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Contract Excuse and Bankruptcy Discharge

Robert A. Hillman*

A wide gulf presently separates our two primary doctrines for relief from promissory obligation—contract excuse¹ and bankruptcy discharge. On the one hand, contract law rarely excuses promisors.² The traditional wisdom holds that an expansive view of excuse compromises freedom of contract, and judges have no business interceding in people's private affairs.³ Moreover, people make contracts precisely to wager on the future, and excusing obligations subverts this aim.⁴ Granting excuse liberally would make people wary of entering contracts, to society's detriment.⁵

Proponents of the miserly approach to excuse add that we should not feel too charitable towards a promisor who foolishly or mistakenly enters a contract: Once parties make agreements, they should perform.⁶ Accordingly, contract courts rarely excuse promisors, even when a catastrophe makes performance extremely onerous. Notwithstanding academic writing that reports or urges expansion of the grounds of excuse, courts actually remain extremely reluctant to release parties from their obligations.⁷

Bankruptcy, on the other hand, liberally discharges individuals to afford

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1. Contract excuse doctrine includes the excuses of impossibility, impracticability, frustration, and mistake. See generally *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 60-78 (W.D. Pa. 1980); Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 650-51 (1983).

2. Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "the Wisdom of Solomon,"* 135 U. PA. L. REV. 1123, 1125 & n.8 (1987); Hillman, *supra* note 1, at 651.

3. See, e.g., *Printing Indus. Ass'n v. International Printing & Graphic Communications Union*, Local No. 56, 584 F. Supp. 990, 996 (N.D. Ohio 1984); George Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME LAW. 203, 218 (1979).

4. See, e.g., U.C.C. § 2-615 comment 4 (1978) ("Neither is a rise or a collapse in the market in itself a justification [for impracticability], for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.").

5. See ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* 31-35 (1987); Stephen J. Sirianni, *The Developing Law of Contractual Impracticability and Impossibility: Part II*, 14 U.C.C. L.J. 146, 162 (1981).

6. See, e.g., *Wabash, Inc. v. Avnet, Inc.*, 516 F. Supp. 995, 998 (N.D. Ill. 1981).

7. See Hillman, *supra* note 1, at 651; notes 43-51 *infra* and accompanying text. Generally, scholars bicker over the degree to which government has impinged on private contract. See Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988).

them a fresh start⁸ based on both humanitarian and economic justifications.⁹ A consumer debtor, many argue, is typically an innocent casualty of today's consumption ethic lured into incurring obligations beyond her means, or a victim of a calamity beyond her control.¹⁰ Even if the debtor is somehow at fault, the fresh-start policy prevails because society is better off reintegrating the debtor into its productive ranks than leaving her saddled with unconquerable debt.¹¹ Affording the debtor a second chance therefore produces a net social gain, discharge proponents claim.

Bankruptcy law also reorganizes businesses,¹² discharging their prior obligations based on similar economic reasoning: A company is often worth more to its creditors as a going concern than dissolved.¹³ A reorganization may also protect largely innocent third parties, such as employees of the debtor.¹⁴ To encourage investment, the law effectively (although not officially) discharges corporate debtors in liquidation proceedings, since the equity owners of a company are not personally liable to its creditors.¹⁵ Advocates of the bankruptcy discharge conclude that the policies supporting a fresh start, reorganization, and limited liability of shareholders outweigh the contractarians' concerns about creditors' expectations of performance and the parties' freedom of contract. Some go further and argue that the bankruptcy discharge enhances contract's goals by cushioning contract's hard-edged individualistic tendencies that may lead to unfair decisions and thereby discourage contracting.¹⁶

These positions largely capture today's accepted wisdom concerning contract excuse and bankruptcy discharge.¹⁷ In this article, I will delve more deeply into reasons for the wide divergence between these two approaches to

8. See John C. Weistart, *The Costs of Bankruptcy*, LAW & CONTEMP. PROBS., Autumn 1977, at 107, 110-11. Moreover, the right of discharge is not waivable prior to bankruptcy. See note 152 *infra* and accompanying text.

9. See Weistart, *supra* note 8, at 111-15. Bankruptcy law aims to liberate debtors psychologically and return them to "productive economic participation." Margaret A. Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1061-62 (1987).

10. See Howard, *supra* note 9, at 1052 (quoting Jack L. Van Baalen, *Bankruptcy Code Chapter 13—What Price the "Better Discharge"?*, 35 OKLA. L. REV. 455, 486 n.173 (1982)).

11. See Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 341 (1982).

12. E.g., corporations, partnerships, sole proprietors, business trusts, and unincorporated associations. See note 159 *infra*.

13. RICHARD I. AARON, BANKRUPTCY LAW FUNDAMENTALS § 1.04 (Release No. 9, Sept. 1990); see also THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 14-15 (1986).

14. See, e.g., H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977); *In re Johns-Manville Corp.*, 36 Bankr. 727, 736 (Bankr. S.D.N.Y. 1984); *In re Coram Graphic Arts*, 11 Bankr. 641, 645 (Bankr. E.D.N.Y. 1981). But see T. JACKSON, *supra* note 13, at 210 (the purpose of bankruptcy is to preserve nonbankruptcy entitlements).

15. When the law provides that a corporation makes a promise, not its owners, it engages in a convenient legal fiction designed to encourage investment. See note 158 *infra*.

16. See note 42 *infra*; Theodore Eisenberg, *Bankruptcy in the Administrative State*, LAW & CONTEMP. PROBS., Spring 1987, at 3, 28 (Bankruptcy acts as a "catch-as-catch-can patch to financial ventures that did not work.").

17. There are, of course, analysts that would quarrel with both portrayals on positive and normative grounds. See, e.g., T. JACKSON, *supra* note 13 (bankruptcy policy); Weistart, *supra* note 8, at 111-12 (contract excuse).

the single problem of limiting promissory liability. The individualism of contract excuse and the communitarianism of bankruptcy discharge¹⁸ certainly derive in part from perceived differences in context, parties, and goals. For example, in bankruptcy, unlike contract excuse, most envision that the debtor suffers a complete collapse and cannot perform all existing obligations. Upon discharge, a pool of creditors shares the loss, whereas a contract promisee must absorb the entire injury when a court excuses a promisor. Moreover, we often perceive bankrupts as vital merchants and sympathetic, ill-advised wage-earners battling grim creditor interests. Bankruptcy discharge, therefore, appears to encourage beneficial investment by merchants and protect deserving wage-earners. The cast of characters in a contract excuse case, in contrast, does not seem so differentiable, suggesting the futility of crafting excuse doctrine to serve instrumental goals.

I assert that these perceived distinctions, although numerous and stark on the surface, do not justify radically different approaches to contract excuse and bankruptcy discharge. Some of the understandings, I will argue, are factually accurate, but simply do not support the extent of today's divergence between contract and bankruptcy doctrines. Other perceived contrasts are at least in part fallacious.

More critical are differences in the methodologies of excuse and discharge. Discharge is a relatively bright-line rule; excuse is amorphous.¹⁹ Bankruptcy law permits courts to shape the precise nature of the discharge; excuse is an all-or-nothing remedial question.²⁰ Because we tend to embrace bright-line substantive and flexible remedial law and to resist other approaches, these differences in method contribute to our acceptance of discharge and to our suspicion of excuse. Nevertheless, the methodologies of discharge and excuse derive in part from the questionable perceptions concerning the context, parties, and goals of contract and bankruptcy. We therefore should not rule out adjusting contract and bankruptcy doctrines to reflect the true merits of discharging obligations and excusing performances, provided that we preserve the benefits of substantive clarity and remedial flexibility.

This article breaks down the attitudinal and doctrinal barriers that separate contract and bankruptcy and that mask the similarities between excuse and discharge. This approach sheds light on the nature of promissory obligation in our society and clarifies appropriate policies for excuse and discharge. Specifically, I argue that bankruptcy law teaches us that contract

18. The "communitarian vision" posits people who are not wholly self-interested and who are, in turn, dependent on others. Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 842-44 (1983). The "individualist pattern," on the other hand, describes a world of independent people free to pursue their own interests without concern for the well-being of others. *Id.* at 839. Of course, some of the economic justifications for bankruptcy discharge are communitarian only in the sense that self-interest ultimately benefits everyone.

19. See notes 263-266 *infra* and accompanying text. Moreover, the prestige of congressional legislation supports the bankruptcy discharge structure; excuse is largely state common law. See notes 261-262 *infra* and accompanying text.

20. See notes 267-268 *infra* and accompanying text.

excuse should incorporate a more communal view, and contract law suggests that bankruptcy discharge should better contemplate individual contract expectancies.

In Part I, I briefly trace the history of contract excuse and bankruptcy discharge and outline today's versions of these doctrines. I conclude that both excuse and discharge focus on the problem of supervening events that make performance of promises unusually costly, yet contract and bankruptcy tackle the problem very differently. Part II discusses why the doctrines diverge and removes impediments to a more unified analysis in Part III, which analyzes what proponents of contracts can adopt from bankruptcy law and what bankruptcy analysts can borrow from contract law.

I. THE DOCTRINES OF CONTRACT EXCUSE AND BANKRUPTCY DISCHARGE

A. *Contract Excuse*

1. *A brief historical sketch.*

Not surprisingly, our law of contract excuse derives from English law. English contract law of the seventeenth and eighteenth centuries, grounded on the sanctity of contract, enforced promissory obligations with few exceptions. In the venerable *Paradine v. Jane*,²¹ for example, a lessee's unanticipated dispossession by an enemy army did not relieve him of his obligation to pay rent. The court reasoned that a promise binds a party, despite unanticipated circumstances, unless the contract expressly excused the party. By the mid-1800s, English courts followed *Paradine* as a general principle of contract law.²²

But such logic can yield harsh results; both courts of law and equity, therefore, carved a few narrow exceptions. For example, courts relieved promisors, or their estates, when the promised performance was physically impossible because of the death of the promisor,²³ the destruction of a chattel,²⁴ or the illegality of performance.²⁵ In 1863, the court in *Taylor v. Caldwell*²⁶ extended the exceptions to *Paradine*²⁷ by finding that the continued existence of a person or a thing could be implied in an agreement as a condi-

21. 82 Eng. Rep. 897 (K.B. 1647).

22. *Hall v. Wright*, 120 Eng. Rep. 695 (Ex. Ch. 1859); *Brown v. Royal Ins. Co.*, 120 Eng. Rep. 1131 (Q.B. 1859); see also John Henry Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 422 (1969) (*Paradine* a "good prophecy of the attitude of the 19th century"); John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L.J. 1575, 1580-93 (1987) (discussing subsequent cases).

23. *Hyde v. Dean of Windsor*, 78 Eng. Rep. 798 (Q.B. 1597); *Abbot of Westminster v. Executors of Clerke*, 73 Eng. Rep. 59 (K.B. 1536).

24. *Williams v. Lloyd*, 82 Eng. Rep. 95 (K.B. 1628).

25. *Abbot of Westminster v. Executors of Clerke*, 73 Eng. Rep. at 63; see E. ALLAN FARNSWORTH, *CONTRACTS* 670-73 (2d ed. 1990); Schlegel, *supra* note 22.

26. 122 Eng. Rep. 309 (Q.B. 1863).

27. There is some controversy over whether *Paradine* absolved promisors from a performance that was impossible. See Wladis, *supra* note 22, at 1579-88.

tion of performance.²⁸ The court therefore excused the renter of a music hall when fire accidentally destroyed the hall. Influenced by this reasoning, late nineteenth and early twentieth century courts, in limited circumstances, began to excuse performance even when it was not objectively impossible.²⁹

The express rationale of these latter "frustration" cases, involving businesses such as charter parties, commodity brokers, and commercial lessees and builders,³⁰ was that an event not "reasonably . . . in the contemplation of the parties at the date of the contract" destroyed the "foundation" of the contract.³¹ Obviously, the parties could not have intended to allocate the risk of an event neither could reasonably contemplate. Therefore, courts based their reasoning not on any express or implied-in-fact promise, but on their intuition about what the parties would have done had they thought about the matter.³² Still, most English courts during this period and later³³ enforced promises strictly, adhering to the traditional view.³⁴ Courts only grudgingly accepted excuses short of objective impossibility³⁵ due to their reluctance to destabilize contracts by offering relief based on assumptions about how parties might allocate risks.³⁶

American courts followed the lead of their English counterparts in decisions such as *Mineral Park Land Co. v. Howard*³⁷ and *Lloyd v. Murphy*.³⁸ In *Mineral Park*, a contractor desired to avoid an obligation to remove gravel that was under water. In *Lloyd*, an automobile dealer sought to avoid a lease when the government restricted its operations during World War II.³⁹

28. 122 Eng. Rep. at 314.

29. See, e.g., *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.) (occurrence of coronation an implied condition of contract to let rooms to view procession; cancellation of procession excuses obligation to pay); Schlegel, *supra* note 22, at 423; Wladis, *supra* note 22, at 1608-14.

30. See, e.g., *Jackson v. Union Marine Ins. Co.*, 10 L.R.-C.P. 125 (Ex. 1874); *In re Badische Co.*, [1921] 2 Ch. 331; cf. *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Prods. Co.*, [1916] 2 App. Cas. 397 (frustration defense recognized but not applicable); *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K.B. 680 (1919) (same).

31. *Krell v. Henry*, [1903] 2 K.B. at 751; see also Schlegel, *supra* note 22, at 424 (summarizing the "frustration of adventure" cases: "[I]nordinate delay which will defeat and destroy the object of a commercial adventure excuses performance of the contract.").

32. See, e.g., *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Prods. Co.*, [1916] 2 App. Cas. at 404. Some judges were sufficiently bold to suggest that the result was based simply on what was just and reasonable. *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co.*, [1944] App. Cas. 265, 274-76.

33. Schlegel, *supra* note 22, at 439-40 ("[T]he rule of *Paradine v. Jane* and the deep-rooted doctrine of 'sanctity of contract' are still very evident in the relevant body of thought.").

34. See *id.*; Wladis, *supra* note 22, at 1630 ("Generally one is not excused from a contractual obligation by events that make performance impossible.").

35. See Schlegel, *supra* note 22, at 439-40.

36. *Krell v. Henry* has played only a limited role in subsequent English excuse cases according to John Wladis. See Wladis, *supra* note 22, at 1620-21; see also Schlegel, *supra* note 22, at 423. Moreover, late nineteenth century courts did not recognize an excuse based on increased difficulty of performance. See, e.g., *Ashmore & Son v. C.S. Cox & Co.*, [1899] 1 Q.B. 436 (1898); *Turner v. Goldsmith*, [1891] 1 Q.B. 544 (C.A.). These cases are discussed in Wladis, *supra* note 22, at 1598-99. Wladis also states that "English courts still grant excuse essentially only upon facts on which they would have granted excuse at the end of the nineteenth century." *Id.* at 1623.

37. 172 Cal. 289, 156 P. 458 (1916) (allowing impracticability defense).

38. 25 Cal. 2d 48, 153 P.2d 47 (1944) (frustration defense recognized but distinguished).

39. The court rejected the lessee's argument in part because the lessor had waived restrictions

Based on the same implied-term analysis that characterized English frustration cases, these cases recognized the possibility of relieving some promisors even when performance was not impossible.⁴⁰ As in England, however, American judges only warily supplied terms for the parties. Focusing on factors such as the foreseeability and magnitude of the harm,⁴¹ the decisions were not indulgent of promisors.⁴²

Article 2 of the Uniform Commercial Code codified the doctrines of impossibility and impracticability in sales cases.⁴³ The official comments appeared to signal a more liberal attitude toward excusing promisors.⁴⁴ But despite widescale legislative adoption of the U.C.C., recent case law suggests that courts will continue to apply excuse doctrines parsimoniously.⁴⁵ The economic upheavals of the 1970s and 1980s disrupted many long-term agreements, but courts generally denied relief to promisors burdened by events such as the OPEC embargo.⁴⁶ They continued to construe U.C.C. requirements for relief (such as unforeseeability and impracticability) narrowly, and they remain no more lenient in nonsales cases.⁴⁷

Today's miserly treatment of promisors in excuse cases derives from judicial attitudes consistent with the early English decisions.⁴⁸ Courts continue to emphasize the sanctity of contract and the moral obligation to keep promises.⁴⁹ The fear that relief from obligations will destabilize expectations and, ultimately, the economy, is apparent in modern decisions as well.⁵⁰ Finally, and perhaps most importantly, courts continue to perceive excuse law as too malleable.⁵¹ Unable to apply it with precision, courts retreat to traditional principles favoring promise enforcement.

on the lessee's use of the premises, so that the lessee could have conducted another line of business or subleased the premises to avoid loss. 25 Cal. 2d at 58, 153 P.2d at 52.

40. See also *La Cumbre Golf & Country Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 271 P. 476 (1928) (country club cannot force hotel company to pay for guest privileges where hotel destroyed by fire).

41. See generally Halpern, *supra* note 2.

42. See, e.g., *School Dist. No. 1 v. Dauchy*, 25 Conn. 530 (1857); *Wills v. Shockley*, 52 Del. 295, 157 A.2d 252 (1960); *Adams v. Nichols*, 36 Mass. (19 Pick.) 275 (1837); *Leavitt v. Dover*, 67 N.H. 94, 32 A. 156 (1891); *Garman Bros. v. Hoover*, 95 Pa. Super. 203 (1928). See generally JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 176-79 (3d pract. ed. 1989).

Perhaps courts would have been less stingy if the bankruptcy discharge had not been expanding at about the same time. See Discussion, *LAW & CONTEMP. PROBS.*, Autumn 1977, at 123, 163.

43. U.C.C. §§ 2-613, 2-615 (1978). Section 2-615(b), paralleling bankruptcy, requires a seller to allocate a deficient quantity of goods among its customers in a "fair and reasonable" manner. See Discussion, *supra* note 42, at 163.

44. See, e.g., U.C.C. § 2-615 comments 4, 6, 7 (1978).

45. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983); *Northern Ill. Gas Co. v. Energy Coop.*, 122 Ill. App. 3d 940, 461 N.E.2d 1049 (1984).

46. E.g., *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. App. 1979).

47. See cases cited in notes 45-46 *supra* & note 237 *infra*; *McGinnis v. Cayton*, 312 S.E.2d 765, 775 (W. Va. 1984) (Impracticability has been "rarely allowed as an excuse for nonperformance."); *Wallach*, *supra* note 3, at 212, 215-17; see also note 261 *infra*.

48. See notes 30-36 *supra* and accompanying text.

49. See, e.g., *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1456 (E.D. Va. 1984).

50. See J. WHITE & R. SUMMERS, *supra* note 42, at 178.

51. See text accompanying notes 81-84 *infra*; see also *Wallach*, *supra* note 3, at 218.

2. *Anatomy of the excuse defenses today.*

Courts continue to excuse performance where a party has died or the subject matter has been destroyed, based on the early-established impossibility exception to absolute liability.⁵² Problems arise, however, when courts venture beyond these well-established categories into cases where performance is not physically impossible. In this subsection, I demonstrate that courts in practice balance a host of factors in allocating the risk of changed circumstances. Nevertheless, this methodology's weakness is its inconclusiveness.⁵³ Lacking adequate guidance, judges have not been generous towards parties seeking relief.

Consider the barebones of a typical problem: An oil embargo more than doubles a supplier's costs of supplying oil to a utility under a long-term contract. The supplier faces huge losses over the course of the contract. Influenced by the plethora of reasons supporting the enforcement of freely made contracts,⁵⁴ a court's analysis typically begins with the parties' agreement—have the parties expressly allocated the risk of the embargo in the contract? A clause such as the following would resolve the problem: "Supplier agrees to perform regardless of the magnitude of divergence between the contract price of the oil and the supplier's costs, and despite any disruptions, such as an oil embargo."⁵⁵ Of course, parties rarely litigate such a clause. For one thing, the supplier is not in the insurance business and is not likely to agree to such a term. For another, a supplier that so clearly did agree to guarantee performance is not apt to seek judicial relief.⁵⁶

In the usual case brought to court, then, the agreement alone cannot

52. See, e.g., E.A. FARNSWORTH, *supra* note 25, at 670-77; U.C.C. § 2-613 (1978) (casualty to goods identified when contract made). But a builder is not excused if fire destroys a building during construction. E.A. FARNSWORTH, *supra* note 25, at 674.

53. Few lawyers or judges today are undaunted by the prospect of determining whether an unanticipated event was, under the U.C.C., a "contingency the nonoccurrence of which is a basic assumption," U.C.C. § 2-615(a) (1978), or whether the event was "unforeseeable" or, at least, unforeseen, thereby excusing the promisor from performance, *id.* comment 1 (1978).

Recent cases bear out the unpredictability. In one, a court dismissed a frustration claim and required a purchaser of a horse to pay a quarter of a million dollars for the promotion of a dead horse. *Arabian Score v. Lasma Arabian Ltd.*, 814 F.2d 529 (8th Cir. 1987). Conversely, another court, apparently oblivious to the capriciousness of Mother Nature, found unforeseeable a drought in the peanut growing sections of our country and excused a peanut wholesaler from full performance. *Alimenta (U.S.A.) Inc. v. Gibbs Nathaniel (Canada) Ltd.*, 802 F.2d 1362 (11th Cir. 1986).

Despite the limited usefulness of contract excuse doctrines, which analysts have thoroughly worked over, see, e.g., ROBERT A. HILLMAN, JULIAN B. McDONNELL & STEVE H. NICKLES, *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* ¶ 7.03 (1985), today's courts, on the whole, penetrate the rules and decide excuse cases practically by balancing. See Hillman, *supra* note 1, at 620-42. Still, most decisions have not granted relief to the promisor. See cases cited in notes 45-46 *supra*.

54. See notes 3-6 *supra* and accompanying text.

55. Courts would focus on this language under U.C.C. § 2-615 because the language suggests that the "seller may have assumed a greater obligation."

56. But all is not lost for the supplier. Purchasers such as the utility in our example are not likely to insist on performance. They often exhibit flexibility and agree to a price adjustment to keep the supplier in business and to ensure reciprocal cooperation in the future. See Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 8 & nn.40-42.

resolve the risk allocation dispute. A court, therefore, typically engages in a contextual investigation to determine the parties' intentions.⁵⁷ But this inquiry is generally inconclusive as well. Suppose, for example, that the parties to our supply contract include a price adjustment feature tied to the wholesale price index. Suppose further that the parties hammer out the formula after extensive negotiations and with the aid of an expert such as Alan Greenspan.⁵⁸ Does the presence of a price formula suggest that the supplier intended to assume the risk that the formula would fail to reflect the supplier's true cost increases?

Most people probably believe so. But as the dissenting judge in the famous case of *Sherwood v. Walker*⁵⁹ pointed out almost a century ago, you cannot be mistaken in the legal sense about things you have not bothered to find out. You gamble about such things.⁶⁰ If Walker sold Rose 2d, the pregnant cow, to Sherwood assuming that Rose was barren and relatively valueless, but without the benefit of any investigation, Walker should not recover Rose 2d if the cow is actually fertile and valuable. Walker was not mistaken; he simply made a bad gamble.⁶¹ If the parties consulted a veterinarian, who inspected Rose 2d and then mistakenly proclaimed that she was barren, however, perhaps Walker should recover her on the basis of a mutual mistake. Is not Greenspan in our problem like the veterinarian? After all, the parties are mistaken in their belief that Greenspan's price formula would reflect the true costs of performance.⁶² At the very least, the reasoning of the *Sherwood* dissent suggests that the mere presence of a price adjustment feature should not conclude the risk-assumption inquiry.

Courts often enlist the test of foreseeability to aid in determining the parties' risk allocation.⁶³ Courts reason that a promisor assumed the risk of all foreseeable contingencies except those specifically allocated to the promisee.⁶⁴ But this approach falls short, too. Parties may deliberately agree not to address a foreseeable but unanticipated contingency for fear that it will rock the boat or because they believe that further negotiation would not be cost effective.⁶⁵ They may expect cooperation and compromise if an event whose risk was unallocated comes to pass.⁶⁶ Or the parties may make a binding agreement to bargain later over some exogenous risks.⁶⁷ They may

57. Under the rubric of U.C.C. § 2-615, the court seeks to determine whether the parties' "basic assumption" was that the harmful contingency would not occur.

58. See *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 58 (W.D. Pa. 1980).

59. 66 Mich. 568, 33 N.W. 919 (1887) (*Sherwood, J.*, dissenting).

60. *Id.* at 580-81, 33 N.W. at 925.

61. *Id.*

62. Cf. *Aluminum Co. of Am.*, 499 F. Supp. at 69 (retaining Greenspan and other signs of attentiveness point away from promisor's assuming risk that price index would fail).

63. See U.C.C. § 2-615 comment 1 (1978).

64. *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-92 (5th Cir. 1976); *Lloyd v. Murphy*, 25 Cal. 2d 48, 53-54, 153 P.2d 47, 50 (1944); *Barbarossa & Sons, Inc. v. Iten Chevrolet Inc.*, 265 N.W.2d 655, 659-60 (Minn. 1978). For an alternative to the foreseeability approach, see Halpern, *supra* note 2, at 1158-59.

65. Hillman, *supra* note 56, at 4-8.

66. *Id.*

67. *Id.* at 4.

even overlook a foreseeable risk. And even if the parties intend to allocate the risk of a contingency, they still may view some of the disruption resulting from the event as an unallocated risk. Threats by oil producing nations may saturate the pages of newspapers, but a supplier should still be entitled to prove that it did not assume the risk of some magnitude of cost escalation resulting from an embargo.⁶⁸

In short, if parties agree not to approach a problem because it is remote, costly to negotiate, or likely to upset the agreement, there is little reason to place the risk solely on the promisor based on the finding that the risk was foreseeable.⁶⁹ Conversely, although it is unlikely, a promisor may agree to perform even under unforeseeable conditions.⁷⁰ When the promisor acts as an insurer, unforeseeability offers a poor reason to excuse performance.

When express and implied risk allocation analysis does not point the way, courts must look to principles other than freedom of contract to fill the gap. Our legal literature is well endowed with proposals about the appropriate principles to apply.⁷¹ Nevertheless, each proposal is itself problematic and adds to the uncertainty of excuse litigation.

Economic analysts of law, for example, posit that courts should allocate the risk of an extraordinary event to the party better able to insure against it or to avoid it (the "superior risk bearer") because rational parties would have placed the risk on that party.⁷² This approach saves future parties the cost of negotiating and drafting around another default rule and is therefore efficient.⁷³ But if cooperation and compromise are the norms that govern an agreement—and, at least in long-term contracting where gap problems are most likely to occur, they are prominent norms⁷⁴—it is unlikely that the parties would allocate the risk of a debilitating contingency solely to one of them. Moreover, economic analysis may be no more certain in its application than traditional analysis. Who can best prevent a risk from occurring? Who is the best insurer of a risk? The answers may be expensive or impossible to determine.

Courts also focus on the related issue of whether a promisor's inappropriate conduct caused the disruption.⁷⁵ If a supplier failed to stockpile in-

68. See *id.* at 11-14.

69. Parties are likely to desire flexibility in the long-term contract setting, which produces most gap problems. See notes 74 & 252-257 *infra* and accompanying texts.

70. See, e.g., *Transatlantic Fin. Corp., v. United States*, 363 F.2d 312, 316-19 (D.C. Cir. 1966); *United States v. Wegematic Corp.*, 360 F.2d 674, 676-77 (2d Cir. 1966).

71. See generally Hillman, *supra* note 1. For recent efforts, see *The Law and Economics of Risk*, 19 J. LEGAL STUD. 531 (1990).

72. See Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90 (1977).

73. *Id.* at 88-89. But see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (efficient default rules may at times not be what the parties would have contracted for, but might be set to encourage the parties to disclose information).

74. See Hillman, *supra* note 56, at 4-6; notes 251-257 *infra*.

75. See, e.g., *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 195, 179 N.E. 383, 384 (1932).

ventories, to expand supply sources, or to use less expensive methods of production, courts generally allocate the risk to the supplier.⁷⁶ This "fault" approach may contribute little, however, because determining whether a supplier's response was reasonable under the circumstances often stymies courts.

Courts also consider whether enforcing or excusing will cause the least overall disruption to the parties. Invoking fairness norms including harm avoidance⁷⁷ and reciprocity,⁷⁸ a court in our oil supply agreement example might consider the supplier's potential losses and the utility's reliance expenditures, such as building a new power station in reliance on a long-term supply of oil.⁷⁹ Such an interests analysis is quite sensible and practical, and it influences courts.⁸⁰ Still, there are obvious problems with it. How should the court measure the supplier's potential losses? Should the court restrict its inquiry to potential out-of-pocket costs, or should it also consider the supplier's opportunity costs?⁸¹ Should the court investigate the supplier's overall balance sheet or, at least, the overall relationship between the supplier and utility, or should the court focus on the particular contract at issue?⁸² Should the court consider the utility's foregone opportunities? What about the utility's ability to pass on reliance expenses to ratepayers?⁸³ What about third party interests?⁸⁴

In sum, there are many inquiries for courts in excuse cases. Remote from contextual realities and limited in resources, courts can rarely clearly determine the parties' intentions on risk allocation. Courts accordingly consider many factors in a grand balancing approach. Unfortunately, the various factors frequently contradict each other: Some point toward excuse, others toward enforcement. Furthermore, the balancing process often reveals that both parties have strong interests.

Cases involving changed circumstances, then, exacerbate the tension between free contracting and social control of the exchange process.⁸⁵ Courts typically avoid the morass by adhering to traditional freedom of contract principles. This does not mean that judges have a hidden purpose, conscious or unconscious, to advance one societal interest or another. It merely sug-

76. See, e.g., E.A. FARNSWORTH, *supra* note 25, at 684 and cases cited therein; see also Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 153-62 (1977).

77. A contracting party must avoid decisions that needlessly harm the other party. See Hillman, *supra* note 1, at 634-37.

78. Each party should enjoy the fruits of the exchange. *Id.* at 638-39.

79. The "impracticability" language of U.C.C. § 2-615(a) (1978) invites an inquiry into the supplier's losses.

80. See Hillman, *supra* note 1.

81. See Victor P. Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 WIS. L. REV. 527, 541.

82. See Halpern, *supra* note 2, at 1137.

83. See note 219 *infra* and accompanying text.

84. See text following note 217 *infra*.

85. The tension arises because although in theory parties freely make their own agreements, in practice judicial gap filling may overwhelm the agreements. See generally Hillman, *The Crisis in Modern Contract Theory*, *supra* note 7.

gests that courts are unwilling to concede their limitations openly and seek to avoid controversy.

Contract's all-or-nothing remedial tradition⁸⁶ also disfavors an enthusiastic move to contract excuse. Excuse's balancing methodology too often underscores significant interests on both sides. Courts inclined to construct a remedy that reflects these interests would be forced to come to terms with their aversion to a solution based on sharing losses. A host of hurdles obstructs fabricating a sharing strategy: Consider the challenge of constructing standards for apportioning the loss and comprehending the contextual implications of complex deals.⁸⁷ It is easier for courts to repress their urges to move to a sharing approach and simply find for the promisee on the basis of freedom of contract.⁸⁸

B. *Bankruptcy Discharge*

1. *A brief historical sketch.*

Our story again begins with developments in England. Bankruptcy law in sixteenth and seventeenth century precapitalist England reflected a general suspicion of the mercantile class.⁸⁹ The first English bankruptcy law of 1542, enacted to facilitate debt collection and distribution of a debtor's assets to creditors,⁹⁰ did not discharge debtors. In fact, at the time, English law subjected debtors to imprisonment or, even worse, corporal punishment.⁹¹

A counter-image of merchants or traders⁹² as "noble and vulnerable statesm[e]n of society whom the law should protect from the cruel contingencies of economic life"⁹³ slowly emerged as England embraced a mercantile economy. By 1705, bankruptcy discharged honest and cooperative merchant debtors.⁹⁴ Some evidence suggests that discharge was primarily

86. 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1363, at 511-13 (1962); Hillman, *supra* note 1, at 633.

87. I argue here and elsewhere, however, that these problems can be overcome in limited circumstances. See Hillman, *supra* note 56, at 19-32; text accompanying notes 293-294 *infra*.

88. Bankruptcy discharge law could influence excuse courts to become more ambitious. See notes 273-296 *infra* and accompanying text.

89. Professor Weisberg describes "the vague moral suspicion in precapitalist England about the elusive, manipulative role of those who deal in money, credit, and other people's goods." Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 22 (1986); see also *id.* at 13; John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 367 (1986).

90. Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 155 (1982); Louise E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 14 (1919).

91. Levinthal, *supra* note 90, at 17.

92. Merchant and "trader" debtors "earned their living by 'buying and selling.'" Cohen, *supra* note 90, at 156.

93. Weisberg, *supra* note 89, at 6.

94. Act of 4 Anne, ch. 17, § 7 (1705) (discussed in T. JACKSON, *supra* note 13, at 226 n.4). See generally Weisberg, *supra* note 89, at 22-34. Although creditor approval of discharge was originally not required, the law was quickly amended to require approval of four-fifths of the creditors. Act of 6 Anne, ch. 22, § 2 (1706) (discussed in Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 70 n.7 (1982)).

Dishonest or uncooperative merchant debtors still felt the penalties of criminal law. Vern Coun-

aimed at facilitating debt collection by inducing debtors to cooperate in the collection process, not at rehabilitating unfortunate merchant debtors.⁹⁵ In reality, both policies probably influenced lawmakers.⁹⁶ At any rate, the law contributed to an image of bankrupt merchants as victims of circumstances beyond their control.⁹⁷ As mercantile activity expanded and the view of merchants evolved, English bankruptcy law began to enlarge the category of those entitled to bankruptcy relief.⁹⁸ Courts first broadened the category of merchants entitled to a discharge,⁹⁹ and then, in 1861, Parliament made all individuals eligible.¹⁰⁰

Meanwhile, in this country, the United States Constitution federalized bankruptcy to centralize a response to post-revolutionary financial upheaval and to alleviate bickering among the states.¹⁰¹ From the outset, however, as in England, disparate interests contested the shape of proposed legislation. Those wary of the effects of a credit economy and suspicious of merchant self-interest fueled anti-bankruptcy feelings.¹⁰² Nevertheless, an emerging "bourgeois ideology"¹⁰³ that embraced the necessity of expanded capitalism¹⁰⁴ and celebrated the contingency of mercantile activity¹⁰⁵ ensured the eventual centrality of discharge in bankruptcy legislation.¹⁰⁶

Regionalism also fueled the controversy concerning the contours of bankruptcy law. Southern and western farmer-debtors opposed involuntary bankruptcy, whereas northeastern creditors contested discharge without creditor approval.¹⁰⁷ Although nineteenth century attempts to harmonize

tryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 227 (1976). In addition, non-merchant debtors could still be imprisoned for nonpayment of debt. Cohen, *supra* note 90, at 162; see also Weisberg, *supra* note 89, at 31 ("[O]nly or primarily, traders should have access to bankruptcy, since only they suffer losses by accident, while others go broke through willful prodigality.").

95. The preamble to the 1705 Act suggests little sympathy for debtors, stating that bankruptcy was caused "not so much by reasons of losses and unavoidable misfortunes, but rather by an 'intent to defraud and hinder (creditors) of their just debts . . .'" Cohen, *supra* note 90, at 157; see also T. JACKSON, *supra* note 13, at 226 n.4; Boshkoff, *supra* note 94, at 105; Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 54 (1986); Harris, *supra* note 11, at 350; Weisberg, *supra* note 89, at 30 ("Parliament may have intended not so much to make the law generous as to make it more sophisticated in its instrumental effects.").

96. See generally Boshkoff, *supra* note 94, at 70 (Discharge "resulted from shifts in the balance of legislative power from creditor to debtor interests and shifts in society's perception of the public interest in debtor rehabilitation."); Cohen, *supra* note 90, at 156-57; Levinthal, *supra* note 90, at 18 (bankrupt thought of as object of pity).

97. Weisberg, *supra* note 89, at 5-6, 30.

98. *Id.* at 30-31.

99. See Ian P.H. Duffy, *English Bankrupts, 1571-1861*, in 24 AM. J. LEGAL HIST. 283 (1980).

100. *Id.* at 292.

101. U.S. CONST. art. I, § 8, cl. 4; see R. AARON, *supra* note 13, § 1.01.

102. Weisberg, *supra* note 89, at 57-59.

103. *Id.* at 55.

104. *Id.* at 60.

105. Hallinan, *supra* note 95, at 56 (indebtedness viewed as an "essential aspect of successful commercial activity" in nineteenth century America); Weisberg, *supra* note 89, at 57.

106. Weisberg, *supra* note 89, at 65 ("After the Revolution in the United States, the right of discharge . . . was essentially assumed . . .").

107. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND*

these and other interests in bankruptcy legislation failed,¹⁰⁸ out of the turmoil developed a growing awareness of the need for compromise¹⁰⁹ and for a centralized solution to the insolvency problem.¹¹⁰

This realization culminated in the Bankruptcy Act of 1898,¹¹¹ the first lasting piece of major bankruptcy legislation in this country. Accepting the propriety of debtor relief, the new law discharged debtors without creditor consent and without regard to the debtor's ability to pay.¹¹² As in England, early interpretation of the discharge policy focused on the debtor as a "commercial actor" entitled to relief from commercial failures,¹¹³ and on the public good realized by restoring debtors to public life.¹¹⁴

The depression of the 1930s led to additional concessions from warring interests in the form of amendments to the 1898 Act.¹¹⁵ For example, in an attempt to improve complicated and inadequate federal court equity receiverships,¹¹⁶ Congress included various provisions for corporate reorganization and for individual wage-earner plans.¹¹⁷ The premise was that an ongoing company or a productive individual was worth more to creditors and to society than a liquidated business or a destitute person.

Beginning at the turn of the century, wage-earners displaced merchants

CREDITORS 170 (1986); see also Boshkoff, *supra* note 94, at 109 ("[D]ramatic westward expansion . . . produced a sectionalism that eventually favored debtor interests.").

108. The first national bankruptcy act was enacted in 1800. 2 Stat. 19 (1800). The law applied only to merchants and discharged debtors only after two-thirds approval by creditors. The law was repealed in 1803, 2 Stat. 248 (1803), because it gave too much power to the federal government and disfavored creditors. Another bankruptcy law in 1841 followed the depression of 1837. 5 Stat. 440 (1841). It was available to all debtors and granted automatic discharge unless a majority of creditors objected. It too was repealed only two years after enactment because of complaints that discharges were too numerous. Countryman, *supra* note 94, at 229. A third bankruptcy law, passed in 1867, 14 Stat. 517 (1867), was repealed in 1878, 20 Stat. 99 (1878).

109. II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 45 (4th ed. 1873) (Boston 1833); Boshkoff, *supra* note 94, at 108.

110. "The present state of things in this country is intolerable. Every state has its own laws, with regard to debtor and creditor . . . [T]he very want of uniformity is itself a serious evil." Address by Joseph L. Story, Suffolk Bar Anniversary (Sept. 4, 1821), reprinted in 1 AM. JURIST & L. MAG. 35, 36 (1829).

111. 30 Stat. 544 (1898).

112. Bankruptcy Act of 1891, ch. 541, § 14(b), 30 Stat. 544, 550 (1898). Professor Boshkoff ascribes this outcome to creditor interests' inability to muster sufficient votes and their satisfaction with the provision for involuntary proceedings. Boshkoff, *supra* note 94, at 112.

113. *E.g.*, Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915) ("It is the purpose of the Bankrupt Act [sic] to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."); see Hallinan, *supra* note 95, at 57.

114. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt.") (emphasis in original).

115. Chandler Act, ch. 575, 52 Stat. 840 (1938).

116. See JOHN C. ANDERSON, CHAPTER 11 REORGANIZATIONS §§ 1.05, 1.06 (1989). Equity receiverships lacked, among other things, judicial control of the plan and adequate protection of creditors. *Id.* § 1.05.

117. See generally Countryman, *supra* note 94, at 231 (discussing amendments to 1898 Act).

as the principal group seeking bankruptcy protection.¹¹⁸ As the view emerged that unsophisticated consumers required protection from wily creditors, the bias against discharging consumers also shifted.¹¹⁹ The Bankruptcy Reform Act of 1978,¹²⁰ reflecting the "consumer" revolution of the time,¹²¹ solidified the fresh-start policy for consumers.¹²² Influenced by theories of consumer incompetence to gauge the risk and consequences of default accurately¹²³ and by perceptions of aggressive credit marketing,¹²⁴ Congress saw a national interest in the rehabilitation of debtors.¹²⁵ Considerations such as debtor need, the cause of the debtor's travails, and even the effects of liberal discharge on the credit market and debtor behavior yielded to the momentum of discharge.¹²⁶ As a result, the Reform Act contained few gatekeeper rules designed to turn back undeserving candidates.

To qualify for voluntary bankruptcy, for example, a consumer debtor had only to surrender usually valueless nonexempt assets for liquidation under Chapter 7¹²⁷ or propose a Chapter 13 wage-earner plan in good faith.¹²⁸ Insolvency was not a prerequisite.¹²⁹ In addition, the categories of nondischargeable debt narrowed under the 1978 Act.¹³⁰ Finally, reaffirmations of debt after bankruptcy, the sole method of waiving a discharge, became enforceable only upon court approval.¹³¹

To streamline business reorganization, the 1978 Act also combined the

118. Hallinan, *supra* note 95, at 65; *see also* Harris, *supra* note 11, at 346 (creation of Commission on Bankruptcy Laws in 1970 prompted by increase in nonbusiness bankruptcies).

119. Hallinan, *supra* note 95, at 67-68; *see also* Howard, *supra* note 9, at 1051 (debtor an innocent victim lured beyond her means or the victim of an event beyond her control).

120. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

121. *See, e.g.*, H.R. REP. NO. 595, *supra* note 14, at 116-17.

122. *See* Harris, *supra* note 11, at 346-47, 351.

123. For a recent version of the argument, *see* T. JACKSON, *supra* note 13, at 237-43 (justifying the nonwaivable consumer discharge as a method of correcting impulsive behavior).

124. H.R. REP. NO. 595, *supra* note 14, at 116; Hallinan, *supra* note 95, at 77-78.

125. R. Glen Ayers, Jr., *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharges to Consumers?*, 17 NEW ENG. L. REV. 719, 722 & n.21 (1982) (discussing legislative history of Bankruptcy Reform Act of 1978).

126. Hallinan, *supra* note 95, at 78-79.

127. *See* R. AARON, *supra* note 13, § 1.03; TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* 35 (1989); Hallinan, *supra* note 95, at 50 (most consumer bankruptcies produce nothing for general creditors); notes 146 & 156 *infra*. Nevertheless, secured creditors are generally entitled to repossess property subject to their liens unless, in the case of personal property collateral, the debtor pays the creditor the full value of the collateral. 11 U.S.C. § 722 (1988); T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra*, at 138.

128. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1325(a)(3), 92 Stat. 2549, 2649 (current version at 11 U.S.C. § 1325(a)(3) (1988)). Chapter 13 allowed the debtor to propose a payback from future wages while shielding the debtor's assets from creditors. H.R. REP. NO. 595, *supra* note 14, at 118. The Act also increased the category of dischargeable debts. Harris, *supra* note 11, at 347 n.109.

In the interest of creditors, the 1978 Act included some provisions designed to make Chapter 13 attractive to debtors, Harris, *supra* note 11, at 347, and increased those entitled to use the chapter, such as small sole proprietors. R. AARON, *supra* note 13, § 1.06.

129. *See* note 151 *infra* and accompanying text.

130. Hallinan, *supra* note 95, at 88.

131. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 524, 92 Stat. 2549, 2592 (amended 1984) (current version at 11 U.S.C. § 524 (1988)).

various reorganization chapters of previous law into a new Chapter 11.¹³² The purpose of the new chapter was to promote negotiation between debtors and creditors¹³³ and, ultimately, to create reorganization plans that would enable debtors to remain viable.¹³⁴ Creditors would gain the benefit of the "going concern value" instead of merely the liquidation value of the debtor's assets.¹³⁵ Chapter 11 included few prerequisites;¹³⁶ the drafters apparently thought reorganization sufficiently painful to deter the undeserving.

During the Reagan years, however, the individual debtor's newly acquired gains narrowed. Pro-creditor amendments in 1984 protected against alleged abuses of the 1978 Act by erecting some hurdles to a discharge.¹³⁷ Under the amendments, courts may deny discharge in a Chapter 7 liquidation if relief would constitute "substantial abuse" of the chapter.¹³⁸ This provision, while seemingly sweeping in nature, targets consumer debtors who seek to misuse Chapter 7 by hiding nonexempt assets or by receiving a discharge when they could pay many of their debts out of future income under a Chapter 13 wage-earner plan.¹³⁹ In conjunction with the Chapter 13 "good faith" requirement, the debtor must now devote all "disposable income" to creditor payments in a Chapter 13 plan, usually for three years.¹⁴⁰ Moreover, reaffirmations no longer require judicial approval, but

132. For a discussion of reorganization prior to 1978, see *SEC v. American Trailer Rentals Co.*, 379 U.S. 594, 603-07 (1965); Walter W. Miller, Jr., *Bankruptcy Code Cramdown Under Chapter 11: New Threat to Shareholder Interests*, 62 B.U.L. REV. 1059, 1059-71 (1982).

133. J. ANDERSON, *supra* note 116, § 1.01.

134. *Id.*; see also Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy,"* 21 UCLA L. REV. 403, 420 (1973) (rehabilitation by means of reorganization).

135. Miller, *supra* note 132, at 1059; see also Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 142 (1986) (assets of a firm may have their highest value in the hands of existing owners when the owners "have expertise or other advantages" over third-party purchasers); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 173 (1989).

136. See, e.g., H.R. REP. NO. 595, *supra* note 14, at 128 (misconduct not a bar to confirmation of a plan); J. ANDERSON, *supra* note 116, §§ 3.01, 3.02.

137. In the early 1980s there was a dramatic increase in the number of consumer filings. Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"* (pt. 1), 59 AM. BANKR. L.J. 327, 337 (1985). Some argued that the increase resulted from the leniency of the 1978 Code. Others thought it attributable to economic conditions. *Id.* at 337-39. A study of consumer bankruptcy suggested that many bankrupts could pay their debts from future income. CREDIT RESEARCH CENTER, KRANNERT GRADUATE SCHOOL OF MANAGEMENT, PURDUE UNIVERSITY, MONOGRAPHS NO. 23-24, CONSUMER BANKRUPTCY STUDY (1982) [hereinafter PURDUE STUDY]. But see Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091 (debunking the Purdue study). The Purdue study, along with the lobbying of the consumer credit industry, helped instigate the 1984 amendments to the Bankruptcy Code. Breitowitz, *supra*, at 329.

138. 11 U.S.C. § 707(b) (1988).

139. According to one recent case, the section provides a vehicle for court review of whether a consumer debtor sought "unscrupulously" to avoid debts or whether the debtor legitimately could not pay them because of "calamity, sickness, [or] unemployment." *In re Bryant*, 47 Bankr. 21, 24 (Bankr. W.D.N.C. 1984); see also BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL ¶ 1.14[2] (rev. ed. 1986 & Supp. 1989); notes 172-176 *infra* and accompanying text.

140. 11 U.S.C. § 1325(b)(1) (1988); Howard, *supra* note 9, at 1081. The provision applies when a creditor objects to a plan to pay less than 100% of unsecured claims. *Id.* "Disposable income" is defined in 11 U.S.C. § 1325(b)(2) (1988).

may be certified by the debtor's lawyer as in the debtor's best interest.¹⁴¹

2. *Anatomy of the bankruptcy discharge today.*

Bankruptcy law continues to reflect the competing goals of efficient collection and equitable distribution of assets, on the one hand,¹⁴² and limiting the debtor's liability on the other.¹⁴³ Nevertheless, unlike contract excuse, bankruptcy presents a relatively clear rule of discharge.

Bankruptcy helps achieve the collection and distribution goals by eliminating costly and competitive collection efforts facing multiple creditors under state law.¹⁴⁴ Chapter 7 liquidations of both consumers' and businesses' assets facilitate the collection of debtors' nonexempt assets and subsequent distribution to creditors.¹⁴⁵ Theoretically, both business and consumer pay-out plans in Chapters 11 and 13 also benefit creditors because the debtor is often worth more to creditors either as a going concern or pursuing employment.¹⁴⁶

Bankruptcy's other goal—limiting debtors' liability by discharging their

141. 11 U.S.C. § 524(c) (1988).

142. See, e.g., *In re Alison Corp.*, 9 Bankr. 827, 829 (Bankr. S.D. Cal. 1981); see also Jackson & Scott, *supra* note 135, at 155 ("[P]rebankruptcy entitlements should be impaired in bankruptcy only when necessary to maximize net asset distributions to the creditors as a group . . ."). Bankruptcy creditors include secured and unsecured lenders, depository banks, sellers of property, spouses and children with support orders, governments with tax obligations, labor unions, employees, promisees with executory contracts, and more. See Morris G. Shanker, *Why the Bankruptcy Course Ought to Be Mandatory*, 39 J. LEGAL EDUC. 299, 299 (1989).

143. See, e.g., *Segal v. Rochelle*, 382 U.S. 375, 379-80 (1966) (whether an asset is "property of the estate" depends upon harmonizing the need to distribute the debtor's property to the creditors with the desire to preserve a fresh start for the debtor); see also Harris, *supra* note 11, at 350 ("Modern bankruptcy law . . . has become much more than an aid to the collection of debts; it has developed into a debtors' relief measure as well."); Mark J. Roe, *Commentary on "On the Nature of Bankruptcy": Bankruptcy, Priority, and Economics*, 75 VA. L. REV. 219, 240 (1989) ("Some sharing rules that soften the blow to the debtor may be . . . a contest between judicial forgiveness for those who have lost financially and the desire of critics to see a more efficient, wealth-maximizing system."); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 786-88, 799 (1987) (two concerns of bankruptcy law are distributing claims among creditors and permitting debtors to remain viable).

144. Warren, *supra* note 143, at 793 (Bankruptcy reflects a "normative conclusion that spreading the losses of default by an organized scheme . . . is superior to an unmonitored distribution by powerful creditors or self-interested debtors."). For a debate over whether distributional decisions should be made within bankruptcy law, see *id.* at 780-97; Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987); see also T. JACKSON, *supra* note 13, at 83-88 (discussing state-created priorities and statutory liens).

145. See Howard, *supra* note 9, at 1049-50. Debtors file most cases voluntarily, R. AARON, *supra* note 13, § 1.03, although three creditors may begin involuntary proceedings. 11 U.S.C. § 303(b)(1) (1988). The bankruptcy petition automatically stays most forms of action against the debtor or its property. 11 U.S.C. § 362(a) (1988). A trustee is appointed who amasses the debtor's assets, if any, and distributes them to those creditors who have filed proofs of claim. 11 U.S.C. § 704(1) (1988).

146. See Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, in 22 U. RICH. L. REV. 303, 305 (1988). Consumer debtors rarely have assets that could be distributed in a Chapter 7 proceeding. E. WARREN & J.L. WESTBROOK, *supra* note 107, at 179. Business reorganizations may benefit at least unsecured creditors who may recover more if the debtor stays in business. Warren, *supra* note 143, at 801.

debts¹⁴⁷—derives from the perceived senselessness and unfairness of requiring performance in oppressive situations¹⁴⁸ and from the apparent long-term benefits to society of rehabilitating or preserving debtors.¹⁴⁹ Despite the recent pro-creditor amendments of 1984,¹⁵⁰ these policies are manifest in many provisions of current bankruptcy law. For example, insolvency is still not a prerequisite for a discharge in a voluntary bankruptcy,¹⁵¹ nor is a discharge waivable prior to bankruptcy under any of the chapters.¹⁵² A court may deny discharge to an individual debtor who surrenders her nonexempt assets for Chapter 7 liquidation only in those unusual cases where the debtor engaged in malfeasance, such as prebankruptcy fraud, concealment of property, post-bankruptcy evasion of court orders, or other “abuse” of the act.¹⁵³ Chapter 7 entitles an individual to a discharge whether or not a calamitous unforeseen event caused her predicament.¹⁵⁴ In other words, honest debtors, no matter how extravagant or foolish, are generally eligible for discharge.¹⁵⁵

Chapter 13 allows a wage-earner to propose a plan of repayment from future wages while shielding her assets from creditors. To induce more filings under the chapter, Congress included a “super discharge” provision: Chapter 13 discharges many obligations that would not be forgiven in Chapter 7.¹⁵⁶ Moreover, a Chapter 13 debtor who fails to complete a plan may still obtain a discharge if the court finds that the creditors have recovered as

147. The court's discharge order releases the debtor from judgments and permanently enjoins creditors from future attempts to enforce discharged obligations. 11 U.S.C. §§ 524(a), 727(b), 1328(c) (1988). The debtor can reaffirm debts, however. *See* note 152 *infra*.

148. *See* Harris, *supra* note 11, at 341. Professor Weistart suggests that the discharge is “buoyed primarily by humanitarian concerns.” Weistart, *supra* note 8, at 110-11.

149. *See* Eisenberg, *supra* note 16, at 35, 36.

150. *See* notes 137-141 *supra* and accompanying text. Our discharge rules are still the most generous in the world. T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 334.

151. *See* 11 U.S.C. § 109 (1988); *In re Johns-Manville Corp.*, 36 Bankr. 727, 730, 732 (Bankr. S.D.N.Y. 1984); 1 COLLIER ON BANKRUPTCY ¶ 4.03, at 580-81 (Moore 14th ed. 1974) (“There is nothing in the Act which requires the person to be insolvent, and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors through bankruptcy proceedings, he should not be allowed to do so . . .”); *see also* 3 DANIEL R. COWANS, COWANS BANKRUPTCY LAW & PRACTICE § 20.1, at 246 (1986) (Chapter 11 does not require insolvency, but courts require that the petitioner owe debts); Discussion, *supra* note 42, at 161. Instead of insolvency, the Bankruptcy Reform Act polices debtors through tests such as “substantial abuse.” *See* notes 172-176 *infra* and accompanying text.

152. *See* 11 U.S.C. §§ 727(a)(10) (court approved written waiver of discharge only after an order of relief); 1141(d)(4) (same); 1328(a) (same); 524(c), (d) (waiver of individual debt subject to safeguards) (1988); T. JACKSON, *supra* note 13, at 226, 230; Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 988 (1981).

153. 11 U.S.C. § 727 (a)(2), (a)(6) (1988); *see* R. AARON, *supra* note 13, § 1.03. In addition, the debtor may not be discharged more than once in a 6-year period. 11 U.S.C. § 727(a)(8) (1988).

154. *See* Eisenberg, *supra* note 152, at 979-80; Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 968 n.247 (1986).

155. Eisenberg, *supra* note 152, at 979-80; *see also* T. JACKSON, *supra* note 13, at 225 (“Unless he has violated some norm of behavior specified in the bankruptcy laws, an individual who resorts to bankruptcy can obtain a discharge from most of his existing debts in exchange for surrendering either his existing nonexempt assets or, more recently, a portion of his future earnings.”); Howard, *supra* note 9, at 1050-57 (bankruptcy's goal is to provide honest debtor with a fresh start).

156. 11 U.S.C. § 1328(a) (1988). A court will not approve a plan under Chapter 13 unless unsecured creditors receive at least as much as they would under Chapter 7. 11 U.S.C. § 1325(a)(4)

much as they would have in a liquidation, and the debtor's inability to complete the plan was due to "circumstances for which the debtor should not justly be held accountable."¹⁵⁷

Although corporate debtors may not receive a discharge under Chapter 7,¹⁵⁸ they may remain in business and obtain a discharge of prebankruptcy obligations under the reorganization provisions of Chapter 11.¹⁵⁹ The debtor must propose a plan to pay in cash, property, or securities, some or all of the claims of each class of creditors over a specified time period.¹⁶⁰ Like Chapters 7 and 13, Chapter 11 compromises the creditors' prebankruptcy rights in a host of ways. Filing a Chapter 11 petition automatically stays any actions against the debtor, such as repossession and resale of collateral by a secured creditor.¹⁶¹ Although creditors vote to approve the plan, approval requires far less than unanimity.¹⁶² Even if a class of creditors disapproves, a court may impose the plan upon them in a "cram down"¹⁶³ if the plan does not "discriminate unfairly" among creditors and it treats disapproving creditors "fairly and equitably."¹⁶⁴ A court will not con-

(1988). However, because debtors in most consumer bankruptcies have no assets, Chapter 7 unsecured creditors would receive nothing. See Howard, *supra* note 9, at 1080.

157. 11 U.S.C. § 1328(b)(1) (1988).

158. Although corporate debtors cannot be discharged under Chapter 7, 11 U.S.C. § 727(a)(1) (1988), the doctrine of limited liability of corporate shareholders shields the owners from personal liability. See John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1835 (1987). Limited liability encourages investment by protecting against financial calamity, spares investors the costs of monitoring corporate behavior, and shifts the risk of insolvency to creditors who may be superior risk bearers. *Id.*; see also Eisenberg, *supra* note 152, at 989 ("State laws limiting shareholder liability for corporate debts . . . assure corporations of the functional equivalent of discharge."); Shuchman, *supra* note 134, at 421 (corporate limited liability substitutes for discharge).

Because a corporation's equity owners lose only their personal investment in the event of bankruptcy, shareholders, such as the principals of close corporations, can form a new corporation and avoid the obligations of the old dissolved firm. B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 3.03[1].

159. See generally B. WEINTRAUB & A. RESNICK, *supra* note 139, ch. 8. Entities entitled to file under Chapter 11 include corporations, partnerships, sole proprietors, business trusts and unincorporated associations. *Id.* ¶ 8.05.

160. E. WARREN & J.L. WESTBROOK, *supra* note 107, at 399. Sometimes a plan involves the sale of the debtor's business or assets to a new owner, with the proceeds going to the creditors. *Id.* at 629.

161. 11 U.S.C. § 362(a)(3) (1988). But the secured creditor is entitled to "adequate protection" to ensure that it receives the benefit of its bargain. 11 U.S.C. § 361 (1988); see *In re American Mariner Indus.*, 734 F.2d 426, 431 (9th Cir. 1984).

The automatic stay affords the debtor "a breathing spell from his creditors . . . [to enable] the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." H.R. REP. NO. 595, *supra* note 14, at 340.

162. Only a majority of the creditors of each impaired class must approve. In addition, a class accepts a plan only if the members favoring it hold at least two-thirds of the debt in that class. 11 U.S.C. § 1126(c) (1988). A plan "impairs" the rights of a creditor when it "alters" those rights. 11 U.S.C. § 1124(1) (1988); see, e.g., *In re Barrington Oaks Gen. Partnership*, 15 Bankr. 952, 956 (Bankr. D. Utah 1981).

163. 11 U.S.C. § 1129(b) (1988). The "cram down" terminology is not in the Act.

164. The former requirement is satisfied if the plan treats the dissenting class the same as other classes of equal rank. 11 U.S.C. § 1129(b)(1) (1988); B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8.23[3]. The latter requirement is satisfied with respect to unsecured creditors if the impaired class is fully compensated for its allowed claims, or if junior classes receive nothing. 11 U.S.C.

firm a plan, however, unless the plan is feasible,¹⁶⁵ each creditor accepts the plan or receives at least as much as it would have received in a hypothetical Chapter 7 liquidation,¹⁶⁶ and the debtor proposed the plan in good faith.¹⁶⁷

A confirmed Chapter 11 reorganization plan binds almost all who have a financial relationship with the debtor, including dissenting classes of creditors subject to "cram down" and dissenting members of accepting classes.¹⁶⁸ Judicial confirmation discharges the debtor from all prior debts and obligations and replaces them with those set forth in the confirmed plan.¹⁶⁹ Unlike an individual discharge, the reorganization discharge may include debts that arose from fraud or other malfeasance, on the theory that guilty managers will likely be replaced as part of the plan.¹⁷⁰

As the above discussion suggests, bankruptcy litigation does not center on whether a debtor is entitled to a discharge, but rather on the nature of the discharge—the amount of property to be retained by the debtor and the amount to be distributed to creditors.¹⁷¹ For example, consider the issue of a consumer debtor's "substantial abuse" of Chapter 7.¹⁷² Many commentators, emphasizing the narrowness of this gatekeeper rule, assert that "substantial abuse" requires actual debtor misconduct, such as an intent to subvert the liquidation of nonexempt assets, not just an ability to repay debts over time.¹⁷³ Even if ability to repay is enough,¹⁷⁴ a finding of "substantial abuse" typically does not bar the consumer from seeking a discharge under Chapter 13.¹⁷⁵ Hence, deciding the "substantial abuse" question determines

§ 1129(b)(2)(B) (1988); B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8.23[4][b]; *see also* 11 U.S.C. § 1129(b)(2)(A) (1988) (protection of secured parties).

165. 11 U.S.C. § 1129(a)(11) (1988). The feasibility test "goes to the likelihood that the plan will succeed," and its application tests the business judgment of the bankruptcy judge. E. WARREN & J.L. WESTBROOK, *supra* note 107, at 574.

166. 11 U.S.C. § 1129(a)(7) (1988); *see* B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8.23[2], at 8-104.

167. 11 U.S.C. § 1129 (a)(3) (1988).

168. 11 U.S.C. § 1141(a) (1988); *see* B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8.23[5].

169. 11 U.S.C. § 1141(a) & (d)(1)(A) (1988); *see* B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8.24.

170. B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8.24 (all debts discharged); *see also* *In re Kuempel Co.*, 14 Bankr. 324, 325-27 (Bankr. S.D. Ohio 1981).

171. *See, e.g.*, T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 33 (debtors "get" a Chapter 7 with little dispute). The Bankruptcy Code authorizes the court to dismiss a case if dismissal is in the best interests of the debtor and creditors. 11 U.S.C. § 305(a)(1) (1988); B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 2.15[2]. For example, the provision enables the court to preserve an out-of-court arrangement or other superior method of liquidation. *In re Win-Sum Sports*, 14 Bankr. 389, 393 (Bankr. D. Conn. 1981).

172. 11 U.S.C. § 707(b) (1988); *see* notes 138-139 *supra* and accompanying text.

173. *In re Wegner*, 91 Bankr. 854 (Bankr. D. Minn. 1988); *In re Keniston*, 85 Bankr. 202 (Bankr. D.N.H. 1988); Karen Gross, *Preserving A Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 98-114 (1986); Raymond T. Nimmer, *Consumer Bankruptcy Abuse*, LAW & CONTEMP. PROBS., Spring 1987, at 89, 99.

174. *See In re Kelly*, 841 F.2d 908, 913-15 (9th Cir. 1988); *In re Strong*, 84 Bankr. 541, 545 (Bankr. N.D. Ind. 1988) ("The single most important indicator of substantial abuse is the presence of enough disposable income to realistically enable debtor to repay a significant portion of his debts, through a Chapter 13 plan.").

175. Howard, *supra* note 9, at 1082 (the "probable purpose" of the substantial abuse provision

whether the debtor's assets (Chapter 7) or wages (Chapter 13) are subject to collection and influences the amount of the creditors' recovery, but resolving the issue generally does not affect whether the debtor may ultimately receive a discharge.¹⁷⁶ Other common flashpoints in individual bankruptcies, such as whether the debtor proposed a Chapter 13 plan in good faith,¹⁷⁷ whether payments under a Chapter 13 plan encompass all of the debtor's "disposable income,"¹⁷⁸ whether particular property is exempt,¹⁷⁹ and how to value such property¹⁸⁰ also typically involve the distribution of property between the debtor and her creditors,¹⁸¹ rather than denial of discharge.¹⁸²

As with individual debtors in Chapters 7 and 13, the battle zones in Chapter 11 business reorganizations most often involve issues that determine the structure of the post-reorganization debtor and the division of wealth among the creditors. Litigation rarely addresses whether to discharge the debtor at all.¹⁸³ For example, a court considering the bankruptcy of the oil supplier in our earlier example would probably confront issues such as whether a secured creditor subject to the bankruptcy stay has "adequate protection"¹⁸⁴ and whether a debtor gave a creditor preferential treatment shortly before filing for bankruptcy.¹⁸⁵ Even when the court considers

of Chapter 7 was to encourage use of Chapter 13). *But see In re Krohn*, 87 Bankr. 926 (Bankr. N.D. Ohio 1988), *aff'd*, 886 F.2d 123 (6th Cir. 1989) (Chapter 7 case dismissed for "substantial abuse" even though debtor was ineligible for Chapter 13).

176. *See* Howard, *supra* note 9, at 1080. The effect of the "substantial abuse" provision is also limited because the section includes a presumption in favor of the debtor's right to relief under Chapter 7. 11 U.S.C. § 707(b) (1988); *see also In re Mastroeni*, 56 Bankr. 456, 459 (Bankr. S.D.N.Y. 1985). In addition, only the court may raise the question of "substantial abuse." *Id.* Finally, the absence of guidance as to what constitutes "substantial abuse" diminishes the effectiveness of the provision.

177. 11 U.S.C. § 1325(a)(3) (1988); *see In re Jolly*, 13 Bankr. 123 (Bankr. E.D. Wis. 1981).

178. 11 U.S.C. § 1325(b)(1)(B) (1988); *see* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 36 (the disposable income test may not have changed the "practical operation" of Chapter 13).

179. 11 U.S.C. § 522 (1988); *see, e.g., In re Graham*, 726 F.2d 1268, 1271-75 (8th Cir. 1984); *In re Laflamme*, 14 Bankr. 21 (Bankr. 1st Cir. 1981); *see also Harris, supra* note 11, at 340 ("[A]ffording the debtor a fresh start is an appropriate goal of bankruptcy law and . . . exemptions are supposed to promote that goal.").

180. 11 U.S.C. § 522(a)(2) (1988); *see In re Walsh*, 5 Bankr. 239 (Bankr. D.D.C. 1980).

181. *See, e.g., In re Graham*, 726 F.2d 1268, 1271 (8th Cir. 1984) (court refers to property "needed for a fresh start").

182. Other issues affecting the distribution of assets between bankrupt consumers and their creditors include whether certain security interests and judicial liens should be avoided, 11 U.S.C. § 522(f) (1988), and whether a debtor is entitled to a modification or hardship discharge of a Chapter 13 plan, 11 U.S.C. §§ 1328-1329 (1988); *see In re Bond*, 36 Bankr. 49 (Bankr. E.D.N.C. 1984) (granting hardship discharge).

183. But creditors may gain full equity ownership of a reorganized company, thereby extinguishing shareholder interests. Miller, *supra* note 132, at 1060. If the company is successful, the result is similar to the denial of a discharge.

184. 11 U.S.C. §§ 361, 362(d)(1) (1988); *see, e.g., In re Rogers Dev. Corp.*, 2 Bankr. 679 (Bankr. E.D. Va. 1980) (creditor not entitled to relief from the automatic stay because interests adequately protected).

185. Creditors must surrender any preferences received to the general estate. *See* 11 U.S.C. § 547 (1988). *See generally* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713 (1985).

Another subject of litigation involves whether the oil supplier's contracts were executory and therefore subject to assumption or rejection. Executory contracts, governed by 11 U.S.C. § 365

whether to approve a plan where the "feasibility" of a plan,¹⁸⁶ the "best interests" of the creditors,¹⁸⁷ and the fairness of a "cram down"¹⁸⁸ are in dispute, the abstract right to a discharge is not at stake. Instead the issue is whether the *particular* plan is feasible and fair to the creditors.¹⁸⁹

II. REASONS FOR THE DISPARATE VIEWS OF CONTRACT EXCUSE AND BANKRUPTCY DISCHARGE

Both bankruptcy and contract law excuse or limit promissory obligations. Courts, however, with great hesitation, have carved only narrow exceptions to the absolute enforcement of contractual promises and have refused to follow the lead of the U.C.C. in broadening relief.¹⁹⁰ At the same time, bankruptcy law has embraced the machinery of broad discharge.¹⁹¹ Part I's study illuminated differences in context, parties, goals, and methodology in and out of bankruptcy. These differences correctly influence attitudes about granting relief to promisors under the two systems. But many misunderstand excuse and discharge because they overemphasize these distinctions or draw dubious conclusions from them.

A. Contextual Differences

The issues of excuse and discharge obviously arise in different settings.¹⁹² The bankruptcy debtor generally receives a discharge only after suffering an overall financial collapse.¹⁹³ When the debtor *cannot* perform and creditor expectations *must* be disappointed, it naturally follows that the best approach is to rehabilitate the debtor. In contrast, excuse entitles a promisor to seek relief from an overly burdensome contract promise outside of bank-

(1988), "are nothing more than mixed assets and liabilities arising out of the same transaction." T. JACKSON, *supra* note 13, at 106 (footnote omitted). The debtor-in-possession or trustee may assume favorable executory contracts and reject (breach) unfavorable ones. Promisees in the latter case become general creditors whose claims are typically not paid in full. "[I]n most cases the power to reject . . . should be viewed as no more than stating the obvious: that contracts can be breached, converting the other party into the holder of a damage claim . . ." *Id.* at 110.

186. 11 U.S.C. § 1129(a)(11) (1988); see note 165 *supra* and accompanying text.

187. 11 U.S.C. § 1129(a)(7)(A) (1988); see B. WEINTRAUB & A. RESNICK, *supra* note 139, ¶ 8-23[2], at 8-104.

188. See notes 163-164 *supra* and accompanying text.

189. One ground for dismissal in Chapter 11 is the debtor's bad faith in filing the petition. 11 U.S.C. § 1129(a)(3) (1988). But cases construing the section generally involve debtor conduct designed to subvert Chapter 11, such as organizing a corporation immediately prior to a bankruptcy case solely to delay foreclosure by secured creditors. See, e.g., *In re Bonded Mailings, Inc.*, 20 Bankr. 781 (Bankr. E.D.N.Y. 1982); *In re Alison Corp.*, 9 Bankr. 827 (Bankr. S.D. Cal. 1981); *In re Dutch Flat Inv. Co.*, 6 Bankr. 470 (Bankr. N.D. Cal. 1980). Such cases do not question the right of discharge when the debtor has not engaged in devious conduct.

190. See Part I.A *supra*.

191. See Part I.B *supra*.

192. Professor Warren made a similar point in comparing state collection laws and bankruptcy law. She noted that the issues under state collection laws, involving only one creditor and debtor, may be very different from those involving all of the creditors after a debtor's total collapse. Warren, *supra* note 143, at 784.

193. *Id.* at 782; see also Frank R. Kennedy, *Creative Bankruptcy? Use and Abuse of the Bankruptcy Law—Reflection on Some Recent Cases*, 71 IOWA L. REV. 199, 202 (1985) (discussing, among others, the *Johns-Manville* case).

ruptcy, despite, in some cases, exhibiting an enviable balance sheet overall.¹⁹⁴ Such an approach is bound to engender the suspicion that the costs of destabilizing contracts exceed the benefits of granting relief.

Additionally, bankruptcy includes all of the creditors in one proceeding and sets priorities among them to eliminate expensive competitive debt collection,¹⁹⁵ whereas excuse typically involves only two parties. Although bankruptcy's priority rules could eliminate creditor rivalry without ultimately discharging debtors,¹⁹⁶ the collectivization of bankruptcy promotes a policy of discharge in a number of ways. First, courts can evaluate and resolve the entire financial puzzle in bankruptcy, whereas a contract excuse case often involves only one small part of the promisor's financial dilemma. Aware that her decision may affect others not before the court, a judge may be cautious in excusing contractual performance. Second, a pool of creditors shares the loss in bankruptcy, while a contract promisee absorbs the entire loss if the court excuses the promisor. Because a promisee, like a creditor, can typically assert strong interests in continued performance,¹⁹⁷ contract courts not surprisingly hesitate to relieve promisors. Third, a debtor voluntarily surrendering her assets in bankruptcy for the good of all may be morally entitled to forgiveness and to the opportunity to heal.¹⁹⁸ Alternatively, adopting a utilitarian perspective, debtors may extract the discharge as the price of their cooperation in the collective proceeding.¹⁹⁹ The resulting arrangement may enhance both creditors' and debtors' welfare. Creditors avoid a costly race to the debtor's assets,²⁰⁰ and debtors elude some of their obligations.

While these contextual differences are important, their significance can be inflated. First, the generalization that bankruptcy debtors cannot perform and that contract promisors can is simply too facile. In truth, both regimes entertain obligors exhibiting a wide range of abilities to perform their obligations. Some bankrupts, for example, *are* capable of performing their duties.²⁰¹ In fact, the perceived misuse of bankruptcy by debtors not

194. See, e.g., *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

195. See Baird, *supra* note 135, at 131 ("Bankruptcy law prevents a costly and destructive race to the firm's assets by offering a collective proceeding that freezes the rights of all investors in a firm, values them, and then distributes these assets . . ."); see also T. JACKSON, *supra* note 13, at 16-17 (bankruptcy eliminates common pool problems).

196. Bankruptcy law could distribute the debtor's assets according to statutory priorities, thereby eliminating the creditors' race to the assets, but permit the creditors to look to the debtor for satisfaction of their residual claims.

197. See notes 82-83 *supra* and accompanying text.

198. Mercy, a kind of altruism, is the product of the "moral fault or moral virtue" of the parties' conduct. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717-18 (1976); see also Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786 (1983) ("Bankruptcy reveals our acceptance of the fact that beyond a certain point, the sheer magnitude of a person's debt may be demoralizing.").

199. See note 95 *supra* and accompanying text; see also Baird, *supra* note 135, at 139-40 (justification for reorganization of closely held corporations is that a firm's survival depends on continued participation of present management).

200. See note 144 *supra* and accompanying text.

201. PURDUE STUDY, *supra* note 137, at 88-91 (in 1981, 30% of debtors could have paid their

truly on the verge of financial collapse has already prompted some legislative reforms. Several bankruptcy courts have recently considered whether an otherwise functioning company could invoke bankruptcy to evade collective bargaining agreements.²⁰² Even after Congress responded to this problem by amending the Bankruptcy Act,²⁰³ the suspicion lingers that anti-union employers continue to rely on bankruptcy to evade collective bargaining contracts.²⁰⁴ At the consumer level, studies suggesting that some debtors abuse bankruptcy²⁰⁵ led to the 1984 restrictions on consumer bankruptcies discussed earlier.²⁰⁶ Research also demonstrates that at least some consumer debtors filing for bankruptcy are financially troubled but not desperate.²⁰⁷

Moreover, even when legitimate calamities rack debtors, discharge need not automatically follow.²⁰⁸ Even the most destitute consumer debtors, for example, may ultimately be capable of paying their debts out of future income.²⁰⁹ Bankruptcy law could thus defer or reform obligations instead of

debts). *But see* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 220 (refuting the Purdue study).

Professor Boshkoff notes that in the "modern era [of] American bankruptcy law . . . the debtor has been able to obtain a discharge without any consideration of her ability to make further payments to creditors." Boshkoff, *supra* note 94, at 105.

202. *See, e.g., In re Continental Airlines*, 38 Bankr. 67 (Bankr. S.D. Tex. 1984); *see also* NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) (discussing the conditions under which a party undergoing bankruptcy proceedings may alter or terminate a collective bargaining agreement).

203. 11 U.S.C. § 1113 (1988). The new law requires the bankrupt and its employees to negotiate over proposed changes in a collective bargaining agreement. If the parties cannot agree, the court may determine the necessary modifications.

204. *See, e.g., Wall Street J.*, April 7, 1988, at 1, col. 1 (machinists' union's claim against Texas Air).

205. Eisenberg, *supra* note 152, at 986 n.117 (citing studies indicating that many debtors can pay their debts in full over a reasonable period of time); PURDUE STUDY, *supra* note 137, at 88-91 (a significant number of debtors could pay their debts).

In the area of nonconsensual obligations, bankruptcy increasingly reflects attempts to avoid a single obligation, rather than large-scale financial failure. Texaco filed bankruptcy in response to a large judgment for Pennzoil at a time when it arguably could have paid the judgment or negotiated a settlement. *See In re Texaco, Inc.*, 73 Bankr. 960 (Bankr. S.D.N.Y. 1987). Johns-Manville filed for bankruptcy, not in response to existing dire financial straits, but in anticipation of the decline that would accompany many future asbestos-based claims against the company. *See In re Johns-Manville Corp.*, 36 Bankr. 727 (Bankr. S.D.N.Y.), *appeal denied*, 39 Bankr. 234 (S.D.N.Y. 1984); *The Manville Bankruptcy: Treating Mass-Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983) (student author).

206. *See* notes 137-141 *supra* and accompanying text.

207. The numbers may be small, however. *See* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 208-12 (only 3-9% of the debtors studied could probably pay 100% of their obligations in three years). Professor Eisenberg, however, reports empirical evidence that at least before 1981 "the overwhelming majority" of filers earned a regular income. Eisenberg, *supra* note 152, at 985; *see also* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 86.

208. *See* Boshkoff, *supra* note 94, at 70 (discharge unavailable in France, Germany, Italy, and the Netherlands), 84 (discharge discretionary in England); Weistart, *supra* note 8, at 108 (discharge is not an "inseparable part" of bankruptcy).

209. Discussion, *supra* note 42, at 161 (John Weistart noting that bankruptcy discharges "people who are fully solvent" especially "if their human capital is valued"). *But see* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 201-13 (data suggesting that fewer than 10% of consumer debtors can repay their debts).

granting discharges.²¹⁰ I do not prescribe such a position: At least until social insurance programs adequately protect people from causes of bankruptcy such as exorbitant medical bills and job layoffs,²¹¹ discharge may be an appropriate, albeit imperfect, buoy to ensure that those treading water financially do not drown.²¹² My point is only that performance of a promise is rarely "impossible" in the sense that excuse courts employ the term—the debtor has not died, a painting the debtor has promised to deliver has not been reduced to ashes²¹³—although performance may demand so much sacrifice that we simply do not wish to require it. But many contract obligors seeking to be excused assert financial or other crises just as serious as a bankruptcy debtor's.²¹⁴ Both bankruptcy and contract therefore must ultimately confront the normative question of how much adversity is too much in comparable situations. Consequently, the plight of the party seeking relief is an imperfect justification for distinguishing discharge and excuse.

In addition, bankruptcy's collective nature may only partially explain its more generous relief policy. Although represented in bankruptcy proceedings, many creditors have little real leverage once the debtor goes bankrupt.²¹⁵ Consumer debtors typically have little or nothing for distribution to general creditors in consumer bankruptcies, making those creditors' participation a hollow benefit indeed.²¹⁶ Even in business reorganizations subject to creditor approval, a court may impose the plan on disapproving classes and minority creditors of approving classes must accede to the plan.²¹⁷ On the contract side, third-party representation is arguably not very relevant. A contract court's focus is on how to fill a gap in the *parties'* agreement. The court should therefore concern itself primarily with the parties' interests and should not hesitate to grant relief to a promisor simply because third parties are not represented.²¹⁸

210. Cf. Eisenberg, *supra* note 152, at 985-86 ("[M]any empirical studies suggest that many debtors could afford to pay their debts in full over a reasonable period of time."). But see Harris, *supra* note 11, at 351-61 (arguing that continual repayment costs both debtors and creditors).

211. Recent empirical work on consumer bankruptcies suggests that job disruptions are a primary cause of bankruptcy. See T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 96-103. Interestingly, the study also reports that medical problems are not a significant factor. *Id.* at 166-75.

212. Many individuals' need to resort to bankruptcy might disappear if they had publicly funded catastrophic health care insurance and satisfactory unemployment benefits and retraining programs. See Sullivan, Warren & Westbrook, *supra* note 137, at 1138-40 (describing the "bankruptcy poor" that would be created by limiting access to Chapter 7); cf. Weistart, *supra* note 8, at 119-21 (instead of a discharge, the government should use the tax system to ensure that poorer debtors do not bear most of our system's costs). But see T. JACKSON, *supra* note 13, at 232 (discharge aggravates the problem of moral hazard).

213. "Virtually the only instances of permanent excuse are the death or permanent incapacity of a performer under a personal services contract, or the loss or destruction of an irreplaceable object necessary for performance." Wladis, *supra* note 22, at 1603.

214. See Hillman, *supra* note 1, at 652 n.220.

215. See notes 147-170 *supra* and accompanying text.

216. See note 127 *supra* and accompanying text. Secured creditors, of course, can look to their collateral.

217. See text accompanying notes 162-167 *supra*.

218. Under FED. R. CIV. P. 19, joinder is indispensable only for joint obligees. See 3A JAMES WM. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 19.11 (2d ed. 1990).

The spreading-the-loss explanation for the dissimilarity between discharge and excuse may be unsatisfactory as well. Ultimately, neither the pool of creditors in bankruptcy nor a single contract promisee may feel the pain of a discharge or excuse. Both may raise interest rates or increase prices and thereby pass on the costs of discharge and excuse to their customers.²¹⁹

Instrumental reasons based on bankruptcy's collectivity are also of limited value in distinguishing discharge and excuse. Bankruptcy discharge undoubtedly creates some incentive for debtors to cooperate in collective proceedings. Contract law, on the other hand, affords no such incentive for promisors facing difficulties to cooperate, presumably on the theory that granting relief to promisors would induce them not to perform in the first place and would destabilize the expectations of promisees. Ironically, however, the costs of promisor opportunism and disappointed expectations are more likely to outweigh the benefits of increased cooperation in bankruptcy than in contract. On the whole, considering the present popularity of bankruptcy²²⁰ and the number of creditors disappointed in *each* proceeding, discharge probably disrupts contracts much more than would a liberal approach to granting relief in excuse cases.²²¹ Compounding the problem, bankruptcy law discharges debtors who have committed hard-core breaches of promises,²²² whereas contract excuse applies only in the absence of an agreement that clearly allocates the risk to the promisor, often precisely the situations where the parties expect mutual flexibility and cooperation.²²³

As to moral reasons, we probably should not discharge debtors simply because they have surrendered to a collective proceeding. It is arguably more important to keep one's promises in the first place.²²⁴ Contract promisors, who may not have promised to perform under the exigent circumstances

219. See, e.g., Howard, *supra* note 9, at 1066. But see Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1427 n.111 (1985) (noting the debate concerning the transfer effects of discharge). Of course, obligees' ability to pass losses on to customers may be limited (by rate-setting regulators, for example, in the case of our utility in the oil supply example above).

220. See, e.g., Shanker, *supra* note 142, at 299 ("In recent years, more than 500,000 bankruptcy cases have been filed annually, a figure that exceeds the combined total of civil and criminal cases filed each year in the federal district courts."); T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 4 (billions of dollars of debt discharged in bankruptcy each year).

221. Of course, as a practical matter, expectations will be disappointed notwithstanding the bankruptcy discharge if the debtor really cannot pay.

The right to a discharge is not boundless, of course. See text accompanying notes 137-141 *supra*. In addition, under the Bankruptcy Code the debtor may receive a discharge only once every six years. 11 U.S.C. § 727(a)(8), (9) (1988). This section may create an irrebuttable presumption that a debtor who requires a discharge any more frequently is so "financially negligent" that he does not deserve one. Howard, *supra* note 9, at 1052.

Contract excuse doctrines also police successive efforts to obtain relief. For example, it is unlikely that a court would find an exigency unforeseeable if the promisor had invoked it in previous pleas for relief.

222. Harris, *supra* note 11, at 346 (bankruptcy law discharges "virtually every honest and cooperative debtor"); Discussion, *supra* note 42, at 164 (Ellen Peters noting that much of bankruptcy addresses hard-core breaches).

223. See notes 52-88 *supra* and accompanying text.

224. See CHARLES FRIED, *CONTRACT AS PROMISE* 16 (1981) ("An individual is morally

and who may expect compromise and cooperation, arguably have a greater moral claim to relief than, at least, improvident debtors.

Perceptions about excuse and discharge also diverge because of the supposedly greater stigma of bankruptcy.²²⁵ We perceive bankruptcy as a serious illness; those who succumb to it face informal social sanctions and potential economic hardship wrought by those unwilling to deal further with the victim. We therefore believe that anyone who pays bankruptcy's high admission price must have real need. Conversely, we distrust those reneging on their promises outside of bankruptcy.

This reasoning, of course, depends on an accurate measurement of the relative costs of entering bankruptcy and seeking a contract excuse. An excursion through bankruptcy today may be relatively painless,²²⁶ and bankruptcy is now a popular avenue.²²⁷ Moreover, the stigma suffered by an individual bankrupt may be more than offset by her liberation from the shame of being unable to honor her obligations and her renewed optimism and self-confidence upon obtaining a fresh start.²²⁸ On the contract side, the costs of seeking a complete release from a contractual obligation, such as a tarnished reputation and loss of good will, continue to grow in a world increasingly characterized by long-term relations dependent on cooperation and compromise.²²⁹

B. *Differences in Parties and Goals*

Also contributing to the divergence of excuse and discharge are varying perceptions concerning the nature of the combatants in and out of bankruptcy, the fairness to these parties of forgiving promissory obligations, and the effects of discharge or excuse on their incentives. The parties in a bankruptcy discharge, we generalize, are sympathetic though fallible wage-earners, essential merchants, or, in the case of reorganizations, potentially productive businesses,²³⁰ battling aggressive and powerful banking or other creditor interests in a consumption-oriented, volatile economy.²³¹ From this

bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.”).

225. See, e.g., H.R. REP. NO. 595, *supra* note 14, at 118 (Chapter 13 “satisfies many debtors’ desire to avoid the stigma attached to straight bankruptcy . . .”); T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 324 (stigma as “gatekeeper for bankruptcy”); Howard, *supra* note 9, at 1061 (“resulting feelings of shame”).

226. T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 337-38 (stigma of bankruptcy weakening; some debtors can obtain substantial credit even after bankruptcy); see also Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding “Rejection,”* 59 U. COLO. L. REV. 845, 847 n.6 (1988) (bankruptcy refers to “debtors” not “bankrupts”).

227. See T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 329, 337 (almost half a million people in bankruptcy; famous bankrupts include Johns-Manville, Texaco, Braniff Airlines, Continental Airlines, Denton Cooley, and John Connally); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, BANKRUPTCY STATISTICAL TABLES A58-72 (1983).

228. See Howard, *supra* note 9, at 1061.

229. Hillman, *supra* note 56, at 4-14.

230. See notes 92-114 *supra* and accompanying text.

231. See, e.g., T. JACKSON, *supra* note 13, at 7 (“prototype” creditor is a bank or other finan-

perspective, it is easy to assert that bankruptcy discharge shields wage-earners from the ravages of bargaining power imbalances and other market imperfections,²³² from unforeseeable calamities, and from their own poor judgment.²³³ Bankruptcy discharge, we also believe, encourages beneficial, albeit risky, business activity by merchants and manufacturers.²³⁴ No similar chasm divides the parties in excuse litigation, we surmise, because cases usually involve merchants or business entities on both sides.²³⁵ Instrumental or fairness-based arguments in favor of contract promisors therefore appear more difficult to maintain.

Important recent empirical work supports some of these generalizations as far as consumer bankrupts are concerned.²³⁶ Nevertheless, the parties in contract excuse cases may be more diverse than we currently assume. Much research remains to be done on all fronts.²³⁷ Even assuming the validity of the distinctions between the cast of characters in bankruptcy and contract, however, they do not compel favoring bankruptcy discharge over contract excuse on normative grounds. Predicating discharge and excuse policy on broad generalizations about the bargaining power, judgment, or risk avoidance skills of particular classes of parties seriously intrudes on private contracting and eliminates the precision of individualized justice. Suppose, for

cial institution); T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 274-76 (listing types of creditors); Roe, *supra* note 143, at 240 ("deep-seated moral aversions to interest" may have influenced bankruptcy law). *But see* Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 770 (1989) (consumers may accept coercive remedies as a "self-command mechanism" to discourage weak will and to resolve internal conflicts between short- and long-term goals).

232. *See* Scott, *supra* note 231, at 767.

233. *Id.* at 778-82 (debtors' poor judgment).

234. *See generally* Weisberg, *supra* note 89, at 60 (citing historical arguments that "bankruptcy would facilitate credit and limit liability"). *But see* Eisenberg, *supra* note 152, at 990 (discharge an inferior mechanism of fulfilling the goal of limited liability).

235. *See* notes 45-46 *supra* (cases cited) and text accompanying notes 17-19 *supra*.

236. One recent empirical study reports that consumer bankrupts represent a cross section of the American populace, three quarters of whom live above the federal poverty level, T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 65, but who face loss of livelihood and whose debts amount to more than three times their annual income, *id.* at 74. *See* Robert A. Hillman, *Empiricism in Bankruptcy* (Book Review), 75 CORNELL L. REV. 1095 (1990) (reviewing T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127); *see also* EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES (pt. 1), H.R. DOC. NO. 137, 93d Cong., 1st Sess. 41-43, 51, 55 (1973) (summarizing earlier studies of personal bankruptcy).

237. Studies similar to that of Professors Sullivan, Warren and Westbrook, *supra* note 127, of business bankruptcies and contract excuse would clarify the normative issues.

Certain data dispel the idea that bankruptcy law exists to protect consumer debtors. For example, small business debt is more likely to be discharged than consumer debt. T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 289. In addition, a casual survey of recent cases suggests that both individuals and entities populate contract excuse cases, and both are held to the same standards. For examples of cases denying relief to individual promisors, see, e.g., *Silverman v. Charmac, Inc.*, 414 So.2d 892 (Ala. 1982); *Jenson v. Haynes*, 633 S.W.2d 154 (Mo. App. 1982); *Miller v. Titeca*, 628 P.2d 670 (Mont. 1981); *Brennen v. Little Red School House Ltd.*, 274 S.E.2d 206 (N.C. 1981); *Associated Grocers of Iowa Coop., Inc. v. West*, 297 N.W.2d 103 (Iowa 1980). For cases denying relief to entities, see, e.g., *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1456 (E.D. Va. 1984); *In re Fontana D'oro Foods, Inc.*, 107 A.D.2d 808, 484 N.Y.S.2d 644 (1985).

example, a bank concludes that the costs of evaluating whether debtors are bad credit risks outweigh the gains and therefore aggressively markets credit without investigating an overeager debtor's balance sheet.²³⁸ Has the bank engaged in commendable cost-benefit analysis or has it unjustifiably lured a spending-addicted consumer into further debt?²³⁹ Despite the obvious process costs,²⁴⁰ contract policing doctrines that focus on the fairness of the formation process and the equity of the resulting terms in particular cases better address such concerns and draw such lines.²⁴¹

Instrumental distinctions between discharge and excuse may also be problematic.²⁴² In fact, some analysts maintain that bankruptcy discharge detracts from social welfare rather than improves it. They argue that discharge allocates the risk of consumer debtors' financial problems to their creditors. However, the debtors are in control of their financial activities and therefore are arguably in a better position to predict and avoid financial collapse or to insure against it. In the aggregate, then, consumers may be the efficient risk bearers.²⁴³ In addition, debtors cannot waive their right to discharge prior to bankruptcy.²⁴⁴ As a result, creditors may demand higher than optimal interest rates from particular borrowers or incur costs in seeking additional security.²⁴⁵ Moreover, a debtor may not internalize all of the costs of a discharge. When the expense of identifying high-risk borrowers appears too great, lenders may pass on the costs of discharge to all borrowers in the form of higher interest rates.²⁴⁶ Therefore, the discharge policy

238. See T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 302-25. Surprisingly, credit card debt accounted for only 3% of the total debt in this survey. *Id.* at 306.

239. See, e.g., *id.* at 302-25; cf. Scott, *supra* note 231, at 770 (A conclusion of "systematic exploitation of consumers . . . simply does not seem justified by the current evidence.").

240. The costs of differentiating claimants may sometimes exceed the gains.

241. See generally Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, in 67 CORNELL L. REV. 1 (1981). For example, a court could determine whether the bank's conduct was unconscionable, whether the bank has unduly influenced a consumer, or whether the bank has the duty to disclose the ramifications of using the credit card. Each of these doctrines is context-dependent. See, e.g., U.C.C. § 2-302(2) ("[T]he parties shall be afforded a reasonable opportunity to present evidence as to [the contract's] commercial setting, purpose and effect . . ."). If the bank has engaged in any unlawful conduct, the consumer debt may be unenforceable, thereby discharging the consumer.

242. Eisenberg, *supra* note 152, at 990.

243. *Id.* at 981-82; T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 312-13 (data confirm that because debtors likely to end up in bankruptcy resemble most Americans, creditors have difficulty identifying them). Even consumer debtors poor at estimating their ability to repay may be efficient risk-bearers. See A. Charlene Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1069, 1071 ("[T]he risk of bankruptcy for an individual could be largely a function of personal characteristics that creditors are not particularly adept at evaluating."); see also Scott, *supra* note 231, at 762-63 ("[A]llocating exogenous risks of nonperformance to the party who bears the endogenous risks is a rational risk-distribution strategy when it is difficult to distinguish legitimate claims of excuse from manufactured ones.").

244. See note 152 *supra* and accompanying text.

245. See, e.g., Hallinan, *supra* note 95, at 81. Creditors can obtain security interests in debtors' collateral, but these are not costless. And bankruptcy law compromises even secured interests. For example, courts can enjoin secured parties from repossessing collateral and, instead, ensure them "adequate protection." See note 161 *supra* and accompanying text.

246. Eisenberg, *supra* note 152, at 983; Sullivan, *supra* note 243, at 1071; see also text accompanying note 219 *supra*.

may actually reduce the debtor's incentive to borrow wisely or may encourage her to resort to bankruptcy.²⁴⁷ Creditors unable to pass on the costs of discharge due to limited information or other deficiencies may be discouraged from lending at all.²⁴⁸

A few commentators even argue that, based on efficiency considerations, we should abolish Chapter 11 business reorganizations altogether.²⁴⁹ They assert that a firm's shareholders would prefer to sell firm assets on the market than to reorganize: A reorganization is, in effect, a forced sale of the firm to its creditors without the benefit of an asset-maximizing market valuation.²⁵⁰

Outside of bankruptcy, contracting parties enjoy the unbridled freedom to allocate the risk of unanticipated disasters.²⁵¹ In fact, the rules of excuse technically apply only when the parties have left a gap in their agreement.²⁵² In this context, liberal excuse rules may be efficient, at least if the court has the option of apportioning the losses, because such rules may reflect the parties' preferences.²⁵³ Gap cases most often arise in relatively long-term contracts, since unanticipated events generally occur over the long haul. Parties to such agreements are often comfortable with each other and negotiate with a minimum of formality.²⁵⁴ Because each has invested in their relationship and is vulnerable to the other's opportunism, cooperation and flexibility govern their behavior.²⁵⁵ In advance, such parties will not want to place the entire risk of unanticipated events on either one of them. Instead, they will seek to preserve their arrangement and each other's economic vitality,²⁵⁶ even to the extent of incurring costs to contract around narrow excuse provisions.²⁵⁷

This instrumental analysis of discharge and excuse is far from conclusive, of course. Debtors may or may not be the efficient risk bearers.²⁵⁸ Creditors may or may not be able to pass on the costs of nonwaivable discharge terms

247. This is a "moral hazard" problem. See Hallinan, *supra* note 95, at 92; Howard, *supra* note 9, at 1054-56; Weistart, *supra* note 8, at 110.

248. See, e.g., Sullivan, *supra* note 243, at 1072.

249. See, e.g., T. JACKSON, *supra* note 13, at 218-24.

250. *Id.* A reorganization is a forced sale to the creditors in the sense that the creditor "sells" its claim in return for a share of the reorganized firm. Baird, *supra* note 135, at 127 n.1, 138. A sale of the business to a third party buyer, among other things, reduces conflicts among the creditors. *Id.* at 128; Jackson & Scott, *supra* note 135, at 190. Jackson and Scott, however, make a case for reorganizations based on risk sharing. *Id.* at 190-92.

251. See text accompanying notes 54-70 *supra*.

252. See text accompanying notes 54-85 *supra*.

253. But see Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 526 (1985) (wide variety of risk-allocating devices, none of which can be said with any degree of confidence to represent what most parties would choose).

254. See Hillman, *supra* note 56, at 5-6, 17.

255. *Id.* at 4-8.

256. *Id.*

257. *Id.* at 30-31.

258. Dean Jackson notes that creditors, having dealt with many debtors, may be more skilled than debtors at monitoring borrowing. Debtors may also be risk averse and therefore derive a net benefit from discharge and higher interest rates. T. JACKSON, *supra* note 13, at 230; see also Harris, *supra* note 11, at 362; Howard, *supra* note 9, at 1063-68.

to debtors.²⁵⁹ The parties to long-term contracts may or may not intend to incorporate norms of flexibility and compromise into their contracts. As with bankruptcy debtors under our liberal discharge regime, contract promisors might have little incentive to avoid bad deals or to avoid litigation under a more liberal excuse policy. The indeterminacy of this analysis does suggest, however, that we should be wary of distinguishing excuse and discharge on policy grounds.²⁶⁰

C. *Process Differences*

For better or worse, Congress embraced these distinctions in contexts, parties, and goals when fabricating its discharge policy. The federalization of bankruptcy law in turn legitimized discharge, thereby adding momentum to its general acceptance.²⁶¹ Federal bankruptcy discharge law also contributed to the image of merchants, and, later, wage-earners, as sympathetic victims of events beyond their control.²⁶² In addition, the law has made a discharge in bankruptcy a foreseeable risk of contracting. We might now presume that creditors comprehend that risk and demand higher prices to cover it. We might not feel too sorry for such parties, therefore, when the risk comes to pass.

The prevailing perceptions of the contexts, parties, and efficiencies of bankruptcy also facilitated congressional fashioning of a relatively bright-line rule of discharge,²⁶³ thereby avoiding the need for ex post judicial intrusions into particular contracts. As a result of the certain approach to discharge, bankruptcy law largely avoids the risk-allocation morass that confronts courts in excuse cases.²⁶⁴ The bankruptcy court need not consider the intentions of the parties, assess the foreseeability of the debtor's woes, or search for the superior risk bearer. Nor must the court analyze whether the debtor was at fault or balance the parties' reliance and other interests.²⁶⁵ Constrained by the statute, bankruptcy courts avoid these issues even though confronting them might suggest denying a discharge in a particular case.²⁶⁶ Many, uncomfortable with judicial discretion, prefer the certainty

259. See Howard, *supra* note 9, at 1066; text accompanying note 219 *supra*.

260. See generally T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 230-63 (discussing the deficiency of economic models). An approach based on whether bankruptcy discharge or contract excuse best promotes settlement would be equally problematic. Nevertheless, I have argued elsewhere that a more liberal approach to excuse may promote settlement. See Hillman, *supra* note 56.

261. Unlike the federalization of bankruptcy, the state-law codification of excuse in U.C.C. § 2-615 has not increased the popularity of the excuse idea. For one thing, the provision applies only in the sales context. For another, as part of article 2's "common-law code" approach, the section fails to clarify when a promisor should be excused; instead, it leaves for case law development the meaning of such phrases as "impracticability" and "basic assumption." Of course, despite current judicial reluctance to adopt a favorable view of § 2-615, the innovation is relatively new. Whether it will have any lasting effect remains to be seen.

262. See text accompanying notes 92-126 *supra*.

263. Boshkoff, *supra* note 94, at 71 (discharge by legislative rule, not judicial discretion).

264. See text accompanying notes 52-85 *supra*.

265. See text accompanying notes 71-85 *supra*.

266. See Eisenberg, *supra* note 152, at 990-91 (debtor may be the superior risk bearer).

and clarity of the legislative bright-line approach.

Ironically, notwithstanding our preference for certainty on the substantive issue of whether an obligor should have *any* relief, we may also be more comfortable with discharge because it provides remedial flexibility. Bankruptcy law authorizes courts to adjust obligations to reflect the "divide-the-pie" issues generated by a case. By shaping the discharge, of course, courts can soften the bite of an unmerited discharge by extracting a real price for it. Curiously, although contract law is amorphous on the issue of whether to recognize an excuse defense, its remedial tradition in excuse cases, as elsewhere, is inflexibly all-or-nothing.²⁶⁷ An excused promisor may ultimately pay little or nothing.²⁶⁸ Thus, contract excuse may be singularly unattractive to the judiciary: It offers the appearance of too much discretion on the substantive side and the reality of too little discretion on the remedial side.

D. *Summary*

A rational policy approach to discharge and excuse depends on the costs and benefits of limited liability in each context. Discharge and excuse diverge because of the perception that only the former ultimately benefits society. Contextual differences, contrasts in parties and goals, and process concerns fuel this view, but these distinctions can be exaggerated. Contract and bankruptcy fundamentally wrestle with the same concern—how the law should balance the need for stable and certain obligations on the one hand, and the desire to protect parties from the hardships of changed circumstances on the other. They should therefore adopt similar or at least complementary strategies to cope with the problems.²⁶⁹ Permitted to evolve separately and still largely perceived as distinct today,²⁷⁰ the treatments of excuse and discharge diverge because analysts avoid the challenge of justifying separate approaches.²⁷¹

III. WHAT CONTRACT THEORISTS CAN ADOPT FROM BANKRUPTCY DISCHARGE AND WHAT BANKRUPTCY ANALYSTS CAN BORROW FROM CONTRACT EXCUSE

Discharge and excuse treat similar issues of promissory liability. Neither

267. Hillman, *supra* note 56, at 16-17. Courts consider the restitutionary interests (and occasionally the reliance interests) of the litigants, however. See R. SUMMERS & R. HILLMAN, *supra* note 5, at 970-79.

268. A promisor excused from performance may be liable only to return any benefits received under the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 158(1) (1982).

269. The traditional view is that bankruptcy is "an entirely new game" dealing with different problems. Baird, *supra* note 144, at 816.

270. See *id.* But see Discussion, *supra* note 42, at 159-65 (several commentators discussing excuse/discharge analogy); John H. Moore, *Foreword*, LAW & CONTEMP. PROBS., Autumn 1977, at 1, 7 (Bankruptcy "entails a set of restrictions on the contracts into which individuals can freely enter."); Weistart, *supra* note 8, at 111-12 (not at all clear that we must accept distinction).

271. But see Howard, *supra* note 9, at 1056 (discussing Shuchman, *supra* note 134) ("[T]he law providing enforceability for certain promises is merely one set of constitutive rules that exists beside another set—bankruptcy.").

the context, the parties, nor the goals of bankruptcy and contract compel radically different solutions. In particular, the environment of bankruptcy does not require discharge on demand; nor do the conditions of contract necessarily bar excuse. Both discharge and excuse inevitably accommodate conflicting principles and interests, yet must remain sufficiently coherent to encourage application in hard cases. Scholars, lawyers, judges, and legislators shaping discharge and excuse law can assist each other in achieving these goals. Each field offers a helpful analogy to the other and reminds strategists of the need to accommodate conflicting goals.²⁷² At a minimum, lawmakers should formulate contract's approach to excusing performance with bankruptcy discharge principles in mind. Conversely, they should construct bankruptcy's approach to the debtor's crisis with an informed view of the policies underlying contract excuse doctrine.

A. *What Theorists of Contract Excuse Can Learn From Bankruptcy Discharge Policy*

Part II pointed out that bankruptcy law discharges a debtor's duties arising from express contract terms *en masse*, sometimes when the debtor's financial situation is less than hopeless, whereas contract law balks at excusing a promisor who may not even have agreed to perform under the exigent circumstances. Critics who complain that contract excuse is an unprecedented assault on freedom of contract ignore these realities. In fact, bankruptcy discharge may actually disrupt expectations much more than would a liberal approach to contract excuse. Just as dire predictions that bankruptcy discharge would cause economic chaos and a decline of morality did not stop Congress from broadening it,²⁷³ neither should alarming prophecies about the death of contract head off the liberalization of contract excuse.

Some might argue, however, that the easy availability of bankruptcy discharge *justifies* the traditional skeptical approach to contract excuse. In this view, bankruptcy more appropriately deals with communitarian concerns such as limiting liability, while contract law protects individual freedom and expectations that private agreements will be enforced. We have seen, however, that bankruptcy discharge law's effort to balance the countervailing goals of protecting expectations and limiting liability is problematic in a number of respects. Although debtors display an array of abilities to pay, bankruptcy fails to confront the normative issue of how much adversity justifies discharge.²⁷⁴ Nor does bankruptcy adequately address the requisite standards of care of both debtors and creditors.²⁷⁵ Moreover, while bankruptcy involves all of the creditors, they may have little leverage in the bank-

272. See T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 328, 333 (bankruptcy part of a larger legal system).

273. See Shuchman, *supra* note 134, at 433.

274. See notes 201-214 *supra* and accompanying text.

275. See notes 238-239 *supra* and accompanying text.

ruptcy proceeding and may pass on the losses of discharge to others.²⁷⁶ Because the stigma of bankruptcy is diminishing and the blemish of excuse is increasing, we may also have little reason to distrust the motives of those seeking an excuse any more than those filing for bankruptcy.²⁷⁷ Bankruptcy discharge policy may also be inefficient.²⁷⁸

If bankruptcy discharge is not superior to contract excuse either in normative appeal or clarity of application, there is little reason to postpone the relief of a contract promisor with a single highly burdensome obligation until bankruptcy, with all of bankruptcy's attendant costs.²⁷⁹ Contract excuse's constructive focus on filling gaps in contracts rather than overturning express obligations, as well as its probable efficiencies in gap filling,²⁸⁰ reinforces the conclusion that we should not delay relief until bankruptcy.²⁸¹

In fact, instead of justifying an individualistic approach to contract excuse, the bankruptcy discharge model should entice contract courts to be more charitable to victims of severe disruptions. Whatever its faults, the discharge policy reflects Congress's view that the benefits of rehabilitating troubled debtors outweigh the costs of disappointing creditors' expectations. Similar reasoning may apply to contract excuse. Recognizing that whole or partial excuse may be appropriate under certain conditions may help keep many promisors from going out of business. And it might preserve contractual relationships that, under the current all-or-nothing remedial approach, are shattered by strategic behavior such as holding out for a complete release from liability or insisting on full performance. Under a more flexible remedial scheme, both parties would know that the likely result of litigation would be sharing the losses. Society as a whole would also benefit by avoiding the costs of contractual breakdowns. Such benefits may exceed the costs of disappointed promisee expectations.²⁸²

A move toward greater liberality in contract excuse demands a more structured excuse inquiry, however. Otherwise, courts may correctly perceive that the costs of a case-by-case analysis exceed the gains. Courts should seek to construct clear rules defining the appropriate role of foreseeability, the kinds of fault that preclude relief, and the significance, if any, of certain kinds of promisor losses, such as lost opportunity costs.²⁸³

276. See notes 215-219 *supra* and accompanying text.

277. See notes 225-229 *supra* and accompanying text.

278. See notes 243-250 *supra* and accompanying text.

279. Whatever the social cost of relaxing contract excuse, it must be weighed against the possible benefits such as fewer costly single-issue bankruptcies.

280. See notes 251-257 *supra* and accompanying text.

281. See Eisenberg, *supra* note 16, at 7 ("[M]ost debtors and their creditors would and should prefer to work out their problems in a nonbankruptcy setting.").

282. See generally Hillman, *supra* note 56, at 31-33.

283. For example, there is considerable confusion concerning whether an event must be "unforeseen" or "unforeseeable" for a promisor to gain relief under U.C.C. § 2-615. See Richard E. Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management*, 32 S.C.L. REV. 241, 261-63 (1980). Many courts apply an objective test of unforeseeability. See, e.g., *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 140 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 129, 310 N.E.2d 363, 367 (1974). Some courts, however, recognize that the objective

Bankruptcy can help here as well. For example, bankruptcy discharge expressly differentiates, for some purposes, between firms and wage-earners.²⁸⁴ Although contract law (notably in the U.C.C.) often distinguishes between merchants and consumers, excuse courts generally differentiate between companies and individuals only implicitly when they interpret contractual terms, determine the superior risk bearer, or consider the foreseeability of a disruption. As in bankruptcy, explicitly acknowledging the distinction may help clarify results in excuse cases.²⁸⁵

In contrast, there are some bankruptcy inquiries that may contribute too much uncertainty to excuse cases. For example, evaluating the nature and extent of the interests of third parties not before the court may strain the capacities of an excuse court. Similarly, such a court should consider evidence of the promisor's overall financial strength only in carefully defined categories. The promisor's financial health may be relevant where the promisor's balance sheet reveals it to be the superior risk bearer²⁸⁶ or portends its likely demise if the court enforces the obligation. On the other hand, a court probably should not take the promisor's overall financial well-being into account simply to bolster the court's vague perception of the "fair" result.

As hinted above, bankruptcy discharge policy also offers a powerful analogy for those who assert the need for greater remedial flexibility in contract law, especially for those who advocate court adjustment of contracts and other loss-sharing methods in excuse cases.²⁸⁷ Bankruptcy law grants the court some discretion in dividing the pie between the debtor and her creditors.²⁸⁸ This remedial flexibility enables courts to accommodate the conflicting goals of maximizing creditors' recoveries and rehabilitating debtors.²⁸⁹ Contract excuse theorists should emulate bankruptcy and abandon the search for a unifying principle such as freedom of contract.²⁹⁰ As with bankruptcy, as courts acknowledge the conflicting interests of contract, they should be more willing to abandon contract's rigid remedial structure.²⁹¹ In its place, they should construct a remedial scheme reflecting both parties'

test ignores bargaining realities, noting that the parties do not necessarily intend the promisor to bear all foreseeable risks. See notes 64-68 *supra* and accompanying text; see, e.g., *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966) (dictum); *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 91 (W.D. Pa. 1980). The better test for relief, therefore, requires only that an event was unforeseen by the promisor. Some additional suggestions are made in Hillman, *supra* note 1.

284. Corporate debtors are ineligible for Chapter 7 discharges, for example.

285. For example, an individual may have less reason than a company to foresee the likelihood of a disruptive event or to comprehend the language of an industry. For that matter, the individual company distinction should influence whether performance is "impracticable" under U.C.C. § 2-615, which often depends on financial hardship. See R. HILLMAN, J. McDONNELL & S. NICKLES, *supra* note 53, at 7-17.

286. A promisor's overall wealth is relevant to whether the promisor can best self-insure.

287. See generally Hillman, *supra* note 56.

288. See notes 171-189 *supra* and accompanying text.

289. See generally Warren, *supra* note 143.

290. See generally Hillman, *The Crisis in Modern Contract Theory*, *supra* note 7.

291. As an example of remedial flexibility, see *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E.2d 183 (1973) (where restitution damages too meager and expectancy measure too harsh, intermediate reliance-based measure appropriate).

potent interests in murky situations.²⁹² Such a remedial approach need not be overly ambitious, nor is it beyond our reach.

For example, consider again the effects of an unforeseen oil embargo on the long-term agreement between an oil supplier and utility.²⁹³ Suppose the embargo more than doubles the supplier's costs, that any price-adjustment clause fails to keep pace, and that the supplier faces severe losses over the duration of the agreement. Suppose further that the utility has relied on the long-term supply of fuel by constructing a new power station or forgoing other market opportunities. The supplier then refuses to perform without an adjustment and the utility seeks specific performance.

On these facts, there is little reason to favor one party completely. Under an all-or-nothing remedial approach, however, the court must order the supplier to perform in full or excuse the supplier entirely on the basis of impracticability. Instead, a progressive court might order the parties to engage in good-faith bargaining or mediation to nudge them toward an equitable settlement. If that fails, the court could adjust the agreement.

Adjustment could be based on standards agreed in the parties' contract. The court could seek evidence revealing the parties' goals and assumptions—documents or testimony, perhaps, showing that the parties expected the price to cover the supplier's costs with a certain percentage markup. Alternatively, the court could refer to other, similar contracts formulated or adjusted under the current conditions. Instead of adjusting the agreement, the court could excuse the supplier after requiring it to compensate the utility for reliance expenses. This model could be based on the judicial response to terminable-at-will franchise agreements, where courts grant damages to terminated franchisees based on their reliance expenditures.²⁹⁴

On a more theoretical level, some assert that contract law overemphasizes individualism and freedom of contract and relegates communitarian principles to the background, in order to legitimate an unjust status quo.²⁹⁵ A miserly interpretation of contract excuse in the name of contractual freedom may or may not support the proposition that contract law maintains existing hierarchies.²⁹⁶ Regardless, the more communitarian discharge policy of bankruptcy foils any such plot. In fact, as a bulwark of our legal approach to obligations, bankruptcy's fresh-start policy suggests that no such scheme ever underlay our legal system. After all, liberally discharging promissory obligations in the name of debtor rehabilitation would be a curious method of maintaining a hierarchical status quo.

292. See Eisenberg, *supra* note 16, at 50 (bankruptcy as sharing). Remedial flexibility would therefore enable a court to extract a price from a promisor seeking to be released from its obligations. For example, a court inclined to grant relief to the oil supplier in our earlier problem, *see* text accompanying note 54 *supra*, could require the supplier to perform at least a portion of the supply contract.

293. See text accompanying note 54 *supra*.

294. For more details on these ideas, see Hillman, *supra* note 56.

295. Hillman, *The Crisis in Modern Contract Theory*, *supra* note 7, at 110 (discussing authorities).

296. *Id.* at 110-13.

B. *What Bankruptcy Discharge Analysts Can Learn From the Approach to Contract Excuse*

An ungenerous discharge policy disserves debtors and society. At the other extreme, however, bankruptcy discharge available on demand undermines the sanctity of contract.²⁹⁷ As a general matter, the miserly approach of courts to contract excuse reminds bankruptcy courts of the sanctity-of-contract principle's powerful tradition.²⁹⁸ Ironically, the few theorists who have noted the relationship between discharge and excuse have justified bankruptcy discharge policy on the basis that contract already excuses performance.²⁹⁹ The stinginess of excuse doctrines today diminishes that argument.

More important, contract excuse offers courts a model for examining issues that reflect the conflicting goals of bankruptcy.³⁰⁰ Excuse courts entertain a variety of factors in a grand balancing approach.³⁰¹ The contract model, although lacking in structure, suggests that a bankruptcy court should not short-circuit its inquiry in deciding whether to discharge.³⁰² For example, excuse courts consider whether a contract promisor was at fault in failing to perform in order to encourage prudence and ensure fairness. Likewise, a debtor's blameworthiness in purposely or even carelessly incurring excess obligations should be relevant to whether a discharge under Chapter 7 would constitute abuse, or whether a debtor proposed a Chapter 13 plan in good faith.³⁰³ In a business reorganization, to cite another example, a plan should accommodate both creditors *and* equity owners of a company.³⁰⁴ A

297. In general, the drafters of bankruptcy law should better recognize that it is only one component of a massive legal structure. *See generally* Eisenberg, *supra* note 152.

298. Professor Weisberg characterizes as "the fundamental challenge of bankruptcy lawmaking" the need to reflect disparate interests. Weisberg, *supra* note 89, at 9.

299. *See* Weistart, *supra* note 8, at 111. But Professor Weistart also stated that he invoked the impossibility doctrine not as a defense of the existing bankruptcy regime, "but as a standard that we might use to define a more desirable bankruptcy system." Discussion, *supra* note 42, at 161. At the time, Professor Weistart saw an "increasing liberalization of the grounds for excuse" in contract, pointing to U.C.C. § 2-615. With the benefit of hindsight, it is now apparent that § 2-615 has not broadened judicial treatment of excuse. *See* notes 43-47 *supra* and accompanying text; *see also* Discussion, *supra* note 42, at 164.

300. *See, e.g.*, Discussion, *supra* note 42, at 161 (impossibility doctrine might help "define a more desirable bankruptcy system.").

301. *See* notes 52-85 *supra* and accompanying text.

302. Bankruptcy law, of course, already balances interests to some extent. For example, the law discharges a debtor even after she files a false financial statement if no creditor relied on the statement. *See* 11 U.S.C. § 523(a)(2)(B)(iii) (1988); Howard, *supra* note 9, at 1052.

303. *See, e.g.*, *In re Strong*, 84 Bankr. 541 (Bankr. N.D. Ind. 1988) (court considered whether bankruptcy was due to illness, calamity, disability or unemployment, or whether the debtor made purchases far in excess of the ability to pay and planned an unreasonable family budget); Nimmer, *supra* note 173, at 99 ("When bankruptcy can be related to identifiable and unexpected financial setbacks, a debtor seeking relief is guilty of no abuse"; debtor qualifies for Chapter 7 relief if he "made good faith efforts" to pay and "to protect his creditors' interests . . ."); Weisberg, *supra* note 89, at 8-9 (part of the "fundamental challenge of bankruptcy" is to distinguish reasonable and unreasonable difficulties); *see also* Eisenberg, *supra* note 152, at 979-80; Harris, *supra* note 11, at 355-58; Howard, *supra* note 9, at 1065.

A court should also consider whether to police creditor lending practices. *See* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 287, 305-22.

304. Some fear that a severe cost of Chapter 11 is the loss of protection "for widely scattered

creditor's motive for extending credit—for example, its desire to establish a long-term relationship with the debtor—and even the creditor's identity and financial position may have some relevance to the fairness and social usefulness of a plan.³⁰⁵ Conversely, courts should not ignore the desire of the debtor company's shareholders to protect their investment.³⁰⁶

The dilemma, of course, is that accommodating conflicting interests in determining whether to grant discharge may sacrifice the very certainty that makes bankruptcy discharge acceptable in the first place.³⁰⁷ Too much flexibility in contract excuse doctrine has been its downfall, and empirical evidence has substantiated at least some of the generalizations about the parties in bankruptcy.³⁰⁸ The costs of a case-by-case analysis, then, may exceed its benefits. Bankruptcy courts must therefore not be too ambitious. Nevertheless, they should seek to construct appropriate categories of "abuse" and "good faith," for example, that are not blind to the realities of the competing bankruptcy interests.³⁰⁹

Bankruptcy legislative reformers can also look to the law of contract excuse for guidance. One possible method of minimizing the disruption of creditor expectations in consumer bankruptcies, for example, would be to emphasize Chapter 13 wage-earner plans as the principle vehicle of discharge.³¹⁰ Legislation could require debtors to attempt to repay at least some of their debts from future earnings. Whether the pendulum would swing too far in favor of creditor interests at the expense of the fresh start policy and whether a mandatory Chapter 13 would invest bankruptcy judges with too much discretion are the subjects of considerable debate.³¹¹ Nevertheless, just as bankruptcy discharge serves as a beacon for those urging greater liberality in contract excuse, contract law's rigidity should remind

and relatively powerless public debtholders and stockholders." E. WARREN & J.L. WESTBROOK, *supra* note 107, at 397.

305. For example, an exception to discharge already exists when the creditor is a family member seeking support or a governmental entity seeking to collect a tax deficiency. *See* 11 U.S.C. § 523(a)(1), (5) (1988). But some have argued that the issue of "creditor worthiness" should be expanded. *See, e.g.,* Shuchman, *supra* note 134, at 428-29, 446-47 (size and net worth of the creditor and the moral worthiness of the debt should both be factors); *see also* T. SULLIVAN, E. WARREN & J.L. WESTBROOK, *supra* note 127, at 290 (Policymakers should "distinguish the cautious creditor from the highroller . . .").

306. Shareholders may see their investment compromised if the reorganization is too beneficial to creditors. *See, e.g.,* Baird, *supra* note 135, at 128 (investors would prefer sale of assets on market).

307. Professor Harris opts for a bright-line rule of discharge because of the absence of standards concerning the appropriate content of a discharge. Harris, *supra* note 11, at 353-55. For a discussion of the paradox of rules and standards in the bankruptcy context, *see generally* Weisberg, *supra* note 89; Boshkoff, *supra* note 94, at 118-25.

308. *See* note 236 *supra*.

309. For example, a bankruptcy judge might appropriately deny discharge where a debtor company seeks to avoid obligations under its collective bargaining agreements. *See* notes 202-204 *supra* and accompanying text.

310. *See* Eisenberg, *supra* note 152, at 978-86; *see also* H.R. REP. NO. 595, *supra* note 14, at 118 ("[D]ebtors should attempt repayment under chapter 13."), 120 (Bankruptcy Commission rejected imposition of Chapter 13).

311. *See generally* Eisenberg, *supra* note 152, at 976-91; Harris, *supra* note 11, at 345-64; Sullivan, Warren & Westbrook, *supra* note 137, at 1140-45.

lawmakers of the importance of preserving expectations³¹² and deflect the criticism that requiring some pay-back from future earnings in bankruptcy would be "truly radical."³¹³

Reformers could also employ specific aspects of the contract excuse balancing process in shaping bankruptcy discharge law. For example, reformers could rely more heavily on excuse's "superior risk bearer" analysis and enact laws that attempt to allocate the risk of the debtor's crisis to the party best able to bear it or avoid it.³¹⁴ I have little optimism that the approach would be any more precise in bankruptcy than it is in contract.³¹⁵ Nevertheless, the efficiency analysis could contribute to an overall effort to produce optimal discharge law, just as it has enriched the analysis of contract excuse.

IV. CONCLUSION

Contract excuse and bankruptcy discharge reflect our deep ambivalence concerning the extent to which the law should limit liability for failure to keep promises. Excuse and discharge both involve the problem of supervening events that make performance of promises onerous. But contract and bankruptcy treat the issue very differently. It is time to abandon the pretense that contract and bankruptcy are inherently different, and accept that no single principle can justify either doctrine. We can then better derive insights about how the law should deal with unanticipated events that disrupt promises and develop a more coordinated and coherent policy toward promissory relief.

312. Professor Harris points out that alimony and child support claims in bankruptcy involve judicial balancing of interests in determining what a debtor can afford to pay, but he believes that these cases are unique because of the moral strength of the creditors' claims. Harris, *supra* note 11, at 353. Although I agree with his assessment of these creditors' claims, it does not follow that the law should discharge debtors *carte blanche* when the creditors' claims are not as strong.

313. *Id.* at 349. Professor Harris adds that making Chapter 13 mandatory "would transform bankruptcy into a creditors' remedy more powerful than any available nonbankruptcy remedy" *Id.* at 353.

314. See Eisenberg, *supra* note 152, at 981-83.

315. See T. JACKSON, *supra* note 13, at 229-30; Eisenberg, *supra* note 152, at 981-83; Harris, *supra* note 11, at 361-64.