PREFACE: THE ROLE OF BANKRUPTCY LAW IN THE U.S. LEGAL SYSTEM

by

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I used to know but I'm not sure now
What I was made for
What was I made for?[**]

Death and taxes are inevitable. Appearing in bankruptcy court isn't as quite inevitable, but as both Judge Christopher Klein and Professor Pamela Foohey point out in their articles, for most people, the bankruptcy court "likely will be the only federal court with which they ever come in contact."[1] Thus, understanding how our Bankruptcy Code and Bankruptcy Rules interact with nonbankruptcy law is an important part of explaining to so many people how our particular specialty matters to them—and how our specialty works in real life.

I fell in love with bankruptcy practice because it's a specialty that allows us also to be generalists in so many other areas. A good bankruptcy lawyer is both a transactional lawyer and a litigator—and, most important of all, a good bankruptcy lawyer is a counselor in the truest sense of the word. We need to know enough about tax law, and employment law, and secured transactions, and numerous other legal fields to be able to provide competent advice in our own specialty. This symposium issue lets us talk about the Bankruptcy Code and its place in the larger legal environment: to paraphrase Billie Eilish and her brother Finneas, "what was it made for?" Is

[*] In addition to being grateful to our panelists, who made our symposium panel's discussion marvelous, I'm grateful to Judges Terrence L. Michael and Michelle M. Harner for their leadership, to my indefatigable law librarian colleague Youngwoo Ban, and to my ever-patient (and best editor) husband, Jeff Van Niel.

[**] Billie Eilish O'Connell & Finneas Baird O'Connell, *What Was I Made For?*, BARBIE THE ALBUM (2023). This song won an Oscar for Best Original Song, and yes, I still hold a grudge that Greta Gerwig was not nominated for a Best Director Oscar this past year.

[1] *See* Pamela Foohey, *The Periphery of Bankruptcy Law: The Importance of Non-Bankruptcy Issues in Consumer Bankruptcy Cases*, 98 AM. BANKR. L.J. vol. 3 (Symposium Issue) (2024); *see also* Hon. Christopher M. Klein & Nancy B. Rapoport, *A Life in Service: Interview with the Hon. Christopher M. Klein*, 98 AM. BANKR. L.J. vol. 3 (Symposium Issue) (2024).

the Code constructed simply to carry out the twin objectives of giving debtors a fresh start and giving creditors a single forum for debtor-related issues, or does the Code have a broader purpose? Can it be a tool for solving complex problems that nonbankruptcy law simply doesn't solve very well? You're about to read four articles that show us four different ways to approach the "what was it made for" question.

Professor Pamela Foohey's article gives us a glimpse into the wide array of nonbankruptcy law that good consumer bankruptcy lawyers must master, and she highlights the ways that bankruptcy law can solve many of the financial problems that consumers experience. Bankruptcy courts can be a place for consumer debtors who are in over their heads to be heard; a place for consumer debtors to explain what happened to them and to signal what a fresh (or almost fresh) start can do to help them. In our symposium discussion, Professor Foohey explained how important that feeling of being heard was to the sense that justice was being served, and Judge Klein corroborated her point with a few stories of his own. The expertise of the bankruptcy courts, and of the lawyers who practice in those courts, can enable people trapped by debt to once again become contributing members of our economy.

Judge Christopher Klein's article shows us how a judge can parse what is happening in a case and use the mantra of "justice delayed is justice denied" to keep a case moving toward a sensible resolution. Sometimes, a judge can give the litigants a reality check: the concept of a "show business-y" courtroom, with its last-minute, *Perry Mason*-like confessions is very different from the day-to-day experience that we've seen in our bankruptcy system, where many of the moves are predictable.[2] Someone is going to move for relief from the automatic stay. Someone is going to argue about the value of certain collateral. There are going to be some adversary proceedings. A good judge can signal when one side's going off the deep end in terms of credible arguments.[3] And if both parties are unhappy with a signaled (or

[2] Thank goodness some aspects, both on the business side and on the consumer side, still present novel issues calling for creativity, or we'd be bored out of our wits.

[3] Consider the following exchange,

> Sonny Weaver Jr.: ⟦*thinking*⟧ Final offer. Take our number two pick this year, next year, and the next year after that. That's three years of number two picks.

entered) decision, the parties will find a way to negotiate a better solution. Judge Klein's article demystifies part of how judges think about the issues before them, and how judges interact with both the repeat players and those for whom the bankruptcy case is a "one and done."

Those of us who love bankruptcy law like to assume that it can solve almost any problem. As Abraham Maslow famously said, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."[4] Professor Jonathan Seymour taps into this concept with the first of his three observations—that "specialization risks overdiagnosis of problems that call out for solutions deployed from the specialist toolkit from which they make their living, as the rest of the world recedes into the distance much like – in Judge Goldblatt's comparison – the *New Yorker*'s *View of the World* beyond Ninth Avenue.[5]" Do most things that go on in a given case really involve bankruptcy law *qua* bankruptcy law, or are most issues in bankruptcy court just garden-variety legal issues that draw on other areas of law and happen to be situated in a bankruptcy court? And, equally important, when there is a clash of titans and the Bankruptcy Code points in one direction and another area of law points in exactly the opposite

> Jeff Carson: [*his scouts nod their approval*] Four. I want your next four number twos.
> Sonny Weaver Jr.: Nah, Jeff, I'm not gonna do that. Stay with me on planet Earth here, all right? You know what I just offered you is fair.

DRAFT DAY (Lionsgate Films 2014), https://www.imdb.com/title/tt2223990/quotes/. That "stay with me on planet Earth here" moment is something that good trial judges do very, very well.

[4] ABRAHAM MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15–16 (First Gateway Edition 1969).

[5] Jonathan M. Seymour, *Bankruptcy in Conflict*, 98 AM. BANKR. L.J. vol. 3 (Symposium Issue) (2024). In his article, Professor Seymour references *In re Yellow Corp.*, for two propositions: "[s]ome argue that bankruptcy judges tend to place an outsized premium on the importance of the sphere with which they are most familiar;" and bankruptcy law is perceived "much like the *New Yorker* magazine cover of a *View of the World from Ninth Avenue*, with the imperatives of the bankruptcy case appearing prominently in the front and center, while everything else is of receding importance as it fades into the distance." 2024 WL 1313308, at *13 (Mar. 27, 2024); *see also View of the World from 9th Avenue & Steinbergian Cartography*, Saul Steinberg Found., https://saulsteinbergfoundation.org/essay/view-of-the-world-from9th-avenue/. It did my heart good to see almost the entire NCBJ conference organized around Professor Seymour's earlier piece: Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925 (2022).

direction, how should we decide which law should break the tie?

I was raised on Baird and Jackson,[6] so I was happy to see the abstract for Professor Douglas Baird's article, which begins by reminding us about Professor Thomas Jackson's theory about having a minimalist corporate bankruptcy law. As Professor Baird explains, in the Baird/Jackson world, "[t]he law of corporate reorganizations was in the first instance procedural. There was no need to change substantive rights beyond what was necessary to respond to the collective action problem, and these changes were relatively few in number."[7] When I was a law student, I translated this concept into the mantra that bankruptcy law should not change nonbankruptcy law rights unless there was a darn good reason to do so. As a Theory of Everything,[8] it had elegance. As a lived experience, though, Professor Baird correctly points out that *how* one uses procedure can affect substantive rights dramatically. (For what it's worth, the opinions of many bankruptcy judges, including Judge Klein himself,[9] demonstrate a mastery of this concept.) And he posits a wonderful example for explaining the concept of capturing value inside bankruptcy: Schrödinger's restaurant, which I'll leave for you to explore.[10] Moreover, adept bankruptcy lawyers can, as Professor Baird observes, "distort the incentives" even in a bankruptcy-minimalistic world.[11] So Professor Baird's article teases out the nuances of how far bankruptcy minimalism can take us.

This symposium issue gives us the opportunity to think deliberately about our place in the United States legal system. We can think about not just *what* we do, but *why* we do it, and whether what we are doing is good not only for our clients but also for the viability of our bankruptcy system

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[6] I was lucky enough to have had Tom Jackson as my professor for both Contracts and Bankruptcy.

[7] *See* Douglas G. Baird, *Bankruptcy Minimalism*, 98 AM. BANKR. L.J. vol. 3 (Symposium Issue) (2024).

[8] *Cf.* Tereza Pultarova, *The Theory of Everything: Searching for the universal rules of physics*, SPACE.COM (Dec. 18, 2022) ("The Theory of Everything is an overarching hypothetical framework that would explain the physics of the entire universe in a single equation."), https://www.space.com/theory-of-everything-definition.html.

[9] *See, e.g.*, Love v. U.S. Dept. of Educ. (*In re* Love), 649 B.R. 556 (Bankr. E.D. Cal. 2023) (finding undue hardship with respect to the discharge of the debtor's student loans).

[10] That imagery is quintessentially Bairdian.

[11] *See* Baird, *supra* note 7.

as a whole.[12] Does bankruptcy theory help us decide how far we should push the edges on behalf of our clients? Do the ethics rules help us? Does common sense?[13] Read on and see.

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[12] *Cf.* SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 48 (1996) (Elihu Root is said to have said, "The law lets you do it, but don't.... It's a rotten thing to do.").

[13] Although I'm trying hard not to say, "let's talk about venue now," I'm sure thinking it. For my own thoughts on venue's latest developments (perversions?), see, e.g., Nancy B. Rapoport, *Failing to See What's in Front of our Eyes: The Effect of Cognitive Errors on Corporate Scandals,* 16 WM. & MARY. BUS. L. REV. 1, 78–87 (2024).