TICKET TO DEBT: *CITY OF CHICAGO V. FULTON* AND THE TWO-TRACK CONSUMER BANKRUPTCY SYSTEM

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In 2021, the Supreme Court decided City of Chicago v. Fulton*, a landmark bankruptcy case that addressed the issue of whether passive retention of estate property violates § 362(a)(3) of the U.S. Bankruptcy Code, commonly known as the "automatic stay" provision. The automatic stay, as its name suggests, is a breathing spell that prevents creditors from taking certain collection actions against the debtor after a bankruptcy petition has been filed. The Court answered in the negative, significantly weakening the automatic stay's protective power in cases involving creditor actions commenced pre-petition and maintained post-petition. This Note examines the aftermath of the* Fulton *decision. It considers* Fulton*'s impact on debtors, creditors, and bankruptcy courts. Specifically, this Note argues that* Fulton *sheds light on the shortcomings of the current bankruptcy system, and it discusses the ways in which debtors of color are disproportionally disadvantaged. In closing, this Note proposes that the Bankruptcy Code's discharge provisions should be amended to provide debtors with a better chance at relief.*

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INTRODUCTION

On Christmas Eve 2017, Robbin Fulton's car was towed. She did not know that she was driving on a suspended license. Her license had apparently been suspended because she had failed to pay fees for a number of parking tickets. She would later discover that it actually was her ex-husband who had incurred the tickets, but it did not matter because the tickets were tagged to the car that the two of them once shared. Fulton, a woman of color and single mother to a preschooler,[1] tried to get her car back but was told that her car would not be returned to her until she paid a fee of $4,000.[2] Unable to pay, she subsequently filed for Chapter 13 bankruptcy.[3]

Her case made its way to the Supreme Court. In 2021, the Court decided *City of Chicago v. Fulton*, a landmark bankruptcy case that addressed a long-standing circuit split on the issue of whether passive retention of estate property violates § 362(a)(3) of the U.S. Bankruptcy Code, commonly known as the "automatic stay" provision.[4] The Court held that because the automatic stay merely prohibits "any act . . . to exercise control over property" of the bankruptcy estate, *passive* retention—wherein the creditors are simply holding onto the estate property—falls outside the scope of the provision and is therefore permissible.[5]

This Note considers the problems arising out of this holding: that bankruptcy courts are struggling to draw a line between passive and affirmative acts, that communities of color are disproportionately affected, and that people experiencing insolvency are further disempowered—thus

1. See Rafael I. Pardo, Racialized Bankruptcy Federalism, 2021 Mich. St. L. Rev. 1299, 1341 n.218 ("The court opinions related to Fulton's bankruptcy case do not discuss her race. The profile picture from her *Facebook* page is one of a woman of color."); see also Brief for Respondents at 7, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 1478598 [hereinafter Brief for Respondents] ("Robbin Fulton is the single mother of a pre-school-aged daughter; at the time of her bankruptcy filing, she worked at a Chicago area hospital.").

2. Brief for Respondents, supra note 1, at 7.

3. Id.

4. 141 S. Ct. 585, 589 (2021).

5. Id. at 592.

contravening the bankruptcy system's dominant purpose to "help people who can no longer pay their creditors get a fresh start."[6]

This Note argues that the suggestions put forth by commentators, the Court, and Justice Sonia Sotomayor in her concurrence are attractive for their simplicity but ultimately fall short.[7] The problem cuts deeper; *Fulton* exposed the consumer bankruptcy system's structural vulnerabilities. This Note proposes that a more complete solution must address bankruptcy's "two-track" structure. The two-track system requires individual debtors to choose between Chapter 7 and Chapter 13 bankruptcy; the two Chapters are governed by similar but separate eligibility, relief, and discharge provisions. This Note argues that the two Chapters' discharge provisions should be brought into closer alignment, which would allow debtors who have not engaged in willful or malicious behavior to access the protections provided by either Chapter 7 or Chapter 13.

This Note proceeds in three Parts. Part I provides relevant context. It lays out the basic framework of the Bankruptcy Code's key provisions and bankruptcy procedure rules. It then provides a history of Chicago's vehicle impoundment program, which has become too common a trigger for bankruptcy. Part II discusses the *Fulton* decision and the Court's legal reasoning. It also explains the main problems arising out of the holding, primarily that it is now more difficult for debtors to get relief. Part III proposes a statutory solution that would shrink the gap between Chapter 7 and Chapter 13 bankruptcy to mitigate *Fulton*'s impact on the automatic stay.

I. BACKGROUND

Fulton is about passive retention: It's about what creditors can and should do with debtors' property that—for whatever reason—happens to be in their possession when the debtor first files for bankruptcy. The case directly invokes three separate subsections of the Bankruptcy Code. This Part provides a primer to the consumer bankruptcy system as context for understanding the *Fulton* decision. It begins with a broad summary of the fresh start principle and the two-track consumer bankruptcy system. It then introduces Chicago's vehicle impoundment program as the trigger for Fulton's decision to file for bankruptcy. Finally, it ends with descriptions of the three most relevant subsections of the Bankruptcy Code.

A. *The "Fresh Start" Principle*

The "fresh start" principle is closely related to the discharge of debt. Discharge of debt is a primary goal of individual bankruptcy, which exists

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6. Bankruptcy Courts, USAGov, https://www.usa.gov/federal-agencies/bankruptcy-courts [https://perma.cc/C9P2-ZWKJ] (last visited Aug. 23, 2023).

7. See infra Part II.

to "free the debtors who would otherwise be so hampered by unmanageable debt that they would stop contributing to society in a meaningful way."[8] Upon discharge, the legal obligation to repay debts is eliminated; the successful debtor is given a financial fresh start and is empowered to go out into the world and return to full productivity.

Professors Barry Adler, Ben Polak, and Alan Schwartz proposed an economic theory under which discharge is governed by ex ante and ex post goals.[9] They argued that discharge encourages debtors to take good-faith risks with some guarantee of relief and provides a mechanism for debtors to restore their lives if and when their debt becomes paralyzing.[10] This principle assumes that debtors end up with unmanageable debt not because of irresponsible or irrational behavior but because they were unlucky. The "incomplete heuristics" problem predicts that individuals, through no fault of their own, sometimes make decisions that underestimate future risks.[11]

The fresh start principle is nonetheless contentious because popular culture is quick to label those who repay their debts as trustworthy customers and those unable to do so as irresponsible shirkers; the repayment of debt is sometimes thought of as less an economic obligation and more a moral one.[12] Critics of discharge argue that "an individual, confident in his knowledge of his own best interests," impliedly waives "the right [of discharge] when he seeks to obtain credit."[13] The bankruptcy

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8. Abbye Atkinson, Consumer Bankruptcy, Nondischargeability, and Penal Debt, 70 Vand. L. Rev. 917, 926 (2017); see also Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 4 (1999) ("[Bankruptcy] is financial death and financial rebirth. Bankruptcy laws literally make debts vanish. When a judge signs a paper titled 'Discharge,' debts legally disappear.").

9. See Barry Adler, Ben Polak & Alan Schwartz, Regulating Consumer Bankruptcy: A Theoretical Inquiry, 29 J. Legal Stud. 585, 586–87 (2000).

10. See id. at 607 ("[T]he law must harmonize the conflicting goals of insuring borrowers and providing them with appropriate incentives.").

11. See Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393, 1411–12 (1985).

12. See David Graeber, Debt: The First 5,000 Years 4 (1st ed. 2011) ("What could be a more obvious example of shirking one's responsibilities than reneging on a promise, or refusing to pay a debt?"); Game of Thrones: A Golden Crown (HBO television broadcast May 22, 2011) (Tyrion Lannister says to a guardsman, "And of course, you have also heard the phrase, 'A Lannister always pays his debts,'" in an attempt to bribe his way out of captivity.); The Office: Money (NBC television broadcast Oct. 18, 2007) (Creed Bratton says to Michael Scott, "[I] heard you're having money problems," to which Scott responds, "No you didn't." Bratton then says to Scott, "Listen, I've got the answer. You declare bankruptcy, all your problems go away.").

13. Jackson, supra note 11, at 1394; see also Bartenwerfer v. Buckley, 143 S. Ct. 665, 675 (2023) ("[T]he Code, like all statutes, balances multiple, often competing interests. . . . No statute pursues a single policy at all costs, and we are not free to rewrite this statute (or any other) as if it did."); Rafael I. Pardo & Michelle R. Lacey, Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, 74 U. Cin. L. Rev. 405, 413–14 (2005) ("Two principles generally provide the metric against which bankruptcy law and policy are tested for their soundness: (1) a fresh start for the debtor

system, therefore, reflects a fragile balance between forgiveness and accountability, between dischargeability and nondischargeability.

B. *The Two-Track Consumer Bankruptcy System*

The American consumer bankruptcy system is sometimes described as "two-track" to reflect the choice that individual debtors have between two main types of relief: Chapter 7, which immediately liquidates the debtor's nonexempt assets to pay off creditors, and Chapter 13, which refinances debt to allow for long-term payment to creditors.[14] The current system has roots in the 1898 Bankruptcy Act[15] and was solidified with the passage of the Bankruptcy Reform Act of 1978.[16] The latter was widely celebrated as a modernized system for obtaining financial relief.[17] The Bankruptcy Reform Act of 1978 was designed with the hope that if a debtor was statutorily eligible for either option,[18] the usefulness of each Chapter would come down to the individual debtor's circumstances and priorities.[19]

Regardless of which Chapter a debtor files under, a voluntary individual bankruptcy case begins when a debtor submits a petition to the bankruptcy court.[20] The debtor must also submit (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement

(the fresh start principle) and (2) equal treatment of similarly situated creditors (the equality principle).").

14. See Michael B. Kaplan & Stacey L. Meisel, Consumer Bankruptcy Handbook With Forms § 1:6 (2023) (providing general guidance for borrowers deciding between Chapter 7 and 13); The Consumer Bankruptcy Reform Act of 2020, Am. Bankr. Inst., https://www.abi.org/feed-item/the-consumer-bankruptcy-reform-act-of-2020 [https://perma.cc/2SVH-LSAM] (last visited Aug. 25, 2023) (describing the consumer bankruptcy system as "two-track").

15. See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544; Timothy W. Dixon & David G. Epstein, Where Did Chapter 13 Come From and Where Should It Go?, 10 Am. Bankr. Inst. L. Rev. 741, 742–44 (2002) (describing an increase in consumer credit use under the 1898 Act).

16. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2548.

17. See Katherine Porter, The Pretend Solution: An Empirical Study of Bankruptcy Outcomes, 90 Tex. L. Rev. 103, 105 (2011) (describing the Bankruptcy Reform Act of 1978 as a "new, improved system[] [that] bifurcated options[] [and] offered families in financial trouble a rich array of tools to eliminate, reduce, or restructure debts").

18. Debtors must meet several statutory requirements to be eligible under Chapter 7. See 11 U.S.C. § 707(b)(2)(A)(i) (2018) (providing that debtors must pass a formulaic means test to determine whether filing under Chapter 7 would be presumptively abusive); § 727(a)(8) (providing that debtors are ineligible for Chapter 7 relief if they were granted a Chapter 7 or Chapter 11 discharge within the last eight years); § 727(a)(9) (providing that debtors are ineligible for Chapter 7 relief if they were granted a Chapter 12 or Chapter 13 discharge within the last six years, unless the debtor paid either 100% of the allowed unsecured claims or at least 70% of the claims under the Chapter 12 or Chapter 13 plan).

19. Porter, supra note 17, at 105.

20. Fed. R. Bankr. P. 1002(a).

of financial affairs.[21] If employed, debtors filing under Chapter 13 as well as debtors filing under Chapter 7 with primarily consumer debts must submit evidence of any payment they have received within sixty days before filing.[22] Those filing under Chapter 7 must also include a copy of their tax returns.[23] These requirements are intended to facilitate the bankruptcy process and to ensure that the debtor's assets or future income are fairly and efficiently distributed.[24]

After the petition is filed, the U.S. Trustee appoints an impartial case trustee to oversee the case.[25] The mechanics of the trustee's role differ somewhat between Chapter 7 and Chapter 13, but generally the trustee acts as a third party mediator between the debtors and the creditors.[26] Most importantly, the trustee holds a meeting of creditors within forty or fifty days of filing, during which the trustee and the creditor(s) may relay additional information or ask the debtor questions about their assets or financial affairs.[27]

Chapter 7 requires debtors to turn over all nonexempt assets to the trustee, who then sells off the assets to compensate the creditors.[28] Debtors are permitted to retain any "exempt" property; most common, everyday assets like clothing and household goods are exempt, but the exact rules vary among states.[29] Some debtors also are allowed to claim property deemed exempt by the Bankruptcy Code.[30] Chapter 7 is usually a good option for debtors whose debts substantially outweigh their assets.

Chapter 13 is different. In a typical Chapter 13 case, the debtor instead is required to submit a "repayment plan" to the bankruptcy court within fourteen days after the petition is filed.[31] The repayment plan provides that "the debtor [will receive] a discharge of his or her remaining dischargeable debts if he or she successfully complies with the terms of the . . . plan."[32] The plan provides a fixed amount for payments that must be made on a regular basis, usually biweekly or monthly.[33] Under some circumstances, a plan will be approved even if it does not actually provide

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21. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007(b).

22. Fed. R. Bankr. P. 1007(b).

23. Id.

24. Cho v. Park (In re Seung Chan Park), 480 B.R. 627, 639 (Bankr. D. Md. 2012).

25. 11 U.S.C. §§ 701(a), 1302.

26. Id. § 1302.

27. Fed. R. Bankr. P. 2003(a).

28. See Porter, supra note 17, at 116 (explaining Chapter 7 procedure generally).

29. See Jean Braucher, Dov Cohen & Robert M. Lawless, Race, Attorney Influence, and Bankruptcy Chapter Choice, 9 J. Empirical Legal Stud. 393, 394 (2012).

30. 11 U.S.C. § 522(b)(2), (d).

31. Chapter 13—Bankruptcy Basics, U.S. Cts., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics [https://perma.cc/M6PA-RMDS] (last visited Aug. 25, 2023).

32. Kaplan & Meisel, supra note 14, § 1:4.

33. Chapter 13—Bankruptcy Basics, supra note 31.

creditors with full repayment of their claims.[34] Regardless, the bankruptcy court must approve the repayment plan before the case trustee begins distributing funds to creditors.[35]

While Chapter 7 is more popular overall and typically thought of as "quick forgiveness" or the "cheaper, easier, and faster" option,[36] Chapter 13 is preferred when a debtor owns nonexempt and "large assets like a home, a car, or a retirement account."[37] This is because Chapter 13, unlike Chapter 7, restructures in lieu of liquidation. It allows debtors to recoup their assets, regardless of whether their assets are exempt under Chapter 7.[38] Chapter 13 can be the better option when a debtor is dealing with more valuable assets such as a home or a car—useful possessions that a debtor likely would not want to be without. If a debtor has pledged valuable assets as collateral, Chapter 13 allows them to keep those assets upon repayment, but under Chapter 7, the assets will be lost unless the creditor agrees to a reaffirmation.[39] The discharge provisions under Chapter 13 are also somewhat more generous to the debtor: Debts incurred from willful and malicious injury to property, nondischargeable tax obligations, and property settlements in divorce or settlement proceedings are dischargeable under Chapter 13 but not under Chapter 7.[40] Because a discharge granted under Chapter 13 encompasses some debts that are dischargeable under Chapter 13 but not under Chapter 7, a Chapter 13 dicharge is sometimes referred to as a "superdischarge."[41]

The main downsides of Chapter 13 are twofold: It takes longer to carry out, typically three to five years, and it costs more.[42] Unsurprisingly, Chapter 13 is the riskier option because "debtors are vulnerable to changes of life circumstance, such as loss of employment, divorce, or

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34. Id.

35. Id.

36. Sara S. Greene, Parina Patel & Katherine Porter, Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes, 101 Minn. L. Rev. 1031, 1031 (2017).

37. Leslie A. Pappas, Bankruptcy Racial Disparities Poised to Add to Pandemic Pain (1), Bloomberg L. (Aug. 31, 2020), https://news.bloomberglaw.com/bankruptcy-law/bankruptcys-racial-disparities-poised-to-add-to-pandemics-pain (on file with the *Columbia Law Review*).

38. Id.

39. See Kristopher Ramsfield, The Basics of Chapter 7 Bankruptcy, Legal Aid of Ark. (Feb. 2, 2017), https://arlegalaid.org/news-events/newsroom.html/article/2017/02/02/the-basics-of-chapter-7-bankruptcy [https://perma.cc/J45S-UDKV] ("Usually, if a debtor wishes to keep secured property (most often an automobile or home that is the collateral for the purchase loan), he or she must 'reaffirm' the debt."). A reaffirmation is an agreement between the debtor and the creditor that the debtor will remain legally liable for otherwise dischargeable debt. Id.

40. Chapter 13—Bankruptcy Basics, supra note 31.

41. Pamela Foohey, Fines, Fees, and Filing Bankruptcy, 98 N.C. L. Rev. 419, 419 (2020) ("[P]eople who file bankruptcy under [C]hapter 13—one of the two most common chapters filed by consumers—are entitled to a so-called 'superdischarge' that provides for the discharge of a few categories of debt that are not dischargeable in [C]hapter 7.").

42. Pappas, supra note 37.

unanticipated emergency."[43] Further, attorneys' fees are higher under Chapter 13—often more than twice as much as they would be under Chapter 7—but Chapter 13 debtors are permitted to make incremental payments over a period of time.[44] Under Chapter 7, the attorneys' fees must be paid upfront.[45]

The periodical nature of a Chapter 13 repayment plan makes it possible for a debtor to default on their payments. It is also possible for a creditor or a third-party trustee to object to the debtor's Chapter 13 repayment plan, which would in turn require the debtor to adjust, and often increase, the payment amounts. In such cases, a debtor might ask the bankruptcy court to convert a petition initially filed under Chapter 13 to Chapter 7.[46] If their request is granted, the debtor would no longer need to make payments under the original plan, but there still would be some debts that remain nondischargeable.[47] As a final measure, a debtor might also ask the bankruptcy court to grant a hardship discharge, but this is available only under very limited circumstances.[48]

A bankruptcy case generally ends in one of two ways. If debtors are successful, part or all of their debt will be discharged, and their creditors will be prevented from taking or continuing an action to collect from them.[49] Some debts are statutorily barred from discharge,[50] but because debtors can usually discharge most if not all of their consumer debt, filing for bankruptcy often is still worthwhile. If debtors are unsuccessful, however, their case will be dismissed. Notably, the dismissal rates for Chapter 7 cases are low—hovering around five percent—but the dismissal rates for Chapter 13 cases soar at around sixty-seven percent.[51]

Dismissal generally is a bad outcome because it puts debtors in a worse position than the one in which they began. Absent the bankruptcy system's protections, creditors are again free to collect against debtors, interest rates continue to mount, and by then, the debtor has "borne the costs of

43. Id. (internal quotation marks omitted) (quoting Charles Hall, a spokesman for the Administrative Office of the U.S. Courts).

44. Edward R. Morrison, Belisa Pang & Antoine Uettwiller, Race and Bankruptcy: Explaining Racial Disparities in Consumer Bankruptcy, 63 J.L. & Econ. 269, 270 (2020).

45. Id. at 287.

46. See 11 U.S.C. § 1307 (2018) (describing the rules and procedures for chapter conversion).

47. See id. § 523(a) (listing types of debts that are nondischargeable under Chapter 7).

48. See id. § 1328(b) (providing that hardship discharges are available when a debtor's failure to complete payment is due to circumstances outside the debtor's control, creditors have received at least as much as they would under Chapter 7, and modification of the plan is impossible).

49. Id. § 1328.

50. Id. §§ 523, 1328.

51. See infra note 174 and accompanying text.

bankruptcy—attorney and filing fees, a seven-year flag on their credit reports—without receiving its primary benefit."[52]

C. *Chicago's Vehicle Impoundment Program*

In 2011, the City of Chicago faced a massive budget deficit.[53] Under Mayor Rahm Emanuel's leadership, the City revamped its vehicle impoundment program to increase fines and fees for parking and traffic violations.[54] It also began enacting ordinances permitting boot-related impoundment for unpaid fines; boots were placed on cars that belonged to owners who had failed to pay traffic fees for more than one year.[55] If a car was impounded, the City would charge additional fees for impounding, towing, and storing the car.[56] Until all fees were paid, the car generally would not be returned to its owner, and the City retained the right to sell it.[57] The program differed from its counterparts in that Chicago did not attach a statute of limitations to fines related to traffic tickets.[58] This made it possible for fines to slowly yet substantially accumulate without any expiration date. Between 2011 and 2019, about 50,000 cars were sold under this program.[59] Most were sold for scrap value, even if the market value of the car was much higher.[60]

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52. Paul Kiel & ProPublica, Caught in the Bankruptcy Feedback Loop, The Atlantic (Sept. 27, 2017), https://www.theatlantic.com/business/archive/2017/09/bankruptcy-memphis-chapter-13/541194/ (on file with the *Columbia Law Review*).

53. Press Release, Mayor's Press Off., City of Chi., Chicago Office of Budget and Management Reminds Chicagoans of Changes to Expect in the New Year (Dec. 30, 2011), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2011/december_2011/chicago_office_ofbudgetandmanagementremindschicagoansofchangesto.html [https://perma.cc/Q5WF-6AD2].

54. Elliott Ramos, Chicago Police Impounded 250,000 Vehicles Since 2010. Here's Why City Hall's Rethinking That, WBEZ Chi. (July 13, 2020), https://www.wbez.org/stories/chicago-police-impounded-250000-vehicles-since-2010-heres-why-city-halls-rethinking-that/a085f94b-4a87-437b-837a-d5b4501a9168 (on file with the *Columbia Law Review*).

55. Mun. Code of Chi. § 9-100-120(b)–(c) (2023).

56. Id. § 9-92-080(b).

57. Elliott Ramos, Chicago Seized and Sold Nearly 50,000 Cars Over Tickets Since 2011, Sticking Owners With Debt, WBEZ Chi. (Jan. 7, 2019), https://www.wbez.org/stories/chicago-seized-and-sold-nearly-50000-cars-over-tickets-since-2011-sticking-owners-with-debt/1d73d0c1-0ed2-4939-a5b2-1431c4cbf1dd (on file with the *Columbia Law Review*) [hereinafter Ramos, 50,000 Cars].

58. Melissa Sanchez & Sandhya Kambhampati, Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy, ProPublica Ill. (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/ [https://perma.cc/3G85-RYPJ].

59. Ramos, 50,000 Cars, supra note 57.

60. Id.

Today, four in ten American adults struggle to cover emergency expenses of $400.[61] Until Mayor Lori Lightfoot lowered the fines and fees in 2020, Chicago's base fee for impoundment was $1,000. It is now $500, but this amount is still debilitating for many.[62]

Chicago is not alone in its practice of using municipal police power to raise revenue. One study found that at least 284 American cities and towns rely on fines and fees for 20% or more of their revenue.[63] States do the same, with California using "traffic citations to collect revenue for 18 different state and county funds" and North Carolina using them to "raise[] money for [its] court system, jails, counties, law enforcement, and schools."[64]

This practice, otherwise known as "taxation by citation," is prevalent across the country. It entered into mainstream awareness in 2014 after Michael Brown was shot and killed by a police officer in Ferguson, Missouri.[65] A Department of Justice investigation revealed that in the months and years leading up to Michael Brown's death, Ferguson city officials had been deliberately encouraging the police chief and municipal court judge to increase revenue through ramping up citations.[66]

In 2013, the city of Montgomery, Alabama, collected almost $16 million in fines, a sum more than five times greater than what other similarly sized Alabama cities collected.[67] What accounted for this discrepancy? In 2017, Michael W. Sances and Hye Young You conducted a

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61. See Alicia Loro, Ellen Merry, Jeff Larrimore, Jacob Lockwood, Zofsha Merchant & Anna Tranfaglia, Bd. of Governors of the Fed. Reserve Sys., Economic Well-Being of U.S. Households in 2022, at 31 (2023), https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf [https://perma.cc/GRN3-2E4H] (noting that sixty-three percent of American adults would be able to cover a hypothetical expense of $400 with "cash, savings, or a credit card paid off at the next statement"); see also Brief of the American Civil Liberties Union, the American Civil Liberties Union of Illinois, the Cato Institute, the Fines and Fees Justice Center, the Institute for Justice, the R Street Institute, and the Rutherford Institute as Amici Curiae in Support of Respondents at 3, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 1305027 [hereinafter Brief of the ACLU et al.].

62. Vehicle Impoundment Program Reforms, City of Chi., https://www.chicago.gov/city/en/sites/newstartchicago/home/vehicle_impoundment_program_reforms.html [https://perma.cc/CEL6-NJ6U] (last visited Sept. 14, 2023).

63. Mike Maciag, Addicted to Fines: Small Towns in Much of the Country Are Dangerously Dependent on Punitive Fines and Fees, Governing (Aug. 19, 2019), https://www.governing.com/archive/gov-addicted-to-fines.html [https://perma.cc/8NEB-QZ93].

64. Brief of the ACLU et al, supra note 61, at 12.

65. Dick M. Carpenter II, Ricard Pochkhanawala & Mindy Menjou, Inst. for Just., Municipal Fines and Fees: A 50-State Survey of State Laws, Inst. for Just. (Apr. 30, 2020), https://ij.org/report/municipal-fines-and-fees/ [https://perma.cc/VH8D-5PPE].

66. C.R. Div., DOJ, Investigation of the Ferguson Police Department 9–11 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/8HJV-29LE].

67. Carpenter et al., supra note 65.

study and found that cities with larger Black populations are more likely to fine residents higher amounts on a per capita basis and tend to rely more heavily on fines for revenue.[68] A *Chicago Reporter* study "showed that [in California] a 1% increase in [B]lack population is associated with a 5% increase in per capita revenue from fines and a 1% increase in share of total revenue from fines."[69]

In Chicago, Black residents make up almost thirty percent of the population.[70] The Chicago Police Department (CPD) recently reported data to the Illinois Department of Transportation indicating that between 2015 and 2021, the number of traffic stops increased by four times.[71] The CPD report also showed that compared with white drivers, Black drivers were six times as likely to be stopped,[72] while Latinx drivers were more than two times as likely to be stopped.[73]

As part of its program, Chicago imposes additional requirements upon its residents, such as maintaining a City Vehicle Sticker, which costs between $95 and $225 for vehicles not classified as motorcycles or large trucks.[74] Those who fail to display the City Sticker on their cars risk being issued a $200 fine, and there is no limit on how many times the fine can be issued.[75] If the City Sticker is improperly displayed, a resident could be fined $200 each day for however many days in a row. Fees related to City Sticker violations are the largest source of ticket debt in Chicago.[76]

Taxation by citation is generally unpopular.[77] Cognizant of public opinion, Chicago—along with many other municipalities—recently

68. Michael W. Sances & Hye Young You, Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources, 79 J. Pol. 1090, 1093 (2017).

69. Akheil Singla, Cities With More Black Residents Rely More on Traffic Tickets and Fines for Revenue, Chi. Rep. (Oct. 31, 2019), https://www.chicagoreporter.com/cities-with-more-black-residents-rely-more-on-traffic-tickets-and-fines-for-revenue/ [https://perma.cc/SVP4-H6VG].

70. QuickFacts: Chicago City, Illinois, U.S. Census Bureau, https://www.census.gov/quickfacts/chicagocityillinois [https://perma.cc/ZR93-WD4Y] (last visited Aug. 26, 2023).

71. Loren Jones & Amy Thompson, Bus. & Pro. People for the Pub. Int., A New Vehicle for "Stop and Frisk" 27 (2023), https://www.impactforequity.org/wp-content/uploads/2023/05/BPI_Traffic-Stop-Report_F.pdf [https://perma.cc/UAK2-ZV5F].

72. Id. at 15–16.

73. Id. at 16.

74. Chicago City Vehicle Sticker FAQs, Off. of City Clerk Anna M. Valencia, https://www.chicityclerk.com/chicago-city-vehicle-sticker-faqs [https://perma.cc/N6TW-8ZCN] (last visited Aug. 26, 2023).

75. Mun. Code of Chi. §§ 3-56-150(b), 9-64-125(f), -100-020(c) (2023).

76. Sanchez & Kambhampati, supra note 58.

77. Press Release, Fines & Fees Just. Ctr., First-of-Its-Kind National Poll Reveals Broad Consensus for Fines and Fees Reform (Jan. 12, 2021), https://finesandfeesjusticecenter.org/2021/01/12/press-release-first-of-its-kind-national-poll-reveals-broad-consensus-for-fines-and-fees-reform/ [https://perma.cc/K4BJ-9ZR3] (reporting that "79% of voters believe that government revenue should not depend on making people pay more through fines, fees, and tickets").

lowered the fines and fees for traffic violations.[78] At the federal level, Senators Chris Coons and Roger Wicker introduced the Driving for Opportunity Act, a bill designed to incentivize municipal and state governments to reinstate the licenses of those who failed to pay fees.[79] These reforms might point to a greater national movement for racial and economic justice, but they do not offer debtors relief in instances in which estate property was seized by their creditors prior to filing for bankruptcy.

As of 2018, Chicagoans owed $1.45 billion in unpaid ticket fines dating back to 1990.[80] Thousands of residents faced with prohibitively high fees have since sought relief through the bankruptcy system, and reforms to lower fines or to restore drivers' licenses will not do them much good.[81] These reforms also fail to address a persistent and overarching feature of the bankruptcy system: Although the law is racially neutral on its face, individual bankruptcy filings disproportionately are made by people of color.[82] Further, the disparities are more severe for Chapter 13 filings, particularly in the south, where Black individuals more frequently make such filings.[83]

A long history of racial segregation and discrimination has shaped Chicago's landscape and transit system into what it is today: deeply divided and convenient for wealthier, white neighborhoods but lagging in poorer neighborhoods of color. In a study, Professor Edward Morrison found that poor people of color in Chicago "tend to live in neighborhoods that are not only far from their jobs but far from essential amenities such as

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78. Vehicle Impoundment Program Reforms, supra note 62.

79. Driving for Opportunity Act, S. 998, 117th Cong. § 3 (2021).

80. Sanchez & Kambhampati, supra note 58.

81. Between 2007 and 2017, the number of Chapter 13 bankruptcy filings increased from about 1,000 per year to about 10,000. Id. The median amount of Chicago debtors' municipal debt increased from about $1,500 to $3,900. Id.

82. See Aisha Al-Muslim, Black People Are More Likely to File for Personal Bankruptcy, Choose Repayment Option, Wall St. J. (June 7, 2021), https://www.wsj.com/articles/black-people-are-more-likely-to-file-for-personal-bankruptcy-choose-repayment-option-11623058202 (on file with the *Columbia Law Review*) ("Black people in the U.S. . . . are more likely to file for bankruptcy protection, if they can afford to pay for the cost of filing, than any other racial group, according to studies, researchers and legal experts."). But see Anthony J. Casey, Comment, Consumer Bankruptcy Pathologies, 173 Institutional & Theoretical Econ. 197, 200–01 (2017) ("[I]f parking tickets in Chicago have a disparate racial effect, the best solutions will almost certainly be targeted at fundamental racial inequalities either in the city or in the parking enforcement itself, rather than at Chapter 13."). As for why people of color are more likely to file for bankruptcy, much has been written on the racial wealth gap, but this is largely beyond the scope of this Note. For a brief discussion of the racial wealth gap, see generally Ricardo Mimbela & Katie Duarte, Visualizing the Racial Wealth Gap, ACLU (Aug. 10, 2023), https://www.aclu.org/news/racial-justice/visualizing-the-racial-wealth-gap [https://perma.cc/9SYG-EKNV] (describing the racial wealth gap in relation to homeownership, mortgage loans, and median income).

83. See Hannah Fresques & Paul Kiel, In the South, Bankruptcy Is Different, Especially for Black Debtors, ProPublica (Sept. 27, 2017), https://projects.propublica.org/graphics/bankruptcy-chapter-13 [https://perma.cc/X3JR-K22H] (representing visually a correlation between Black population share and the frequency of Chapter 13 filings by county).

supermarkets. They live in food deserts. Even worse, they are poorly served by mass transit, such as L trains."[84] Another study found that "[t]he average Black resident can access 236,641 potential jobs in 45 minutes using transit, . . . compared to 344,182 for the average white resident."[85] Despite efforts to revamp its public transit system, Chicago remains a car city. The City continues to tow and impound up to hundreds of cars every day; the City continues to send thousands of its residents into bankruptcy.[86]

D. *The Bankruptcy Estate: 11 U.S.C. § 541(a)*

When a debtor first files for bankruptcy under Chapter 7 or Chapter 13, an "estate" is automatically created under the Bankruptcy Code. This is defined by 11 U.S.C. § 541(a), which includes as part of the estate "all legal or equitable interests of the debtor in property as of the commencement of the case."[87] It is well established that the term "legal or equitable interests" includes all property in which the debtor has an ownership or leasehold interest and not only property over which the debtor is in actual possession.[88]

This broad construction is one of several provisions that allow the bankruptcy system to make available to the debtor all assets that may be essential to, or simply contribute to, their rehabilitation efforts.[89] Notably, the debtor's property held by *any* party is part of the "estate"; property held by a creditor prior to a bankruptcy proceeding would also become part of the debtor's "estate" upon filing, "wherever located and by whomever held."[90]

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84. Parking Tickets Drive Bankruptcy's Racial Disparity, Colum. L. Sch. (Oct. 24, 2019), https://www.law.columbia.edu/news/archive/parking-tickets-drive-bankruptcys-racial-disparity [https://perma.cc/WYF7-WEM2] (internal quotation marks omitted) (quoting Edward Morrison, Professor, Colum. L. Sch.) (citing Morrison et al., supra note 43).

85. Kyle Whitehead, New Analysis Highlights Racial Disparities in Chicago Area Transit Access, Active Transp. All. (June 17, 2021), https://activetrans.org/blog/new-analysis-highlights-racial-disparities-in-chicago-area-transit-access [https://perma.cc/6BM3-2UPV]; see also Morrison et al., supra note 44, at 271 ("On average, African Americans may have longer commutes to work and live in areas that are farther from schools, medical services, and supermarkets.").

86. Towed Vehicles (Impounded), City of Chi., https://www.chicago.gov/city/en/dataset/relocated_vehicles1.html [https://perma.cc/Q399-SPTC] (last visited Aug. 25, 2023) (listing the make and model of cars that have been towed and impounded within the last ninety days).

87. 11 U.S.C. § 541(a)(1) (2018).

88. See United States v. Whiting Pools, Inc., 462 U.S. 198, 207 (1983) ("[Section] 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.").

89. Id. at 203.

90. 11 U.S.C. § 541(a).

E. *The Automatic Stay Provision: 11 U.S.C. § 362(a)(3)*

Section 362(a)(3) of the Bankruptcy Code, the "automatic stay provision," is at the core of *Fulton*. It governs the creditor's treatment of an estate immediately after a Chapter 7 or Chapter 13 petition has been filed.[91] It is, however, significantly more relevant to Chapter 13 because Chapter 13 proceedings last for several years and because the return of estate property is often necessary to completing a Chapter 13 plan.[92] This provision is more immediate than an injunction in that "it operates without the necessity for judicial intervention,"[93] and it becomes effective without notice to creditors.[94] The stay is designed to be easy and efficient, and it prevents creditors from engaging in "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[95] It lasts until a case ends, which is typically when the bankruptcy court closes a case, if and when the bankruptcy court dismisses a case, or when the debtor is granted discharge.[96]

The automatic stay has long been considered one of the Bankruptcy Code's most important debtor-friendly protections.[97] It "gives the debtor a breathing spell from his creditors" while also "permit[ting] the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy."[98] Creditors who violate the automatic stay—by attempting garnishment of wages, foreclosing on collateral, disconnecting utilities, or even by making phone calls demanding payment—without advance permission from the bankruptcy court may be subject to sanctions and ordered to pay punitive damages to the debtor.[99]

But the automatic stay was never absolute; the Code itself lays out twenty-eight exceptions,[100] and creditors are permitted to ask the bankruptcy court to "grant relief from the stay . . . such as by terminating,

91. Id. § 362(a)(3).

92. Foohey, supra note 41, at 422 ("Although applicable to [C]hapter 7, this is more relevant to [C]hapter 13 because the proceeding lasts for the three to five years of the debtor's repayment plan.").

93. Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 975 (1st Cir. 1997).

94. Overview: Thomson Reuters Practical Law Bankr. & Restructuring & Prac. L. Fin., Res. No. 9-380-7953, Automatic Stay: Overview, https://us.practicallaw.thomsonreuters.com/9-380-7953 [https://perma.cc/K6FT-6UBK] (last updated Dec. 2, 2022).

95. 11 U.S.C. § 362(a)(3).

96. See id. § 362(c)(1) (providing that the automatic stay "continues until such property is no longer property of the estate").

97. S. Rep. No. 95-989, at 54 (1978), as reprinted in 11 U.S.C. § 362 (1982).

98. Id. at 54–55.

99. 11 U.S.C. § 362(k)(1).

100. See id. § 362(b) (providing that the automatic stay does not apply in twenty-eight situations, including when a lease has been fully terminated prior to bankruptcy filing or when certain taxing authorities are involved).

annulling, modifying, or conditioning such stay."[101] Bankruptcy judges may in turn choose to limit the automatic stay if they find that the hardship to the creditor resulting from the stay outweighs the relief that it would provide to the debtor.[102]

The automatic stay provision was last significantly amended in 1984. Before 1984, the provision applied to "any act to obtain possession of property of the estate or of property from the estate."[103] With little legislative history to offer insight as to why, Congress in 1984 appended the phrase "any act . . . to *exercise control* over property of the estate" to the existing statute.[104] This phrase, along with Congress's intent in adding it, has since been heavily litigated.[105]

F. *The Turnover Provision: 11 U.S.C. § 542(a)*

Section 542(a) of the Bankruptcy Code, known as the "turnover provision," is closely related to the automatic stay, and it further protects debtors by allowing a neutral third party—the bankruptcy trustee—to bring together and oversee the estate property during the bankruptcy proceeding.[106] In effect, this provision affirmatively tells creditors what to do with estate property after a debtor has filed for bankruptcy, while the automatic stay provision tells creditors what *not* to do. The turnover provision mandates creditors in possession of the estate property to turn such property over to the trustee "unless such property is of inconsequential value or benefit to the estate."[107]

Although the Code's express terms do not specify so, debtors—or trustees acting on their behalf—who wish to compel creditors to turn over estate property will trigger an adversarial court proceeding.[108] Creditors are entitled to procedural due process, and they are entitled to put forth claims if "the property is of inconsequential value, the creditor has a right to adequate protection, or the debtor and estate lack a legal or equitable interest in the property."[109]

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101. Id. § 362(d).

102. See id. § 362(d)(1).

103. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 362(a)(3), 92 Stat. 2549, 2570.

104. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a)(2), 98 Stat. 333, 371 (codified at 11 U.S.C. § 362(a)(3)) (emphasis added).

105. See infra section II.B (discussing prior litigation on the automatic stay's breadth).

106. See 11 U.S.C. § 542(a).

107. Id.

108. Fed. R. Bankr. P. 7001(1).

109. Caren D. Enloe, Dude, Where's My Car? The Supreme Court Takes on the Battle Between Sections 362 and 542 of the Bankruptcy Code, 74 Consumer Fin. L.Q. Rep. 117, 125 (2020).

II. The Problem

This Part begins with a summary of the *Fulton* holding. It then discusses two main problems that *Fulton* brings to light. First, *Fulton* illustrated that debtor-friendly protections are subject to judicial interpretation that adheres to the text of the Code at the expense of policy goals. Second, *Fulton* highlighted several pre-existing problems within the two-track consumer bankruptcy system.

A. City of Chicago v. Fulton

City of Chicago v. Fulton involved multiple consolidated individual bankruptcy cases, including Robbin Fulton's.[110] In each case, the City seized a resident's car for motor vehicle infractions. Following seizure, the City also charged the resident an additional fee for impounding, towing, and storing of the car. Altogether, the fees came out to thousands of dollars,[111] which each of the residents was unable to pay even under an installment plan.[112] They subsequently filed for Chapter 13 bankruptcy under the assumption that the automatic stay and turnover provisions would mandate Chicago, their creditor, to immediately return their cars to them.

However moral or immoral, this assumption was widespread. Indeed, it was so widespread that some Chicagoans built enterprises around it. In 2015, Chicagoan Daniel Rankins was sentenced to eighteen weeks in prison for bankruptcy fraud.[113] Rankins had been running a sophisticated scheme in which he charged at least $400—a sum lower than whatever his "clients" were supposed to pay the City—to file bogus bankruptcy petitions to secure the release of his "clients'" vehicles from the city's auto pounds.[114] The City would then turn over the impounded cars without checking whether the petitions were legitimate.[115] Debtors believed that if they filed bankruptcy petitions, they would receive their car, be able to go to work, and contribute to their payment plan, and that eventually the City would be paid its due.

Eventually, Chicago had enough. The City refused to give Robbin Fulton her car back, arguing that the automatic stay and turnover

110. See 141 S. Ct. 585, 589 (2021).

111. Brief for Respondents, supra note 1, at 7.

112. In re Fulton, 926 F.3d 916, 920–22 (7th Cir. 2019).

113. See Annie Sweeney, Feds: Bankruptcy Scam Freed Impounded Vehicles, Chi. Trib. (Apr. 25, 2013), https://www.chicagotribune.com/news/ct-xpm-2013-04-25-chi-feds-bankruptcy-scam-freed-impounded-vehicles-20130425-story.html (on file with the *Columbia Law Review*); Press Release, U.S. Att'y's Off. N. Dist. Ill., Former Chicago Man Sentenced to 18 Months in Federal Prison for Accepting Cash to Help 80 People Avoid City Impound Fees (July 7, 2015), https://www.justice.gov/usao-ndil/pr/former-chicago-man-sentenced-18-months-federal-prison-accepting-cash-help-80-people [https://perma.cc/736Z-95CZ].

114. Sweeney, supra note 113.

115. Id.

provisions did not apply because, under its municipal code, it had a possessory lien on the cars.[116] The liens were automatically established when the cars were first impounded, and upon the bankruptcy filings, the City did nothing further than maintain the status quo. The crux of the City's argument was that mere retention of estate property does not violate the automatic stay.[117]

The Bankruptcy Court and the U.S. Court of Appeals for the Seventh Circuit found Chicago's argument unpersuasive, and both lower courts sided with the debtors.[118] They held that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had in effect acted to "exercise control over" the debtors' estate property.[119] The Seventh Circuit relied on its own reasoning applied in an earlier case[120] and held that "limiting the reach of 'exercising control' to 'selling or otherwise destroying the asset,' as the creditor proposed, did not fit with bankruptcy's purpose."[121] Further, the Seventh Circuit disagreed with the City's argument that it was maintaining the status quo by holding onto estate property; instead, the Circuit invoked the turnover provision and held that the "status quo in bankruptcy is the return of the debtor's property to the estate. In refusing to return the vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but actively resisting [the turnover provision] to exercise control over debtors' vehicles."[122]

The Supreme Court reversed. It held that the language of the automatic stay does not apply to passive retention of estate property. The Court relied on three terms—"stay," "act," and "exercise control"—to conclude that the automatic stay applies only to "affirmative acts that would disturb the status quo of estate property."[123] Simply put, the Court held that retention of estate property is not commonly understood to be affirmative.

The Court found it unnecessary to address the debtors' point that "[l]ogically, the only way for a creditor to stop controlling property it is holding is to relinquish its control to someone else."[124] Instead, to further

116. See Mun. Code of Chi. § 9-92-080(f) (2023) ("Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle.").

117. See *Fulton*, 926 F.3d at 925.

118. Id. at 924–25; In re Fulton, 588 B.R. 834, 838 (Bankr. N.D. Ill. 2018).

119. *Fulton*, 926 F.3d at 924–25.

120. See id. at 923 (citing Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009) (holding that the 1984 amendment signaled Congress's intent to make the automatic stay more inclusive)).

121. Id. (quoting *Thompson*, 566 F.3d at 702).

122. Id. at 925.

123. City of Chicago v. Fulton, 141 S. Ct. 585, 590 (2021).

124. Brief for Respondents, supra note 1, at 19–20.

justify its holding, the Court relied on canons of statutory interpretation.[125] The turnover provision, the Court explained, is self-executing and expressly governs the turnover of estate property and, barring some exceptions, orders creditors to turn over estate property to the bankruptcy trustee.[126] If the automatic stay were read to carry the same turnover command, then the turnover provision would be largely superfluous. The Court went on to suggest that even if the two provisions were read to give different commands, they would be contradictory.[127] The turnover provision is conditional. It makes several exceptions to the command that the automatic stay does not. The two cannot be reconciled unless one provision supplanted the other, but as the Court commented, "there [was] no textual basis" for such a conclusion.[128]

The Court also relied on legislative history—or, more accurately, on its absence—to conclude that Congress did not intend for the automatic stay to apply to passive retention of estate property. The phrase "or to exercise control over property of the estate" was added in an amendment; the parties in *Fulton* did not dispute that prior to 1984, the automatic stay would have permitted passive retention.[129] The Court determined that the wording in the amendment is not sufficiently clear to signal that Congress wanted to expand the automatic stay to prohibit passive retention, as this would have been a significant change that would warrant stronger and clearer language.[130] The Court concluded that "exercise control" in the provision suggests doing something that was not already being done, and in the present case, Chicago was only holding on to property that it had seized pre-bankruptcy.[131] Had Congress intended to prohibit creditors from retaining estate property, the Court reasoned, Congress could have more clearly done so.

The *Fulton* decision made clear that without the turnover provision, the automatic stay on its own does not instantly require creditors to return estate property to the debtor. This holding essentially stripped the automatic stay of its independent power.

The Court took pains to instruct that the *Fulton* holding must be narrowly construed. The Court refrained from addressing what the holding meant for the turnover provision and left open the possibility that a remedy might be found in other Bankruptcy Code sections.[132] In her concurrence, Justice Sotomayor nodded to the possibility that debtors

125. *Fulton*, 141 S. Ct. at 591.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id. at 592.
131. Id.
132. Id. (Sotomayor, J., concurring).

could find relief under other provisions such as § 362(a)(4).[133] She also considered the turnover provision as an option but conceded that turnover proceedings often last for months, too long a time for debtors to be deprived of property as essential as their cars.[134] Further, turnover proceedings "resembl[e] the civil trial" in that they are expensive and adversarial, while the goal of bankruptcy, to get a fresh start, can and should be "achieved without any trial whatsoever."[135]

B. *Other Approaches*

The *Fulton* holding went against what most courts have held regarding the automatic stay. For instance, when *Fulton* was decided, the Seventh Circuit—concluding similarly to the Second, Eighth, Ninth, and Eleventh Circuits—had previously held that the ordinary meaning of "exercise control" is to "exercise restraining or directing influence over" or to "have power over."[136] As a practical matter, to retain estate property—actively or passively—is to have power over a debtor's property. Only the Third, Tenth, and District of Columbia Circuits had found that passive retention did not violate the automatic stay.[137]

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133. Id. This provision prevents creditors from taking "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4) (2018).

134. Id. at 594.

135. Douglas G. Baird & Edward R. Morrison, Adversary Proceedings in Bankruptcy: A Sideshow, 79 Am. Bankr. L.J. 951, 951–53 (2005).

136. Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 702 (7th Cir. 2009) (internal quotation marks omitted) (quoting Control, Merriam-Webster's Collegiate Dictionary (11th ed. 2003)); see also Weber v. SEFCU (In re Weber), 719 F.3d 72, 80 (2d Cir. 2013) ("In our view, the plain language of section 542 . . . and the broad language of the 1984 Amendments . . . point unmistakably away from any Congressional desire to impose such an additional burden on debtors seeking bankruptcy protection."); Motors Acceptance Corp. v. Rozier (In re Rozier), 376 F.3d 1323, 1324 (11th Cir. 2004) (holding that where ownership remains with the debtor after repossession under state law, retention of property violates the automatic stay); Cal. Emp. Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1151–52 (9th Cir. 1996) (holding that "knowing retention of estate property violates the automatic stay of §362(a)(3)"); Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (holding that the creditor's exercise of control over the estate property "prevented the debtor from continuing his business with all his available assets").

137. See In re Denby-Peterson, 941 F.3d 115, 126, 131 (3d Cir. 2019) (holding that the creditor was not required to turn over the debtor's property unless the debtor received a court order requiring the creditor to do so); WD Equip., LLC v. Cowen (In re Cowen), 849 F.3d 943, 946, 948–51 (10th Cir. 2017) (reversing the judgment of a lower court imposing damages against a creditor because "passively holding onto an asset" does not violate the automatic stay (internal quotation marks omitted) (quoting *Thompson*, 566 F.3d at 703)); United States v. Inslaw, Inc., 932 F.2d 1467, 1474 (D.C. Cir. 1991) ("The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate.").

Prior to *Fulton*, *United States v. Whiting Pools, Inc.* was the leading Supreme Court case on this issue.[138] There, the Court held that the creditor must turn over the seized estate property to the debtor, which in that case entailed the IRS turning over equipment, vehicles, inventory, and office supplies.[139] The Court relied on the turnover provision to conclude that a creditor must turn over estate property immediately upon a bankruptcy filing.[140] If a creditor wanted to repossess that property, the Court found, the creditor had to invoke other Bankruptcy Code provisions.[141] The Court explained:

> Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if "sold for scrap." . . . Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate.[142]

Notwithstanding the merits of its legal reasoning, *Whiting Pools* was widely accepted in cases involving either the automatic stay or the turnover provision because it was seen as consistent with underlying policy justifications.[143] If a creditor could seize property pre-bankruptcy and if the property is of essential value to the debtor, then refusing to turn over such property would yield a lose–lose outcome. For both corporate and individual debtors, the physical possession of personal property advances the fresh start principle because it allows them to be more productive, therefore making repayment more likely. Otherwise, the debtor would be ill-equipped to successfully carry out the repayment plan, and the creditor would be unlikely to receive the payment owed. That the creditor continues to hold onto estate property is inefficient for all involved; the creditor's interest in the estate property is typically low relative to that of the debtor.

Almost one century ago, the Supreme Court recognized that "[t]he power of the individual to earn a living for himself and those dependent

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138. 462 U.S. 198 (1983); see also *Weber*, 719 F.3d at 77 (relying on *Whiting Pools* as the basis for deciding whether failure to turn over property seized pre-filing is a violation of the automatic stay); *Knaus*, 889 F.2d at 775 (same).

139. *Whiting Pools*, 462 U.S. at 200.

140. See id. at 205.

141. See id.

142. Id. at 203 (citation omitted) (quoting H.R. Rep. No. 95-595, at 220 (1977), reprinted in 1978 U.S.C.C.A.N 5963, 6179).

143. See Claudia A. Restrepo, Comment, A Pro Debtor and Majority Approach to the "Automatic Stay" Provision of the Bankruptcy Code—*In re Cowen* Incorrectly Decided, 59 B.C. L. Rev. E. Supp. 537, 548 (2018), https://storage.googleapis.com/jnl-bcls-j-bclr-files/journals/1/articles/455/63aaf569e300c.pdf [https://perma.cc/Z4GC-Y685] ("The expansion of the [automatic stay] provision is consistent with the Supreme Court's explicit understanding that the overarching goal of bankruptcy is to allow the debtor to get back in a position where they can satisfy all of their debts.").

upon him is in the nature of a personal liberty."[144] At least one other provision of the Bankruptcy Code supports this view. Section 522(d) exempts certain property from the bankruptcy estate, which protects debtors from having to relinquish essential items such as $1,500 in value in "implements, professional books, or tools[] of the trade," in hopes that debtors can make use of those items to get back on their feet.[145]

Yet the Court in *Fulton* followed a strict textualist approach and interpreted the lean legislative history of the automatic stay to mean that Congress did not want the automatic stay to apply to passive retention of estate property. Still, *Fulton* was not all that surprising because at least two years before it was decided, scholars and commentators had already observed a "jurisprudential trend" in which textualist Justices display a "willing[ness] to . . . argue in favor of overruling established statutory interpretation precedents—even though such a practice is difficult to reconcile with textualism's core aims of promoting clarity and stability in the law."[146]

It is nonetheless significant that for many years, most courts landed differently on the question of congressional intent with respect to the automatic stay. The Second Circuit reasoned that the 1984 amendment of the automatic stay, which followed the *Whiting Pools* decision, signaled Congress's intent for the automatic stay to apply to estate property seized pre-bankruptcy.[147] The Eighth Circuit observed that "if persons who could make no substantial adverse claim to a debtor's property in their possession could . . . compel the debtor or his trustee to bring suit as a prerequisite to returning the property, the powers of a bankruptcy court . . . would be vastly reduced."[148] Similarly, the Ninth Circuit held that "knowing retention of estate property violates the automatic stay" provision because that reading created no contradiction with the turnover

144. Loc. Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

145. 11 U.S.C. § 522(d)(6) (2018).

146. Anita Krishnakumar, Academic Highlight: *Hyatt* Is Latest Example of Textualist-Originalist Justices' Willingness to Overturn Precedent, SCOTUSblog (May 24, 2019), https://www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent/ [https://perma.cc/98RN-33KR] (analyzing the Supreme Court's decision in Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019), in light of the Supreme Court's turn toward textualism).

147. See Weber v. SEFCU (In re Weber), 719 F.3d 72, 80 (2d Cir. 2013) ("The 1984 Amendments, passed after the *Whiting Pools* decision in 1983, broadened the already sweeping provisions of the automatic stay even further to prohibit . . . 'any act . . . to exercise control over the property of the estate.'" (quoting Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a)(2), 98 Stat. 333, 371 (codified as amended in scattered sections of 11 U.S.C., 28 U.S.C.))), abrogated by City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

148. Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989), abrogated by *Fulton*, 141 S. Ct. 585.

provision. Read together, the Ninth Circuit found, the two provisions provide that creditors have a duty to return estate property to the estate.[149]

The *Whiting Pools* holding took a purposivist approach that reconciled individual sections with the fresh start principle and the Bankruptcy Code as a whole.[150] Under this approach, "[t]he various provisions of the Bankruptcy Act were adopted in light of [the fresh start] view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act."[151] Ambiguity in the Code may be interpreted in favor of the debtor if doing so advances the goals of bankruptcy.

The *Fulton* holding went in a different direction and read the automatic stay and turnover provisions in isolation to inhibit debtors. *Fulton* shows that a debtor protection, even one that has long been seen as a staple in the Bankruptcy Code, can be significantly weakened despite the majority view if the weaker interpretation comports with the text of the law.[152] Strikingly, the *Fulton* holding was unanimous.[153] Though Justice Sotomayor wrote separately in a concurrence acknowledging the racially disparate impact that the holding may have absent further political action, she agreed that the language of the automatic stay provision precluded alternative readings.[154] Although the *Fulton C*ourt emphasized that its holding should be interpreted narrowly, the decision inevitably has broader implications for private creditors in possession of a debtor's property (typically held as collateral) at the time of filing. Creditors, both public and private, are now more able to retain estate property essential to debtors' relief efforts.

Because the *Fulton* holding only gave an example of what does *not* count as an affirmative act that disturbs the status quo of estate property, lower courts now face a line-drawing challenge in determining whether creditors ran afoul of the automatic stay.[155] While some acts fall squarely within the affirmative category, many acts could be construed as either

149. Cal. Emp. Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1151 (9th Cir. 1996), abrogated by *Fulton*, 141 S. Ct. 585.

150. See United States v. Whiting Pools, Inc., 462 U.S. 198, 208 (1983) ("Any other interpretation . . . would deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions.").

151. Loc. Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

152. See Nina A. Mendelson, Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade, 117 Mich. L. Rev. 71, 73 (2018) ("When text straightforwardly suffices to answer a question, no further investigation is needed, and evidence about congressional purpose will not override it.").

153. *Fulton*, 141 S. Ct. at 588.

154. See id. at 592 (Sotomayor, J., concurring) ("I join the Court's opinion because I agree that, as used in § 362(a)(3), the phrase 'exercise control over' does not cover a creditor's passive retention of property lawfully seized prebankruptcy.").

155. For examples of acts that traditionally fall within the "affirmative" category, see 11 U.S.C. § 362(k)(1) (2018).

passive or active. For example, "[i]f a creditor freezes or seizes property of the estate, so long as the creditor's actions simply keep the status quo in place," the act does not trigger the automatic stay under *Fulton* because creditors are not deemed to have performed an "act" despite having effectively prevented debtors from accessing the estate property.[156]

Unsurprisingly, creditors tend to argue for a broad reading of *Fulton* while debtors argue for a narrow one. Post-*Fulton*, some debtors have argued that creditors must have *possession* of the debtor's property before filing to avoid triggering the automatic stay provision.[157] Two courts have held that creditors retaining a pre-petition attachment of the debtors' bank account does not violate the automatic stay because, as in *Fulton*, the creditors were merely maintaining the status quo.[158] Yet another court relied on policy objectives and held that "inaction combined with other facts might nonetheless violate the automatic stay."[159]

The *Fulton* decision also failed to provide clear guidance on whether the turnover provision can be used—when a creditor is not in violation of the automatic stay—to trigger turnover of estate property. In her concurrence, Justice Sotomayor seemed to imply that it could.[160] But if debtors rely solely on the turnover provision, as she noted, they not only are required to undergo a lengthy adversarial proceeding but also are burdened with filing fees, and, if they choose to hire counsel, they must also cover additional attorney's fees.[161] Problematically, "[b]oth the out-of-pocket costs and the opportunity cost[] of pursuing an action pursuant to § 542 could prove catastrophic to debtors already experiencing financial distress."[162]

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156. Jeffrey I. Golden & Sonja M. Hourany, The Waxing and Waning of the Automatic Stay, 35 Cal. Bankr. J. 297, 313 (2021).

157. See Margavitch v. Southlake Holdings (In re Margavitch), No. 5:19-05353-MJC, 2021 WL 4597760, at *3 (Bankr. M.D. Pa. Oct. 6, 2021).

158. See id. at *6 (holding that the distinction between the present case and *Fulton* "is not particularly relevant and perhaps weighs more in favor of [the creditor] under the reasoning of *Fulton* since [the creditor] [is] not in actual possession of the funds"); see also Stuart v. City of Scottsdale (In re Stuart), 632 B.R. 531, 536 (B.A.P. 9th Cir. 2021) (affirming the lower court's rejection of the plaintiff's argument "that *Fulton*'s narrow holding under § 362(a)(3) [is] inapplicable . . . because the [defendant] denied ever possessing [the plaintiff's] property"), aff'd, No. 21-60063, 2023 WL 5011739 (9th Cir. Aug. 7, 2023).

159. See Cordova v. City of Chicago (In re Cordova), 635 B.R. 321, 344 (Bankr. N.D. Ill. 2021) (noting that expansion of the *Fulton* holding to other subsections of § 362 would further inhibit the debtor's "ability to earn the income on which a plan is predicated").

160. City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021) (Sotomayor, J., concurring) ("[T]he Court has not decided whether and when §362(a)'s other provisions may require a creditor to return a debtor's property. . . . Nor has the Court addressed how bankruptcy courts should go about enforcing creditors' separate obligation to 'deliver' estate property to the trustee or debtor under §542(a).").

161. See Golden & Hourany, supra note 156, at 313 ("Filing a complaint under § 542 most likely requires counsel, let alone the $350.00 filing fee that some debtors will struggle to afford in the first instance." (footnote omitted)).

162. Id.

C. Fulton*'s Impact*

This Note has explained that Chapter 7 and Chapter 13 are distinct in several ways: in procedure, in benefits, in drawbacks, in who uses them, and in why they are used.[163] *Fulton* is also important because it sheds light on how, even with two options, there remains a gap: For some debtors, neither option suits their goals.

For example, before *Fulton*, Chapter 13 was the better choice for those who wanted to use the automatic stay provision to stop the City of Chicago from impounding their vehicles or suspending their licenses. With or without the automatic stay, debtors are still incentivized to file under Chapter 13 because it allows them to discharge ticket debt, while Chapter 7 does not. But now, under *Fulton*'s weak construction of the automatic stay, Chapter 13 no longer halts the City from impounding cars or suspending licenses. In effect, Chapter 13 is still the *better* option because it at least retains the possibility of discharge. But simply because it beats out Chapter 7 does not make it a *good* option. Bankruptcy law lacks sufficient safeguards to make actual discharge feasible when the law's effects inhibit people from getting to and from work and contributing to their payment plans.

Although most debtors are theoretically given a choice between Chapter 7 and Chapter 13, studies have shown that Black individuals tend to file under Chapter 13 even when Chapter 7 would or could be the better option.[164] Controlling for variations in financial circumstances, Black debtors also are more than twice as likely to file under Chapter 13 instead of Chapter 7 than white debtors.[165] This discrepancy suggests that in a simplified world, more Black debtors would file for Chapter 7 than currently do. Indeed, Chapter 7 is by far the preferred option in most parts of the country; "[o]nly in the South, in a band of states stretching from North Carolina to Texas, is Chapter 13 predominant."[166] That Black debtors are much more likely to choose Chapter 13 is troubling because at the time of filing, they often have few to no assets that would be liquidated under Chapter 7.[167] Put differently, many Black debtors would almost certainly benefit more from Chapter 7 because their assets are almost, if not entirely, exempt, and their debts would be discharged with

163. See supra Part I.

164. See Braucher et al., supra note 29, at 395 ("[A]n African American is about twice as likely to file Chapter 13 as compared to debtors of all other races, even after controlling for a multitude of financial, demographic, and legal factors."); Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, "No Money Down" Bankruptcy, 90 S. Cal. L. Rev. 1055, 1082 (2017).

165. Kiehl & ProPublica, supra note 52.

166. Id.

167. See Morrison et al., supra note 44, at 270 ("Yet [the] commonly cited explanation for preferring Chapter 13 [(that it can prevent the loss of one's home)] seems implausible for the vast majority of filings by African Americans, most of whom have few or no assets vulnerable to liquidation in Chapter 7.").

minimal liquidation. In contrast, the risks of choosing Chapter 13 loom large,[168] and "[t]he same vulnerabilities that make [B]lack Americans more likely to file for bankruptcy make them less likely to succeed in bankruptcy."[169]

In our world, one in which for various reasons the majority of Black debtors file under Chapter 13, it is imperative that bankruptcy law provides safeguards so that debtors have a fair chance at repayment and discharging their debt. The automatic stay is one such safeguard, but after *Fulton*, it no longer holds the same power that it once did.

Though not directly at issue in *Fulton*, debtors likely chose to file under Chapter 13 in part because traffic fines such as parking ticket debt are not dischargeable under Chapter 7.[170] Chapter 7 makes no distinction between criminal and civil fines; debts that are payable to a governmental entity generally are not dischargeable, and ticket debt is owed to local governments.[171] If the debtors chose to file under Chapter 7, their nonexempt assets would be liquidated to repay their creditors, but their parking ticket debt would remain.

But these debts may be dischargeable under Chapter 13, which *does* make a criminal/civil fine distinction and bars relief only when debt takes the form of "restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime."[172] Although some jurisdictions still consider traffic violations as criminal, most consider them to be civil penalties.[173] As long as the violations are not criminal in a given jurisdiction, they are dischargeable upon complete repayment of a Chapter 13 plan.

But there is another problem: Chapter 13 has a meager thirty-three percent discharge rate compared to Chapter 7's ninety-five percent. Although bankruptcy law technically permits it, most ticket debt incurred by Chapter 13 debtors will never actually be discharged.[174] The *Fulton* holding makes actual discharge even more illusory because debtors now lack reliable transportation to get to and from work.[175]

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168. See supra note 37 and accompanying text.

169. Kiehl & ProPublica, supra note 52; see also supra note 82 and accompanying text.

170. See 11 U.S.C. § 523(a)(7) (2018) (specifying that Chapter 7 discharge does not include debt "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit").

171. Id.

172. Id. § 1328(a)(3); see also Morrison et al., supra note 44, at 293 ("[T]he importance of Chapter 13 is driven, in part, by a quirk of the bankruptcy code: [F]ines, such as parking tickets, can be discharged in Chapter 13 but not in Chapter 7.").

173. Dario Alvarez, My Life Was Derailed by a Traffic Ticket, ACLU (Oct. 21, 2021), https://www.aclu.org/news/criminal-law-reform/my-life-was-derailed-by-a-traffic-ticket [http://perma.cc/3DRJ-GSAT/] ("12 states still have laws on the books that trap people in endless cycles of debt for these minor infractions.").

174. See Porter, supra note 17, at 153.

175. See supra section II.A.

Problematically, these differences may end up controlling the choice between filing under Chapter 7 and Chapter 13, which is considered "[o]ne of the most important decisions a person makes about bankruptcy" because the two chapters "are . . . distinct proceedings in substance and process."[176] Although Congress initially designed Chapter 13 to increase access to relief,[177] the reality is that Chapter 13 debtors fail more often than they succeed. It remains a good choice for some, but importantly, it only makes sense for those who are very likely and well equipped to complete a repayment plan. Before *Fulton*, the automatic stay was one way in which bankruptcy law made Chapter 13 discharge more accessible. Now, a large class of debtors—those overwhelmed with debt incurred through taxation by citation—are left without a good option for relief.

The current bankruptcy system fails to provide an adequate remedy for debtors who are saddled with municipal debt incurred from parking fines and fees, who tend to be individuals of color. And because municipalities have power to pass legislation that might allow them to meet the *Fulton* standard of passive retention of estate property,[178] the implications of this holding are far-reaching.

In this sense, *Fulton* did not so much create a new problem within bankruptcy law as show how the structure of the bankruptcy system has long been flawed. Without significant reform, bankruptcy law will continue to disproportionately disadvantage communities of color.

III. THE SOLUTION

The previous two Parts have shown how the bankruptcy system has failed to meet its objectives and that its individual Code provisions are vulnerable to the whims of the Court's interpretation. The Court's holding in *Fulton* narrowed the power of the automatic stay against the view of most circuit courts as well as bankruptcy law's policy goals. Further, the decay of the automatic stay is felt heavily by debtors (and their creditors) who, because of various discharge provisions and personal circumstances, lack any meaningful choice between Chapter 7 and Chapter 13.[179]

To address these problems, this Note draws inspiration from the Consumer Bankruptcy Act of 2020 and argues that Congress should amend the Bankruptcy Code's discharge provisions on public policy grounds so that the provisions apply more equally to Chapter 7 and Chapter 13 debtors. The Bankruptcy Code's discharge provisions are supposedly grounded in public policy considerations, the idea that

176. Foohey et al., supra note 164, at 1057.

177. See Porter, supra note 17, at 105 (describing the creation of Chapter 13 as "a cornerstone of the improved system of legal relief for consumers").

178. For a brief description of how Chicago's municipal code allowed the City a lien on estate property, see Brief for Petitioner at 10–11, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 583728.

179. See supra section II.A.

although bankruptcy should give debtors a second chance, it should never reward misconduct, that it must not "be a haven for wrongdoers."[180] Congress added many of the nondischargeability provisions because it wanted to prevent bad actors from abusing the bankruptcy system.[181] But this premise is arbitrary and overly simplistic and ignores the reality that bankruptcy's discharge provisions are a bad proxy for determining wrongdoing. This is particularly true in light of policies like taxation by citation, which have disparate racial impacts through selective enforcement and profit-motivated overregulation.[182] Actual outcomes show that the current provisions are outdated and should be amended.[183]

As a starting point, Congress should repeal 11 U.S.C. § 523(a)(7) to allow the discharge of civil fines under Chapter 7 bankruptcy, which would ensure that honest debtors like Fulton have a fair chance at discharge. This change would make Chapter 7 a more viable alternative to Chapter 13 for debtors with ticket debt owed to governmental entities. It is also consistent with policy goals and would allow bankruptcy law to better fulfill its purpose.[184] As a broader, long-term solution, this Part also proposes that the categorical discharge provisions should slowly be abandoned in favor of a flexible, holistic approach in which bankruptcy judges consider both the debtor's circumstances and the creditor's interests leading up to filing. Overall, this Part argues that amending the Code to bridge the gap between Chapter 7 and Chapter 13 would make discharge under Chapter 7 more accessible but still retain the option for debtors to choose Chapter 13 should that chapter make more sense for them.

A. *Prior Congressional Attempts at Intervention*

The Bankruptcy Code is not often amended. A recent major amendment of the Bankruptcy Code occurred in 2005 with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[185] BAPCPA was largely seen as favorable to creditors because it

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180. U.S. Dep't of Hous. & Urb. Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995).

181. See Grogan v. Garner, 498 U.S. 279, 287 (1991) ("Congress . . . concluded that the creditors' interest in recovering full payment in [certain] categories [such as child support, alimony, certain unpaid taxes, and liabilities for fraud] outweighed the debtors' interest in a complete fresh start."). For a more detailed discussion on how public policy came to justify the nondischargeability of student loan debt, see generally Doug Rendleman & Scott Weingart, Collection of Student Loans: A Critical Examination, 20 Wash. & Lee J. C.R. & Soc. Just. 215 (2014) (explaining how the complicated structure of the student loan collection scheme fails to accomplish the goal of accessible higher education).

182. See supra section I.C.

183. See supra notes 180–181 and accompanying text.

184. See infra section III.D.

185. See Fed. Jud. Ctr., The Evolution of U.S. Bankruptcy Law: A Time Line (2012), https://www.govinfo.gov/app/details/GOVPUB-JU13-PURL-gpo120250 [http://perma.cc/H2NV-VW46/] (describing the major amendments to the Bankruptcy Code as those enacted in 1800, 1841, 1867, 1898, 1938, 1978, 1986, 1994, 2005, and 2010).

"made filing for bankruptcy more difficult and included harsh consequences for 'fraudulent' debtors."[186] It also included provisions designed to push debtors toward Chapter 13 over Chapter 7.[187] In isolation, BAPCPA is not a positive indicator of Congress's willingness to further amend the Code to better protect debtors.

But other efforts suggest that Congress might be willing to push forth debtor-friendly amendments, at least on a more moderate scale. In 2019, Congress enacted the Small Business Reorganization Act,[188] which "created special provisions related to small business debtors in Chapter 11 and addressed certain issues with preferential transfers."[189] This Act suggests that "Congress realized BAPCPA was overly harsh on debtors."[190]

Some have even proposed that the two tracks should be completely overhauled. Twice recently, Senator Elizabeth Warren and Representative Jerrold Nadler introduced legislation that would eliminate the two-track system in favor of a single chapter.[191] Under the Consumer Bankruptcy Reform Act of 2020, Chapter 7 and Chapter 13 would be repealed and replaced by "Chapter 10."[192] But the singular "Chapter 10" is somewhat misleading because it would still allow debtors to choose between two routes. The first route would allow for no-payment discharge, which tracks closely with how Chapter 7 currently works. The second route, which allows for "debt-specific plans," requires debtors to have bankruptcy plans and looks more like Chapter 13. The bill provides that certain criminal justice fines and fees would be fully dischargeable but prevents "debts stemming from civil rights violations from being dischargeable."[193] This move suggests that Congress is still relying on public policy to drive dischargeability provisions but is becoming more aware that the existing framework of public policy is outdated.

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186. Caitlin M. McAuliffe, Note, Creditors, Keepers: Passive Retention of Estate Property and the Automatic Stay, 74 Vand. L. Rev. 829, 852 (2021).

187. For a description of BAPCPA's "means test," see 11 U.S.C. § 707(b)(2) (2018). For a discussion of how means testing disadvantages consumers, see Li Zhou, The Case Against Means Testing, Vox (Oct. 15, 2021), https://www.vox.com/2021/10/15/22722418/means-testing-social-spending-reconciliation-bill [http://perma.cc/LH6B-D5YC/] ("Means-tested benefits can actually be more expensive to provide, harder to sell politically, and less effective than universal social programs, and they can place both a social stigma and discouraging bureaucratic requirements on Americans in need.").

188. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (amending the Bankruptcy Code).

189. McAuliffe, supra note 186, at 853.

190. Id.

191. Press Release, Sen. Elizabeth Warren, Senator Warren and Representative Nadler Reintroduce the Consumer Bankruptcy Reform Act (Sept. 28, 2022), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-representative-nadler-reintroduce-the-consumer-bankruptcy-reform-act [http://perma.cc/2UEW-VHM9/].

192. Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. (2020).

193. Shane Stover, Consumer News: The Nation's Antiracist Interventions to Fight Consumer Racism, 33 Loy. Consumer L. Rev. 441, 443 (2021).

Still, the 2020 bill failed to move on the floor of Congress, even during the COVID-19 pandemic, when some commentators hoped that the urgency of the pandemic might push Congress to act quickly.[194] A renewed proposal has not moved since it was first introduced in September 2022.[195] Even if the bill fails to pass, it has gained support among bankruptcy law professors, and it is indicative of an emerging awareness among public officials that bankruptcy's dischargeability provisions are failing to serve those who need them most.[196]

B. *Reconciling Between Chapters 7 and 13*

As a narrow solution, if Congress repeals § 523(a)(7), the discharge provisions will become more consistent between Chapters 7 and 13. Debtors filing under either Chapter would be able to have parking ticket debt discharged, and if they wish to liquidate under Chapter 7, they will no longer be steered into Chapter 13 based primarily on this distinction.

By retaining § 523(a)(6) and § 1328(a)(4), debt incurred from injuries arising out of "willful and malicious injury" would still be nondischargeable under either Chapter.[197] Intentional conduct would be penalized by these provisions, and debt owed to a governmental body could still be nondischargeable if it falls into this category. The analysis will turn on whether the debtor acted with the requisite mental state.

These twin provisions also are more flexible than § 523(a)(7) and better suited to accommodate the range of circumstances that might prompt a debtor to file for bankruptcy. Unlike § 523(a)(7), which considers whether—but not why—the debtor has a penalty payable to a governmental entity, the willful and malicious injury provisions focus on the intent of the debtor, and the burden is placed on the party opposing the exemption to show that the debtor acted with the requisite intent.

Currently, § 523(a)(6) applies to most tort claims.[198] Patent infringement debt offers a workable framework of analysis that could be

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194. See Jay Adkisson, Warren–Nadler Consumer Bankruptcy Reform Act Portends Biggest Changes to Bankruptcy Code Since 2005, Forbes (Jan. 27, 2021), https://www.forbes.com/sites/jayadkisson/2021/01/27/warren-nadler-consumer-bankruptcy-reform-act-portends-biggest-changes-to-bankruptcy-code-since-2005 (on file with the *Columbia Law Review*) ("If [the Act] does move on the floor of Congress, . . . I would expect it to move pretty quickly as it is aimed at giving financial relief to individuals and small business owners that have been zapped by the COVID pandemic.").

195. Consumer Bankruptcy Reform Act of 2022, S. 4980, 117th Cong. (2022).

196. Letter from 86 Law Professors to Sen. Elizabeth Warren (Sept. 28, 2022), https://www.warren.senate.gov/imo/media/doc/CBRA%202022%20-%20Law%20Prof%20Letter.pdf [https://perma.cc/DEB8-EE3G] (expressing support for the Consumer Bankruptcy Reform Act of 2022).

197. See 11 U.S.C. §§ 523(a)(6), 1328(a)(4) (2018).

198. See Scott F. Norberg, Contract Claims and the Willful and Malicious Injury Exception to the Discharge in Bankruptcy, 88 Am. Bankr. L.J. 175, 176 (2014) (stating "the primary application of § 523(a)(6) is to intentional torts").

applied to debt payable to a governmental entity, including ticket debt. Patent infringement, like other torts, generally is dischargeable unless the opposing party meets their burden of showing that the debt arose out of "willful and malicious injury" pursuant to § 523(a)(6).[199] To determine whether infringement is both willful and malicious, courts rely on *Kawaauhau v. Geiger*, a medical malpractice case in which the Supreme Court held that nondischargeability requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury."[200] The Court also noted that "willful and malicious" intent under § 523(a)(6) attaches to intentional torts rather than negligence or recklessness.[201] Further, intentional torts generally require that the actor intend "the consequences of an act," not just "the act itself."[202] Under this framework, most garden-variety patent infringement debt is dischargeable because the opposing party is rarely able to show that the debtor acted with the requisite mental state.

If this model were applied to Fulton's case, she would be able to discharge her ticket debt. Because she had no notice of overdue parking tickets, her failure to pay did not arise out of the requisite mental state.

C. *The Discharge Provisions: 11 U.S.C. § 523(a) and § 1328(a)*

Nondischargeability is inherently in conflict with the fresh start principle because it means "certain debtors whose debts are categorically nondischargeable are prevented from bankruptcy relief regardless of how debilitating the debt may be."[203] If a debt is nondischargeable, bankruptcy law has hit its limits, and the debt will stay with the debtor.[204] Nondischargeability of debt is thus exceptional.[205] Unless a provision specifically prohibits it, debts are dischargeable.

Debts that are barred from discharge under Chapter 7 are enumerated under 11 U.S.C. § 523(a). In the 1982 Code, § 523(a) included debt incurred from only nine sources: (1) certain taxes; (2) debts stemming from fraud; (3) liabilities that the debtor failed to disclose; (4) debts from fraud by a fiduciary; (5) domestic support obligations; (6) liabilities resulting from willful and malicious injury to property or person; (7) fines, fees, and forfeitures; (8) student loans unless undue

199. See In re Albarran, 347 B.R. 369 (B.A.P. 9th Cir. 2006).

200. 523 U.S. 57, 61 (1998); see also Monsanto Co. v. Trantham (In re Trantham), 304 B.R. 298, 308 (B.A.P. 6th Cir. 2004) (applying the *Geiger* construction of the willful and malicious standard); Markowitz v. Campbell (In re Markowitz), 190 F. 3d 455, 463–65 (6th Cir. 1999) (same).

201. *Geiger*, 523 U.S. at 61–62.

202. Id.

203. Atkinson, supra note 8, at 927.

204. Id.

205. See Ryan v. United States (In re Ryan), 389 B.R. 710, 713–14 (B.A.P. 9th Cir. 2008) ("[E]xceptions to discharge are interpreted strictly against . . . creditors and in favor of debtors.").

hardship is shown; and (9) liabilities that the debtor failed to disclose in a previous bankruptcy proceeding.[206] The list has since more than doubled to include nineteen types of debt, many of which broadened the scope of nondischargeability of penal debt or debt arising out of civil and criminal penalties and fines.[207]

Section 1328(a) is parallel to § 523(a) and governs one type of Chapter 13 discharge. In the absence of liquidation and "[i]n exchange for committing some of their future income to the repayment of their debts," Chapter 13 offers an important concession: It allows some debts to be discharged that are nondischargeable under Chapter 7.[208] Thus, the "range of nondischargeable debts in Chapter 13 is smaller than in Chapter 7,"[209] or more debtor-friendly, but there is still substantial overlap; many debts that are nondischargeable under Chapter 7 also are nondischargeable under Chapter 13.[210]

In this way, between Chapters 7 and 13, the discharge provisions are similar but different. In some instances, Congress later added provisions to § 1328(a) that initially appeared under § 523(a). Restitution obligations—currently nondischargeable under either Chapter—once were only excluded under Chapter 7. In *Pennsylvania Department of Public Welfare v. Davenport*, the Supreme Court addressed the issue of whether restitution also can be discharged under Chapter 13.[211] The Court answered in the affirmative, holding that restitution is not penal in nature, and Congress intended to reward Chapter 13 debtors with a "superdischarge" for repaying their debts.[212] But Congress superseded *Davenport* just a few months after it was decided and amended § 1328(a) to make nondischargeable "any debt . . . for restitution . . . included in a sentence on the debtor's conviction of a crime."[213]

At the time of writing, treatment of debt from civil penalties remains an area in which Chapter 7 and Chapter 13 diverge. As long as parking ticket debt is a civil penalty, it is dischargeable only under Chapter 13, though *Davenport* shows that this could change in the future. The differences between discharge under Chapters 7 and 13 are complex and often overlooked, but *Fulton* demonstrates why they matter greatly.[214]

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206. 11 U.S.C. § 523(a) (1982).
207. See 11 U.S.C. § 523(a) (2018).
208. Atkinson, supra note 8, at 938.
209. Id.
210. See 11 U.S.C. §§ 523(a), 1328(a).
211. 495 U.S. 552, 557 (1990).
212. Id. at 557–60.
213. 11 U.S.C. § 1328(a)(3).
214. See supra notes 169–176 and accompanying text.

D. *Balancing Public Policy Concerns*

Bankruptcy's discharge provisions, which rely in large part on moral considerations under the umbrella of public policy, lead to inconsistent outcomes. To illustrate, Chapter 7 bars discharge for debt stemming from "fines, penalty, or forfeiture payable to and for the benefit of a governmental unit."[215] It further defines a "governmental unit" as including foreign, federal, state, and municipal governments.[216] This covers parking ticket debt—owed to municipal governments—even when the wrongdoing, if any, is minimal. Robbin Fulton, for instance, was unaware that she was doing anything wrong because she did not know that her ex-husband had incurred tickets. But the discharge provision fails to consider her circumstances, and she was barred from relief under Chapter 7.

At the same time, as Professor Abbye Atkinson noted, debts incurred from "environmental harms like toxic dumping *are* dischargeable [under a Chapter 7] bankruptcy proceeding" even when the harm caused by toxic dumping is far more devastating to local communities.[217] This is because the debtor in a toxic dumping case usually is a corporation, and even if the debt is owed to a governmental entity, § 523(a)(7) applies only to individuals. For individual debtors, the dischargeability of an environmental claim depends on whether it falls within any of the enumerated § 523(a) exceptions. Most relevant are § 523(a)(7), which provides that the debt must not be owed to a governmental entity, and § 523(a)(6), which provides that the harm must not be willful and malicious.[218] Because the damage that results from toxic dumping is typically widespread, environmental harm generally involves high financial liabilities. The financial harm that Fulton caused, if any, pales in comparison.

In *Ohio v. Kovacs*, Williams Kovacs, CEO of Chem-Dyne, faced a lawsuit after causing a ten-acre chemical waste dump, which at the time was considered the worst environmental hazard in Ohio and one of the worst in the nation.[219] After he was found liable, he was given a cleanup order. But he failed to comply, which prompted Ohio to appoint a receiver to possess his assets. He then filed for Chapter 7 bankruptcy and claimed that his obligation was not statutorily barred from discharge.[220] The Court agreed and held that his cleanup order was a debt and dischargeable

215. Atkinson, supra note 8, at 943.

216. 11 U.S.C. § 101(27) (2018).

217. Atkinson, supra note 8, at 945–47 (emphasis added).

218. 11 U.S.C. § 523(a)(6)–(7).

219. 469 U.S. 274 (1985); Penny Chorlton, Hamilton, Ohio, Struggles With Massive Toxic Waste Cleanup, Wash. Post (Nov. 3, 1982), https://www.washingtonpost.com/archive/politics/1982/11/03/hamilton-ohio-struggles-with-massive-toxic-waste-cleanup/9144394a-5814-4cc7-afef-8be8695b25ac (on file with the *Columbia Law Review*).

220. *Kovacs*, 469 U.S. at 276.

under Chapter 7.[221] Although the Court emphasized that Kovacs could have faced nondischargeable fines and penalties if Ohio had decided to bring those charges instead, Kovacs still received a form of relief that was related to the toxic dumping and that was not available to Fulton, even though he demonstrated a higher level of misconduct.[222] The difference is seemingly small but technically profound: He had the benefit of claiming that Ohio chose not to prosecute him and instead appointed a receiver to possess his assets.[223] The receivership made it impossible for Kovacs to personally carry out the cleanup order, and it converted the order into a payable, dischargeable debt.[224] But practically, his actions burdened the people and State of Ohio, a governmental entity with a strong interest in regulating environmental harm, while Fulton's act was passive and had minimal bearing on public safety.

Similarly, in medical malpractice cases, practitioners found liable are ordered to compensate their patients, and this may prompt them to file for Chapter 7 bankruptcy. Again, because there is no separate nondischargeability provision for medical malpractice, debtors need only show that their conduct was not the result of willful and malicious intent. In *Kawaauhau v. Geiger*, because the debtor's conduct was deemed unintentional, his malpractice debt was discharged after he improperly and unnecessarily amputated his patient's leg above the knee.[225] The debtor also failed to carry malpractice insurance.[226] *Geiger* involved an individual victim whose quality of life suffered permanently and directly as a result of someone else's misconduct. Yet the debtor in *Geiger* was granted relief that Fulton, whose conduct was victimless, was not.

These examples only begin to show that reliance on categorical characterizations of public policy leads to arbitrary and inconsistent outcomes. Section 523(a) bars relief for penalties owed to a governmental unit, but it does not bar relief for debt stemming from negligent or reckless conduct even when such conduct in some way affects a governmental body and more seriously invokes public policy concerns. This inconsistency can be reconciled with the flawed presumption that if a debtor owes a governmental unit a penalty, the debtor must have engaged in immoral conduct, and that the creditor is somehow entitled to "special treatment."[227] Bankruptcy's view of public policy is outdated and fails to meet the demands of a society marred with persistent social challenges.

221. Id. at 278–79.
222. Id.
223. Id. at 282–83.
224. Id.
225. 523 U.S. 57, 61–64 (1998).
226. Id.
227. Pardo & Lacey, supra note 13, at 417 n.47.

Normatively, public policy aims to protect honest and unlucky individuals while deterring intentionally immoral or harmful behavior.[228] The existence of § 523(a)(7) signals there is something about governmental debt that is different; that if someone owes a criminal or civil penalty, they must have engaged in wrongdoing that they must literally pay for. But there is a spectrum of wrongdoing, and the deterrence value of nondischargeability is low when debts are incurred for innocuous violations of laws that are themselves profit driven. Nondischargeability does not deter poor debtors from failing to pay fees that are prohibitively high in the first place. With or without discharge, poor debtors cannot pay these fees. Put bluntly, the current nondischargeability provisions are further punishing debtors' inability to pay.

If public policy can be given as the reason for why categorical nondischargeability works the way it does, then it can also be given as a reason for why § 523(a)(7) should be repealed in favor of the more holistic § 523(a)(6). When bankruptcy first emerged in English common law, relief through discharge was available only to those formally designated as merchants because only they regularly engaged in credit dealings.[229] Access to bankruptcy expanded as the general public began using credit.[230] Historically, bankruptcy has demonstrated an ability to expand to accommodate societal changes and growing classes of consumers, and its discharge provisions ought to follow suit.

When Chicago's Municipal Code was amended in 2017, the City admitted that expansion of its vehicle impoundment program hopefully would stop the "growing practice of individuals attempting to escape financial liability."[231] Notably, the City did not once invoke public safety and left unanswered the question of whether it was even justified in imposing financial liability upon its residents.[232] As long as taxation by citation remains prevalent, a governmental entity can continue to take advantage of its poor residents. Because of its inflexibility, § 523(a)(7) will continue to inhibit debtors, including those who have not engaged in any significant wrongdoing, from accessing relief.

CONCLUSION

Fulton is a landmark case in bankruptcy law not only because it solidified the Supreme Court's standing on the automatic stay but also

228. See supra notes 180–181 and accompanying text.

229. See G. Stanley Joslin, The Philosophy of Bankruptcy—A Re-Examination, 17 U. Fla. L. Rev. 189, 189 (1964).

230. Id.

231. 1 Journal of the Proceedings of the City Council of the City of Chicago, Illinois 51,164 (2017), https://chicityclerk.s3.us-west-2.amazonaws.com/s3fs-public/document_uploads/journals-proceedings/2017/2017_06_28_VI_VII_1.pdf [https://perma.cc/6T97-T3CT].

232. Id. at 51,164–65.

because it shed light on the ways in which our bankruptcy system has failed to protect the most marginalized debtors. *Fulton* was decided in early 2021, in the wake of the COVID-19 pandemic, the January 6 attack on the United States Capitol, and the murder of George Floyd. As the country reckoned with its history, Black and brown communities again bore the heaviest burden as our nation's essential workers with little choice but to risk their lives for a steady income: In Chicago, Black residents accounted for 75% of COVID-19–related deaths despite making up less than a third of the population.[233] Dario Alvarez, a Chicago based activist, shared his story:

> Today, I still don't have a driver's license. My fines and fees now total about $3,000. I've been paying what I can but barely making a dent in my debt because of the interest rate. I don't know how long it will take to pay off my debt and get my license back with the $12 per hour I make at my current job as a dishwasher at a sushi restaurant. My job is unstable, especially now with restaurants closing due to the pandemic. If I lose my job, I will once again have to make the choice between driving without a license and making those payments. Right now, I walk or use city bikes to get to work, but winter is coming.[234]

This Note began with a story about a woman, Robbin Fulton, who filed for bankruptcy in hopes that she would get her car back so that she could work and pay Chicago back its $4,000. Fulton likely could not have anticipated that her story would become the basis of a Supreme Court decision, let alone that it would show that our current bankruptcy law, originally intended to empower individuals who become overwhelmed with unmanageable debt, is yet another aspect of our legal system that falls short of its purpose. Under *Fulton* and without the full protection of the automatic stay, debtors are less likely to succeed under Chapter 13. They are vulnerable to falling into an endless cycle of debt with no real chance at a fresh start. And because of the intricacies of bankruptcy's two-track system, debtors like Fulton who struggle to pay off municipal ticket debt for traffic violations have little choice but to file under Chapter 13.

This Note has illustrated that the two-track system in theory offers individual debtors a choice between liquidation and repayment, between Chapter 7 and Chapter 13. But the discharge provisions that apply to each Chapter vary, and the reasons for such variations are both unsatisfying and arbitrary. As a response, Congress should consider repealing 11 U.S.C. § 523(a)(7) while broadening the applicability of 11 U.S.C. § 523(a)(6).

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233. See Building Vaccine Confidence: Our Shot at Curbing the Pandemic in Chicago and Beyond: Hearing Before the Select Subcomm. on the Coronavirus Crisis of the H. Comm. on Oversight & Reform, 117th Cong. 5 (2022) (statement of Lori E. Lightfoot, Mayor, City of Chi.) ("For example, in April 2020, despite making up only 29 percent of Chicagoans, Black residents accounted for 75 percent of COVID-related deaths. That was seven times the rate of any other demographic.").

234. Alvarez, supra note 173.

Nearly twenty years ago, at a time when COVID-19 was unfathomable and long before Chicago developed its vehicle impoundment program into what it is today, Professor Mechele Dickerson called on Congress to "consciously consider the racial impact of their decisions," and to "commit to using the [Bankruptcy] Code to achieve substantive racial justice."[235] Her call is even more pertinent today.

235. A. Mechele Dickerson, Race Matters in Bankruptcy, 61 Wash. & Lee L. Rev. 1725, 1775–76 (2004).