

# ACCESS TO CONSUMER BANKRUPTCY

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## INTRODUCTION

Over the past decade, each year, about a million households filed bankruptcy.<sup>1</sup> This figure initially may loom large. But when compared to the one-third of Americans who have fallen behind on debt payments,<sup>2</sup> the one in seven Americans who face debt collection calls every year,<sup>3</sup> and the hundreds of millions of Americans burdened with debt,<sup>4</sup> the figure becomes more significant for its seemingly relative fewness. Financial distress undoubtedly leads people to seek bankruptcy protection, but the path to filing is more complicated than mere finances. Indeed, on a purely financial basis, far fewer households than one might estimate would benefit financially from bankruptcy actually file.<sup>5</sup> As with people's use of the legal system more generally, whether someone will file bankruptcy depends on a variety of factors often identified under the umbrella of "access to justice."<sup>6</sup>

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<sup>1</sup> *Caseload Statistics Data Tables*, UNITED STATES COURTS, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>. This rough estimate is based on nonbusiness bankruptcy cases commenced between 2008 and 2017, as reported on Table F-2. Nonbusiness bankruptcy filings peaked in 2010 at about 1.5 million and steadily declined to a low of approximately 770,000 in 2016. *See id.* This amounts to a little less than one percent of American households filing bankruptcy per year. *See Number of Households in the U.S. From 1960 to 2016 (in millions)*, STATISTA, <https://www.statista.com/statistics/183635/number-of-households-in-the-us/> (reporting data from the United States Census Bureau).

<sup>2</sup> Aimee Picchi, *The United States of Indebted America*, CBS NEWS MONEYWATCH (Dec. 14, 2017), <https://www.cbsnews.com/news/the-united-states-of-indebted-america/>.

<sup>3</sup> *See Delinquent Debt Shrinks While Real Estate Debt Continues to Fall*, FED. RES. BANK OF N.Y. (Feb. 27, 2012), <https://www.newyorkfed.org/newsevents/news/research/2012/an120227.html>.

<sup>4</sup> *See* Kelley Holland, *Eight in 10 Americans Are in Debt: Study*, CNBC (July 29, 2015), <https://www.cnbc.com/2015/07/29/eight-in-10-americans-are-in-debt.html> (reporting on a Pew Charitable Trust study which found that for many Americans, debt is burdensome).

<sup>5</sup> *See* Michelle J. White, *Why Don't More Households File Bankruptcy?*, 14 J.L. ECON. & ORGANIZATION 205, 206 (1998) (calculating that at least 15% of households would benefit financially from filing bankruptcy, while about 1% of households actually file in a given year).

<sup>6</sup> "Access to justice" in the context of civil law, which includes bankruptcy, has been described as focusing "on people's experiences with civil justice events, organizations, and institutions." Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIOLOGY 339, 340 (2008). It most often is associated with the delivery of legal services and the dearth of lawyers. *See* D. James Greiner, Dalié Jiménez & Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1120–21 (2017) ("[T]he overwhelming majority of human beings . . . who face legal problems in the United States do so . . . without any form of professional legal assistance"); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education*

This Essay examines the state of access to justice in the context of consumer bankruptcy. As with the use of any legal remedy, before turning to bankruptcy, people first must recognize the relevancy of law, the legal system, and bankruptcy to help solve their financial problems.<sup>7</sup> This aspect of access to bankruptcy is the least researched, despite being critical to the ultimate delivery of bankruptcy's "fresh start."<sup>8</sup>

In the Essay's first part, I summarize research regarding how people decide to use bankruptcy to address their financial troubles. To shed new light on bankruptcy's place in people's lives, I analyze the narratives accompanying consumer complaints about financial products and services submitted to the Consumer Financial Protection Bureau (CFPB).<sup>9</sup> These narratives provide a previously unexplored perspective on how people connect their financial troubles to the legal solution of filing bankruptcy, both adding to our understanding of how they come to the legal system and revealing what remains unknown. With these knowledge gaps in mind, I outline key questions for future research about how individuals translate their financial problems to legal problems addressable by filing bankruptcy.

Having decided that filing bankruptcy is the most suitable avenue to deal with their financial troubles, people must actually be able to file for it to be a viable solution. The most robust research about access to consumer bankruptcy focuses on debtors' multiple barriers to entry. The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)<sup>10</sup> made it more difficult, expensive, and time-consuming for people to file bankruptcy.<sup>11</sup> BAPCPA's addition of the "means test" created a legal barrier to entry.<sup>12</sup> Likewise, BAPCPA's paperwork and documentation requirements introduced

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*and Research*, 62 J. LEGAL EDUC. 531, 532–33 (2013) (distinguishing access to procedural and substantive justice). It also encompasses how people decide to use law and the legal system to deal with justiciable problems in their lives. *See infra* Part I.

<sup>7</sup> *See infra* Part I.

<sup>8</sup> "Fresh start" comes from *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

<sup>9</sup> This analysis draws on my sample of narratives submitted by consumers that I previously analyzed in Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177 (2017) [hereinafter, Foohey, *Calling on the CFPB*]; *see infra* notes 81–88 and accompanying text.

<sup>10</sup> *See generally* Pub. L. No. 109-8, 119 Stat. 23 (2005). The law's effective date was October 17, 2005.

<sup>11</sup> *See* Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 183–87 (2016) [hereinafter, Littwin, *Adapting*] (overviewing BAPCPA's changes to the Bankruptcy Code that "appeared likely to impair the consumer bankruptcy system's ability to function"); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 27 (2012) ("[O]ne of [BAPCPA's] stated goals the reduction of consumer bankruptcy filings.").

<sup>12</sup> 11 U.S.C. § 707(b) (2012); *see also* Robert M. Lawless, et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 352–53 (2008) (overviewing the "means test").

procedural hurdles to filing that deter people from seeking bankruptcy protection even more so than the means test.<sup>13</sup> BAPCPA also imposed more work on debtors' attorneys, necessitating that they increase their fees, creating yet another financial barrier to filing.<sup>14</sup>

Although BAPCPA decreased access to consumer bankruptcy,<sup>15</sup> one often-noted feature of the bankruptcy system is that regardless of the laws on the books, attorneys, judges, and trustees play a pivotal role in the system's success or failure.<sup>16</sup> Attorneys interact the most with people considering bankruptcy, positioning attorneys as the most important system actors in terms of delivering access to justice. More than 90% of people who file bankruptcy do so with an attorney's assistance,<sup>17</sup> meaning that attorneys mediate access to bankruptcy much more so than in other civil law contexts.<sup>18</sup> Attorneys provide their clients with the information about the benefits and drawbacks to choose between chapter 7 and chapter 13, the two bankruptcy chapters that consumers most often use.<sup>19</sup> Which chapter households file dictates nearly every aspect of their experience, from how much they will pay their attorney, to what property they will keep, to their likelihood of obtaining a discharge of debts.<sup>20</sup> Yet research, including the analyses conducted by my co-investigators and me on the current

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<sup>13</sup> See Littwin, *Adapting*, *supra* note 11, at 191–92 (noting that “it is the procedural barriers BAPCPA imposed that appear to be having a larger impact” on deterring people from filing bankruptcy than the means test); Lawless, et al., *supra* note 12, at 353 (finding that BAPCPA blocks “hundreds of thousands of struggling families [from bankruptcy] indiscriminately”).

<sup>14</sup> See Lupica, *supra* note 11, at 56, 58, 69, 70 (finding that attorneys' fees increased by 18% to 48% after BAPCPA depending on the chapter filed, whether the case resulted in a discharge, and the value of the debtor's assets relative to debts); Littwin, *Adapting*, *supra* note 11, at 194, 219–24 (findings that “the real harm BAPCPA caused was through the procedural barriers it created, especially the additional work it imposed on consumer bankruptcy attorneys” and discussing interviews with debtors' attorneys about why they raised their fees).

<sup>15</sup> See Lawless, et al., *supra* note 12, at 349–51 (discussing the decline in consumer bankruptcy filings).

<sup>16</sup> See Littwin, *Adapting*, *supra* note 11, at 188 (commenting that “attorneys, judges, and other system actors play a protective role” in the bankruptcy system); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1935 (2011) (noting that “[c]onsumer bankruptcy's lawyer- and judge-based framework appears to have shielded it from the worse effects” of BAPCPA's procedural burdens).

<sup>17</sup> Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, “No Money Down” *Bankruptcy*, 90 S. CAL. L. REV. 1055, 1057 n.2 (2017) [hereinafter, Foohey, et al., *No Money Down*] (reporting on data from the Consumer Bankruptcy Project (CBP)).

<sup>18</sup> See Lisa Needham, *Measuring the Access-to-Justice Gap*, LAWYERIST.COM (Aug. 27, 2016), <https://lawyerist.com/measuring-access-to-justice/> (reporting that, based on a sample of ten urban communities, nearly 70% of all civil cases have an attorney representing only one side).

<sup>19</sup> See Foohey, et al., *No Money Down*, *supra* note 18, at 1057 (overviewing chapters 7 and 13). More than 99.5% of households file under chapter 7 or 13. See *id.* at 1061 n.22.

<sup>20</sup> See *id.* at 1057–58 (noting these differences).

iteration of the Consumer Bankruptcy Project (CBP),<sup>21</sup> shows that the two most significant predictors of people's chapter choice are their place of residence and race, neither of which have anything to do with the substantive legal benefits of chapter 7 or chapter 13.<sup>22</sup> This breakdown of access to justice in the bankruptcy system has endured for decades.<sup>23</sup>

In the second part of this Essay, I chronicle the evolution of research regarding consumer bankruptcy's "local legal culture,"<sup>24</sup> systemic racial bias, and the link between attorneys' fees and bankruptcy chapter choice. The data and literature I analyze in this Essay confirm that "access to justice" and "consumer bankruptcy" are far from synonymous. At the same time, however, these resources point toward avenues for future research that promise to improve bankruptcy's ability to deliver a fresh start to struggling families.

## I. FROM FINANCIAL PROBLEM TO BANKRUPTCY

As one might expect, households' finances can predict bankruptcy filings. The number of consumer bankruptcy filings fluctuates year to year in part based on a function of outstanding consumer debt and people's income.<sup>25</sup> But simply because people experience financial distress does not mean that they all will file bankruptcy.<sup>26</sup> Some debts, such as student loans, are effectively non-dischargeable, making filing futile.<sup>27</sup> Some people's financial situations are so

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<sup>21</sup> The CBP is a multi-researcher effort that investigates the people who file bankruptcy. The other co-investigators on the CBP's current iteration are Robert Lawless, Katherine Porter, and Deborah Thorne. At present, the CBP's current iteration includes people who filed bankruptcy between 2013 and 2016. For details about the CBP, *see id.* at 1071–74.

<sup>22</sup> *See id.* at 1059–60.

<sup>23</sup> *See* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Experience from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 806–07 (1994) (noting the "pervasive, systematic influence" of attorneys and judges on variations not tied to economic or state legal differences in case outcomes across the consumer bankruptcy system); *infra* Part II.

<sup>24</sup> Sullivan, et al., *supra* note 23, at 804 (defining bankruptcy's "local legal culture" as "systematic and persistent variation in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and differing in identifiable ways from the practices, perceptions and expectations existing in other localities subject to the same or a similar formal legal regime").

<sup>25</sup> Bob Lawless, *Bankruptcies Down 12% in 2014, Forecast Predicts the Same Decline for 2015*, CREDIT SLIPS (Jan. 8, 2015), <http://www.creditslips.org/creditslips/2015/01/bankruptcies-down-12-in-2014-forecast-predicts-the-same-for-2015.html> (detailing "a mathematical model that . . . does a good job of capturing the variation in bankruptcy filing rates").

<sup>26</sup> *See* Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 3–4 (2008) (discussing how bankruptcy filings provide an "incomplete measure of consumer financial distress").

<sup>27</sup> *See* Xiaoling Ang & Dalié Jimenez, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, in STUDENT LOANS AND THE DYNAMICS OF DEBT (Kevin Hollenbeck & Brad Hershbein eds., 2015) (overviewing the history of the

dire that bankruptcy laws offer little benefit, which is why bankruptcy largely is a middle class phenomenon.<sup>28</sup> In short, households' use of bankruptcy as a legal remedy is dependent on more than the figures on their balance sheets.<sup>29</sup>

To evaluate access to consumer bankruptcy, the first inquiry must be how people determine that their serious financial problems can be remedied by filing bankruptcy. Lawyers naturally tend to see law everywhere. They not only recognize that many events in people's everyday lives are problems with legal solutions, but they also think that legal action might be useful. The same is not true for laypeople, even though Americans are noted for their litigious nature.<sup>30</sup> Instead, for most people, the justiciable problems in their lives remain "alegal."<sup>31</sup> They may try to solve these problems on their own, may turn to third parties for help, or may simply ignore them, taking no action at all.<sup>32</sup> Eventually, some people determine that the worrisome situations in their lives should be addressed by invoking law.<sup>33</sup>

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dischargeability of student loans and studies of the percentage of debtors who successfully discharge their student loans); Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2103–05 (2014) (focusing on the difficulties in demonstrating the "undue hardship" necessary to discharge student loan debt).

<sup>28</sup> See Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. \_\_\_, (forthcoming 2018) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126901](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126901)) [hereinafter Foohey, et al., *Sweatbox*] (reporting based on CBP's current iteration that "bankruptcy filers still have many characteristics of the American middle class, as they did in the 2007 CBP and prior iterations of the CBP").

<sup>29</sup> See Stephanie Wilshusen, *Meeting the Demand for Debt Relief*, FED. RES. BANK OF PHILA. (Aug. 2011), <https://ssrn.com/abstract=1908334> (discussing options available to consumers to manage debts).

<sup>30</sup> See Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 950 (2009) [hereinafter, Sandefur, *Fulcrum Point*] (contrasting how "justice scholars and practicing attorneys" and laypeople think about civil justice problems); Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and the Importance of Inaction, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 112, 112 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007) [hereinafter, Sandefur, *Importance of Doing Nothing*] ("Americans are noted for their willingness to press claims when they feel they have been wronged.").

<sup>31</sup> See Sandefur, *Importance of Doing Nothing*, *supra* note 30, at 113 (defining justiciable problems as "circumstances that people experience as troubling and that raise civil legal issues, though they are not necessarily best solved or only remediable through use of law"); Sandefur, *Fulcrum Point*, *supra* note 30, at 953 ("A pattern of pervasive alegality characterizes how ordinary people across societies handle their own everyday civil justice problems.").

<sup>32</sup> See Sandefur, *Importance of Doing Nothing*, *supra* note 30, at 112–14 (nothing that "[f]or roughly a quarter of justiciable problems, low- and moderate-income Americans in the most recent national survey reported taking no action at all to attempt to resolve the situation" and discussing what else people may do to deal with justiciable problems).

<sup>33</sup> This is a complex process described by the "naming, blaming, claiming" framework. William L.F. Felsiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 644–47 (1980).

How people respond to civil legal problems in general depends significantly on how these problems are socially constructed.<sup>34</sup> An individual's understanding of appropriate responses to particular events and situations is colored by both enduring factors, such as upbringing, and more transitory experiences, like conversations with family, friends, and neighbors.<sup>35</sup> Addressing a justiciable problem through the legal system also requires action. Even if someone abstractly understands law's relevance, she must have the time and motivation to advocate for herself, with or without an attorney's aid. But for many people, particularly low- and moderate-income individuals, day-to-day struggles to provide for themselves and their families capture their time and attention, creating a condition of scarcity.<sup>36</sup> Recent research shows that time and money scarcity overtax people's mental "bandwidth," decreasing their ability to attend to other issues that require advanced planning, such as taking legal action.<sup>37</sup>

Nervousness, fear, and related concerns associated with unfamiliarity with the legal system may further decrease someone's motivation to use time and resources to deal with a justiciable issue.<sup>38</sup> Although lack of money or the cost of legal services are important, they are not leading reasons why people do not turn to law to resolve problems.<sup>39</sup> Combined, few people mobilize their legal

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<sup>34</sup> See Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE 222, 232 (Anthony Duggan, et al., eds. 2012) [hereinafter, Sandefur, *Money Isn't Everything*] ("The legal nature of any given civil justice problem is not a self-evident fact; rather, it is socially constructed."); THOMAS LUCKMANN & PETER L. BERGER, *THE SOCIAL CONSTRUCTION OF REALITY* (1966) (introducing the term "social construction").

<sup>35</sup> See Sandefur, *Money Isn't Everything*, *supra* note 34, at 232 (discussing how people characterize their problems).

<sup>36</sup> See Greiner, et al., *supra* note 6, at 1128 (discussing the scarcity in the context of people being sued in state court for delinquent debts).

<sup>37</sup> See *id.* at 1128–29 (discussing how scarcity may affect the "goal identification, goal pursuit, persistence, plan making, plan-implementation strategies, and self-control" necessary for people to engage with the legal system); SENDHIL MULLAINATHAN & ELDAR SHAFIR, *SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH* 157–58 (2013) (explaining that low bandwidth "means that you have fewer mental resources to assert self-control").

<sup>38</sup> See Greiner, et al., *supra* note 6, at 1129–30 (noting that people dealing with debt collection lawsuits often cite anxiety and feelings of threat when asked about the lawsuits, and that the "mundane details of how the formal legal system works" may intimidate laypeople); Sandefur, *Importance of Doing Nothing*, *supra* note 30, at 123–24 (finding that people fail to take action because of shame, "a sense of insufficient power," and "frustrated resignation").

<sup>39</sup> See Sandefur, *Money Isn't Everything*, *supra* note 34, at 244 (concluding that "the costs of lawyers' services may play some role in explaining why justice problems are seldom taken to attorneys, but that other more important factors are also at play"); Sandefur, *Fulcrum Point*, *supra* note 30, at 953–54 (noting "that people sometimes do nothing about serious civil justice problems, even when taking action would cost them no money"); *infra* note 114 and accompanying text.

rights, and most civil justice problems remain outside the legal system.<sup>40</sup> Those few who decide to take legal action then must choose a particular legal solution and find an attorney. Research shows that people accomplish this through a process termed “social searching,” wherein they rely on their social networks—family, friends, neighbors—for information about legal actions and referrals to attorneys.<sup>41</sup>

### A. *Coming to Bankruptcy*

Little systematic research exists about how people come to view their financial problems as legal problems and then decide to deal with them by filing bankruptcy. Most research on these processes involves surveys and interviews completed by people who have filed bankruptcy or by debtors’ attorneys. The results of these studies support the more general findings detailed above about the social construction of civil legal problems and people’s tendency to do nothing in response to issues. For example, attorneys term consumers’ propensity to put off filing bankruptcy the “ostrich defense.”<sup>42</sup> People stick their heads in the sand and hope that their financial problems will go away—that is, they do nothing.<sup>43</sup>

Research from the CBP confirms that people seriously struggle with their debts for years before they file bankruptcy. Data from the CBP’s latest iteration (“Current CBP”) show that two-thirds of debtors report struggling for two or more years before filing.<sup>44</sup> One-third state that they struggled for more than five years before filing.<sup>45</sup> Attorneys’ reports corroborate debtors’ responses of their lengthy financial struggles. When debtors finally file bankruptcy, they tell their attorneys that they should have done so years before.<sup>46</sup>

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<sup>40</sup> See Pamela Foohey, *When Faith Falls Short: Bankruptcy Decisions of Churches*, 76 OHIO ST. L. REV. 1319, 1325 (2015) [hereinafter, Foohey, *When Faith Falls Short*] (overviewing research about how people decide to pursue legal remedies); Richard O. Lempert, *Mobilizing Private Law: An Introductory Essay*, 11 LAW & SOC’Y REV. 173, 173 (1976) (defining mobilization of the law as the “process by which legal norms are invoked to regulate behavior”).

<sup>41</sup> See Sandefur, *Money Isn’t Everything*, *supra* note 34, at 222 (detailing “social searching”).

<sup>42</sup> See Ronald J. Mann & Katherine Porter, *Saving Up For Bankruptcy*, 98 GEO. L.J. 289, 313 (2010) (discussing interviews with bankruptcy attorneys).

<sup>43</sup> See *id.* (“Most debtors do not immediately recognize the consequences of their financial plight.”); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 541 (1993) (noting attorney statements that “[m]any debtors struggle with huge debts for a long time before visiting a bankruptcy lawyer”).

<sup>44</sup> Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_.

<sup>45</sup> *Id.* at \_\_. Data from the CBP’s prior iterations likewise show that debtors report struggling with their debts for years before filing. See Lawless, et al., *supra* note 12, at 381 (reporting on data from the 2001 and 2007 CBPs).

<sup>46</sup> Mann & Porter, *supra* note 42, at 314 (discussing interviews with debtors’ attorneys).

During the years that bankruptcy debtors struggle, they report going without necessities, such as food and healthcare, losing their property in foreclosure actions, selling other property, and trying to work out deals with their creditors.<sup>47</sup> These privations and coping techniques suggest that people's financial problems remain alegal for a significant time.<sup>48</sup> People also view filing bankruptcy as shameful, which may blind people from thinking of bankruptcy—or law at all—as an appropriate response to financial problems.<sup>49</sup> The Current CBP questionnaire asks debtors about their feelings upon filing bankruptcy and provides them with a list of major emotions.<sup>50</sup> More than two-thirds (68%) of debtors reported that they felt shame upon filing.<sup>51</sup> Other qualitative studies of people who have filed bankruptcy likewise find that most debtors file while feeling shame and that bankruptcy remains stigmatized.<sup>52</sup> If anything, bankruptcy may have become more stigmatized in recent years than in prior decades.<sup>53</sup>

In short, most people who file bankruptcy do not decide to file in “frantic acts of desperation.”<sup>54</sup> Neither do they file “bankruptcies of convenience,” carefully timed after they run up debts with the understanding that they can and likely will file.<sup>55</sup> Rather, research suggests that most people go through an

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<sup>47</sup> Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_\_\_.

<sup>48</sup> See *supra* note 31 and accompanying text.

<sup>49</sup> Research regarding how people deal with money issues other than invoking the legal solutions of filing bankruptcy similarly shows that they opt not to deal with the problems, even when the issues threatened their credit worthiness and solvency, because, among other reasons, they were embarrassed and ashamed about their problems. See Sandefur, *Fulcrum Point*, *supra* note 30, at 953–55.

<sup>50</sup> Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_\_\_\_. For details about basic and other major emotions, see Foohey, *Calling on the CFPB*, *supra* note 9, at 189–90.

<sup>51</sup> Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_\_\_.

<sup>52</sup> See Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 77, 86–87 (2006) (describing how couples reported postponing filing for months or even years to avoid the stigma of bankruptcy and hiding their bankruptcies post-filing from relatives and friends because of fear of stigmatization); Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435, 463–69 (2013) (reporting that results of interviews with consumers who filed under chapter 7 between 2006 and 2010 and finding that some people avoided filing for bankruptcy because of its stigma and the shame they felt more generally about incurring debts they could not pay).

<sup>53</sup> See Michael D. Sousa, *Persistence of Bankruptcy Stigma*, 26 AM. BANKR. INST. L. REV. (forthcoming 2018) (exploring bankruptcy stigma for approximately four decades based on General Social Survey and finding that the consumer bankruptcy's stigma seems to have increased over time); Teresa A. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN L. REV. 213, 233–47 (2006) (refuting the declining stigma hypothesis and arguing that growing number of households are in financial trouble, but less are filing, which may mean that bankruptcy's stigma has increased).

<sup>54</sup> Mann & Porter, *supra* note 42, at 313.

<sup>55</sup> Ronald J. Mann, *Bankruptcy Reform and the “Sweatbox” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376–77 (discussing characterization of people who file bankruptcy).



“internal reckoning” about the severity of their financial situation, often only recognizing the need for legal action after resigning themselves to the dire state of their financial lives.<sup>56</sup>

For those people who file bankruptcy, creditors’ attempts to collect debts, such as phone calls or filing collection suits in state court, may spur them to consider the seriousness of their financial situations. The Current CBP questionnaire also asks debtors their reasons for filing bankruptcy and lists eleven “things,” including pressure from debt collectors.<sup>57</sup> Three-quarters of debtors cited pressure from debt collectors as a reason that they turned to bankruptcy.<sup>58</sup> Prior studies based on interviews with people who filed bankruptcy likewise found that creditors’ sustained debt collection efforts encourage people to take legal action to deal with financial issues.<sup>59</sup> In this way, outside pressures may help to remove the alegality of financial troubles, transforming them into legal issues.

Finally, to get from financial problem to filing bankruptcy, people must decide that seeking bankruptcy protection is a suitable legal solution. Even less empirical research exists about the sub-question of how people decide upon the specific legal option of bankruptcy. The most applicable studies consider the effects of “social spillover” on consumer bankruptcy filings,<sup>60</sup> based upon the “social searching” theory of how people come to connect with lawyers and the legal system.<sup>61</sup> “Social spillover” refers to neighbors’ actions influencing people’s decisions, even if they do not discuss law or using the legal system with others directly.<sup>62</sup> In the context of consumer bankruptcy, studies suggest that filing rates increase in a given year if filing rates increased in the same geographic location in the prior year. Scholars link this increase to both diffusion of information about bankruptcy and a decline in the perceived stigma of filing bankruptcy.<sup>63</sup>

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<sup>56</sup> Mann & Porter, *supra* note 42, at 316–18 (overviewing this “internal reckoning”).

<sup>57</sup> Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_\_.

<sup>58</sup> *Id.* at \_\_\_.

<sup>59</sup> See Mann & Porter, *supra* note 42, at 315–18 (describing the “grinding psychological toll” of debt collection and noting that “[b]ankruptcies occur only after consumers have endured a lengthy period of collection pressure”); Thorne & Anderson, *supra* note 52, at 86–87 (detailing how debtors avoided bill collectors).

<sup>60</sup> See Ethan Cohen-Cole & Burca Duygan-Bump, *Household Bankruptcy Decision: The Role of Social Stigma vs. Information Sharing* (Fed. Res. Bank of Boston, Working Paper No. QAU08-6, 2008); Astrid Dick, Andreas Lenhart, & Giorgio Topa, *Social Spillovers in Personal Bankruptcies* (June 2008), [https://www.newyorkfed.org/medialibrary/media/research/economists/topa/HLT\\_062808.pdf](https://www.newyorkfed.org/medialibrary/media/research/economists/topa/HLT_062808.pdf); Foohey, *When Faith Falls Short*, *supra* note 40, at 1329–30 (discussing these studies).

<sup>61</sup> See *supra* note 41 and accompanying text.

<sup>62</sup> See Foohey, *When Faith Falls Short*, *supra* note 40, at 1329 (defining “social spillover”).

<sup>63</sup> See *id.* at 1329–30 (overviewing these studies).

In my research into religious organizations' chapter 11 bankruptcy cases, I directly asked leaders about how they decided to invoke law generally and use the legal solution of bankruptcy.<sup>64</sup> Although these leaders (often church pastors) filed business bankruptcy cases on behalf of their organizations, the timing of the filings track with consumer bankruptcy filings,<sup>65</sup> likely making the pattern of religious organizations' filings relevant to consumer filings. Religious leaders also described a process of conceptualizing their organizations' financial problems as legal problems, consistent with studies of how other people come to the bankruptcy system. Like consumers, religious leaders ignored the financial problems, discussed what to do about their predicaments with their social networks, and often ultimately recognized the legal nature of their organizations' financial problems through creditors' collection attempts or creditors' recommendations to consider filing bankruptcy.<sup>66</sup>

As "social searching" theory would predict, leaders recounted learning details about bankruptcy and finding attorneys through the leaders' social networks.<sup>67</sup> Religious organizations' attorneys likewise hypothesized that networks among churches and other religious organizations brought them clients.<sup>68</sup> Indeed, religious organizations' cases filed in the past decade clumped in particular districts, with more than half of the cases originating in ten out of a possible ninety districts, and a few attorneys representing a sizable proportion of the cases filed in some of those ten districts.<sup>69</sup> This clumping further suggests that social searching and spillover effects drive bankruptcy filings, in line with research about how people generally mobilize their legal rights.

How religious organizations' leaders decided to file chapter 11 exposes a significant hole in our knowledge about how people come to the bankruptcy system that is essential to evaluating access to consumer bankruptcy. There is a dearth of research that directly asks people how they chose bankruptcy from the menu of available legal responses to financial troubles. However, there is a more cavernous (albeit understandable) gap in research about people's road to bankruptcy. Little research focuses on those people who struggle with their finances but do not turn to bankruptcy.

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<sup>64</sup> *Id.* at 1334–45 (discussing the study's methodology).

<sup>65</sup> *Id.* at 1339, figure 1 (comparing religious organizations' chapter 11 filings to filings of chapter 7 and 13 cases with predominately consumer debts).

<sup>66</sup> *Id.* at 1345–50.

<sup>67</sup> *Id.* at 1350.

<sup>68</sup> *Id.* at 1351.

<sup>69</sup> *Id.* at 1335–37 (discussing the clumping of religious organizations' chapter 11 cases).

One reaction to research findings about how long debtors struggle with their financial problems before filing bankruptcy is a concern that people wait an unduly long time to file. By the time many households file, the financial benefits of bankruptcy almost undoubtedly outweigh the costs.<sup>70</sup> While people struggle, they seem to deplete not only their financial resources, but also their emotional and physical well-being.<sup>71</sup> Yet, people who do not file might successfully address their problems in other ways. Or financial problems' shame and stigma (which is more cursorily explored in scholarship than bankruptcy's stigma) might prevent people from dealing with their problems at all.<sup>72</sup> Or individuals may take other legal action to deal with their financial problems, only to find these solutions ineffective.

### B. *Discussing Financial Problems and Bankruptcy in Complaints to CFPB*

An easily-accessed data source that may begin to answer questions about how appropriate responses to financial problems are socially construed is the CFPB's complaint database. One of the CFPB's statutorily-prescribed functions is to collect, monitor, and respond to consumers' complaints regarding financial products and services.<sup>73</sup> To collect complaints, the CFPB established an interactive webpage.<sup>74</sup> When consumers submit complaints via the webpage, they have the option to write narratives describing their problems, and can also choose to allow the CFPB to make their complaints public through its consumer complaint database.<sup>75</sup> From December 2011, when the CFPB began collecting complaints that are publicly downloadable, to the end of January 2018, consumers submitted over 956,000 complaints online.<sup>76</sup> One-quarter of these

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<sup>70</sup> See Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_; *supra* note 5.

<sup>71</sup> See *supra* note 47 and accompanying text.

<sup>72</sup> Perhaps the most prominent study of people struggling with debt who did not file bankruptcy is based on interviews with people who enrolled in Debtors Anonymous. See generally Terrell A. Hayes, *Stigmatizing Indebtedness: Implications for Labeling Theory*, 23 *SYMBOLIC INTERACTION* 29 (2000); see also Brent T. White, *Take This House and Shove It: The Emotional Drives of Strategic Default*, 63 *SMU L. REV.* 1279, 1280–82 (2010) (interviewing 350 individuals about their decision-making process to stop paying mortgages for houses on which they owed more than the house itself was worth, which, on a financial basis, likely would be beneficial, and finding that their decisions were more “driven by emotional matters” than economically rational); Brent T. White, *Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis*, 45 *WAKE FOREST L. REV.* 971 (2010) (relying on the same interviews to find that people did not walk away from underwater homes until long after it would have been financially beneficial); *supra* note 49.

<sup>73</sup> See Foohey, *Calling on the CFPB*, *supra* note 9, at 177 (discussing this function).

<sup>74</sup> *Submit A Complaint*, CFPB, <https://www.consumerfinance.gov/complaint/> (last visited Feb. 2, 2018).

<sup>75</sup> *Consumer Complaint Database*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/> (last visited Mar. 25, 2018).

<sup>76</sup> This figure is based on a download of the entire database on February 2, 2018. See *id.* The CFPB began making the complaint database available to the public in June 2012. See Foohey, *Calling on the CFPB*, *supra* note 9, at 183–84. The CFPB also allows consumers to submit complaints via telephone, mail, email, or fax.

submissions include narratives that consumers allowed the CFPB to make public.<sup>77</sup> This amounts to over 5,000 complaint narratives published each month.<sup>78</sup>

These narratives provide some of the first data about how people express their financial problems and how they think about solutions to those issues in a context not linked to bankruptcy. Although there are obvious limitations to this data source,<sup>79</sup> it still offers an initial glimpse of how people think about money troubles and legal problems. There is a significant hole in research about how people deal with their finances because it is especially difficult to identify and gain access to a relevant group of people with financial problems, apart from relying on public records of who has filed bankruptcy.<sup>80</sup> By lodging complaints through the CFPB, people self-identify as being in financial distress or as having an issue with a financial product or service sufficiently severe to merit complaint.

In my prior work, I analyzed a random sample of 6,000 complaints with narratives submitted between May 1, 2015 and April 30, 2016.<sup>81</sup> The goal of that analysis was to examine the complaint mechanism's role in helping people "voice, solve, and come to terms with" their financial problems, and compare the results to the CFPB's envisioned role of taking and processing complaints.<sup>82</sup> Given my focus on people's lived experiences with financial problems, as expressed through the narratives they wrote, I used qualitative content analysis by way of a coding frame based on major emotions expressed to analyze the narratives.<sup>83</sup> Together with research assistants (to provide inter-coder reliability), I read each narrative to identify language expressing anger,

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About 55% of complaints are submitted through the CFPB's website. *See id.* at 178 n.6 (discussing submitting complaints).

<sup>77</sup> This figure is based on a download of the entire database on February 2, 2018. *See Consumer Complaint Database*, *supra* note 75. According to the CFPB, 59% of consumers choose to make their narratives public. The lower percentage of complaints with published narratives is a result of when the CFPB began asking consumers if they assented to their narratives being made public, with the idea that it would later debut "an enhanced public-facing consumer complaint database." Foohey, *Calling on the CFPB*, *supra* note 9, at 183–84.

<sup>78</sup> *See* Foohey, *Calling on the CFPB*, *supra* note 9, at 178.

<sup>79</sup> *See id.* at 184–86 (discussing the data's limitations).

<sup>80</sup> For instance, Terrell Hayes leveraged Debtors Anonymous rosters. *See supra* note 72. Debt collection proceedings may provide another venue to draw a sample of financially-distressed individuals. *See* D. James Greiner, et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 *GEO. J. POVERTY L. & POL'Y* 449, 450–51 (2013) (proposing a randomized control trial involving people named as defendants in debt collection lawsuits).

<sup>81</sup> Foohey, *Calling on the CFPB*, *supra* note 9, at 186–89 (discussing sampling, sample characteristics, and comparing the sample to overall complains submitted via the CFPB).

<sup>82</sup> *Id.* at 178.

<sup>83</sup> *Id.* at 189 (discussing qualitative content analysis).

frustration, disgust, sadness, fear, shame, and guilt.<sup>84</sup> I also created variables to assess whether consumers were directing their complaints to the CFPB or the financial company, and whether consumers discussed law in their complaints.<sup>85</sup>

In brief, I found that people's narratives expressed one of two sentiments: anger and frustration about a company's practices, or sadness and fear about how a company's practices negatively affected their lives. When people expressed anger and frustration, they more often raised legal claims and asked the CFPB to investigate the company generally.<sup>86</sup> When people expressed sadness and fear, they more often pleaded with the CFPB for individualized help—help which the CFPB is not equipped to provide.<sup>87</sup> With this in mind, I identified new ways that the CFPB and other agencies with similar complaint mechanisms may help people in need that turn to them for assistance, including encouraging these individuals to think of their issues as legal problems.<sup>88</sup>

As relevant to this Essay, when I initially analyzed the sample of narratives, I also created a variable for instances in which narratives mentioned bankruptcy. When combined with my other data, these narratives may offer a window into how people construct their financial problems as legal problems addressable, in part, by bankruptcy. Few of the sampled narratives discussed law or bankruptcy, which aligns with research showing that people often do not think of their problems as legally addressable. Nine percent of the narratives asserted alleged violations of federal and state laws, such as the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA),<sup>89</sup> and four percent mentioned bankruptcy.<sup>90</sup> Less than one percent both discussed bankruptcy and alleged a legal violation.<sup>91</sup>

Those narratives that cited both bankruptcy and another law predominately alleged violations of FDCPA and FCRA for creditors' attempts to collect debt that consumers thought had been discharged through their bankruptcy cases, or for including information on credit reports that consumers believed was inaccurate. In three-fourths of the narratives in which consumers discussed

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<sup>84</sup> *Id.* at 189–91 (discussing major emotions and coding strategy).

<sup>85</sup> *Id.* at 191–93 (detailing these variables).

<sup>86</sup> *Id.* at 192; *see also id.* at 182–83 (discussing how the CFPB responds to complaints).

<sup>87</sup> *Id.* at 178 (summarizing the results).

<sup>88</sup> *Id.* at 207–09 (discussing the results).

<sup>89</sup> *Id.* at 200.

<sup>90</sup> 264 (4.4%) of the 6,000 narratives mentioned bankruptcy. *See generally* Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012); Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012).

<sup>91</sup> 37 (0.6%) of the 6,000 narratives mentioned both bankruptcy and another law. *See generally* Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012); Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012).

bankruptcy, they asked that information be removed from credit reports or requested that debt collectors stop calling them, their relatives, and their employers about purportedly discharged debts.<sup>92</sup>

Many of the remaining narratives in which consumers brought up bankruptcy—15% of all narratives mentioning bankruptcy—speak to people’s paths considering debts financial problems to issues properly addressed through bankruptcy. Consumers usually recounted their financial difficulties and related life problems that motivated them either to be “forced to” file bankruptcy<sup>93</sup> or to consider filing bankruptcy in the near future.<sup>94</sup> These consumers’ stories reflect a journey to bankruptcy that included trying to solve their problems by working with creditors, looking for more or new work, appealing to others for help, and eventually realizing the necessity of bankruptcy or other legal action.<sup>95</sup>

Corroborating research about people choosing legal solutions and being aware of bankruptcy’s stigma, consumers sometimes provided rationalizations for financial troubles and bankruptcy filings. For instance, narratives included consumers’ statements that they “first and foremost” tried to pay their creditors,<sup>96</sup> that their creditors “caused” them to file because of continuing threats,<sup>97</sup> that they were “good” people, and that bankruptcy was a last-ditch

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<sup>92</sup> 196 of the 264 narratives mentioned bankruptcy discuss debt collection or credit reporting issues post-bankruptcy. A portion of the other narratives that mentioned bankruptcy recounted specifics of bankruptcy cases, often reaffirmations. *See generally* Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012); Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012).

<sup>93</sup> *See, e.g.*, Study ID 02624, Complaint ID 1848449 (March 24, 2016) (on file with author) (“I was forced into bankruptcy due to Flagstar.”); Study ID 33215; Complaint ID 1593521 (Oct. 5, 2015) (on file with author) (“I am now forced to file bankruptcy”); Study ID 46527, Complaint ID 1495359 (July 30, 2015) (on file with author) (“I finally had to file bankruptcy and lost everything I owned.”).

<sup>94</sup> *See, e.g.*, Study ID 04685, Complaint ID 1823089 (March 8, 2016) (on file with author) (“I have to now worry about having them come after me . . . or just be forced into bankruptcy!”); Study ID 09280, Complaint ID 1783549 (Feb. 12, 2016) (on file with author) (“I called and they were very abusive over the phone and hung up on me when I asked them who they were. I has to file bankruptcy.”); Study ID 59285, Complaint ID 1393648 (March 27, 2015) (on file with author) (“I am getting to the point where I will be obligated to seek other resolution like litigation or bankruptcy.”).

<sup>95</sup> *See, e.g.*, Study ID 08890, Complaint ID 1787818 (Feb. 15, 2016) (on file with author) (discussing job loss); Study ID 12312, Complaint ID 1761064 (Jan. 27, 2016) (on file with author) (noting that modified mortgage and then had to file bankruptcy); Study ID 39125, Complaint ID 1550121 (Sept. 3, 2015) (on file with author) (“[I] had to file Bankruptcy to figure out what to do next.”); Study ID 41182, Complaint ID 1532844 (Aug. 24, 2015) (on file with author) (“My only recourse at this point is to file bankruptcy . . . I’ve also considered seeking an attorney to see if there is any legal recourse I can take against the company.”).

<sup>96</sup> Study ID 08890, Complaint ID 1787818 (Feb. 15, 2016) (on file with author) (“First and foremost we have always wanted to pay our mortgage.”).

<sup>97</sup> Study ID 01844, Complaint ID 1862573 (April 4, 2016) (on file with author) (claiming that a notice of default was incorrectly recorded).

solution.<sup>98</sup> In another narrative, the consumer began by describing an email threatening that the consumer would be “arrested or put in jail for fraud,” then noted speaking with an attorney about bankruptcy, and ended with an exculpatory explanation: “[t]his situation was brought on due to a serious medical condition.”<sup>99</sup> Yet another narrative described a consumer’s unsuccessful attempt to negotiate with a creditor by trading \$1,000 intended for bankruptcy filing and attorney’s fees to settle the soon-to-be-discharged debt.<sup>100</sup>

In a few other narratives, consumers specifically affirmed that they had not filed bankruptcy. These statements also described bankruptcy as a last resort, and consumers expressed pride in evading the stigmatized option. For example, after describing a family’s extensive efforts to deal with their debts, one narrative ended with: “We did everything but bankruptcy.”<sup>101</sup>

The CFPB complaint narratives admittedly are the thoughts of a small, select subset of the population dealing with financial troubles. Nonetheless, consumers’ unprompted discussions of bankruptcy correspond with research about how people connect their justiciable problems to law, demonstrating the usefulness of future studies to assess how people with financial problems enter the legal system. Additionally, narratives that traced people’s journeys from financial distress to filing bankruptcy stand out for other reasons. These consumers’ narratives read much like other statements that did not mention bankruptcy, yet told stories of struggles with debt that impacted their survival. Both types of narratives were imbued with the same fear and sadness.<sup>102</sup> The handful of consumers who ended their stories with filing bankruptcy, however, seemingly realized (or found the courage to use) another solution for their financial issues, even if bankruptcy proved not to be a panacea.

These results again raise questions about all individuals who struggle financially, but do not enter the bankruptcy system. Do these people find another

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<sup>98</sup> See, e.g., Study ID 03312, Complaint ID 1837826 (March 17, 2016) (on file with author) (“My parents, who have had wonderful credit scores in the past . . . are now considering bankruptcy as a solution, which for us is a last resort.”); Study ID 14610, Complaint ID 1745642 (Jan. 15, 2016) (on file with author) (“I am a good person and believe in paying my debts, but the way Wells Fargo has treated me, I don’t think they want me to keep my home.”); Study ID 59752, Complaint ID 1390462 (April 24, 2015) (on file with author) (“We finally . . . had to declare bankruptcy. It was not what we wanted to do we worked for years to try and avoid it.”).

<sup>99</sup> Study ID 08352, Complaint ID 1792061 (Feb. 17, 2016) (on file with author).

<sup>100</sup> Study ID 42080, Complaint ID 1525645 (Aug. 19, 2015) (on file with author).

<sup>101</sup> Study ID 58649, Complaint ID 1399329 (May 31, 2015) (on file with author) (“We did everything but bankruptcy.”); see also Study ID 19045, Complaint ID 1708838 (Dec. 19, 2015) (on file with author) (“I never filed for bankruptcy.”); Study ID 50301, Complaint ID 1465608 (July 13, 2015) (on file with author) (“I am trying to prevent filing [bankruptcy].”).

<sup>102</sup> See *supra* note 66 and accompanying text.

way to resolve their financial problems? Or do they languish, struggling with mounting debts, dealing with the threatened loss of homes, and worrying about paying for medical care, food, and utilities?<sup>103</sup> Again, these questions demonstrate the need for new research incorporating both individuals who are currently struggling with debts and those who have successfully navigated their financial issues.

Not only will surveying these populations answer questions about how financial problems become socially constructed as legal problems, but it also should yield insights about what roles law and legal institutions play in effectuating people's rights. Greater access to and increased use of the legal system is not necessarily more productive. Many people may better achieve their goals through negotiating with their creditors directly, essentially "bargaining in the shadow of the law."<sup>104</sup>

Currently, the CFPB's complaint mechanism provides the most prominent, and perhaps the most useful legal way for people to alert consumer financial product and service providers about their issues. The fact that complaints originate from the CFPB may imbue them with an authority that seems to generally benefit consumers.<sup>105</sup> Other less "squeaky wheel" consumers who do not know about, or are not willing to use the CFPB's complaint mechanisms, may receive different, less beneficial treatment.<sup>106</sup> The same holds true for other quasi-legal and non-legal avenues to assert legal rights, such as citing relevant law, calling upon prominent community members or elected politicians for help, or simply hammering away until issues are resolved.<sup>107</sup> Crucially, the mere fact that complaint mechanisms and other quasi-legal dispute resolution mechanisms exist may serve to redirect many would-be legal claims through these channels,

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<sup>103</sup> See Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_ (noting that people indicate they go without healthcare, food, and utilities while struggling to pay debts before filing bankruptcy).

<sup>104</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979); see also Amanda E. Dawsey, et al., *Non-Judicial Debt Collection and the Consumer's Choice among Repayment, Bankruptcy and Informal Bankruptcy*, 87 AM. BANKR. L.J. 1 (2013) (measuring the impact of state debt collections laws that prohibit debtor harassment by creditors who originated or purchased defaulted debts on bankruptcy filings).

<sup>105</sup> See Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMPLE L. REV. 895, 904-27 (2015) (detailing the CFPB's complaint mechanism as alternative dispute resolution).

<sup>106</sup> See Amy Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPPERDINE L. REV. 279, 283 (2012) (noting that attending primarily to complaining consumers "allows businesses to ration remedies and discriminate in favor of sophisticated squeaky wheel consumers with the requisite information and resources to protect their interests and pursue purchase complaints").

<sup>107</sup> See generally Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547 (2016) (discussing businesses' internal dispute resolution processes).



so that fewer legal claims are raised through the legal system.<sup>108</sup> If this becomes a pervasive trend, this behavior may weaken the force of law and decrease the legal system's legitimacy and impact. Or such channeling may have no such effect.

These larger questions about legal institutions' integrity turn on how people use the legal system to solve justiciable problems—that is, their access to justice. Understanding how people come to the legal system and how these journeys in turn affect the force of law and the legal system is complex, both in general and in the consumer bankruptcy context. But exploring these difficult “front-end” questions about how people move from financial trouble to legal problem to filing bankruptcy (or not) is essential to evaluating people's access to the bankruptcy system's benefits.

## II. ACCESSING BANKRUPTCY

When thinking about access to justice, perhaps the most frequently raised question is the extent to which people can assert and effectuate their legal rights within the legal system. In consumer bankruptcy, once people have decided to file, their access to justice depends on their ability to find an attorney to help them do so. Data show that *pro se* debtors fare considerably worse in the bankruptcy system as compared to represented debtors. For instance, in a sample of cases filed *pro se* in 2007 and 2008, 0.8% of chapter 13 cases and 71.8% of chapter 7 cases ended in a discharge.<sup>109</sup> For comparison, approximately 50% of all chapter 13 cases and 97% of all chapter 7 cases in the 2007 iteration of the CBP resulted in a discharge.<sup>110</sup> Perhaps because people understand that filing with the help of an attorney is vital, or perhaps because bankruptcy is technically daunting, the vast majority of debtors retain an attorney.<sup>111</sup>

Although the cost of retaining an attorney is not the sole or even primary reason that people do not assert their legal rights,<sup>112</sup> once people come to understand their problems as *legal* problems, attorneys' fees undoubtedly factor into their ability to effectuate their legal rights. For people facing financial problems, in particular, it may be hard to find money to pay a bankruptcy

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<sup>108</sup> See Katherine Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanism*, 7 BROOK. J. CORP. FIN. & COM. L. 57, 82–85 (2012) (discussing whether the CFPB's “complaint system will improve the overall consumer protection framework”).

<sup>109</sup> See Lupica, note 11, at 64.

<sup>110</sup> See Foohey, et al., *No Money Down*, *supra* note 18, at 1093 tbl 5.

<sup>111</sup> See *supra* note 87 and accompanying text.

<sup>112</sup> See *supra* note 39 and accompanying text.

attorney.<sup>113</sup> Indeed, prior research has shown that the timing of consumer bankruptcy filings track when people receive their tax refunds and paychecks, leading to the conclusion that people have to “save up” for bankruptcy, initially accumulating emotional resources, and then financial assets.<sup>114</sup>

The issue of how people find the funds to pay their attorneys intersects with perhaps the most enduring issue of access to justice in consumer bankruptcy: substantial regional disparities in the proportion of households filing chapter 7 or chapter 13. Chapter choice determines a household’s experience while in bankruptcy and post-bankruptcy. In chapter 7, debtors give up all their non-exempt property in exchange for a discharge of most of their debts. Almost all chapter 7 cases end in a discharge, typically four to six months after filing. In chapter 13, people retain all their property, and, in exchange, pay all their “disposable income” to fund a repayment plan that lasts three to five years. Once they complete the plan, they receive a discharge of most of their debts. Data from the Current CBP show that about half of households that file chapter 13 receive a discharge, including those cases that ended with a discharge after they were converted to chapter 7.<sup>115</sup>

Since the beginning of systematic empirical research into the consumer bankruptcy system, most prominently by the original CBP co-investigators (Teresa Sullivan, Elizabeth Warren, and Jay Westbrook), scholars have identified and commented on the bankruptcy system’s “local legal culture” in terms of what chapter households file.<sup>116</sup> In some regions of the country, such as Idaho and Indiana, most households file under chapter 7. In other areas of the country, such as Alabama, Georgia, and Texas, most households file under chapter 13.<sup>117</sup> Although as a matter of law the Bankruptcy Code leaves chapter choice mostly up to debtors, this research suggests that debtors’ “choices” are

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<sup>113</sup> See Study ID 51768, Complaint ID 1451772 (July 6, 2015) (on file with author).

<sup>114</sup> See Mann & Porter, *supra* note 42, at 319–24 (detailing the “tax refund effect” and “paycheck effect” on filing patterns).

<sup>115</sup> See *supra* note 110 and accompanying text; Foohey, et al., *No Money Down*, *supra* note 18, at 1061–63 (detailing and contrasting chapters 7 and 13).

<sup>116</sup> See generally TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICAN IN DEBT* (2000); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989); Braucher, *supra* note 43; see also *supra* notes 23, 24 and accompanying text; DAVID T. STANLEY & MARJORIE L. GIRTH, *BANKRUPTCY: PROBLEMS, PROCESS, REFORM 74–76* (1971) (documenting a wide variation in chapter XIII rates—the chapter of the Bankruptcy Act that became chapter 13 of the Bankruptcy Code—among seven districts studied).

<sup>117</sup> See *Caseload Statistics Data Tables*, *supra* note 1.

guided by system actors, namely attorneys.<sup>118</sup> Regional disparities in chapter 7 and 13 filing rates have persisted for decades, as is evident through scholarship incorporating data from successive CBP iterations.<sup>119</sup>

Later research built upon these results by adding debtors' race to the analysis of disparities in chapter choice. Relying on data gathered since 1991, studies have shown that black households are over-represented in chapter 13, regardless of where they are located, and that this disparity persists after controlling for factors that would counsel filing under chapter 13.<sup>120</sup> Stated differently, black households are much more likely to file chapter 13 as compared to similarly-situated households of other demographics. The racial demographics of chapter choice become even more significant considering that 2007 CBP data show that black households are 17% less likely to receive a discharge in chapter 13 than other similarly-situated households.<sup>121</sup>

To explore what may influence the racial disparity in chapter choice, Jean Braucher, Dov Cohen, and Robert Lawless conducted a study in which they sent a vignette to consumer bankruptcy attorneys across the country that asked the attorney to select a bankruptcy chapter for a hypothetical couple with a mix of financial circumstances that made counseling filing chapter 7 or 13 equally plausible. The vignettes varied on two items: the couple's names ("Reggie and Latisha," "Todd and Allison," and no names), and whether the couple indicated they were leaning toward filing chapter 7 or 13.<sup>122</sup> The results suggest that attorneys may guide chapter choice in a way that connects with racial

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<sup>118</sup> 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").

<sup>119</sup> See Foohey, *No Money Down*, *supra* note 18, at 1063; Chrystin Ondersma, *Are Debtors Rational Actors? An Experiment*, 13 LEWIS & CLARK L. REV. 279, 295–303 (2009) (replicating the persistence of local legal culture with an expanded dataset); see also William C. Whitford, *Small Ball*, 90 TEX. L. REV. 9, 16–18 (2011) (finding that the percentage of chapter 13 cases filed across districts has remained constant from 1993 to 2010).

<sup>120</sup> See 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 the 2007 CBP to find that black households were more likely to file under chapter 13 as compared to similar other households); Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 AM. BANKR. L.J. 623, 631 (2017) (relying on CBP data from cases filed in 2013, 2014, and 2015 to replicate findings based on 2007 CBP data about racial disparities in chapter choice); Robert M. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 387 (2002) (using data from the 1991 CBP to find that black households were over-represented in consumer bankruptcy, but not in chapter 7); Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 234 (2009) (relying on data from the 2001 CBP to find that 61.8% of black households filed chapter 13).

<sup>121</sup> Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1060, 1086–87 (2017).

<sup>122</sup> Braucher, et al., *supra* note 120, at 405–08 (describing the vignette).

disparity.<sup>123</sup> Attorneys were twice as likely to recommend that “Reggie and Latisha” file under chapter 13 as attorneys who counseled “Todd and Allison.”<sup>124</sup> And attorneys were more likely to indicate that they thought the white couple leaning toward filing chapter 7 had “good values” and was competent, while attorneys were more likely to indicate that the black couple that preferred chapter 13 had “good values” and was competent.<sup>125</sup>

Another study conducted by Dov Cohen, Robert Lawless, and Faith Shin, based on a survey of a nationally-representative sample of attorneys about racial disparity in chapter choice, found that attorneys’ beliefs about debtor’s chapter choice is opposite of actual trends in percentages of chapter 13 filings from black and white household.<sup>126</sup> Although this result suggests that attorneys do not recognize that their actions may contribute to racial disparities in chapter choice—which would align with implicit bias research<sup>127</sup>—it does not change the fact that attorneys may influence chapter choice decisions such that disparities emerge.

Bankruptcy attorneys also have a monetary interest in chapter choice. Attorneys charge more to assist with a chapter 13 filing than a chapter 7 filing. Based on Current CBP data, attorneys charge an average of \$1,224 to file and represent a debtor in chapter 7, and an average of \$3,442 to file and represent a debtor in chapter 13.<sup>128</sup> Because of Code section language providing attorney payment, as well as a Supreme Court decision interpreting that language, attorneys require their clients filing chapter 7 to pay attorneys’ fees before filing, but can allow their clients filing chapter 13 to pay attorneys’ fees as part of the repayment plan.<sup>129</sup>

This leads to what my co-authors and I termed “no money down” bankruptcy—filing chapter 13 without paying any attorneys’ fees before filing—as contrasted with all other chapter 13 cases, which we termed

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<sup>123</sup> *But see* Edward R. Morrison & Antoine Uetwiller, *Consumer Bankruptcy Pathologies*, 173 J. INSTITUTIONAL & THEORETICAL ECON. 174 (2017) (using a sample of chapter 7 and 13 cases from Cook County, Illinois to find that the same racial disparity in chapter choice, but attributing much of the disparity to parking tickets and government fines that were dischargeable in chapter 13, but not chapter 7).

<sup>124</sup> Braucher, et al., *supra* note 120, at 411–13.

<sup>125</sup> *Id.* at 413–16.

<sup>126</sup> Cohen, et al., *supra* note 120, at 638. The authors surveyed bankruptcy attorneys before they published the results of their initial work on the racial disparity in chapter choice.

<sup>127</sup> *See* A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 643–47 (2012) (discussing racial stereotyping and implicit bias).

<sup>128</sup> Foohey, et al., *Sweatbox*, *supra* note 28, at \_\_.

<sup>129</sup> *See* Foohey, et al., *No Money Down*, *supra* note 18, at 1066–67 (discussing 11 U.S.C. § 330 and the effects of *Lamie v. United States Trustee*, 540 U.S. 526 (2004)).

“traditional” chapter 13.<sup>130</sup> Based on data from the 2007 CBP and Current CBP, we found that “no money down” bankruptcy is reshaping the consumer bankruptcy system. Between 2007 and 2015, the percentage of “no money down” chapter 13 cases filed increased by 25%.<sup>131</sup> We also found that two factors determine whether households will file “no money down” cases: where they live and their race.<sup>132</sup> Controlling for other relevant factors, we also found that, as the rate of chapter 13 filings increased in any given district, the percentage of cases filed as “no money down” chapter 13 cases also increased, as did the racial disparity in chapter choice in that district.<sup>133</sup> This suggests that much of the racial disparity in chapter choice in districts with high percentages of chapter 13 cases is attributable to “no money down” chapter 13 bankruptcy.<sup>134</sup> It also provides some evidence of a link between “local legal culture” and the racial disparity in chapter choice. Significantly, we could not identify any legitimate reasons why place of residence or race would correlate with debtors’ need for chapter 13’s substantive legal benefits. Instead, “no money down” bankruptcy emerges as a breakdown in access to justice—more so for black households, but also for many households, regardless of demographics.

Since the publication of *“No Money Down” Bankruptcy*, two studies have expanded on its conclusions. First, in a piece written for ProPublica, Paul Kiel and Hannah Fresques conducted an in-depth analysis of two districts with stark racial disparities in chapter choice: the Northern District of Illinois and the Western District of Tennessee.<sup>135</sup> They found that a few law offices in each district filed most of the chapter 13 cases, and that in Tennessee, chapter 13 cases were “nearly or always” filed with “no money down.”<sup>136</sup>

Second, Robert Lawless and Angela Littwin combined data from the Census Bureau with a database maintained by the Federal Judicial Center that contains information on every bankruptcy case filed between fiscal years 2012 and

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<sup>130</sup> *Id.* at 1074.

<sup>131</sup> *Id.* at 1074–75.

<sup>132</sup> *Id.* at 1080–82.

<sup>133</sup> *Id.* at 1084–91 (discussing the multinomial regression and its results).

<sup>134</sup> *Id.* at 1090.

<sup>135</sup> Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, PROPUBLICA (Sept. 27, 2017), <https://projects.propublica.org/graphics/bankruptcy-data-analysis>; see also Paul Kiel & Hannah Fresques, *How the Bankruptcy System is Failing Black Americans*, PROPUBLICA (Sept. 27, 2017), <https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13/>.

<sup>136</sup> Kiel & Fresques, *Data Analysis*, *supra* note 135. As to Illinois, the authors found that many black households filed chapter 13 to deal with possible driver’s license suspensions, which accords with Morrison’s and Uetwiller’s results, *supra* note 123.

2016<sup>137</sup> with the goal of studying chapter choice on both the judicial district and community levels.<sup>138</sup> This strategy allowed them to begin to disentangle the “local” versus the “legal” in “local legal culture.” In line with previous research, they concluded that case characteristics (such as home ownership), race, and judicial district were the only variables associated with chapter choice.<sup>139</sup> Adding judicial district to the community level analysis, they further found that only one variable significantly predicted chapter choice—race, as measured by the racial composition of the debtor’s zip code.<sup>140</sup> These results strongly suggest that it is “legal” rather than “local” variables that influence the racial disparity in chapter choice.<sup>141</sup>

With this latest study’s results, the conclusion becomes even clearer: to improve access to justice in consumer bankruptcy, reforms must focus on legal professionals. Future empirical research may expand upon these studies’ findings with targeted analyses to assess the inter-connected roles of legal professionals.<sup>142</sup> But given the increasing evidence that professionals guide clients’ choices among chapter 7, “no money down” chapter 13, and “traditional” chapter 13, a central focus of research now must be how best to incentivize system actors to examine their behaviors. Challenging the status quo is difficult, particularly because people often balk at the suggestion that their actions may perpetuate racism.<sup>143</sup> One way to encourage attorneys, trustee, and judges to confront and consider their biases is to provide easily-implementable ways for them to track their clients and the cases that appear before them, such as spreadsheets.<sup>144</sup> For instance, popular software, such as Best Case Bankruptcy, could include features that allow for downloading and simple data analysis.<sup>145</sup>

Research about the persistence of biases, however, suggests that such efforts may not be sufficient to combat systemic disparities. Another tactic is to change the Code itself. These changes, of course, will be harder to implement. Nonetheless, for the sake of discussion, potential reforms might start with

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<sup>137</sup> Integrated Database (IDB), FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/research/idb> (last visited Apr. 26, 2018).

<sup>138</sup> Robert M. Lawless & Angela Littwin, *Local Legal Culture from R2D2 to Big Data*, 96 TEX. L. REV. (forthcoming 2018) (draft dated Feb. 2018) (on file with author).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* (discussing ideas for future research).

<sup>143</sup> *See* Dickerson, *supra* note 127, at 647–48 (discussing implicit bias).

<sup>144</sup> *Id.* (proposing a “Lawyer’s Memo to Self: I May Be Giving Biased Advice”).

<sup>145</sup> BEST CASE BANKRUPTCY, <https://www.bestcase.com/> (last visited Feb. 12, 2018).

changes to the timing of the payment of attorneys' fees in chapter 7, requirements for chapter 13 plan confirmation, and simplifying chapter 7 to make *pro se* filing more plausible.<sup>146</sup> Eliminating the choice between chapter 7 and chapter 13 is a place to end—the discussion of which ended seemingly once and for all with BAPCPA's passage.<sup>147</sup>

Finally, an intermediate tactic is to appeal to bankruptcy judges. Bankruptcy judges promulgate standing orders that assist attorneys in setting fees and seem to effectuate “no money down” bankruptcy.<sup>148</sup> They also are the ultimate arbiters of chapter 13 plan confirmation, as well as case dismissal and conversion. And perhaps most significantly for changing “local legal culture” from the inside out, judges can influence how bankruptcy trustees evaluate cases, which consequently influences how debtors' attorneys shape their law practices.<sup>149</sup>

### CONCLUSION

To evaluate access to justice in the context of consumer bankruptcy, there are two key questions to consider: how do people think about their financial problems as legal problems addressable by filing bankruptcy, and to what extent debtors can effectuate their legal rights in bankruptcy. More research is needed to understand how people come to think of law as a way to deal with their financial problems. In contrast, research shows and reaffirms that the consumer bankruptcy system suffers from racial and regional disparities that negatively impact access to justice. Short of legislative changes, attention now should be paid to shifting consumer bankruptcy's culture.

However, when thinking about access to justice, it is crucial to recognize that bankruptcy is not a panacea for all or even most financial troubles. Racial disparities persist outside of bankruptcy across consumer financial products and services,<sup>150</sup> widening income inequality prevents families from getting ahead,<sup>151</sup>

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<sup>146</sup> Foohey, et al., *No Money Down*, *supra* note 18, at 1103–05 (detailing these ideas).

<sup>147</sup> See William Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy As Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANK. L.J. 397 (1994); William Whitford, *Has the Time Come to Repeal Chapter 13*, 65 IND. L.J. 85 (1989).

<sup>148</sup> Foohey, et al., *No Money Down*, *supra* note 18, at 1068–69 (discussing standing orders).

<sup>149</sup> See Westbrook, *supra* note 118, at 30 (noting the interplay of system actors).

<sup>150</sup> See Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 54 HOUS. L. REV. 1079, 1096–98 (2017) (discussing how blacks pay more for financial products).

<sup>151</sup> See Heather Long, *U.S. Inequality Keeps Getting Uglier*, CNN MONEY (Dec. 22, 2016), <http://money.cnn.com/2016/12/22/news/economy/us-inequality-worse/index.html>.

and companies continue to violate consumer protection laws.<sup>152</sup> Many of the financial issues that Americans face are better addressed outside of bankruptcy, including with the help of states and cities, which may prevent people from needing to file bankruptcy.<sup>153</sup> But once consumers turn to bankruptcy, attorneys, judges, and trustees have a responsibility to ensure that the system itself does not compound the financial problems people face outside of bankruptcy.

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<sup>152</sup> In its first five years, the CFPB returned more than \$11.7 billion to Americans. See Ian Salisbury, *The CFPB Turns 5 Today. Here's What It's Done (and What It Hasn't)*, TIME (July 21, 2016) <http://time.com/money/4412754/cfpb-5-year-anniversary-accomplishments/>.

<sup>153</sup> See Susan Block-Lieb, *Cities as a Source of Consumers' Financial Empowerment*, 34 EMORY BANKR. DEV. J. 387 (2018).