INTRODUCTION

This book is a story of falling out of love. With a law.

The story almost never got off the ground. For my last year of law school, I signed up for a course about bankruptcy. I had second thoughts while out with friends the night before the fall semester started, on a roof deck at a TGI Fridays. The professor held high expectations and a preference for early-morning teaching. Did I want to spend my last year of school working so hard, on a subject my friends considered dull, dry, and just about money?

I set the alarm, walked to school to check out the first class, and, until now, never looked back. I learned that the federal Bankruptcy Code intersects with the lives of more people in the United States than virtually any other law does. The system's instruction manual enacted by Congress, the Bankruptcy Code, was a jigsaw puzzle. Fitting the pieces together helped me see the big picture: restoring economic opportunity in a capitalist society.

The potency of bankruptcy also held my attention. I learned that every contract in America contains an invisible caveat:

different enforcement rules apply if one of the parties files for bankruptcy. Whatever might have happened under ordinary law, bankruptcy could change the outcome like the flip of a switch. But this legal equivalent of a shiny set of power tools existed for a reason, or so I thought. To my student self, the bankruptcy system looked like a useful form of social insurance, a safety valve giving people the freedom to try, fail, and try again. I was taught that bankruptcy could deliver life-changing relief, reduce stress and suffering, and promote innovation and economic participation.

That class and that professor, Elizabeth Warren, changed my life. As graduation crept closer, she encouraged me to apply to work for a federal bankruptcy court, an institution I had only recently learned existed, in Chicago, a city I had never visited. After taking the bar exam required for new lawyers, I drove overnight in a rented van to start my professional life as a law clerk for the Honorable Robert E. Ginsberg.

Working with Judge Ginsberg gave me a front-row seat in the most bustling type of federal court in America. The year was 1994 and bankruptcy filings were skyrocketing. In the federal courthouse, a tall black box designed by Ludwig Mies van der Rohe, I watched and learned as Judge Ginsberg distinguished between better and worse legal arguments, better and worse lawyering, better and worse cases.

The court was a forum of last resort for families that

experienced bad things in volume: layoffs and shortened work hours, crumbled marriages, miscarriages and failed adoptions, flimsy health insurance and medical crises. I was struck by how people had tried everything, for better or worse, before resorting to bankruptcy. One laid-off hospital worker had used credit card cash advances to gamble on a riverboat, intending to bridge the financial gap until he got his job back.

Bankrupt businesses also landed in Judge Ginsberg's courtroom. They were nightclubs, hardware store chains, suburban home developers, paper goods manufacturers, and a security guard company responsible for airports and National Football League stadiums. Were they strong enough to reorganize, or should they shut down? Every day, I rushed to the courthouse to learn what would happen next.

As bankruptcy filings rose along with debt levels and economic insecurity, the consumer credit industry lobbied Congress to make personal bankruptcy relief harder and more expensive to access. It wasn't wrong to want to improve bankruptcy law. My job after the Chicago court involved policy work to do just that. There was plenty to fix, for sure. And, although we did not yet have the research to articulate all the problems, the personal bankruptcy system already was treating Black and white filers differently, reinforcing the effects of race discrimination in credit markets and elsewhere.

But increasing fairness and efficiency were not what the

credit industry was after. Its message was simple—bankruptcy law should not reward irresponsibility and bad decisions—and yet its requested fixes were horribly complicated. To anyone reading the fine print, it was clear that the goal was to make a mess, to squeeze extra profits from the least of us, whatever the causes of financial distress or the effects on everyone else. Insistent, but patient, the lobbyists got much of what they wanted by 2005, when Congress made hundreds of changes to bankruptcy law on a largely bipartisan basis.

The responsibility message not only was misleading, but destined to be unevenly applied. The American legal system tends to be more deferential to artificial persons like big corporations than to humans of modest means. Although the 2005 legislation included some changes to business bankruptcy, the consumer credit industry reforms did not try to make big enterprises take personal responsibility for bad decisions by restricting their bankruptcy access. The consumer credit industry was not focused on whether enterprises used bankruptcy to halt jury trials triggered by hazardous products or child sex abuse. The consumer credit industry was unconcerned with whether cities minimize the legal consequences of police brutality against their Black and brown residents by filing for bankruptcy. The consumer credit industry was not trying to stop businesses from using bankruptcy to sell companies quickly, shedding responsibilities to provide health care

for retirees in hazardous industries or to remedy employment discrimination.

In other words, at the same time bankruptcy has fallen short in providing basic debt relief for struggling families, lawyers for big enterprises and other powerful parties have transformed bankruptcy into a legal Swiss Army knife. They bring into the system all sorts of policy problems beyond its domain and institutional capacity, even climate change if you can believe it.

Even though some of these examples remain rare (for now), the bankruptcy system, as specialized as it seems, affects nearly everyone. About one in ten living American residents has been through bankruptcy at least once. Big enterprises go bankrupt in smaller numbers, but each case can directly affect hundreds of thousands of people, and many millions more indirectly.[1]

Though I have become concerned about the broader impact of the bankruptcy system, the nation's bankruptcy courts, helmed by merit-selected judges, remain a source of inspiration. Their commitment and work ethic are a model for other courts. But individual judges do not have the tools or the authority to address the forces that make the bankruptcy system undercut equality and liberty. Bigger rethinking is in order.

Some contributors to the system's shortcomings stem from

broader forces in American law. American law has a one-track mind when it comes to remedies. If people prove in a civil lawsuit that they have been injured by a hazardous product, were unconstitutionally beaten by the police, or suffered unlawful discrimination, the judgment rarely results in an admission of wrongdoing, or a process of reconciliation. Payment of money is typically the best-case scenario in a civil lawsuit—or its frequent supplement or replacement, a settlement—no matter what the harmed party prefers, no matter what remedy would incentivize better behavior in the future. The preference for using money to compensate for harm has some justifications, such as the limitation on courts' ability to oversee other kinds of remedies. But the current use of the bankruptcy system shows the consequences of this preference. As America translates policy problems into money, liability for those problems becomes debts that lawyers will be tempted to sweep into bankruptcy. Survivors of wrongdoing are recast as creditors, indistinguishable from credit card issuers or sellers of basic commodities. When everything becomes just about money, other objectives of the legal system get deprioritized, such as deterrence, accountability, and restoring agency to harmed parties.

Treating all legal responsibilities as no more or less than money obligations that can be addressed in bankruptcy remains a policy choice, not an inevitable outcome. Giving

the concept of a debt the broadest possible sweep leads the bankruptcy system to interfere with the pursuit of other public policies, subordinating those policies to objectives like maximizing economic value—an aspiration easier to utter than to measure. Especially when it comes to restructuring for-profit and nonprofit entities, bankruptcy's powerful tools are better suited to obligations arising from contracts than to those arising from pretty much anything else.

We also should recognize the hazards of intentional legal complexity, a prominent challenge in the world of bankruptcy. I sometimes show students a cartoon of one man in a suit saying to another, "We need some new jargon. The public is starting to understand what we're talking about!" Lawyers and their clients can profit from making these laws sound too hard for the rest of us to understand, suggesting that we should leave these complex matters to them, the experts. Some may earnestly believe that their decisions and strategies make the world better. They tend not to be the ones facing the consequences, and have already moved on to other projects, when they turn out to be wrong.[2]

Chapter 1 of this book begins with bankruptcy for individuals and the hurdles to the system delivering basic debt relief. It highlights the scrutiny financially distressed individuals undergo, especially after the big system overhaul in 2005.

Synthesizing an established body of research using a wide

range of methods and sources, chapter 2 talks about racial disparities in personal bankruptcy. It illustrates how facially neutral bankruptcy laws generate suboptimal experiences and outcomes for Black filers.

Chapter 3 introduces how bankruptcy law treats fake people, such as corporations, differently than it treats the individuals discussed in chapters 1 and 2. Like many areas of law, bankruptcy law gives enterprises the benefit of personhood. But artificial persons filing for bankruptcy, especially if they are bigger in size, are far less likely to encounter the value judgments that lower-income individuals face before, during, and after they file. For example, fake people can cancel legal obligations—including those that arise from bad behavior—that humans cannot. In addition to reflecting bias, bankruptcy undercuts efforts to deter, remedy, and punish serious corporate misconduct.

Chapter 4 shows how artificial person bankruptcies provide additional pathways for undercutting liberty and equality. A special kind of bankruptcy law for cities weakens legal and constitutional responsibility for police misconduct and other violations of civil rights. Congress originally made bankruptcy accessible to cities to change payment terms on municipal bonds with the support of the majority of bondholders. The law has broadened considerably since then. In this new world,

police officers get a prominent seat at the negotiating table; residents who allege violence at the hands of the state do not.

The rest of this book explores the transformation of corporate reorganization law for businesses and nonprofits. Chapter 11 of the Bankruptcy Code is a package deal of benefits and obligations. The package was designed to promote the instrumental objectives that flow from keeping a viable but heavily indebted company alive. As seen in chapter 5, financial institutions, private equity firms and other buyers of and investors in distressed companies extract the perks of Chapter 11 for their own benefit while abandoning the larger objectives of the national bankruptcy system. Chapter 5 also illustrates how the funding of the bankruptcy system contributes to these patterns.

In the contexts discussed in chapter 6, enterprises use Chapter 11 to halt litigation and cap liability for alleged wrongdoing rather than to restructure debts. Companies shift people who have suffered from hazardous products or survived child sex abuse out of the civil justice system and into Chapter 11, where debtor companies and co-defendants have significant extra leverage and control. Citing economic efficiency and the opportunity to "unlock value," these enterprises seek to permanently limit their responsibility, protecting not only the entity that filed the bankruptcy petition but also solvent third

parties who may have committed wrongdoing of their own. Chapter 6 traces bankruptcy's evolution into the business of tort liability management.

Chapter 7 dives further into the details of bankruptcies filed to stop lawsuits and cap liability for hazardous products and child sex abuse. The concept of "mass torts" notwithstanding, one cannot evaluate the system's fairness and effectiveness without considering its impact on the real individuals whose remedies have been forever altered. Recognition of the spectrum of injuries and strength of proof is also necessary to illustrate why claimants with serious injuries might find the system unfair, even if they vote in favor of a bankruptcy plan.

The conclusion to this book invites consideration of structural change, with modesty about the capacity of a national bankruptcy system. The system needs to be a fair and effective, but targeted, tool to relieve overindebtedness. It should not be a legal Swiss Army knife tackling a world of policy problems that tax the system's institutional competence and lead to regressive effects. The stories in this book lead back to bankruptcy's broad definitions of *debt* and *claim*—key to recruiting so many kinds of policy problems into bankruptcy—and whether the system might be fairer and more consistent with democratic values if it had a narrower scope.

Two key words embedded in this book's title are *just* and *debts*. The multiple meanings of *just* lead to a common end.

Just connotes justice. *Just* also is a limiter, signifying "only." The American economy, families, and communities benefit when the bankruptcy system provides robust cancellation of obligations the average person recognizes as debts. On that central objective, the system has fallen short. Meanwhile, too many system activities bear distant relation to canceling or restructuring debts as traditionally understood, and are disrupting other societal objectives and foundational legal principles, including separation of powers and federalism. If this book has a policy prescription, it is to reduce the footprint of the bankruptcy system. To contribute to a more just legal environment and society, the bankruptcy should focus on *just debts*.