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## FINES, FEES, AND FILING BANKRUPTCY\*

PAMELA FOOHEY\*\*

When faced with mounting civil or criminal court fines, fees, and interest—“court debt,” as broadly defined—people may consider turning to the bankruptcy system to deal with that debt.<sup>1</sup> Every year, about a million people file bankruptcy, seeking to discharge most of their debts.<sup>2</sup> Although most court debt is categorically nondischargeable,<sup>3</sup> bankruptcy’s discharge may provide people struggling with court debt a way to wipe the slate somewhat clean so they have a better chance of paying such debt. Also, people who file bankruptcy under chapter 13—one of the two most common chapters filed by consumers—are entitled to a so-called “superdischarge” that provides for the discharge of a few categories of debt that are not dischargeable in chapter 7.<sup>4</sup> These categories include certain debts that fall under a broad definition of court debt.<sup>5</sup>

Thus, for some people, filing bankruptcy may help them avoid incarceration because of their inability to pay court debt.<sup>6</sup> Failure to pay court

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1. See Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 919 (2017) (defining “penal debt” similarly).

2. See Pamela Foohey et al., “*No Money Down*” *Bankruptcy*, 90 S. CAL. L. REV. 1055, 1056–57, 1057 n.1 (2017) [hereinafter Foohey et al., *No Money Down*] (detailing consumer bankruptcy filing statistics). For historical bankruptcy filing data for the years 2001–19, see generally *Bankruptcy Filings*, U.S. COURTS, <https://www.uscourts.gov/report-name/bankruptcy-filings> [https://perma.cc/57KV-GEX6]. Not all debts are dischargeable. 11 U.S.C. §§ 523, 727, 1328 (2012) (providing for the discharge).

3. See Atkinson, *supra* note 1, at 927–29 (discussing exceptions to the discharge); see also *infra* notes 19–26 and accompanying text.

4. See Atkinson, *supra* note 1, at 938 (discussing the “superdischarge”); see also *infra* notes 16–18 and accompanying text (discussing chapters 7 and 13).

5. See *infra* notes 23–28 and accompanying text.

6. See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, N.Y.U. SCH. OF LAW, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 1–2 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [https://perma.cc/T9WP-N545] (linking inability to pay court debt to incarceration); see also Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, APPEAL (July 16, 2018), <https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/> [https://perma.cc/Z54C-EV4K] (discussing how criminal justice system fees and fines can lead to incarceration); Joseph Shapiro, *Jail Time for Unpaid Court Fines and Fees Can Create Cycle of Poverty*, NPR (Feb. 9, 2015), <https://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty> [https://perma.cc/2PB5-6RZB] (detailing the story of a man who

debt may also result in driver's license suspension, which can lead to job loss, further exacerbating people's debt problems.<sup>7</sup> Bankruptcy law likewise may require that license suspensions be lifted.<sup>8</sup> The threat of incarceration, license suspension, and job loss is particularly acute for racial minorities and economically vulnerable individuals—the very people at high risk of plunging into “socially undesirable debt spirals” that may lead them to consider bankruptcy.<sup>9</sup>

In addition to whether bankruptcy will relieve them of their pressing debts, people who think about filing as an option to deal with their court debt face another, less obvious concern about filing bankruptcy. The consumer bankruptcy system itself is part of the court-debt machine and may perpetuate the inequalities that lead people to need to turn to it for help.

Every year, the number of bankruptcy cases filed is twice the number of other cases filed in federal courts.<sup>10</sup> For example, in 2017, debtors filed about 790,000 bankruptcy petitions; in comparison, about 395,000 cases were filed in federal district courts and courts of appeal.<sup>11</sup> The vast majority of these bankruptcy petitions are filed by consumer debtors, meaning that filing and other fees paid by the people who file bankruptcy are an important source of funds for the federal judiciary.<sup>12</sup>

Of perhaps more concern, filing bankruptcy is so difficult that to succeed, the vast majority of people need to retain an attorney.<sup>13</sup> But bankruptcy

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was jailed for failure to pay fines for letting grass grow too high and for not getting a rabies vaccine for his dog).

7. See Brand, *supra* note 6 (noting the link between driver's license suspension and job loss).

8. See, e.g., Stephen G. Murphy & Allen Rosenberg, *Driver's License Suspensions for Delinquent Taxes and Bankruptcy*, AM. BANKR. INST. J., July 2013, at 18, 19; *Bankruptcy Filing for Driver's License Suspension/Revocation*, LA. DEP'T PUB. SAFETY, OFF. MOTOR VEHICLES (2018), <http://web01.dps.louisiana.gov/omv1.nsf/58c968bd569b099986256cdc00806eb/29fd7c623737cecb862564b600484c73?OpenDocument> [<https://perma.cc/KEH3-Q64U>].

9. Atkinson, *supra* note 1, at 920.

10. See generally *Federal Judicial Caseload Statistics*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [<https://perma.cc/BK84-88GH>] (reporting the workload of courts of appeals, district courts, and bankruptcy courts for calendar years 2001–2018).

11. *Federal Court Funding*, A.B.A., [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/federal-court-funding/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding/) [<https://perma.cc/V5NF-Y36Y>] (last updated Oct. 8, 2019).

12. In 2017, 765,863 (or ninety-seven percent) of the total 789,020 bankruptcy petitions filed were “nonbusiness” cases. *Table F-2—Bankruptcy Filings (December 31, 2017)*, U.S. COURTS, <https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2017/12/31> [<https://perma.cc/SCZ6-P2PS>]. The filing fee for chapter 7 is \$335 and for chapter 13 is \$310. *Bankruptcy Filing Fees and Costs*, NOLO, <https://www.nolo.com/legal-encyclopedia/bankruptcy-filing-fees-costs.html> [<https://perma.cc/T93W-8BES>]. Assuming that every person who filed a “nonbusiness” bankruptcy case in 2017 paid the filing fee, those fees would amount to about \$250 million.

13. See Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 229 (2018) [hereinafter Foohey et al., *Life in the Sweatbox*] (detailing the barriers people face to filing bankruptcy, and that “90.1% of all debtors used an attorney to file their bankruptcy cases”); Pamela Foohey, *Access*

attorneys are expensive.<sup>14</sup> Related to this expense and attorneys' crucial role in facilitating people's access to consumer bankruptcy, research shows that the system itself replicates economic and racial inequalities in society.<sup>15</sup> Although filing bankruptcy on balance may help people deal with court debt and other debts, as detailed in Part I, the barriers that people face to filing, discussed in Part II, raise questions about the accessibility of civil courts and suggest that the consumer bankruptcy system itself is yet another place in which race (and to a lesser extent, economic class) matters in accessing the law's benefits.

### I. BANKRUPTCY'S DISCHARGE

People who file bankruptcy essentially have two options: chapter 7 or chapter 13.<sup>16</sup> The primary end goal of both chapters is for the debtor to receive a discharge of debts.<sup>17</sup> Chapter 7 is akin to liquidation. The debtor turns over non-exempt property to be sold. The proceeds from sales are used to pay the debtor's creditors. This process takes about six months, after which the debtor receives a discharge of most unpaid debts. Chapter 13, in contrast, is akin to reorganization. The debtor keeps all property and, in return, pays a portion of future income to creditors over a three- to five-year repayment plan. Only upon plan completion does the debtor receive the discharge.<sup>18</sup>

Not all debts are discharged at the conclusion of a chapter 7 or chapter 13 case. In chapter 7,<sup>19</sup> nondischargeable debts include "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit,"<sup>20</sup> debts from fees and other court costs "imposed on a prisoner" or "assessed with respect to" a prisoner filing a civil action or appeal,<sup>21</sup> and court or administrative costs stemming from violations of federal and state securities laws.<sup>22</sup>

These exemptions to discharge likewise apply in chapter 13, with the exception of those debts included in the superdischarge.<sup>23</sup> In exchange for

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to *Consumer Bankruptcy*, 34 EMORY BANKR. DEV. J. 341, 357 (2018) [hereinafter Foohey, *Access to Consumer Bankruptcy*] (noting statistics showing that pro se debtors fare considerably worse as compared to represented debtors).

14. Foohey et al., *Life in the Sweatbox*, *supra* note 13, at 229 (noting how much attorneys charge debtors).

15. See *infra* notes 41–51 and accompanying text (discussing this research).

16. Foohey et al., *Life in the Sweatbox*, *supra* note 13, at 226 (detailing bankruptcy filing statistics).

17. See Atkinson, *supra* note 1, at 923 (noting that the discharge represents the "fresh start" promised by the consumer bankruptcy system).

18. See Foohey et al., *Life in the Sweatbox*, *supra* note 13, 226–27 (detailing chapter 7 and chapter 13).

19. 11 U.S.C. § 727 (2012) (providing for discharge in chapter 7).

20. *Id.* § 523(a)(7) (providing for the discharge of debt owed to a governmental unit if it is for compensation of "actual pecuniary loss," under which almost no court debt qualifies).

21. *Id.* § 523(a)(17).

22. *Id.* § 523(a)(19).

23. *Id.* § 1328 (providing for discharge in chapter 13); Atkinson, *supra* note 1, at 938 (noting the superdischarge).

committing their future income to the repayment plan, by which they pay their creditors a greater percentage of amounts owed, debtors are afforded a discharge of more debts in chapter 13 than chapter 7.<sup>24</sup> Not included in the superdischarge—and thereby nondischargeable—is a “restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.”<sup>25</sup> Chapter 13’s superdischarge 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.<sup>26</sup>

Filing bankruptcy also activates an automatic stay, which halts most actions that would adversely affect the debtor’s finances or property, such as bank account and wage garnishment.<sup>27</sup> As relevant to government-assessed debt, courts generally hold that the automatic stay requires the lifting of license suspensions related to certain fines and allows people to prevent their cars from being booted while their bankruptcy case is pending.<sup>28</sup> Although applicable to chapter 7, this is more relevant to chapter 13 because the proceeding lasts for the three to five years of the debtor’s repayment plan.<sup>29</sup> For instance, in Chicago, where each year the city issues more than three million tickets related to traffic and vehicle violations, filing chapter 13 has become a leading option to deal with the resulting debts.<sup>30</sup>

Overall, filing chapter 13 presents a viable option to deal with those governmental fines and fees subject to the superdischarge and with some of the consequences of court debt, such as the booting of vehicles and license suspension. However, neither filing chapter 7 nor chapter 13 will allow people to address the subset of “penal debt” linked to criminal fines.<sup>31</sup> But in these

24. See Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 667–70 (2005) (explaining why people who file chapter 13 are granted a more expansive discharge).

25. § 1328(a)(3).

26. 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).

27. 11 U.S.C. § 362 (2012); see also Foohey et al., *Life in the Sweatbox*, *supra* note 13, at 226 (noting the stay).

28. See Murphy & Rosenberg, *supra* note 8 (discussing states revoking licenses to collect delinquent fines, fees, and taxes, and filing bankruptcy to stave off the revocation of license or to have a license reinstated); Sanchez & Kambhampati, *supra* note 26 (noting the automatic stay).

29. See Foohey et al., *Life in the Sweatbox*, *supra* note 13, 226–27.

30. See Sanchez & Kambhampati, *supra* note 26 (detailing people’s issues paying traffic and vehicle tickets in Chicago).

31. See Atkinson, *supra* note 1, at 919; see also *supra* notes 19–26 and accompanying text.

instances, bankruptcy still may help people facing court debt by discharging some of their other debts, thereby freeing up money to pay court debt.<sup>32</sup>

## II. BARRIERS TO FILING BANKRUPTCY

Although filing bankruptcy offers a way for people to address their court debt, as well as other mounting debts, the consumer bankruptcy system itself has long-standing “access to justice” issues.<sup>33</sup> Only about one-third of debtors who file chapter 13 are able to complete their repayment plans such that they receive the discharge; the remaining two-thirds of cases are converted to chapter 7 or simply dismissed.<sup>34</sup> If a case is converted or dismissed, the debtor will not receive chapter 13’s superdischarge, and any salutary effects of the automatic stay will end.<sup>35</sup>

Beyond the reality that, for many chapter 13 debtors, bankruptcy represents little more than a temporary respite from debt collection, filing is expensive, especially for people already facing unmanageable debts.<sup>36</sup> Attorneys charge their clients on average \$1224 to assist with a chapter 7 case and \$3442 to assist with a chapter 13 case.<sup>37</sup> Thus, how people find the money to pay these fees is one of the most enduring access to justice issues in consumer bankruptcy and one particularly relevant to those people who decide to use bankruptcy to discharge some of their other debts so they are better able to pay court debts.

As evident by the overview of chapter 7 and chapter 13,<sup>38</sup> which chapter someone files determines that person’s experience in and after bankruptcy. Although one may presume that people choose which chapter to file based on their financial characteristics and what the Bankruptcy Code allows, in actuality there are substantial (and enduring) regional variations in the proportion of households that file chapter 7 versus chapter 13.<sup>39</sup> For example, in 2015, 6.7% of the consumer cases filed in the Northern District of Iowa were chapter 13; in

32. Separate from court debt, not all other debts are dischargeable. For example, student loans are nondischargeable absent a showing of “undue hardship.” 11 U.S.C. § 523(a)(8) (2012).

33. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitration*, 96 N.C. L. REV. 605, 610–12 (2018) (discussing access to justice in the courts and linking it to access to legal knowledge); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 340 (2008) (defining “access to justice” as “people’s experiences with civil justice events, organizations, and institutions”).

34. See Foohey et al., *Life in the Sweatbox*, *supra* note 13, at 227 (detailing chapter 13 completion rates).

35. See Foohey et al., *No Money Down*, *supra* note 2, at 1062–63.

36. See Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 112 (2011) (noting that for many people who filed chapter 13, “relief was only temporary”).

37. Foohey et al., *Life in the Sweatbox*, *supra* note 13, at 229 (overviewing attorneys’ fees).

38. See *supra* notes 16–18 and accompanying text.

39. See Robert M. Lawless & Angela Littwin, *Local Legal Culture from R2D2 to Big Data*, 96 TEX. L. REV. 1353, 1358–60 (2018) (discussing regional variations over time).

contrast, 80.3% of the cases filed in the Western District of Louisiana were chapter 13.<sup>40</sup>

Differences in financial and other relevant characteristics of filing households cannot explain the regional disparities in chapter choice. Rather, over the past decades, scholars have linked the disparities to “local legal culture”—the “systematic and persistent variations in local legal practices” that derive from “perceptions and expectations shared by many practitioners and officials in a particular locality.”<sup>41</sup> Stated succinctly, people’s chapter choice appears to be guided by system actors, particularly attorneys.<sup>42</sup>

Later research that built upon findings regarding regional disparities further found that debtors’ race, separate from where they live, is predictive of chapter 13 filings. Several studies have shown that black households are much more likely to file chapter 13 than similarly situated households of other demographics.<sup>43</sup> In addition, a study conducted by Jean Braucher, Dov Cohen, and Robert Lawless explored what may influence this racial disparity and concluded that attorneys may guide chapter choice, in part producing the disparity.<sup>44</sup>

Bankruptcy attorneys also have a monetary interest in debtors’ chapter choice given that they make more in fees from chapter 13 cases.<sup>45</sup> Under the Code section providing for attorney payment, chapter 7 clients effectively must pay the full attorneys’ fees before filing, while chapter 13 clients may pay part or all of the attorneys’ fees through the repayment plan.<sup>46</sup> This results in what my co-authors and I have termed “no money down” bankruptcy—filing chapter 13 and paying nothing in attorneys’ fees before filing.<sup>47</sup> Based on our original

40. Foohey et al., *No Money Down*, *supra* note 2, at 1064; *see also* Foohey, *Access to Consumer Bankruptcy*, *supra* note 13, at 358 (citing examples of other regional disparities).

41. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 804 (1994).

42. *See* Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 30 (1998) (discussing who exercises “the ‘choices’ given to debtors”).

43. *See* Foohey, *Access to Consumer Bankruptcy*, *supra* note 13, at 359 (discussing this research); *see also* Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 406 (2012) (relying on data from consumer bankruptcy filings to find that black households were much more likely to file chapter 13 than other similar households of different racial and ethnic demographics).

44. Braucher et al., *supra* note 43, at 407 (detailing the results); *see also* Edward R. Morrison & Antoine Uetwiller, *Consumer Bankruptcy Pathologies*, 173 J. INSTITUTIONAL & THEORETICAL ECON. 174, 194–95 (2017) (finding that some of the racial disparity in chapter choice in Cook County, Illinois, may be attributable to parking tickets and government fines).

45. *See supra* note 37 and accompanying text. *See generally* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012) (discussing fee trends in chapter 7 versus chapter 13 bankruptcy filings).

46. *See* Foohey et al., *No Money Down*, *supra* note 2, at 1066–68 (discussing this provision and related case law).

47. *Id.* at 1059.

data, “no money down” bankruptcy is an increasingly prevalent way for people to fund their bankruptcies,<sup>48</sup> so much so that it is reshaping the consumer bankruptcy system by pushing certain households to file chapter 13 versus chapter 7.

This reshaping of the system is concerning for a couple of important reasons. First, two factors that have nothing to do with consumers’ legal and financial circumstances determine whether they will file a “no money down” chapter 13 case—where they live and their race.<sup>49</sup> When controlling for other relevant factors that might influence which chapter a household files, as the rate of chapter 13 filings increased in a given location, the percentage of “no money down” cases filed also increased, along with the racial disparity of chapter choice in that location.<sup>50</sup> This suggests that much of the racial disparity in chapter choice relates to “no money down” chapter 13 bankruptcy and debtors’ finances.<sup>51</sup> Indeed, that attorneys’ monetary interest in chapter choice may manifest along racial lines is consistent with literature about implicit bias.<sup>52</sup>

Second, as noted, people who file chapter 13 face an uphill battle to complete their repayment plan and receive the discharge.<sup>53</sup> The racial disparity in chapter choice is concerning on the basis of equal access to civil courts. But it is even more troubling upon realizing that certain households pay about \$2200 more to file bankruptcy only to receive a discharge in a minority of their cases. In comparison, more than ninety-five percent of households that file chapter 7 receive a discharge.<sup>54</sup>

In short, through its persistent “local legal culture” and effectively Code-mandated attorneys’ fee payment structure, the consumer bankruptcy system itself has become yet another instance in which race (and to a lesser extent, economic class) matters in the court system.<sup>55</sup> Filing bankruptcy may help

48. *Id.* at 1074–75 (finding that between 2007 and 2015, the number of “no money down” chapter 13 cases filed increased by twenty-five percent).

49. *Id.* at 1080–82 (detailing these findings).

50. *Id.* at 1084–91 (detailing the multinomial regression).

51. *Id.* at 1090–91; see also Lawless & Littwin, *supra* note 39, at 1356–57 (relying on a database of every bankruptcy case filed between 2012 and 2016 to find that racial disparities in chapter choice persist).

52. See Foohey, *Access to Consumer Bankruptcy*, *supra* note 13, at 360 (discussing implicit bias literature); see also Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 AM. BANKR. L.J. 623, 638 (2017) (relying on a nationally representative sample of bankruptcy attorneys to find that attorneys’ beliefs about debtors’ chapter choice is the opposite of actual trends in percentage of filings based on race); A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 643–47 (2012) (discussing why black households may be steered into chapter 13 versus chapter 7).

53. See Foohey et al., *Life in the Sweatbox*, *supra* note 13, at 227.

54. See Foohey et al., *No Money Down*, *supra* note 2, at 1062.

55. See generally A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004) (detailing how the Bankruptcy Code envisions white households as the typical households



people deal with license suspensions, booted vehicles, and some court debt, thus beginning to address some of the consequences of governmental fines and fees that fall disproportionately on the economically vulnerable and racial minorities.<sup>56</sup> But consumer bankruptcy also plays a role in perpetuating disparities in the judicial system and in society. Bankruptcy's role in maintaining social divisions cannot be overlooked simply because it may not readily come to mind when thinking about disparate treatment within courts. Rather, attorneys, judges, and other system actors, including those able to change provisions regarding dischargeability, have a responsibility to recognize and work to address bankruptcy's place in augmenting the effect that both court debt and fees to access courts have in creating societal inequalities.

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filing bankruptcy); *see also* Atkinson, *supra* note 1, at 957–64 (overviewing racial disparities in the criminal and civil court systems).

56. *See supra* notes 23–28 and accompanying text.