current statutory instruction [is] that, to be nondischargeable, the judgment debt must be ‘for willful and malicious *injury*.’”).

105. *Id.* at 59.

106. *Id.*

107. *Id.* at 62 (exceptions to discharge “should be confined to those plainly expressed”) (citing *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

108. It is possible for individuals to file chapter 11 bankruptcy under 11 U.S.C. § 109(d). However, the vast majority of consumers file bankruptcy under chapters 7 and 13. *See* ADMIN. OFF. OF THE U.S. COURTS, REPORT F-2, U.S. BANKRUPTCY COURTS – BUSINESS AND NONBUSINESS CASES COMMENCED BY CHAPTER OF THE BANKRUPTCY CODE DURING THE TWELVE-MONTH PERIOD ENDING JUNE 30, 2021, https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0630.2021.pdf (reporting 496 nonbusiness chapter 11 cases compared to 325,420 nonbusiness Chapter 7 cases and 117,882 Chapter 13 cases); *see also* Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 588–91 (2022) [hereinafter Foohey et al., *Portraits II*] (describing barriers to bankruptcy, including the attorney fees associated with Chapter 7 and Chapter 13 cases).

109. Foohey et al., *No Money Down*, *supra* note 29, at 1061; Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 116 (2011).

effective relief for bankruptcy debtors.¹¹⁰ By contrast, in a Chapter 13 bankruptcy, a debtor is allowed to keep both exempt and nonexempt assets but must commit to a three- or five-year repayment plan. These repayment plans require the debtor to devote a portion of future income to creditors in exchange for only having to pay a portion of their debts.¹¹¹ In a majority of cases, the debtor receives forgiveness for their remaining debts only after the repayment plan is complete.¹¹² As a result of the three- or five-year repayment period, Chapter 13 filings generally take longer and require the debtor to pay more of the debts owed to a creditor compared to a debtor who filed under Chapter 7.¹¹³ Consequently, Chapter 13 debtors generally have a harder time completing their plans and are less likely to receive robust debt relief.¹¹⁴ Indeed, most Chapter 13 bankruptcies are dismissed before any debt is forgiven because the debtor is unable to complete the repayment plan.¹¹⁵ That is why many bankruptcy scholars believe that Chapter 7 is “the quicker and cheaper consumer chapter” that provides debtors the relief they need.¹¹⁶

Although Chapter 7 provides the best debt relief for consumers, Black debtors are both more likely to file under Chapter 13 and less likely to receive debt relief than similarly situated non-Black debtors.¹¹⁷ There are a few possible explanations for why Black debtors are over-represented in Chapter 13. The first involves the type of debt that Black debtors generally bring into bankruptcy.

110. Foohey et al., *No Money Down*, *supra* note 109, at 1061 (“In [C]hapter 7, the debtor receives a relatively quick discharge in exchange for turning over all non-exempt assets.”).

111. *Id.* at 1062–63; Braucher et al., *supra* note 67, at 394 (same).

112. Foohey et al., *No Money Down*, *supra* note 109, at 1062; Braucher et al., *supra* note 67, at 394 (discussing the timing of discharge in Chapter 13).

113. See Porter, *supra* note 108, at 116–17 (noting the complex repayment plan requirements under Chapter 13, which requires turning over even legally exempt assets and takes years to satisfy, in contrast with Chapter 7, which has “generous exemption levels” and takes “about four months” to satisfy).

114. See *id.* at 107–08 (discussing a major study’s finding that only one-third of Chapter 13 debtors receive a discharge); Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1042 (2017) (finding that only 36.5 percent of a sample of Chapter 13 cases filed in 2007 ended in discharge after plan completion).

115. Greene et al., *supra* note 113, at 1042 (reporting Chapter 13 dismissal rates and stating that the most common reason for dismissal is failure to complete payment plans).

116. Lawless & Littwin, *supra* note 29, at 1355; Foohey et al., *No Money Down*, *supra* note 29, at 1057.

117. See Greene et al., *supra* note 114, at 1036 (“Blacks have less than half the chance of bankruptcy success as non-[B]lacks; this worsens the recent insight that [B]lacks are overrepresented in bankruptcy because of attorney steering to chapter 13.”); see also Braucher et al., *supra* note 67, at 406 (2012) (relying on data from the 2007 Consumer Bankruptcy Project (CBP) to find that Black households were more likely to file under Chapter 13 than other comparable households); Cohen et al. *supra* note 67, at 631–32 (relying on CBP data from cases filed in 2013 and 2014 to replicate findings about racial disparities in chapter choice using 2007 CBP data); Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 234–35 (2009) (relying on data from the 2001 CBP to find that 61.8 percent of Black households filing for bankruptcy used Chapter 13 and “merely being [B]lack lowers the odds of getting a discharge by 40%, and being Hispanic lowers the odds by 43%”).

Chapter 13 provides a “superdischarge” to consumer debtors, which affords debt relief for certain debt that would be nondischargeable, or unforgiveable, in Chapter 7. Included in the superdischarge are some government fines and fees, including those levied for parking tickets and license suspensions.¹¹⁸ Because poor Black debtors are more likely to receive predatory traffic tickets, which lead to suspended licenses and civil fines, Black debtors may file for Chapter 13 bankruptcy at higher rates to obtain relief from these debts.¹¹⁹ Similarly, racial disparities in car ownership and auto debt may push more Black debtors into Chapter 13 to save their cars, which might otherwise be lost in a Chapter 7 bankruptcy proceeding.¹²⁰ Taken together, these factors suggest that Black debtors may be more likely to file Chapter 13 because they are more likely to carry certain types of debts.

As Dickerson noted in the context of family support obligations and student loans, there are some debts that socio-economically marginalized individuals are more likely than other debtors to possess that are nondischargeable, even in Chapter 13. For example, penal debt cannot be forgiven under Chapter 13’s superdischarge.¹²¹ Atkinson compared penal and student loan debts with debts arising from environmental violations like toxic dumping, which can be forgiven in bankruptcy, and argued that “[s]ome debts that implicate the same misconduct, public policy, and/or federalism concerns as penal debt or student loan debt are nonetheless fully dischargeable.”¹²²

Dickerson also argued that bankruptcy law—the Code itself—widens the benefit gap between White and Black debtors.¹²³ Dickerson noted that certain

118. Pamela Foohey, *Fines, Fees, and Filing Bankruptcy*, 98 N.C. L. REV. 419, 422 (2020) (“Chapter 13’s super discharge thus offers a way to get rid of some, but not all, government assessed fines and fees, including some court fines, fees, and other charges. Indeed, one prevalent use of chapter 13 to escape such fines and fees is in the context of parking tickets and license suspensions.”).

119. See Melissa Sanchez & Sandhya Kambhampati, *Driven into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA (Feb. 27, 2018), <https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/> [<https://perma.cc/TW63-EGRR>] (discussing how governmental fees lead people in Chicago to file Chapter 13 and how ticket debt disproportionately affects low-income, mostly Black neighborhoods); Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. INST. & THEORETICAL ECON. 174, 186–87 (2017) (finding that Black households filing for bankruptcy in Chicago are more likely to file Chapter 13, in part because of debt associated with parking tickets); see generally Foohey, *supra* note 118 (discussing the scope of the Chapter 7 and 13 discharge provisions regarding civil fines and fees).

120. See Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 287, 328–29 (2020) (detailing racial disparities in car ownership and auto debt of bankruptcy filers).

121. See Atkinson, *supra* note 6, at 938 (“Per Section 1328(a), Chapter 13 filers cannot discharge several of the debts listed in Section 523(a), including . . . student loans to the extent they are nondischargeable in a Chapter 7 proceeding; and a restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.” (internal citations omitted)); Foohey, *supra* note 118, at 422 (“Not included in the super discharge-and thereby nondischargeable-is a restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.” (internal citations omitted)).

122. Atkinson, *supra* note 6, at 945–46.

123. Dickerson, *Bankruptcy Reform*, *supra* note 10, at 921.

Code provisions make student loan and family support debts, which are largely carried by Black debtors, unforgiveable.¹²⁴ Dickerson also detailed how the Code provides exemptions for retirement accounts and private school tuition, which may be more beneficial to White debtors.¹²⁵

In short, the Bankruptcy Code's provisions benefit White debtors by privileging the types of debt they are more likely to carry into bankruptcy. By contrast, Black debtors are not only steered towards Chapter 13 more often by bankruptcy attorneys, but they are more likely to select Chapter 13 because they carry debt into bankruptcy that cannot be discharged in Chapter 7. This stands in stark contrast to the dischargeability of debts under Chapter 7 that are disproportionately owed to poor, Black, and/or female creditors.

The next Part will explain how the proffered policy rationales for debt forgiveness in the Code led to the anomalies described in the case examples in Part I.

III.

THE IMPACT OF BANKRUPTCY'S INTERNAL INCONSISTENCIES

The Bankruptcy Code's nondischargeability provisions prevent economically marginalized individuals from achieving a financial fresh start through the bankruptcy system.¹²⁶ The Code also allows debtors to discharge civil rights and employment law judgment debts, which are often owed to economically marginalized individuals.¹²⁷ This results in a double harm to this group. Despite the Code's proffered policy objectives for debt forgiveness, the case examples show that the debt discharge categories do not further these objectives.¹²⁸ This reflects internal inconsistencies in the Code, which allows for the discharge of debt that is comparable to nondischargeable debt in terms of the culpability of the debtholder and the capacity for risk spreading.

These nondischargeable debts fall into two main categories: penal debt and student loans. The Bankruptcy Code purportedly prevents the discharge of these debts based on culpability and concerns about moral hazard.¹²⁹ However, the nondischargeability of these debts does not always indicate that the debtor was culpable, or that the debt creates a moral hazard.¹³⁰ In terms of the former, there are debts that fall under the penal debt umbrella, like debts based on fees for

124. *Id.* at 921 ("BAPCPA provisions widen the racial benefits gap, including those that make more student loan and family support debts nondischargeable as well as giving more favorable treatment to debtors who have interests in retirement accounts or who send their children to private schools."); *see also id.* at 955–56 (explaining how the Code provisions widen the benefit gap in bankruptcy).

125. *Id.* at 956.

126. *See generally* Part II.C.

127. *See generally* Part I.

128. *Id.*

129. *See supra* Part II.B.

130. *Id.*; *see also* Jiménez & Glater, *supra* note 91, at 18. Indeed, there is no justification for precluding discharge.

overgrown grass, that do not indicate culpability of the debtor.¹³¹ In terms of the latter, student loans are presumptively nondischargeable based on erroneous assumptions about the number of individuals who try to discharge student loans in bankruptcy and their motivations for discharging those loans.¹³² Yet, both student loans and penal debt are nondischargeable (or presumptively nondischargeable) in Chapter 7.¹³³ This is not only inconsistent with the policy goals of bankruptcy law but also has a perverse effect on socio-economically marginalized individuals.

A. Harm from the Nondischargeability Provisions

Bankruptcy provides a fresh start by granting an individual debtor economic relief and can theoretically help the debtor achieve economic stability or even economic mobility in some cases.¹³⁴ However, individuals carrying nondischargeable debt into bankruptcy, who tend to be part of an economically lower class, are unable to achieve an economic fresh start.¹³⁵ As detailed previously, the nondischargeability of certain debts harms already economically marginalized individuals.¹³⁶ As Atkinson explained, “unmanageable penal debt disproportionately sends the most economically vulnerable individuals into socially undesirable debt spirals.”¹³⁷

Debt relief provisions have distributive effects across race and class. For example, the dischargeability provisions advantage police officers and correctional officers who can discharge civil rights violations, but disadvantage individuals that carry nondischargeable penal debt.¹³⁸ White men make up the

131. See Part III.A; Atkinson, *supra* note 6, at 949–50.

132. Jiménez & Glater, *supra* note 91, at 182–83.

133. 11 U.S.C. § 523(a)(7), (8).

134. See *supra* Part II.A.

135. See *supra* Part II.B.

136. *Id.*

137. Atkinson, *supra* note 6, at 920.

138. See *supra* Part I.A.

majority of police¹³⁹ and correctional officers,¹⁴⁰ while Black and Latine people are disproportionately affected by the penal system and are therefore more likely to carry penal debt.¹⁴¹ This racial divide has myriad causes, including over-policing and over-incarceration of Black and Latine people, poverty, and historical efforts by police departments to exclude Black and Latine officers.¹⁴² There is also a class divide between those who work in the penal system and those who are subject to it. For example, debtors who are employed as police officers are generally in a higher economic class than debtors in the prison system, who are more likely to live in poverty both before and after their imprisonment.¹⁴³

139. See SHELLEY S. HYLAND & ELIZABETH DAVIS, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 6 (2019), <https://bjs.ojp.gov/content/pub/pdf/lpd16p.pdf> [<https://perma.cc/V8ZF-NYNQ>] (indicating 71 percent of police officers were White in 2016); see also Andrea Shalal & Jonathan Landay, *Black Cops Say Discrimination, Nepotism Behind U.S. Police Race Gap*, U.S. NEWS (July 2, 2020), <https://www.reuters.com/article/us-minneapolis-police-blackofficers/black-cops-say-discrimination-nepotism-behind-u-s-police-race-gap-idUSKBN2432T8> [<https://perma.cc/6PTU-Y6TA>] (“Whites accounted for 71.5% of the 701,000 sworn local police officers in the United States in 2016, Bureau of Justice Statistics data show, compared to an estimated 60% of the population.”); Dan Keating and Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter than the People They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/> [<https://perma.cc/8C3K-9FB6>] (noting that some police departments are more than three times as White as their percentage in that county’s population); see also Rosa Brooks, *One Reason for Police Violence? Too Many Men with Badges*, WASH. POST (June 18, 2020), <https://www.washingtonpost.com/outlook/2020/06/18/women-police-officers-violence/> [<https://perma.cc/YV6L-2BR3>] (“Women make up just 13.6 percent of all police officers.”).

140. See *Staff Ethnicity/Race*, FED. BUREAU OF PRISONS https://www.bop.gov/about/statistics/statistics_staff_ethnicity_race.jsp [<https://perma.cc/ZZJ9-UAD5>] (showing that the majority of correctional officers are White).

141. See Atkinson, *supra* note 6, at 950 (“[O]ver-policing and the effective criminalization of poverty that developed in the wake of the War on Drugs disproportionately affected people of color.”).

142. See *id.* (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97–154 (2012)) (“Professor Michelle Alexander has also described the degree to which race has unduly played a factor in who has been arrested and charged in the War on Drugs. She describes how over-policing and the effective criminalization of poverty that developed in the wake of the War on Drugs disproportionately affected people of color.”); Melissa Chan, *I’m Going to Make a Change: Police Departments Struggle to Recruit Black Cops. So This HBCU Came Up with a Plan*, TIME (Apr. 9, 2021) <https://time.com/5952208/hbcu-black-police-academy/> [<https://perma.cc/7JU8-53WB>] (“Throughout history, police forces in the U.S. have been predominantly [W]hite and male. In 2016, the most recent year for which data is available, about 72% of local police officers were [W]hite and nearly 88% were male.”); Andrea Shalal & Jonathan Landay, *Black Cops Say Discrimination, Nepotism Behind U.S. Police Race Gap*, U.S. NEWS (July 2, 2020) <https://www.reuters.com/article/us-minneapolis-police-blackofficers/black-cops-say-discrimination-nepotism-behind-u-s-police-race-gap-idUSKBN2432T8> [<https://perma.cc/V7HX-GC2M>] (“The race gap in U.S. policing remains pronounced in big cities and districts, and among top ranks, despite years-long attempts to rectify it. Department of Justice (DOJ) data shows that 90% of the police chiefs in local departments and 81% of supervisors above sergeant were [W]hite in 2016 – compared to 4% and 9% African American, respectively.”); David A. Graham, *America Is Losing Its Black Police Officers*, THE ATLANTIC (Oct. 4, 2021) (“As recently as the 1960s, some cities had no Black officers; others didn’t allow them to carry guns or arrest [W]hite suspects.”).

143. Compare ALEXANDER, *supra* note 142, at 84–86 (noting that most criminal defendants are indigent), with *Occupational Employment and Wages, 2020*, U.S. BUREAU OF LAB. STAT. (May 2021),

Similarly, court-imposed fees, costs, and expenses, including penal debt accrued while in prison, are nondischargeable and largely affect people of color.¹⁴⁴ Yet, as Atkinson explained, the purported policy justification for making individuals repay penal debt—deterring misconduct—does not foreclose discharge for other debts that implicate the same misconduct concerns.¹⁴⁵ Penal debt does not always indicate that the debtor acted with culpability, but may result from innocuous violations of laws that target the poor. For example, in the earlier-referenced 2010 case where an incarcerated person was assessed a penalty for a failed suicide attempt, he was unable to discharge it because it was a penal debt. The incarcerated person likely accrued this debt and was unable to pay it because he was poor, not because he was essentially dishonest or a bad actor.¹⁴⁶ Moreover, the debtor owed this penal debt to the Wisconsin Department of Corrections, and thus the risk of nonpayment could be spread to multiple parties. Indeed, had the debtor not been in prison, medical debt accrued from a failed suicide attempt would have been dischargeable.¹⁴⁷ Also, if the incarcerated individual had a claim against the prison or a correctional officer for a civil rights violation, the correctional officer could seek discharge of any debt owed as a result of this claim, even though a civil rights violation seemingly implicates misconduct concerns and the Department of Corrections could absorb the costs of nonpayment.

Similarly, fines and fees associated with parking tickets, license suspensions, and even overgrown grass are categorically nondischargeable in Chapter 7 but do not indicate that the debtor engaged in misconduct, especially since it has been well-documented that ticket debt disproportionately affects low-income, mostly Black neighborhoods.¹⁴⁸ For example, a man with limited income and who was on food stamps received a citation for staying in his condemned home of twenty-five years and letting the grass grow too high. Atkinson explained that “he did not comply with the law because, rather than being essentially dishonest, he had nowhere else to live but in that broken down-

<https://www.bls.gov/oes/current/oes333051.htm> [<https://perma.cc/F5QM-VGMZ>] (noting that the national average wage of a police officer is \$67,600).

144. 11 U.S.C. § 523(a)(17) (prison debt); see Atkinson, *supra* note 6, at 950.

145. Atkinson, *supra* note 6, at 945, 947 (“Liability stemming from negligent and reckless tortious conduct arguably similarly implicates the misconduct, public policy, and federalism frames, yet unlike penal debts, these debts are readily dischargeable.”). Atkinson found that the analytical frames applied to student loan debt are not used to prevent discharge of other debts that implicate the same concerns. *Id.* at 945 (“Some debts that implicate the same misconduct, public policy, and/or federalism concerns as penal debt or student loan debt are nonetheless fully dischargeable.”).

146. At the time of the debtor’s bankruptcy filing, he was incarcerated and was receiving nine dollars a month in his prison trust account, which the Department of Corrections withheld to repay his debt. *In re Reimann*, 436 B.R. 564, 566 (Bankr. E.D. Wis. 2010).

147. See Jacoby, *supra* note 67, at 252 (“Medical debt generally can be discharged, as it gets no priority or non-dischargeable treatment in the U.S. bankruptcy system.”).

148. Atkinson, *supra* note 6, at 949–50; see also Morrison & Uettwiller, *supra* note 119, at 186–87.

dwelling on his limited income.”¹⁴⁹ Further, the fact that municipalities, like the one in the above example, are able to absorb some lost revenue suggests that discharge of this type of debt should be allowed. By contrast, a municipality that is responsible for administering nondischargeable penal debt can itself discharge debt owed to individuals for civil rights violations through bankruptcy.¹⁵⁰

The nondischargeability provisions also have unintended effects on individuals with student loan debt. Student loan debts are presumptively nondischargeable to preempt a potential moral hazard.¹⁵¹ Dalié Jiménez and Jonathan Glater investigated this purported moral hazard for the nondischargeability of student loan debt—that students could opportunistically use the bankruptcy process to discharge their debts shortly after graduating and before starting their “lucrative careers.”¹⁵² However, Jiménez and Glater found that the moral hazard concern was overblown. Less than one percent of student loans were forgiven in bankruptcy, the average student loan was forgiven over three years after graduation, and individuals in lucrative careers were not significantly represented among debtors seeking discharge.¹⁵³

Jiménez and Glater noted that the nondischargeability of student loans, especially after Congress made private student loans presumptively nondischargeable under Section 523(a)(8) of the Code in its 2005 bankruptcy reform, is especially burdensome to socio-economically marginalized individuals.¹⁵⁴ They reported that private, for-profit universities specifically target Black and Latine and other marginalized groups like women, immigrants, single parents, and military veterans.¹⁵⁵ Furthermore, Black college graduates are more likely to take out loans to finance their education and earn less after graduation, and they are therefore disproportionately affected by the Bankruptcy Code’s presumptively nondischargeable educational loan provision.¹⁵⁶ Jiménez and Glater argued that student indebtedness systematically disadvantages students belonging to historically subordinated groups.¹⁵⁷ They also argued that

149. *Id.*

150. Melissa B. Jacoby and Mary Ellen Goode have analyzed the discharge of debts stemming from civil rights violations in municipal bankruptcies. *See, e.g.*, Melissa B. Jacoby & Mary Ellen Goode, *Who Pays for Police Misconduct in Bankrupt Cities?*, 1, 15 (Sept. 20, 2016) (U.N.C.L. Stud., Research Paper No. 2796582).

151. *See, e.g.*, Jiménez & Glater, *supra* note 92, at 181.

152. *Id.*

153. *Id.* at 182–83 (indicating the findings were as of 2019).

154. *Id.*

155. *Id.* at 145–46.

156. Abbye Atkinson, *Race, Education Loans & Bankruptcy*, 16 MICH. J. OF RACE & L. 1, 12 (2010) (“Congress’s support of education through federal funding of educational loans as well as its policy of making those loans practically nondischargeable in bankruptcy . . . may impose a greater burden on African Americans, or other similarly situated borrowers, if these borrowers are less likely to realize the protective benefits of a college education.”).

157. Jiménez & Glater, *supra* note 92, at 131 (noting that “student indebtedness works systematically to disadvantage those students who belong to groups historically subordinated”).

there are disparate income and employment outcomes based on race.¹⁵⁸ Christopher Odinet added that disparities in educational price and educational loans result in Black and Latine students paying more for education.¹⁵⁹ And Foohey, Lawless, and Thorne argued that, even if student loans could be easily forgiven in bankruptcy, that does not change the fact that Black and Latine students pay for more student loans.¹⁶⁰ In fact, “because education does not achieve income parity for Black workers, the disproportionate debt Black students are taking to finance their education is reinforcing the racial wealth gap.”¹⁶¹ The nondischargeability of these loans does not prevent a moral hazard as intended, but creates unintended costs that are borne disproportionately by Black and Latine people.

There is also no risk spreading justification for the nondischargeability of student loans. A private student loan company can increase interest rates to account for potential nonpayment, while government lenders can absorb some lost revenue due to nonpayment of student loans. As such, student loan debt is akin to tax debt, since often the debt is owed to the government, which can absorb and spread the cost of nonpayment among the tax base.

The nondischargeability of penal debt and student loan debt, coupled with the dischargeability of debt stemming from civil rights and employment law violations, prevents an already economically marginalized group of people from discharging burdensome debt while simultaneously preventing them from receiving monetary compensation for violations of their rights. This blocks an avenue of economic relief and runs counter to the economic rehabilitation theory of the bankruptcy discharge provisions because it prevents these individuals from becoming consumer-spending economic units.

B. Public and Private Considerations of the Internal Inconsistencies

Individuals in economically marginalized groups have very few avenues for economic mobility. One such avenue is the right to collect damages from a legal violation.¹⁶² However, the bankruptcy debt relief provisions that discharge

158. *Id.* at 132–36 (overviewing disparate income and employment outcomes based on race and ethnicity among similarly educated individuals).

159. Christopher K. Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617, 1666–73 (2019) (detailing disparities in education price and education loans that result in Black and Latine students paying more for education).

160. Foohey et al., *Portraits II*, *supra* note 107, at 635–36.

161. Andre Perry, Marshall Steinbaum & Carl Romer, *Student Loans, the Racial Wealth Divide, and Why We Need Full Student Debt Cancellation*, BROOKINGS INST. (June 23, 2021), <https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/> [https://perma.cc/HW8T-P4AL].

162. See generally Gavin Wright, *The Regional Economic Impact of the Civil Rights Act of 1964*, 95 BOSTON U. L. REV. 759 (2015). But see Ehud Guttel, Alon Harel & Shay Lavie, *Torts for Nonvictims: The Case for Third-Party Litigation*, 2018 U. ILL. L. REV. 1049, 1061 (2018) (“[P]oor, women, and minorities . . . are less likely to receive high economic damages, and given that the compensation they get is lower than their litigation costs, it is often rational on their part not to sue.”).

civil rights and employment violations impede this avenue for economic mobility. For example, in the hostile work environment case discussed above, the employee was a poor Black man who had very little recourse or power in either his workplace or the bankruptcy system, which allowed the debt owed to him to be discharged. In the unpaid wage cases, the employees were low-wage workers who suffered through unpaid labor, a lawsuit, and a bankruptcy proceeding, where the court ultimately discharged their claims. These workers were all women or people of color, which is unsurprising since workers of color are more likely to be victims of wage theft.¹⁶³ Similarly, employees who have been fired due to either disability or racial discrimination lose any monetary damages they are due when the employer discharges those obligations in bankruptcy. Most of these employees are also women or people of color.

Women, particularly women of color, are already more likely to be in a precarious financial situation before the debt obligations owed to them are discharged. Women of color are more likely to be unjustly fired and victims of sexual harassment and assault in the workplace.¹⁶⁴ This is especially true for women of color in poverty.¹⁶⁵ In their capacity as co-investigators on the Consumer Bankruptcy Project, Pamela Foohey, Robert Lawless, and Deborah Thorne have detailed that while all women in bankruptcy make less money than men, Black women especially make less.¹⁶⁶ They also note that Black women are more likely to face unstable employment, have their hours cut, get laid off,¹⁶⁷ face difficulty finding affordable and reliable childcare,¹⁶⁸ and, if they are awarded child support, be less likely to collect that child support.¹⁶⁹

Black women exemplify the social and economic disadvantages at the intersection of class, race, and gender.¹⁷⁰ In the *Tompkins* case, race, class, and gender intersected in a discharge of a sexual harassment settlement claim.¹⁷¹ Despite being subject to unwanted sexual harassment and molestations, the retail worker, a Black woman, was unable to prevent the discharge of her settlement

163. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> [<https://perma.cc/HRV7-82RW>] (finding that “workers of color are more likely to experience minimum wage violations than [W]hite workers”).

164. Frye, *supra* note 65; see also Hernández, *supra* note 65, at 185.

165. Frye, *supra* note 65 (“More than one-quarter of sexual harassment charges were filed in industries with large numbers of service-sector workers, including many low-wage jobs that are often occupied by women.”).

166. See Foohey et al., *Portraits II*, *supra* note 108, at 628.

167. *Id.*

168. *Id.*

169. *Id.*

170. Pamela Foohey & Nathalie Martin, *Fintech's Role in Exacerbating or Reducing the Wealth Gap*, 2021 U. ILL. L. REV. 459, 461 (“Every link is part of a larger chain of discrimination that prevents people of color from converting their income into wealth, thereby deepening the wealth gap.”); see also Foohey et al., *Portraits II*, *supra* note 108, at 585 (“Income and wealth inequality have expanded drastically.”).

171. *Voss v. Tompkins (In re Tompkins)*, 290 B.R. 194, 196–97 (Bankr. W.D.N.Y. 2003).

claim against her employer.¹⁷² As applied to civil rights and employment violations, the standard of intent and maliciousness required for a court to find a debt nondischargeable under Section 523(a)(6) can create an insurmountable obstacle for victims who hold these awards. The 523(a)(6) standard can be higher than what was required for the victim to prove the underlying case.¹⁷³

Moreover, individuals who obtain a civil award for wrongful conduct have already overcome often insurmountable standards in the civil courts.¹⁷⁴ Take, for example, a civil rights judgment against a police officer. Civil rights violations can usually be sustained with a finding of recklessness or negligence.¹⁷⁵ However, under *Geiger*, a finding of recklessness or negligence is insufficient to prevent the discharge of the civil rights violation judgment.¹⁷⁶ A plaintiff is required to not only prove that a police officer violated 42 U.S.C. § 1983, but also that the officer is not shielded by the qualified immunity doctrine.¹⁷⁷

In the context of employee workplace claims, including sexual assault and harassment claims, employees are often subject to mandatory arbitration, making it even harder for a plaintiff to receive a monetary award.¹⁷⁸ Employees subject

172. *Id.* at 202.

173. This does not apply to all civil violations; some are categorically nondischargeable. 11 U.S.C. § 523(a)(2) would prohibit the discharge of a civil violation that was caused by defrauding another out of property or money. Even if this was done recklessly or negligently, this type of civil violation is categorically nondischargeable and would not have to meet the high bar in Section 523(a)(6).

174. See Guttel et al., *supra* note 162, at 1061 (“Many victims’ failure to sue is not irrational. Theorists identify “rational apathy” on the part of victims resulting from the combination of sizeable litigation costs and the difficulties in proving negligence. Rational apathy may apply to the victim but need not apply to others who may be more informed than the victim or have greater resources. Further, rational apathy is more likely to affect the poor, women, and minorities. These groups are less likely to receive high economic damages, and given that the compensation they get is lower than their litigation costs, it is often rational on their part not to sue.”).

175. See *Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding that a defendant can be held liable under § 1983 upon a finding of recklessness or carelessness); see also *Brewer*, *supra* note 16, at 816 (citing cases that used the recklessness standard for claims under 42 U.S.C. § 1983); *Llaurado*, *supra* note 16, at 601 (discussing the use of the negligence standard for claims under 42 U.S.C. § 1983).

176. *Kawaauhau v. Geiger*, 523 U.S. 57, 63 (1998) (“[D]ebts arising from reckless[ly] or negligently inflicted injuries do not fall within the compass of § 523(a)(6).”).

177. See *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“The doctrine of qualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1614 (2011) (detailing the difficulty of overcoming qualified immunity).

178. See Alexander J.S. Colvin, *The Metastisization of Mandatory Arbitration*, 94 CHI.-KENT. L. REV. 3, 3 (2019) (“Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court. Although seemingly voluntary in that the employee or consumer can choose whether or not to sign the arbitration agreement, in practice signing the agreement is required if the individual wants to get the job.”); see also Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECON. POL’Y INST. (Dec. 7, 2015) <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/BS7J-MR9E>] (“Employees subject to mandatory arbitration can no longer sue for violations of many important employment laws, including rights to minimum wages and overtime pay, rest breaks, protections against discrimination

to mandatory arbitration are less likely to win and more likely to receive lower damage awards in arbitration.¹⁷⁹ Employers tend to win more often because they are repeat players to regular arbitration hearings, and the arbitrators are more likely to side with the employer over the employee.¹⁸⁰ However, in the cases detailed above, the plaintiffs were able to overcome these challenges and obtain an award that was then discharged in the bankruptcy system because *Geiger* requires a higher standard of culpability than civil rights and employee protection laws.

The risk-sharing justification for dischargeability seemingly collapses when the discharge of civil rights and employee protection violations are examined. These are debts that an individual perpetrator owes to their victim, and therefore it follows that the discharge of this debt can leave the victim in a worse economic state. The risk-spreading justification shows that the discharge of these debts creates costs that the victims of these actions bear.

Theoretically, if these debts were nondischargeable, the individual debtor would still be able to discharge other typical debts, which could leave the debtor with more money to pay the victims of their actions. When the perpetrator's debts are discharged, the victims of these civil rights and employment violations are left without recourse for the debts owed to them and are unable to simply raise interest rates or absorb costs like a creditor with multiple payers.

Yet, the practical effects of discharge are even more complex when analyzed in the workplace. In the public sector, the perpetrator of the violation is not always the entity that pays a victim of a civil rights violation. For example, there is widespread indemnification for police officers holding civil rights judgments. In a national study of police indemnification, Joanna C. Schwartz found that less than one percent of police officers "financially contributed to settlements and judgments."¹⁸¹ Instead, the municipalities employing these officers paid the settlements and the costs were spread to taxpayers.¹⁸² In the examples presented here, if the officers were able to discharge only a portion of

and unjust dismissal, privacy protection, family leave, and a host of other state and federal employment rights.").

179. Stone & Colvin, *supra* note 178 ("On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court.").

180. *Id.* ("Employers tend to win cases more often when they appear before the same arbitrator in multiple cases, indicating that they have a repeat-player advantage over employees from regular involvement in arbitration.").

181. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) ("Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases.").

182. *See id.* ("[M]y study reveals that taxpayers almost always satisfy both compensatory and punitive damages awards entered against their sworn servants."). *See, e.g.*, Matthew Russell Lee, *Police Brutality Bonds Raise Questions About Investments by Federal Reserve and UN*, INNER CITY PRESS (June 6, 2020), <http://www.innercitypress.com/policebrutality1munifedunicp060620.html> [https://perma.cc/D3CJ-N23E].

the civil rights judgment, the remaining portion could be indemnified by a municipality that then spreads those costs to taxpayers.

Municipalities that are already struggling financially or that have an overwhelming number of lawsuits against police officers each year can file bankruptcy and discharge those violations,¹⁸³ but they are likely to shift resources away from their most vulnerable populations to satisfy these lawsuits. For example, Chicago had to budget more for police tort liability, diverting funding away from lead poisoning screening programs for poor children. Consequently, “kids were paying those tort judgments, not the police officers.”¹⁸⁴ Thus, the costs are shifted to other individuals that are similarly economically marginalized as the victims of these lawsuits.

In the private sector, the other employees of the company may have to bear the costs of corporate malfeasance. In the unpaid wage case examples, if the employer were unable to discharge the damages awards, the employer may spread that cost to other employees by cutting hours, laying off employees, or closing the business completely.¹⁸⁵ Furthermore, the other employees affected may also be economically marginalized and harmed by the nondischargeability of that debt.

The internal inconsistencies of the debt discharge provisions also lead to economic inefficiencies for individuals who cannot discharge their debt. Pardo and Lacy explained that any exception to discharge encroaches on the fresh start principle and threatens the debtor’s ability to “reintegrate into society as an economically productive individual.”¹⁸⁶ They theorized that the debtor who is unable to achieve an economic fresh start will continue to be an economic burden on society.¹⁸⁷ The bankruptcy discharge protects human capital that “can be

183. Jacoby & Goode, *supra* note 150, at 39 (“[T]here is case law support for the proposition that a discharge of debt in bankruptcy can include a release of a city’s liability stemming from police misconduct claims. Due to the other requirements associated with municipal bankruptcy, including the eligibility threshold and good faith, it is unlikely that a city could file for bankruptcy solely for the purpose of shedding liability associated with unconstitutional police practices.”).

184. See Schwartz, *supra* note 181, at 1175.

185. See Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1470 (2016). Liscow explained that there are two positive externalities that result from keeping workers employed. The first is the savings to the government in the form of unemployment insurance and other safety net spending that is required for unemployed workers. The second is based on the Keynesian economic theory that “keeping one worker employed results in a ‘multiplier,’ through which increased spending by one employed worker results in more employment, further increasing spending and therefore employment.” *Id.*

186. Pardo & Lacey, *supra* note 69, at 417–18.

187. *Id.* John Weistart’s economic theory also supports this proposition. He explained that the more general externalities that arise with excessive debt, including the emotional pressure on the debtholder and their family, may inhibit productivity and result in the debtor exchanging leisure for wages. See John C. Weistart, *The Costs of Bankruptcy*, 41 LAW & CONTEMP. PROBS., 107, 111 (1977) (“Excessive debt, with its attendant pressure on family and emotional stability and job security, . . . [may] so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance.”). If the debt is not discharged, the debt would have to be paid out of future income, leaving the debtholder to devote more

seized only by seizing its ‘proceeds’ – that is, by garnishing wages if and when they are earned.”¹⁸⁸ Thomas H. Jackson explained, however, that when human capital is not protected by discharge, debtors may substitute leisure for wages.¹⁸⁹ Jackson noted that “[b]y largely exempting human capital from the bankruptcy estate, society avoids this undesirable externality.”¹⁹⁰ If this exchange occurs, the creditor will not get a payout anyway and will be in the same economic position as before the debtor filed bankruptcy.¹⁹¹

IV.

AN ARGUMENT FOR REFORM

Whereas the previous Section explained how the bankruptcy discharge provisions are applied inconsistently, this Section identifies solutions. Part IV.A makes policy suggestions to further reinforce the goal of ensuring that additional debtors can achieve an economic fresh start. This Section also argues that economic rehabilitation should be the primary goal of the consumer bankruptcy system and reintroduces the question of whether the nondischargeability provisions should be eliminated. Part IV.B will respond to potential concerns with the proposed reforms.

A. *Nondischargeability Reform*

Many consumer bankruptcy scholars have argued for expansive reforms to the consumer bankruptcy system that would eliminate some of the provisions that make it harder for certain debtors to obtain a fresh start. For example, the Consumer Bankruptcy Reform Act (CBRA),¹⁹² introduced by Senator Elizabeth Warren and House Judiciary Committee Chairman Jerrold Nadler, contemplates several systematic reforms to the consumer bankruptcy system that would lessen the disparate treatment of certain consumers in bankruptcy.¹⁹³ The CBRA would amend Section 523 to permit the discharge of debts like student loans and penal debt, which economically marginalized individuals are more likely to have.¹⁹⁴

The nondischargeability of penal debt hinders vulnerable members of marginalized groups from economically reentering society and should be forgiven in bankruptcy. Similarly, student loans should be forgiven in bankruptcy, just like every other unsecured consumer debt. Before 1976, student

time and resources to leisure than productivity. *See also* Jackson, *supra* note 7, at 1420 (“Requiring debts to be paid out of future income may lead an indebted individual to devote more of his energies and resources to leisure, a consumption item that his creditors cannot reach.”).

188. Jackson, *supra* note 7, at 1433.

189. *Id.*

190. *Id.*

191. *Id.* at 1422 (explaining that if a debtor chooses leisure over wages, the “Creditor receives *nothing*” (emphasis in original)).

192. Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. § 2 (2020).

193. *Id.*

194. *Id.*

loans were dischargeable after a waiting period of five to seven years.¹⁹⁵ Both student loans and penal debt can be subject to a period of time where they are not dischargeable, like tax debt, but then should be forgiven just like every other unsecured debt.

However, making student loan debt and penal debt dischargeable may not go far enough. The current system of discharge is underinclusive, and small reforms that make a few nondischargeable debts dischargeable do not address the system-wide issue that prevents individuals from discharging burdensome debts. One of the primary purposes of the consumer bankruptcy discharge is economic rehabilitation, and this goal is hindered when there are individuals excluded from debt relief.

The lack of symmetry in the debt discharge rules reflects the use of bankruptcy law to address nonbankruptcy problems. This misapplication can “obscure both proper bankruptcy policies and the proper nonbankruptcy solutions to these problems.”¹⁹⁶ For example, the bankruptcy system tries to prevent the discharge of debts based on “bad acts” and attempts to define culpability. This internal justification leads to asymmetrical treatment of civil rights and penal debt. This result may be more reflective of lobbying efforts than the internal justifications that the bankruptcy system touts.¹⁹⁷ The perverse outcomes in the bankruptcy system are a symptom of the inequality outside of the system. The bankruptcy system is only exacerbating these problems.

In an ideal system, there would not be any nondischargeable debt. If an individual cannot afford to pay their debts, there is not a compelling economic reason to keep them indebted. Although this proposal is arguably overinclusive, there is not a coherent internal policy that supports nondischargeability and does not result in harm to economically marginalized debtors. Normatively, the consumer bankruptcy system should provide debt relief for individuals that carry burdensome debt, regardless of the type of debt.

195. Education Amendment of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (1976).

196. Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1734 n.109 (2020).

197. The reason only certain debts are included in the nondischargeability provisions may be based on congressional campaign contributions and lobbying efforts that dictate which debts are dischargeable. For example, Victoria Nourse and Jane Schacter reported that Congress extensively engages lobbyists on bankruptcy issues, especially on the House side. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 587 (2002). Also, Senate staffers reported that lobbyists play a pervasive role in the actual drafting process of bankruptcy legislation. See Jacob M. Schlesinger, *As Bankruptcies Surge, Creditors Lobby Hard to Get Tougher Laws*, WALL ST. J., June 17, 1998, at A1 (explaining how a consumer lending coalition helped draft parts of the House bankruptcy reform bill); see also Yochi J. Dreazen, *Bankruptcy Reform Pits Industries Against Each Other*, WALL ST. J. (Apr. 20, 2000), <https://www.wsj.com/articles/SB956190400436100575> [<https://perma.cc/6GHV-Z8EU>] (“[I]n the back rooms of Capitol Hill, the nature of the fight changes. Industry lobbyists, many ostensibly allied in favor of bankruptcy-overhaul legislation, vie to carve out as many favors for their clients as possible at the expense of other business groups.”).

Elimination of the nondischargeability provisions would not change the case outcomes in Part I. Individuals who have violated other people's civil rights or employee rights would be able to discharge that debt in bankruptcy. These discharges would still result in economic harm to their victims, assuming the debtors could afford to pay their victims something in the future and would continue to work to do so. However, if these debts were not discharged, the costs could be shifted to similarly economically marginalized individuals. Therefore, the proposal to encompass economically marginalized individuals to carry previously nondischargeable debt lessens the double harm because these individuals would also be able to discharge their burdensome debt. In other words, a police officer could obtain a discharge of his civil rights violations, and an individual that is fined for fleeing from the police could similarly discharge their debt. The economic rehabilitation theory of discharge necessitates these case outcomes.

B. Potential Concerns and Responses

Even a moderate reform that would allow individuals carrying penal debt and student loan debt to discharge them is not without potential concerns. This Section addresses two such concerns and demonstrates why these targeted reforms are nonetheless the best avenue to begin eliminating the double harm of the nondischargeability provisions and provide an economic fresh start for these debtors.

1. Moral Hazard and Culpability Concerns

One of the primary concerns with making additional debt dischargeable is that individuals will take advantage of the bankruptcy system and discharge debts that they can afford to pay. However, there are good-faith filing requirements already in the bankruptcy system that would prevent individuals who can afford to pay their debts from discharging them.¹⁹⁸ Also, bankruptcy is not cost-free. There are fees associated with filing bankruptcy, including attorney's fees, which have increased substantially since 2005.¹⁹⁹ Individuals who discharge their debts in Chapter 7 must also give up any nonexempt

198. For example, the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act requires debtors that file Chapter 7 to pass a "means test" to determine the debtor's ability to pay. *See* Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

199. *See* Foohey, *supra* note 118, at 423. The Chapter 7 filing fee is \$335, and on average attorneys charge \$1224 to assist Chapter 7 debtors.

assets.²⁰⁰ Once a person exits bankruptcy, there are future costs like higher interest rates and loss of opportunities for future extensions of credit.²⁰¹

We might also be concerned about allowing culpable individuals, like those holding debts from criminal fines, to receive debt relief through the bankruptcy system. Bankruptcy courts forgiving penal debt or tort debt stemming from culpable conduct would seem to infringe on the public policy of punishment and deterrence, allowing a “bad actor” to use the bankruptcy system to avoid paying these debts.

Still, the present bankruptcy system does allow individuals found liable for culpable conduct, such as police officers that commit civil rights violations and employers who sexually harass their employees, to get released from monetary liability. Yet, penal debt is not always based on culpability and can stem from something as innocuous as overgrown grass or parking tickets. Given the unequal burden of penal debt on poor, Black, and Latine individuals, it would be better to forgive all penal debt. To the extent that the nondischargeability provisions serve as a mechanism to prevent culpable individuals from ridding themselves of liability, this mechanism has not been applied equitably across all culpable conduct. Therefore, culpability should not be a bar to debt forgiveness.

2. *Risk of Discharging More Debts Owed to the Government*

Another potential concern lies in the forgiveness of debt owed to the government. This Article argues that, under the risk spreading justification for dischargeability, municipalities can absorb some lost revenue from non-payment for a handful of consumer debtors that file for bankruptcy. However, in the tax priority debates in bankruptcy, one potential concern with spreading the cost of unpaid tax debt to the government is that “the government’s risk burden impacts various important societal and economic functions that the government is required to perform outside of bankruptcy.”²⁰² The argument follows that any increased bankruptcy risk to the government must be weighed against its existing social insurance role.²⁰³

This concern is understandable in the context of tax debt and the traditional notion of the consumer bankruptcy system as a social safety net for the middle

200. See Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2297, 2306 (2019) (“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.”).

201. Jackson, *supra* note 7, at 1427 (“[B]y using bankruptcy in order to obtain a discharge, the individual puts others on notice that he might resort to it again. By exercising his right of discharge, then, the individual may decrease his access to credit in the future.”).

202. See, e.g., Shu-Yi Oei, *Taxing Bankrupts*, 55 B.C. L. REV. 375, 375, 378 (2014) (arguing that “the government’s share of debtor default risk should be limited through the grant of tax priority because . . . the government is constrained in its ability to diversify against such risk via both substantive tax policy and changes in tax administration”).

203. *Id.* at 407.

class.²⁰⁴ Arguably, the government should not absorb additional risk from the middle class for unpaid tax debt if it means that a safety net is transferred away from groups that receive welfare benefits, like Medicaid or Supplemental Nutrition Assistance Program (SNAP). However, the reform proposed in this Article creates access to bankruptcy discharge for economically marginalized debtors who carry nondischargeable debts in the current system. These debtors, who do not necessarily fit the criteria for the middle class (and the rhetorical appeal of making middle class beneficiaries of the bankruptcy system)²⁰⁵ may instead overlap with the group of economically marginalized individuals that rely on the government's social safety net programs outside of bankruptcy. For example, it is not hard to imagine that a debtor who is burdened by penal debt also relies on a SNAP program for food. Under the proposed reforms, municipalities would absorb the loss of the unpaid penal debt, but the debtor, no longer burdened by this unpaid penal debt (and the compounding debt that follows unpaid penal debt),²⁰⁶ may be able to reenter the economic marketplace and no longer rely on the government's assistance for food.

CONCLUSION

The consumer bankruptcy discharge provisions advantage certain debtors over others. The debt relief options available to more privileged individuals, together with the nondischargeability provisions that prevent socioeconomically marginalized individuals from discharging their own debt obligations, doubly harm the most disadvantaged members of society. The proposed reforms to penal and student loan debt can begin to eliminate these inequities. Elimination of the nondischargeability provisions would be a major change in law. However, this Article reinvigorates a dialogue about who is helped and hurt by the nondischargeability provisions. This Article challenges bankruptcy law to include economically marginalized populations in discussions about the proper role of the bankruptcy system. These individuals are also deserving of a fresh start in the consumer bankruptcy system.

204. See Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 116 (2003) (observing that more than 90 percent of families in bankruptcy are middle class); Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1071–73 (2004) (suggesting that while other social safety net programs are designed for the lower classes, bankruptcy appears to provide a safety net for middle-class individuals who may not qualify for other social safety net programs); 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.”).

205. See, e.g., Atkinson, *supra* note 6, at 974.

206. See, e.g., Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 290–91 (2014) (“The cycle of economic sanctions, interest, collections, and incarceration can be financially devastating. In addition to the direct financial burden, the initial and ongoing imposition of economic sanctions has been associated with difficulties in obtaining and maintaining employment, a necessity that is already difficult for individuals with a criminal record to obtain.”).