

2013

The Virtue in Bankruptcy

Matthew Bruckner
Cleveland-Marshall College of Law

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Bankruptcy Law Commons](#)

Recommended Citation

Matthew Bruckner, *The Virtue in Bankruptcy*, 45 Loy. U. Chi. L. J. 233 (2013).
Available at: <http://lawcommons.luc.edu/lucj/vol45/iss1/5>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The Virtue in Bankruptcy

Matthew Bruckner*

In response to a gap in the corporate bankruptcy literature, this Article offers a new positive theory of corporate bankruptcy law based on virtue ethics. The dominant theory of corporate bankruptcy law—the creditors’ bargain model—is necessarily incomplete because it does not account for bankruptcy courts’ equitable and discretionary powers, or for bankruptcy courts’ need to consider decision-making criteria other than economic efficiency. By contrast, virtue ethics offers insights about these features of corporate bankruptcy law for at least three reasons. First, bankruptcy courts appear to give content to bankruptcy laws by using virtue ethical principles. Second, virtue ethics’ decision-making process—practical wisdom—provides insights into how bankruptcy judges balance concerns about efficiency, justice, and fairness when reaching decisions. This is particularly true when the bankruptcy court’s equitable jurisdiction or discretionary powers are implicated. Third, virtue ethics’ symbiotic consideration of means and ends parallels the process bankruptcy judges are called on to use when exercising their discretionary or equitable powers under numerous provisions of the Bankruptcy Code.

* Visiting Clinical Professor, Cleveland-Marshall College of Law. J.D., New York University School of Law, B.A., Binghamton University. Funding for this project was generously provided by St. John’s University School of Law. I would like to thank everyone at St. John’s for their generosity, support, and comments. In particular, John Q. Barrett, Michael Perino, Anita Krishnakumar, and G. Ray Warner all provided comments on a very early draft of this Article. Additional comments, ideas, and suggestions were provided by Kent Barnett, Kara Bruce, David Carlson, Anthony Casey, Marc DeGirolami, Brian Frye, Doron Kalir, David Kamin, Daniel Keating, George Kuney, Ronald Mann, Nancy Ota, Keith Sharfman, Mike Simkovic, Jeremy Sheff, Andy Simons, David Skeel, Jeremy Weintraub, Adam Zimmerman, and workshop participants at Albany Law School, the 2012 Mid-Atlantic Law and Society conference, New York University School of Law, and St. John’s University School of Law. As always, this Article would not have been possible without the support and feedback of my wife, Morgan Hall.

TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION | 102 |
| I. EXISTING BANKRUPTCY THEORY AND THE NEED FOR AN ALTERNATIVE..... | 243 |
| A. <i>The Creditors' Bargain Theory</i> | 243 |
| B. <i>Flaws with the Creditors' Bargain Theory</i> | 245 |
| C. <i>The Need for a New Bankruptcy Theory</i> | 248 |
| II. VIRTUE JURISPRUDENCE AS BANKRUPTCY THEORY..... | 251 |
| A. <i>Introducing Virtue Ethics</i> | 251 |
| B. <i>Three Reasons Why Virtue Jurisprudence Can Undergird a Descriptive Theory of Bankruptcy Law</i> | 255 |
| 1. <i>The Shared Language of Virtue</i> | 256 |
| 2. <i>Practical Wisdom</i> | 259 |
| 3. <i>Virtue Jurisprudence Focuses on Both the Means and Ends of the Law</i> | 265 |
| IV. VIRTUE JURISPRUDENCE BETTER EXPLAINS SOME OF THE BANKRUPTCY CODE'S MOST SALIENT FEATURES..... | 268 |
| A. <i>Virtue Jurisprudence Explains Chapter 11's Focus on Job Preservation</i> | 269 |
| B. <i>Virtue Jurisprudence Explains Chapter 11's Reorganization Bias</i> | 275 |
| C. <i>Virtue Jurisprudence Explains Chapter 11's Examiner Provisions</i> | 280 |
| CONCLUSION..... | 151 |

INTRODUCTION

“From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”¹

Bankruptcy courts are courts of equity.² Congress has empowered

1. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

2. *See Young v. United States*, 535 U.S. 43, 50 (2002) (noting bankruptcy courts are courts of equity); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 389 (1993) (noting that bankruptcy courts are “necessarily entrusted with broad equitable powers”); *In re SubMicron Sys. Corp.*, 432 F.3d 448, 454 (3d Cir. 2006) (noting that bankruptcy courts have the

the bankruptcy courts to modify the contractual relationships between debtors and creditors, and to craft flexible remedies designed to ensure “complete justice” is done.³ To provide complete justice for parties to a bankruptcy case, the bankruptcy judge must consider principles such as equity, honesty, fairness, and justice.⁴ These principles must be considered for at least two reasons. First, the bankruptcy laws often specifically direct the bankruptcy courts to consider such principles.⁵ Second, as courts of equity, bankruptcy courts are obligated to “prevent injustice or unfairness in the administration of bankruptcy estates.”⁶ As a result, bankruptcy judges regularly “eschew[] mechanical rules” to ensure that the bankruptcy process achieves fair and just results.⁷

The Bankruptcy Code⁸ also commits a substantial number of

“equitable authority to ensure ‘that substance will not give way to form, that technical considerations will not prevent substantial justice from being done’” (citing *Pepper v. Litton*, 308 U.S. 295, 305 (1939))). *But see* Hon. Alan M. Ahart, *A Stern Reminder that the Bankruptcy Court is not a Court of Equity*, 86 AM. BANKR. L.J. 191, 200 (2012) (concluding that a bankruptcy court is not one of equity).

3. *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 340 (3d Cir. 2006) (noting that bankruptcy courts have broad authority to act to prevent injustice); *see also* Official Comm. of Unsecured Creditors of Cybergene Corp. v. Chinery, 330 F.3d 548, 567 (3d Cir. 2003) (noting that Congress’ regulation did not alter bankruptcy courts’ fundamental nature).

4. *In re Kaiser Aluminum Corp.*, 456 F.3d at 340 (noting that because bankruptcy courts are courts of equity, they must invoke equitable principles like fairness and justice); *see also* *Marrama v. Citizens Bank*, 549 U.S. 365, 373 (2007) (denying conversion of a Chapter 7 proceeding to a Chapter 13 proceeding in spite of language in the Bankruptcy Code suggesting that conversion was mandatory because of dishonesty by the debtor).

5. *See, e.g.*, 11 U.S.C. § 552(b)(1) (2012) (providing that prepetition security agreements cover related postpetition property unless “the equities of the case” require otherwise); *id.* §§ 1113(b)(1)(A), 1114(g)(3) (allowing the rejection or modification of collective bargaining agreements and retirements savings plans, respectively, only if “all creditors, the debtor and all of the affected parties are treated fairly and equitably”); *id.* § 1129(b) (allowing cramdown unless the plan discriminates unfairly, or if it is not “fair and equitable”); *see also* *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 268 (3d Cir. 2002) (“‘[E]quitable’ is defined as ‘signal[ing] that which is reasonable, fair, or appropriate.’” (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 133 (1995) (Ginsburg, J., concurring))); *In re Patio & Porch Sys., Inc.*, 194 B.R. 569, 575 (Bankr. D. Md. 1996) (“This ‘equities of the case’ provision is intended to prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code, which favors giving debtors a ‘fresh start.’”); *In re Crouch*, 51 B.R. 331, 332 (Bankr. D. Or. 1985) (discussing § 552(b)’s “equities of the case” rule).

6. *In re Kaiser Aluminum Corp.*, 456 F.3d at 340 (citing *Pepper*, 308 U.S. 295 at 305). In a number of provisions of the Bankruptcy Code, bankruptcy judges are specifically directed to consider principles such as justice, fairness, honesty, and equity in rendering decisions. *See, e.g.*, 11 U.S.C. § 1113(c)(3) (providing that collective bargaining agreements can only be rejected if “the balance of the equities clearly favors rejection”); *see also id.* § 1114(g)(3) (stating that certain pension plans are only subject to modification if “all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities”).

7. *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946).

8. This Article uses the terms “Bankruptcy Code” and “Code” to refer to the Bankruptcy

decisions to the discretion of the bankruptcy judge.⁹ For example, the Bankruptcy Code empowers bankruptcy judges to confirm a plan of reorganization, provided that the plan is feasible.¹⁰ However, the Code does not define feasibility, nor does it provide any substantive guidance as to how feasibility should be determined.¹¹ Instead, the Code empowers bankruptcy courts to use their discretion to determine the relevant considerations in a particular case and then to apply those factors to the facts of that case.¹²

Reform Act of 1978. Pub. L. No. 95-598, 92 Stat. 2549 (codified in scattered sections of 11 U.S.C. (2012)).

9. See, e.g., 11 U.S.C. § 105; *id.* § 107(c)(1); *id.* § 303; *id.* § 324; *id.* § 349; *id.* § 350; *id.* § 362; *id.* § 363; *id.* § 365; *id.* § 502; *id.* § 503; *id.* § 1104; *id.* § 1112; *id.* § 1113; *id.* § 1114; *id.* § 1121; *id.* § 1129; see also *In re Lionel Corp.*, 722 F.2d 1063, 1069 (2d Cir. 1983) (“[A] bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code.”). Precisely how much discretion bankruptcy judges possess is hotly contested. See, e.g., *Law v. Siegel (In re Law)*, 435 Fed. Appx. 697, 698 (9th Cir. 2011) (holding that the Bankruptcy Appellate Panel “properly affirmed the bankruptcy court’s order granting the trustee’s surcharge motion because the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor’s misconduct and was warranted to protect the integrity of the bankruptcy process” (citing *Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004)), *cert. granted*, 133 S. Ct. 2824 (2013); cf. Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 153–54 (2005).

10. See 11 U.S.C. § 1129(a)(11) (stating that the court shall not confirm a plan unless it finds that “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan”); see also *In re Geijssel*, 480 B.R. 238, 256–57 (Bankr. N.D. Tex. 2012) (describing how feasibility is required for confirmation).

11. “Feasibility” is a shorthand reference to the requirements of § 1129(a)(11) of the United States Code. See *In re Geijssel*, 480 B.R. at 256.

12. In response, bankruptcy courts have generally considered factors such as the debtor’s proposed capital structure, the earning power of the business, economic conditions, the ability of the debtor’s management, and the probability that existing management will remain in place. See *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 526 (1941); see also *In re Nellson Nutraceutical, Inc.*, No. 06-10072, 2007 WL 201134, at *27–28 (Bankr. D. Del. Jan. 18, 2007) (citing *Consolidated Rock Prods.* with approval for the proposition that an estimate of earning capacity must be based on all relevant facts); *In re Geijssel*, 480 B.R. at 257 (“Courts have employed the following factors in determining whether a plan is feasible: the debtor’s capital structure, the earning power of the business, economic conditions, the ability of debtor’s management, the probability of continuation of management, and other related matter (citing *In re Mortg. Inv. Co. of El Paso*, 111 B.R. 604, 611 n.8 (Bankr. W.D. Tex. 1990)). However, the test is a loose one that allows courts to weigh the various factors at their discretion, including weighing any particular factor at zero. See *Harbin v. IndyMac Bank FSB (In re Harbin)*, 486 F.2d 510, 521 (9th Cir. 2007) (noting that bankruptcy courts may exercise equitable discretion); see also *In re Geijssel*, 480 B.R. at 257 (noting that bankruptcy courts may ignore various factors (citing *In re Landing Assocs., Ltd.* 157 B.R. 791, 819 (Bankr. W.D. Tex. 1993)); NATHALIE MARTIN & OCEAN TAMA, *INSIDE BANKRUPTCY LAW: WHAT MATTERS AND WHY* 178 (2008) (“[T]he feasibility test is applied by the courts on a case-by-case basis within the very broad discretion of the bankruptcy court.”); Robert A. Sauro, *Chapter 11 Confirmation: Increasing Judicial Discretion*, 4 BANKR. DEV. J. 191, 206 (1987) (noting that courts consider many factors

Existing bankruptcy scholarship has addressed neither the role of bankruptcy courts as courts of equity nor their substantial discretionary powers.¹³ Instead, scholars have largely focused on debating the appropriate goals for our bankruptcy laws.¹⁴ Some scholars have

when determining feasibility).

13. *But see* KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 216 (1999) (criticizing textualist interpretations of the Code and claiming that judges must be able to look to policies that lay behind the text in order to reach correct decisions).

14. *Compare* Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 *STAN. L. REV.* 311, 311 (1993) [hereinafter Adler, *Financial and Political Theories*] (arguing that the “common pool” justification for corporate bankruptcy—which asserts that bankruptcy “provides for an orderly disposition of claims against a debtor firm,” thereby preserving “intact the firm’s ‘common pool’”—is unsatisfactory), Philippe Aghion et al., *Improving Bankruptcy Procedure*, 72 *WASH. U. L.Q.* 849, 851–52 (1994) [hereinafter Aghion, *Improving Bankruptcy*] (arguing that “a good bankruptcy procedure” should “try to achieve an ex post efficient outcome,” “give managers the right ex ante incentives to avoid bankruptcy,” “preserve absolute priority,” and “put ultimate decisionmaking power in the hands of the claimants”), Philippe Aghion et al., *The Economics of Bankruptcy Reform*, 8 *J.L. ECON. & ORG.* 523, 532–33 (1992) [hereinafter Aghion, *Economics of Bankruptcy Reform*] (arguing that “a good bankruptcy procedure is one that . . . maximizes the ex post value of the firm . . . [and] preserves the (ex ante) bonding role of debt by penalizing management adequately in bankruptcy states (emphasis omitted)), Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 *U. CHI. L. REV.* 97, 97 (1984) (rejecting the notion “that a bankruptcy proceeding provides . . . an essentially unlimited opportunity to do what appears at the moment to be good, just, or fair,” and arguing that bankruptcy serves “a unique, but limited, function in our society”), Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 *YALE L.J.* 1043, 1089 (1992) (arguing that “Chapter 11 should be repealed and replaced”), Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 *YALE L.J.* 857, 871–72 (1982) (arguing that bankruptcy law does not faithfully mirror the creditors’ bargain model), and Robert K. Rasmussen, *Debtor’s Choice: A Menu Approach to Corporate Bankruptcy*, 71 *TEX. L. REV.* 51, 100 (1992) (discussing the “selections that should be on a congressionally enacted [bankruptcy] menu”), with Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 *U. ILL. L. REV.* 503, 519 (2001) (asserting that both “[c]ommentators applying an economic analysis” of bankruptcy law and their critics “could learn from the other”), Linda J. Rusch, *Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope—Stepping into the Fourth Dimension*, 55 *MONT. L. REV.* 9, 17–22 (1994) (describing the two competing paradigms of bankruptcy reorganization: the creditors’ bargain and loss allocation), Charles J. Tabb, *Of Contractarians and Bankruptcy Reform: A Skeptical View*, 12 *AM. BANKR. INST. L. REV.* 259, 259–60 (2004) (“[A] non-waivable bankruptcy system, with a supervised bankruptcy process, and a non-waivable discharge right, are not only important, but necessary and essential.”), Elizabeth Warren, *Bankruptcy Policy*, 54 *U. CHI. L. REV.* 775, 778 (1987) [hereinafter Warren, *Bankruptcy Policy*] (contrasting her own views of bankruptcy with those of Professor Douglas Baird), Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 *MICH. L. REV.* 336, 338–86 [hereinafter Warren, *Bankruptcy Policymaking*] (discussing “the various and competing goals that underlie the bankruptcy system”), and Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 *YALE L.J.* 437, 467 (1992) [hereinafter Warren, *Untenable Case*] (arguing that while bankruptcy does function “to preserve value in faltering businesses and to enhance the return to all those who have an interest in the business” as argued by Bradley and Rosenzweig, “it also serves to redistribute value”); *see also* Stephen J. Lubben, *The “New and Improved” Chapter 11*, 93 *KY. L.J.* 839, 850 n.47 (2005); Irit Haviv-Segal, *Bankruptcy Law and Inefficient Entitlements* 4–12 (2004) (unpublished

advanced a view of bankruptcy based on the so-called creditors' bargain model.¹⁵ They suggest that bankruptcy laws should only seek to accomplish two things: (i) maximize the value of the bankruptcy estate and (ii) respect ex ante contractual entitlements to the greatest extent possible.¹⁶ Other scholars have taken a wider view and suggest that bankruptcy laws are appropriately focused on reorganizing struggling businesses, preserving jobs, protecting taxing authorities, redistributing assets, enhancing community stability, and other similar aims.¹⁷ Missing from the debate, however, has been an attempt to develop a positive theory of bankruptcy law that adequately explains the most salient features of our current bankruptcy system, including the equitable and discretionary powers of bankruptcy courts, and Congress' decision to privilege decision-making criteria other than economic efficiency.¹⁸

manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=612981 (noting that the "main conflict between different approaches of bankruptcy law is the familiar one between the economic and social approaches," and discussing these approaches).

15. See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 17 (1986) (noting that "[b]ankruptcy provides a way to override the creditors' pursuit of their own remedies and to make them work together"); cf. Richard V. Butler & Scott M. Gilpatric, *A Re-Examination of the Purposes and Goals of Bankruptcy*, 2 *AM. BANKR. INST. L. REV.* 269, 270–71 (1994); Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 *U. CHI. L. REV.* 759, 764–65 (2011) (assuming that the creditors' bargain model is an appropriate framework). But see Thomas H. Jackson & Robert Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 *VA. L. REV.* 155, 202 (1989) (retreating from an earlier normative position and concluding that "a single-minded focus on preserving the value of prebankruptcy entitlements is not necessarily the optimal means of mirroring a hypothetical ex ante bargain among the creditors").

16. See JACKSON, *supra* note 15, at 24 ("Bankruptcy law is best approached by separating . . . the question of how the process can maximize the value of a given pool of assets and the question of how the law should allocate entitlements."); see also Butler & Gilpatric, *supra* note 15, at 270–71 (describing that the two goals of bankruptcy are maximizing values and dealing with allocating entitlements); Casey, *supra* note 15, at 766 (noting that the "only goal of bankruptcy law is to maximize the value of the firm in bankruptcy"); Jackson & Scott, *supra* note 15, at 170.

17. See Warren, *Bankruptcy Policy*, *supra* note 14, at 776, 788 (asserting that bankruptcy serves "'the public interest' beyond the interests of the disputing parties" in recognition "of the larger implications of a debtor's widespread default and the consequences of permitting a few creditors to force a business to close"); see also Charles J. Tabb, *The Future of Chapter 11*, 44 *S.C. L. REV.* 791, 804 (noting that the greater good of the community has always been relevant to bankruptcy policy); Warren, *Bankruptcy Policymaking*, *supra* note 14, at 355 (recognizing the Code gives protection to persons with no formal legal rights); Warren, *Untenable Case*, *supra* note 14, at 467 (stating that bankruptcy serves to redistribute value); Haviv-Segal, *supra* note 14, at 11 ("[A]dvocates of the social approaches stress the numerous aims and values that form the basis of bankruptcy law.").

18. Although they do not address themselves to these points, some scholars have offered normative theories of bankruptcy from outside the dominant perspective. See, e.g., GROSS, *supra* note 13 (justifying the "fresh start" for individual and business debtors, explaining why some creditors are more deserving of payment than others, and justifying the role of community in the

This Article seeks to fill the gap in the corporate bankruptcy literature by offering a new, positive theory of bankruptcy law based on virtue ethics.¹⁹ Virtue ethics is one of the three major schools of moral philosophy,²⁰ and offers a normative account of how citizens should live their lives so that they might achieve *eudaimonia* (human flourishing).²¹ *Eudaimonia* is the ultimate good: the goal that individuals (and the law)²² should work to achieve.²³ Achieving the ultimate good is only possible if individuals act virtuously.²⁴ Virtuous

bankruptcy process); Donald Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993) [hereinafter Korobkin, *Normative Foundations*] (offering a “bankruptcy choice model”); Donald Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991) [hereinafter Korobkin, *Rehabilitating Values*] (offering a “values-based account”); Lynn M. LoPucki, *A Team Production Theory of Bankruptcy Reorganization*, 57 VAND. L. REV. 741 (2004) [hereinafter LoPucki, *Team Production Theory*] (offering a team production account); Ronald Mann, *Bankruptcy and the Entitlements of the Government: Whose Money is it Anyway?*, 70 N.Y.U. L. REV. 993 (1995) (proposing a theoretical justification for the distributive aspects of the bankruptcy system).

19. See *infra* Part I (discussing existing bankruptcy theory and the need for an alternative). For the purposes of this project, all references to virtue ethics should be considered as references to the “broad range of theories of practical philosophy that . . . place high priority on virtue and on happiness.” Eric R. Claeys, *Response: Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 891 (2008). Although many contemporary virtue theorists work within the “neo-Aristotelian” framework (or the closely related neo-Thomistic tradition), there are exceptions. This Article draws heavily from Aristotelian understandings of virtue ethics, but also from other sources, particularly Rosalind Hursthouse and Alasdair MacIntyre. See ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999) [hereinafter HURSTHOUSE, *VIRTUE ETHICS*]; ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1981).

20. Deontology and consequentialism being the other two traditions. See Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism*, 80 FORDHAM L. REV. 1997, 2017 (2012) (recognizing that the “two other competing ethical traditions are deontology and consequentialism”); see also MACINTYRE, *supra* note 19, at 118 (describing Aristotelianism as “philosophically the most powerful of pre-modern modes of moral thought”).

21. *Eudaimonia* means something akin to ultimate happiness, human flourishing, or the qualities necessary to lead a good life. See, e.g., Peter Koller, *Law, Morality, and Virtue*, in WORKING VIRTUE: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS 191, 192 (Rebecca L. Walker & Philip L. Ivanhoe eds., 2007) (defining *eudaimonia* as “a human life that is intrinsically good from the individual’s viewpoint and the general perspective as well”); see also MACINTYRE, *supra* note 19, at 147–48 (noting the link between virtue and happiness); ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 105 (1992) (describing *eudaimonia* as “‘flourishing or doing well’” (citations omitted)).

22. See Chapin F. Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703, 715 (2009) [hereinafter Cimino, *Virtue and Contract*] (noting Aristotle’s belief in government’s obligation to train its citizens to be virtuous).

23. See ARISTOTLE, *NICOMACHEAN ETHICS*, reprinted in ARISTOTLE: SELECTIONS 347, 350 (Terence Irwin & Gail Fine trans., 1995) (noting that happiness “is the highest of all the goods pursued”); see also MACINTYRE, *supra* note 19, at 147–48 (noting the link between virtue and happiness); SOLOMON, *supra* note 21, at 106 (noting that happiness is the ultimate end to be pursued).

24. See ARISTOTLE, *supra* note 23, at 371–72 (“It should be said, then, that every virtue

action takes practice, and only by repeated, conscious efforts to internalize virtuous behavior is *eudaimonia* achievable.²⁵

Virtue jurisprudence differs from consequentialist theories of law, such as the creditors' bargain model, because it does not focus on achieving a single type of outcome in all cases, such as the most efficient outcome.²⁶ And, although it aims to promote the end of human flourishing, virtue jurisprudence is not outcome-centered in the same sense as the creditors' bargain model.²⁷ *Eudaimonia*—the outcome virtue ethics seeks to promote—is both an internal and a multi-variable concept.²⁸ As such, promoting the ability of each person to achieve *eudaimonia* may involve trade-offs between and among individuals, trade-offs that may be irreducible to a single, decision-making criteria, such as efficiency.²⁹

Virtue ethics promises to offer insight into our bankruptcy laws for at least three reasons. First, virtue jurisprudence and bankruptcy law are both moored on similar values and principles.³⁰ Bankruptcy law, like

causes its possessors to be in a good state and to perform their functions well . . ."); *see also* Cimino, *Virtue and Contract*, *supra* note 22, at 713 ("At its broadest level, Aristotelian virtue causes human beings to be happy and function well.").

25. *See* SOLOMON, *supra* note 21, at 4–5 (1992) (noting that acting virtuously must be practiced in order to be fully developed).

26. *See* ARISTOTLE, *supra* note 23, at 367 ("[Q]uestions about actions and expediency, like questions about health, have no fixed and invariable answers."); *see also* MACINTYRE, *supra* note 19, at 149; Cimino, *Virtue and Contract*, *supra* note 22, at 715 (noting that virtue jurisprudence does not focus on a single type of outcome).

27. An outcome-centered theory must offer a theory for what should count as the good, right, just, or legally valid decision. Lawrence B. Solum, *Virtue Jurisprudence, A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 184 (2003) [hereinafter Solum, *Theory of Judging*]. For example, law and economics typically offers the maximization of preference satisfaction as the preferred outcome for decisions. *See, e.g.*, JACKSON, *supra* note 15, at 222; Aghion, *Economics of Bankruptcy Reform*, *supra* note 14, at 543 (noting that shareholders hold value maximization as a "common objective"). Virtue ethics focuses on achieving human flourishing, which may require different outcomes in difference cases. *But see* MACINTYRE, *supra* note 19, at 185 (noting Benjamin Franklin's emphasis on a utilitarian variety of virtue ethics).

28. *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 751 (2009) (arguing that human flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable); *see also* MACINTYRE, *supra* note 19, at 184 (noting the incommensurability of "internal goods and external goods").

29. *See* MACINTYRE, *supra* note 19, at 198–99 ("[T]he notion of summing goods . . . in terms of one single formula or conception of utility . . . makes no sense.").

30. Professor Lawrence B. Solum has coined the phrase "virtue jurisprudence" to refer to "a normative and explanatory theory of law that utilises [sic] the resources of virtue epistemology, virtue ethics, and virtue politics to answer the central questions of legal theory." Solum, *Theory of Judging*, *supra* note 27, at 178; *see also* Cimino, *Virtue and Contract*, *supra* note 22, at 707 (noting that some in the legal academy have coined the phrase "virtue jurisprudence"). This Article will use Professor Solum's phrase to refer to virtue ethics as applied to legal problems.

most law, was shaped by values and principles such as fairness, justice, equity, honesty, and loyalty that underlie common notions of morality.³¹ These concerns also lay at the heart of virtue jurisprudence. As such, virtue jurisprudential concerns about fairness, justice, and equity are often explicitly considered and cited by bankruptcy judges.³² The content of these often-cited principles appears to be derived from virtue ethics.³³ At a minimum, virtue ethics may offer insight into what judges mean when they write that “justice” or “fairness” dictates a result in a particular case.³⁴ As such, understanding virtue jurisprudence helps to explain bankruptcy law.

Second, virtue jurisprudence’s decision theory (practical wisdom) provides useful insights into how bankruptcy judges decide cases.³⁵

31. See *In re Federated Dep’t Stores Inc.*, 44 F.3d 1310, 1320 (6th Cir. 1994) (“Despite our holding today, we believe denying all compensation to Lehman Brothers would not be equitable.”); *In re Greystone Holdings, L.L.C.*, 305 B.R. 456, 463 (Bankr. N.D. Ohio 2003) (noting the demands of fairness and equity on its decision); *In re Edwards*, 228 B.R. 552, 562 (Bankr. E.D. Pa. 1998) (noting that bankruptcy courts have “ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity and maximization of assets”); see also JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 148–51 (1991) [hereinafter GORDLEY, *PHILOSOPHICAL ORIGINS*] (discussing the origins of unconscionability); Bailey Kuklin, “*You Should Have Known Better*,” 48 U. KAN. L. REV. 545, 576 (2000); Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 56–73 (2007); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 478 (2005).

32. See, e.g., *Reading Co. v. Brown*, 391 U.S. 471, 477 (1968) (noting the Bankruptcy Code’s “decisive, statutory objective: fairness to all persons having claims against an insolvent”); see also *In re SubMicron Sys. Corp.*, 432 F.3d 448, 449 (3d Cir. 2006) (noting bankruptcy courts’ “equitable authority to ensure ‘that substance will not give way to form, that technical considerations will not prevent substantial justice from being done’” (quoting *Pepper v. Litton*, 308 U.S. 295, 305 (1939))); *Onick v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231, 1234 (9th Cir. 2002) (asserting that the interests of “fairness, equality, and predictability” justified its holding (internal citations omitted)); Matthew Nozemack, Note, *Making Sense Out of Bankruptcy Courts’ Recharacterization of Claims: Why Not Use § 510(c) Equitable Subordination?*, 56 WASH. & LEE L. REV. 689 (1999) (examining the authority of bankruptcy courts to subordinate claims on equitable grounds).

33. Cf. MACINTYRE, *supra* note 19, at 192 (discussing the requirements of justice and courage).

34. See, e.g., *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 341 (3d Cir. 2006) (rejecting a proffered reading of the Employee Retirement Income Security Act of 1974 because of the “unfair result” that would follow); see also *In re Federated Dept. Stores Inc.*, 44 F.3d at 1320 (“[W]e are of the view that fairness and equity dictate allowing Lehman Brothers to be compensated”); *In re Greystone*, 305 B.R. at 463 (noting the demands of fairness and equity on its decision); *In re Edwards*, 228 B.R. at 562 (noting that bankruptcy courts have “ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity and maximization of assets”).

35. See HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 19, at 12 (discussing practical wisdom). Practical wisdom has variously been referred to as prudence, practical reason, phronesis, and situation-sense. See Heidi Li Feldman, *Prudence, Benevolence, and Negligence*, in *VIRTUE*

Practical wisdom is the intellectual virtue that helps decision makers make good decisions, even when several potentially competing virtues apply to a particular situation and appear to call for disparate results.³⁶ Bankruptcy judges often must decide how to balance uncertain, indeterminate, or incommensurate³⁷ values or policies in order to reach the correct result in a particular case; virtue ethics may offer some insights into how they do so. Practical wisdom offers insights that can help explain how bankruptcy judges perform this balancing act because the process of choosing among competing bankruptcy policies is similar to the process of choosing among competing virtues.³⁸

Finally, virtue jurisprudence calls for a decision maker to simultaneously consider both the means and the ends of the law in a “fully symbiotic way.”³⁹ Virtue jurisprudence’s symbiotic consideration of means and ends allows virtue ethics to offer insights into the decision-making process of judges who are considering whether to authorize discretionary relief.⁴⁰ A virtue jurisprudential approach

JURISPRUDENCE 1, 52–53 (Colin Farrelly & Lawrence B. Solum eds., 2008) (describing the decision-making process of virtue ethics); Suzanna Sherry, *Judges of Character*, in VIRTUE JURISPRUDENCE, *supra*, at 88, 91 (noting the many names authors have given to the Aristotelian notion of *phronesis*).

36. See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 84 (2006) [hereinafter, Solum, *Natural Justice*] (describing practical wisdom); see also HURSTHOUSE, VIRTUE ETHICS, *supra* note 19, at 40 (noting that practical wisdom is required to interpret rules and determine which rules are most appropriately applied).

37. A claim of incommensurability suggests that certain ends cannot be traded off for one another, and thus denies that certain ends can be evaluated by a unitary metric—therefore, any attempt to introduce such a metric would misdescribe the human experience. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 800 (1994) [hereinafter Sunstein, *Incommensurability*]. For example, human beings need food, clothing, and shelter to survive. At some minimum threshold, these are incommensurable needs. One cannot trade all of one’s food for additional shelter and hope to survive. A person needs a minimum amount of each in order to live. The creditors’ bargain model depends on an assumption of commensurability. Otherwise, a single variable decision-making criteria, such as efficiency, would be useless.

38. Aristotle appears to have believed that virtues were never in conflict and that a truly virtuous person could reconcile the apparently (but not actually) conflicting demands of different virtues. This has led some to suggest that Aristotle was a value monist and would deny the existence of plural values, which appears to be a necessary pre-condition for a claim of incommensurability. See Ruth Elizabeth Chang, *Value Pluralism*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 16139, 16139 (James Wright ed., 2012) (noting that Aristotle was arguably a proponent of value monism). Neo-Aristotelian theory is much more sympathetic to arguments that plural and potentially incommensurable values exist. See MACINTYRE, *supra* note 19, at 168 (arguing that moral Aristotelianism is not “necessarily committed to a strong thesis concerning the unity of virtues”). This Article draws on neo-Aristotelian theories on this issue.

39. Cimino, *Virtue and Contract*, *supra* note 22, at 712.

40. See *id.* (asserting that “virtue theory may better account for contract’s dual dimensions”).

requires decision makers to consider whether to authorize discretionary relief to consider two questions: (i) what ends does the Bankruptcy Code seek to achieve; and (ii) what is the best way to achieve those ends.⁴¹ Virtue ethics' dual focus better⁴² accounts for how bankruptcy judges decide whether to grant discretionary relief because it parallels the requirements of many sections of the Bankruptcy Code. Virtue ethics, like the Code, calls on a bankruptcy judge to consider the purpose of the relevant provision: both what it seeks to achieve and how best to achieve that goal.⁴³

The remainder of this Article will proceed as follows. Part I discusses the dominant model of bankruptcy theory—the creditors' bargain. After providing a brief overview of this theory, this Part focuses on one particular flaw of the creditors' bargain: its focus on efficiency poorly explains existing corporate bankruptcy doctrine. Part I also explains why a new theory of corporate bankruptcy law would be useful. Part II introduces virtue ethics and explains three key features of virtue jurisprudence that allow it to provide an attractive descriptive account of corporate bankruptcy law.⁴⁴ Part III provides three specific examples where virtue jurisprudence more accurately explains current bankruptcy doctrine. A conclusion follows.

I. EXISTING BANKRUPTCY THEORY AND THE NEED FOR AN ALTERNATIVE

A. The Creditors' Bargain Theory

The creditors' bargain has been the dominant theory of bankruptcy law for decades,⁴⁵ and although several other normative theories of

41. See *infra* Part II.B.3 (discussing virtue jurisprudence's consideration of means and ends).

42. Virtue ethics offers a "better" approach than other theories because it calls for an analysis more closely aligned with the text of the Code itself. See Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76, 79 (1978) (stating that theories are comparable based on their "consilience," which is a measure of how much a particular theory explains—if an alternative theory has greater consilience, it might fairly be said to be a better theory).

43. Cf. Cimino, *Virtue and Contract*, *supra* note 22, at 737 (noting that "a court would . . . inquir[e] into the parties' goals for both the means and the ends of the contract" (emphasis in original)).

44. Virtue jurisprudence may also offer an attractive normative account of bankruptcy law, but the normative implications of virtue ethics are beyond the scope of this Article. I expect to address the normative implications of virtue jurisprudence for bankruptcy law in a follow-up article.

45. See generally CHRISTOPHER F. SYMES, STATUTORY PRIORITIES IN CORPORATE INSOLVENCY LAW: AN ANALYSIS OF PREFERRED CREDITOR STATUS 70 (2008) (noting the dominance of the creditors' bargain theory); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1454 (2012) (same); Rolef J. de Weijts, *Too Big to Fail as a Game of Chicken with the State: What Insolvency Law Theory has to say about TBTF and Vice Versa* 3 (Amsterdam Law School, Research Paper No. 2012-90, 2012), available at

bankruptcy law exist,⁴⁶ none have had as profound an impact as that model. The creditors' bargain model is a "contractarian" approach to bankruptcy law derived from early law and economics theory.⁴⁷ Originally proposed by Thomas Jackson, the creditors' bargain model claims that bankruptcy should mirror the hypothetical agreement creditors would be expected to form among themselves if they were able to negotiate from a pre-bankruptcy position.⁴⁸ As originally stated, the creditors' bargain model tells us that the optimal bankruptcy system should have only two aims: (i) respect nonbankruptcy contractual rights, such as state law priority schemes; and (ii) maximize the expected value of the assets of the bankruptcy estate.⁴⁹

The creditors' bargain model makes a number of assumptions common to classical law and economics, including that actors are entirely rational welfare maximizers, and that the costs and benefits of any action can be compared along a single, scalar metric.⁵⁰ The creditors' bargain model also assumes that parties⁵¹ would not strike a

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145861 (same).

46. See *supra* note 17 and accompanying text (noting that some scholars have taken a wider view of bankruptcy law); see also Donald Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75, 78–79 [hereinafter Korobkin, *Normative Theory*] (noting that while many traditionalists "maintain that bankruptcy law should pursue the full range of purposes that it currently does . . . they also seem to dismiss the use of normative theory to support this view"); Levitin, *supra* note 45, at 1452.

47. See LoPucki, *Team Production Theory*, *supra* note 18, at 744 (discussing this point); see also Levitin, *supra* note 45, at 1405 (same).

48. Jackson, *supra* note 14, at 860. *But see* Lynn M. LoPucki, *The Unsecured Creditors' Bargain*, 80 VA. L. REV. 1887, 1896 (1994) (claiming that the available data suggest that "a substantial portion of all unsecured creditors do not consent to their status in any meaningful sense."); Nathalie Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 485 (1998) (noting that "many creditors—including utilities, taxing authorities, tort claimants, and environmental claimants had no intention of ever lending money to the debtor").

49. See *supra* note 16 and accompanying text.

50. See JACKSON, *supra* note 15, at 18–19 (discussing two bankruptcy assumptions—(1) "insolvency occurs without warning" and (2) "bankruptcy proceedings take no time"—and, while acknowledging that these two assumptions are "somewhat unrealistic," asserting that imposing these assumptions "clarifies several key features of bankruptcy law"); see also SOLOMON, *supra* note 21, at 220 (discussing the concept of "[h]omo economicus who has no attachments or affects other than crude self-interest and the ability to calculate how to satisfy that interest vis-à-vis other people"); *supra* note 37 and accompanying text (noting that the creditors' bargain model is based on an assumption of incommensurability).

51. Professor Jackson expects that debtors would negotiate with their shareholders and creditors, but would exclude non-creditor employees, local communities, taxing authorities and other similar interests. JACKSON, *supra* note 15, at 222; see also Martin, *supra* note 48, at 439 (asserting that Chapter 11's rehabilitative goals "run not merely to the reorganizing company, its creditors, and shareholders, but also to third party interests"). *But see* SOLOMON, *supra* note 21, at 231.

hypothetical bargain unless it was in their interests to do so.⁵² In other words, bargains are only struck when they are efficient and maximize value.⁵³ These assumptions lead creditors' bargain theorists to suggest that considering non-creditor interests or distributing estate assets other than in accordance with non-bankruptcy law is per se improper.⁵⁴ For example, when a debtor is deciding whether to continue its business as a going concern or liquidate, its only considerations should be to maximize returns to creditors (even at the expense of non-creditors) and to ensure that non-bankruptcy rights are respected.⁵⁵ Under the creditors' bargain theory, debtors should consider only the best interests of its creditors, and not whether reorganization or liquidation would be in the interests of employees, taxing authorities, or the local community, among others.⁵⁶

B. Flaws with the Creditors' Bargain Theory

The creditors' bargain theory has been heavily criticized for its assumptions, methodology, and the ends it pursues.⁵⁷ The most cogent

52. See JACKSON, *supra* note 15, at 59 n.80 (“[I]t is unlikely that secured creditors would agree to the bargain unless they received *some* of the gains resulting from the bargain.”).

53. This assumption has recently been called into question by a number of scholars. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *Anti-Bankruptcy*, 119 YALE L.J. 648 (2010); Richard A. Both, *The New Shareholder and the Current Financial Crisis: Things Happen*, 55 VILL. L. REV. 57, 68 (2010); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1988–90, 2016 (2002); Sarah Pei Woo, *Regulatory Bankruptcy: How Bank Regulation Causes Fire Sales*, 99 GEO. L.J. 1615 (2011) (asserting that creditors' behavior is influenced by financial regulation and regulatory policy).

54. JACKSON, *supra* note 15, at 214–15; see also LoPucki, *Team Production Theory*, *supra* note 18, at 749 (noting that “[a]ny consideration of non-creditor interests . . . would be inefficient” according to the creditors' bargain theory). *But see* Wei Zhang, *The Paradoxes of Secured Lending: Is there a Less Uneasy Case for the Priority of Secured Claims in Bankruptcy* 42 (2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986908 (arguing that efficiency—at least in the context of secured lending—“goes hand in hand with its distributional effects”).

55. See JACKSON, *supra* note 15, at 24 (arguing that incorporating the policy of preserving jobs into a bankruptcy statute “would be to mix apples and oranges”); see also LoPucki, *Team Production Theory*, *supra* note 18, at 748–49 (noting that the creditors' bargain theory is only concerned with creditor interests).

56. It is unclear how the creditors' bargain theory would account for assertions that creditor behavior is not always value maximizing. If creditors' bargain theorists would acknowledge that creditors may properly pursue individually (but not collectively) wealth maximizing strategies, see, e.g., Baird & Rasmussen, *supra* note 53, at 651, they might have to reconsider whether bankruptcy courts should protect non-creditor interests. Cf. Martin, *supra* note 48, at 429–30 (discussing non-creditor interests).

57. See, e.g., Jane Baron & Jeff Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 449 (1996) (“To assume, as economists do, the appropriateness of economic analysis is to evade what is actually the prior and deeper ethical question.”); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 715–16 (1980) (challenging certain empirical assumptions

criticisms are that the creditors' bargain model: (i) makes assumptions that are too crude to yield accurate predictions about bankruptcy law;⁵⁸ (ii) fails to acknowledge that sophisticated creditors have impliedly consented to the current bankruptcy regime;⁵⁹ and (iii) is a flawed normative theory.⁶⁰ Space constraints prevent a thorough discussion of the theory's many flaws, and this Article will focus on only one: the disjunction between the theory's singular focus on economic efficiency and Chapter 11's focus on other norms. However, even if the creditors' bargain model were a fault-free normative account of bankruptcy law, an alternative approach would still be useful because the creditors' bargain fails to account for several key features of bankruptcy law.

A gap exists in the corporate bankruptcy literature because existing theories, including the creditors' bargain model, cannot and do not accurately describe how Chapter 11 actually works.⁶¹ Economic analysis tends to assume that the parties' intent can be uncovered by applying an efficiency norm, but for many corporate debtors and their creditors (including non-contractual creditors) there are other norms at work that may be more important to understanding the parties' intent.⁶²

relied on by the creditors' bargain theorists); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 428 (1981); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1201 (1994) [hereinafter Nussbaum, *Flawed Foundations*] (asserting that law and economics assumptions are "too crude, so oversimple that they fail to single out those aspects of the world that are most salient for predictive purposes."); Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821, 823 n.5 (2009) (noting that the "literature critiquing law and economics is vast and rich" and citing "a few prominent examples," including Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 521 (1980) (critiquing wealth maximization as an efficiency criteria)); Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 614 (2009) [hereinafter Warren & Westbrook, *The Success of Chapter 11*] (criticizing a creditors' bargain study for lack of proper explanation of methodology and other missing data).

58. See e.g., Korobkin, *Normative Theory*, *supra* note 46, at 114–16; Woo, *supra* note 53, at 1617; see also Sunstein, *Incommensurability*, *supra* note 37, at 794 ("[W]ith the assumption of a unitary kind of valuation, we will sometimes offer inadequate predictions . . .").

59. See LoPucki, *Team Production Theory*, *supra* note 18, at 756–57 (2004) (suggesting that sophisticated creditors who do not segregate their assets into bankruptcy-remote entities have implicitly opted-in to the current bankruptcy system); cf. Douglas G. Baird & Anthony J. Casey, *No Exit? Withdrawal Rights and the Law of Corporate Reorganizations*, 113 COLUM. L. REV. 1, 5 (2013) (same).

60. See, e.g., Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 787–88 (1993) [hereinafter Sunstein, *Analogical Reasoning*].

61. See Lynn M. LoPucki, *Reorganization Realities, Methodological Realities, and the Paradigm Dominance Game*, 72 WASH. U. L.Q. 1307, 1308 (1994) [hereinafter LoPucki, *Reorganization Realities*] ("Economists who work on bankruptcy tend to slip off into the world of perfect markets and zero transaction costs . . .").

62. Multiple interests are typically at work. Even when one of those rationales is efficiency, a theory that focuses exclusively on efficiency can be problematic. See, e.g., *In re Cardelucci*, 285

The creditors' bargain fails to account for behavior that is guided by forces other than efficiency, even though corporate bankruptcy law is clearly guided by other social norms and moral intuitions.⁶³ Even if the creditors' bargain model were capable of accurately predicting the behavior of insolvent or bankrupt companies, if the model misunderstands the underlying motivations of actors, it may offer seriously flawed policy prescriptions.⁶⁴

The Bankruptcy Code specifically directs courts to consider non-efficiency rationales,⁶⁵ but the creditors' bargain model's relentless focus on efficiency blinds it to these directions.⁶⁶ Bankruptcy law appears to be grounded in the same principles of fairness and justice that undergird other areas of law and, like other areas of law, expects that individuals will act reasonably, diligently, and carefully.⁶⁷ Bankruptcy law is exceptionally concerned with these values. Both as a matter of statutory command, and as a result of bankruptcy courts' role as courts of equity, bankruptcy judges have a greater obligation than most judges to ensure that "substantial justice" is done.⁶⁸

The creditors' bargain model cannot adequately explain bankruptcy

F.3d 1231, 1236 (9th Cir. 2002) (noting that "two interests, fairness among creditors and administrative efficiency," are often both relevant to bankruptcy cases); *see also* SOLOMON, *supra* note 21, at 127 (noting that even corporations consider virtues other than efficiency to be relevant); Woo, *supra* note 53, at 1617–18 (arguing that bank regulation can explain decisions to pursue liquidation even when reorganization would be value maximizing).

63. *See* David Gray Carlson, *Postpetition Interest Under the Bankruptcy Code*, 43 U. MIAMI L. REV. 577, 613–14 (1989); *see also* Korobkin, *Rehabilitating Values*, *supra* note 18, at 757–61 (discussing *In re Johns-Manville Corp.*, 97 B.R. 174 (Bankr. S.D.N.Y. 1989), and concluding that the case "displays the bankruptcy process as rich, complex, and evolutionary, allowing expression and recognition of diverse human values"); Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 122 (1979) ("Wealth is an important element in most people's preferences . . . but it is not the sum total of those preferences."); Sunstein, *Incommensurability*, *supra* note 37, at 794; Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis*, 96 CALIF. L. REV. 323 (2008).

64. *See* Penalver, *supra* note 57, at 841 (noting that the "potential for misunderstanding is independently significant because it can result in seriously flawed policy prescriptions"); *see also* Korobkin, *Rehabilitating Values*, *supra* note 18, at 762 (arguing that, at best, the economic account of bankruptcy law "offers an undermining explanation of a bankruptcy system that recognizes noneconomic outcomes," and, at worst, "does not explain 'bankruptcy law' at all, but merely restates its own economic assumptions").

65. *See supra* note 5 (citing provisions of the Code).

66. To be fair, the creditors' bargain theory seeks to critique bankruptcy for its inefficiencies, and so it is not unexpected that it fails to engage with the Code's non-efficiency rationales.

67. Virtue ethics appears to have heavily influenced Anglo-American law. *See* Claeys, *supra* note 19, at 901 (contending that virtue ethics "heavily influenced Anglo-American property law"); *see also* Strang, *supra* note 20, at 2026. Virtue-based principles are the basis of contemporary private law. *See* GORDLEY, *PHILOSOPHICAL ORIGINS*, *supra* note 31, at 1–9 (1991) (explaining the progression of contract law to its modern state).

68. *Pepper v. Litton*, 308 U.S. 295, 305 (1939).

law because it is grounded in principles that could not have shaped bankruptcy law.⁶⁹ The creditors' bargain model is founded on principles derived from the clever insights of efficiency-minded academics, such as the effect of bankruptcy discharges on interest rates.⁷⁰ These principles were only "discovered" because the economic approach to law requires efficiency-minded academics to look for costs to be avoided.⁷¹ Efficiency is relevant to bankruptcy law, but it is not the only relevant value.⁷² The creditors' bargain model cannot provide an accurate description of the current state of the law because its efficiency-minded evaluative framework is not up to the task.⁷³

C. The Need for a New Bankruptcy Theory

Some bankruptcy scholars claim that our bankruptcy laws are the product of "social exigency, moral conflict, and political compromise"

69. Efficiency is surely relevant to bankruptcy law, but is not the *only* relevant virtue. James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 2 (2002) [hereinafter Gordley, *Moral Foundations*] (arguing that the virtues of prudence and distributive and commutative justice enable people to live their lives); see also Korobkin, *Rehabilitating Values*, *supra* note 18, at 739–40 (discussing the limitations of the economic account of bankruptcy law).

70. See Gordley, *Moral Foundations*, *supra* note 69, at 8 (discussing attempts to explain the doctrine of necessity in terms of economic efficiency); see also Korobkin, *Rehabilitating Values*, *supra* note 18 at 739–40 (detailing the shortcomings of the economic approach); Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1, 13 (1994) [hereinafter Rasmussen, *Optimal Bankruptcy*].

71. See Gordley, *Moral Foundations*, *supra* note 69, at 6 ("[T]heir economic approach requires them to look for a cost to be avoided."); see also Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1205–06 (1977) (discussing consequentialist arguments in the context of debates about rights); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 154 (1973) (noting that although there was a shift toward an economic model, some judges retained concern for traditional concepts like "reasonableness"); Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1047 (1978) (noting that while efficiency "has been an influential factor in prior law," it "has not been the only influential factor").

72. It is important to note that neither virtue jurisprudence nor bankruptcy law is antagonistic toward the economic analysis of the law. Far from it. Many Bankruptcy Code provisions require judges to promote efficiency and avoid unnecessary costs. For example, the bankruptcy system embraces some overtly utilitarian principles, including the requirement that creditors with a state law right to repossess collateral be forestalled from doing so. See 11 U.S.C. § 362 (2012). This imposes a cost on the individual creditor in order to maximize aggregate welfare for all creditors. In addition, § 363 requires that debtors accept the highest and best offer when selling assets of the estate, which courts have interpreted to mean the highest monetary offer. *Id.* § 363. Sections 327–330 address judicial oversight of the fees for bankruptcy professionals, and are intended to help control costs. *Id.* §§ 327–330. Section 105 is often used to justify consolidation of multiple bankruptcy cases for procedural purposes, which also helps to reduce costs. *Id.* § 105. Efficiency and thrift are both virtues that may apply in bankruptcy. However, while these goals are not anathema to virtue jurisprudence or bankruptcy law, neither are they their *raison d'être*.

73. See AMARTYA SEN, ON ETHICS AND ECONOMICS 78 (Basil Blackwell ed., 1987) ("[T]he distancing of economics from ethics has impoverished welfare economics, and also weakened the basis of a good deal of descriptive and predictive economics.").

rather than “the logical outcome of ethical principles consciously adopted and consistently applied by perfectly rational legislators.”⁷⁴ As a result, these scholars—notably David Carlson—have claimed that it is “unrealistic to expect to find ethical principles that would justify all of bankruptcy law.”⁷⁵ Carlson is correct that it is specious to assume that any particular theoretical model can possibly explain every detail and every rule in an area of law as complex as bankruptcy.⁷⁶ Nevertheless, our bankruptcy laws represent the collective judgments about bankruptcy policy that various Congresses have reached over time.⁷⁷ This Article assumes that these value judgments are mostly rational and “based on logically coherent reasons.”⁷⁸ Any mostly rational, logically coherent system should contain some common principles that have some unifying force for that system.

As such, there are at least two reasons to continue to pursue the hunt for a deep structure in bankruptcy. First, most extant bankruptcy theories, including the creditors’ bargain theory, are normative theories that seek to offer an authoritative theoretical perspective from which to criticize the current bankruptcy system and determine what ends an ideal bankruptcy system should seek to achieve. Most of these proposals fail to make any assertions whatsoever about the reality of the

74. Korobkin, *Normative Foundations*, *supra* note 18, at 543 (citing David G. Carlson *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1389 (1987)); *see also* Warren, *Bankruptcy Policy*, *supra* note 14, at 778 (“I see bankruptcy as a more complex and ultimately less confined process than [Professor] Baird.”). Bankruptcy is highly politicized and therefore bankruptcy law will always have elements that are incoherent from any theoretical prospective. *See* Levitin, *supra* note 45, at 1451–58 (discussing the “politics of bankruptcy”).

75. Korobkin, *Normative Foundations*, *supra* note 18, at 543 (1993) (citing David G. Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1389 (1987)); *see also* John D. Ayer, *Through Chapter 11 with Gun or Camera, But Probably Not Both: A Field Guide*, 72 WASH. U. L.Q. 883, 884 (1994) (asserting that there are different approaches to bankruptcy); Raymond T. Nimmer, *Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions*, 36 EMORY L.J. 1009, 1023 (1987) (contending that it would be “irresponsible . . . to suggest that for all outcomes, special and general protections in bankruptcy can be justified by one, or even several overarching policies”); Linda J. Rusch, *Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope—Stepping into the Fourth Dimension*, 55 MONT. L. REV. 9, 16 (1994) (asserting that the “beliefs and values” at the core of bankruptcy law cannot “be subject[ed] to the test of truth or falsity, but are really matters of individual faith and aspiration”).

76. *See* Lawrence Ponoroff, *Enlarging the Bargaining Table: Some Implications of the Corporate Stakeholder Model for Federal Bankruptcy Proceedings*, 23 CAP. U. L. REV. 441, 452–53 (1994) (arguing that bankruptcy models are merely “gross, oversimplified approximations of reality”).

77. Korobkin, *Normative Theory*, *supra* note 46, at 94.

78. *Id.*; *see also* Levitin, *supra* note 45, at 1405 (suggesting that a proper theoretical understanding of bankruptcy must be based on a political theory). Even at their best, models are “gross, oversimplified approximations of reality.” Ponoroff, *supra* note 76, at 452–53. However, models have explanatory prowess specifically because of their reductive nature.

current bankruptcy system.⁷⁹ No other theory of corporate bankruptcy law has done an adequate job of providing a positive account of current bankruptcy law and the equitable principles that have motivated corporate bankruptcy law and policy since its inception.⁸⁰ As such, it appears that corporate bankruptcy law is currently “under-theorized,” and this Article seeks to fill this gap in the literature. For many, a theory that offers a positive account of our current bankruptcy system would be a welcome alternative.⁸¹ An alternative account of corporate bankruptcy law that is able to tap into insights about the purposes of our bankruptcy policies would be even more valuable.

Second, virtue jurisprudence can provide a useful theoretical counterweight to existing corporate bankruptcy theories and prevent the terms of the debate from becoming solely focused on any one theory. If this Article’s sole accomplishment is to leave readers with an introduction to virtue ethics, and the first glimmers of virtue ethics’ potential explanatory power for corporate bankruptcy law, it will be a success. As it stands, corporate bankruptcy scholarship has been dominated by the creditors’ bargain approach for some time.⁸² This is not surprising because, with a few notable exceptions,⁸³ there has not been a serious theoretical alternative presented. Unless a vibrant alternative theory can be presented, the very terms of the debate may continue to shift into the language of economics.⁸⁴ For those scholars who remain doubtful of the benefits of an exclusive and relentless focus

79. See LoPucki, *Reorganization Realities*, *supra* note 61, at 1309 (noting that economists have failed to explain how they will deal with current problems in implementing their proposals); see also Korobkin, *Normative Theory*, *supra* note 46, at 116 (asserting that Professor Jackson’s “common pool account” of bankruptcy law fails as an explanatory theory); Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 358 (2007) (noting that some scholars remain “mystified that anyone takes [economic analysis] seriously, especially as an explanatory theory” (emphasis in original)); cf. Zamir & Medina, *supra* note 63, at 391 (suggesting that deontologically constrained cost-benefit analysis would make economic analysis “descriptively more valid”).

80. See *supra* note 5 and accompanying text (noting that bankruptcy laws force bankruptcy courts to consider equitable principles like fairness, honesty, and justice).

81. But see LoPucki, *Reorganization Realities*, *supra* note 61, at 1310–11 (calling for a better approach that does not “miss most of the economic interrelationships”).

82. See Susan Block-Lieb, *A Humanistic Vision of Bankruptcy Law*, 6 AM. BANKR. INST. L. REV. 471, 472 (1998) (acknowledging that economic analysis has dominated bankruptcy scholarship); Claeys, *supra* note 19, at 893 (same).

83. Among those offering competing theories are Donald Korobkin, Ronald Mann, Karen Gross, and Lynn M. LoPucki. See, e.g., Korobkin, *Normative Theory*, *supra* note 46, at 78–79 (noting the existence of competing theories).

84. For some, this is precisely the point. See LoPucki, *Reorganization Realities*, *supra* note 61, at 1310–11 (suggesting that creditors’ bargain theorists are engaged in “a deadly serious endeavor” to dominate the terms of the debate over bankruptcy law).

on economic efficiency and ex ante entitlements, a competing framework for understanding bankruptcy law would be very valuable.⁸⁵

II. VIRTUE JURISPRUDENCE AS BANKRUPTCY THEORY

A. Introducing Virtue Ethics

Virtue ethics is the oldest of the three major schools of moral philosophy,⁸⁶ and is rooted in the philosophies of Aristotle and Thomas Aquinas, among others.⁸⁷ Like alternative theories, virtue ethics is not a monolithic approach to moral philosophy. Nevertheless, most accounts of virtue ethics focus on the relationship between law and character, and tend to be concerned with the lived experiences of human life.⁸⁸ They tend to offer a normative account of contemporary moral issues predicated on encouraging virtues such as fairness, equity, and justice in human relations.⁸⁹ While virtue ethics has ancient roots, it is also essentially a new theory, and one that draws on recent developments in moral philosophy to update its historical antecedents.⁹⁰

Virtue ethical accounts generally focus on how citizens may achieve *eudaimonia* (human flourishing).⁹¹ Virtue ethics conceives of *eudaimonia* as the ultimate good: the state of being that all people should seek to achieve.⁹² Virtue ethicists also believe that achieving the ultimate good is only possible by acting in accordance with the

85. The debate in the corporate bankruptcy literature parallels debates happening in other disciplines as well. *See, e.g.*, Penalver, *supra* note 57, at 863–64 (offering virtue ethics as an alternative to the dominant law and economics model of property law).

86. *See* Strang, *supra* note 20, at 2017 (recognizing that “[t]he other two competing ethical traditions are deontology and consequentialism”).

87. Other noted advocates of virtue ethics include Confucius, Hume, the Late Scholastics, Plato, and the Stoics. *See* Rebecca L. Walker & Philip L. Ivanhoe, *Introduction* to *WORKING VIRTUE: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS* 1, 3 (Rebecca L. Walker & Philip L. Ivanhoe eds., 2007) (noting proponents of virtue ethics); *see also* MACINTYRE, *supra* note 19, at 118 (same); Gordley, *Moral Foundations*, *supra* note 69, at 1 (same).

88. Solum, *Theory of Judging*, *supra* note 27, at 179; *see also* SOLOMON, *supra* note 21, at 99 (discussing the need for a theory that “provides not just an abstract set of principles”).

89. *See* Walker & Ivanhoe, *supra* note 87, at 3 (asserting that while a variety of approaches to virtue ethics exist, “all share something in common by offering virtue-based analyses of contemporary moral issues”). Among the various normative approaches to virtue theory are those offered by Alasdair MacIntyre, Julia Driver, and Rosalind Hursthouse. *See* JULIA DRIVER, *The Virtues and Human Nature*, in *HOW SHOULD ONE LIVE?: ESSAYS ON THE VIRTUES* 116, 116 (Roger Crisp ed., 1996); HURSTHOUSE, *supra* note 19, at 28–29; MACINTYRE, *supra* note 19, at 150–52.

90. Rosalind Hursthouse’s book, *ON VIRTUE ETHICS*, offers an excellent introduction to virtue ethics. *See* HURSTHOUSE, *supra* note 19, at 1–25; *see also* MACINTYRE, *supra* note 19, at 146–64.

91. *Eudaimonia* is discussed further in the text accompanying notes 21–29.

92. *See* MACINTYRE, *supra* note 19, at 140 (noting the link between virtue and happiness).

virtues.⁹³ People must practice acting virtuously and only by repeated, conscious efforts to internalize virtuous behavior can *eudaimonia* be achieved.⁹⁴

Virtue ethics relies on concepts of vice and, correspondingly, of virtue.⁹⁵ Virtue refers to something like an admirable character trait, and simultaneously, to a person's propensity to act in accordance with that character trait.⁹⁶ Acting virtuously helps a person "fit into" and contribute to society.⁹⁷ Virtuous action requires more than simply acting in accordance with the virtues, and is not simply "the result of a cost/benefit calculation of utility."⁹⁸ A virtuous action is the right action taken for the right reasons;⁹⁹ "right action" requires a unity of reason and feeling.¹⁰⁰ Vice is the converse. Vice refers to something

93. See Cimino, *Virtue and Contract*, *supra* note 22, at 713 ("At its broadest level, Aristotelian virtue causes human beings to be happy and function well." (citation omitted)).

94. SOLOMON, *supra* note 21, at 4–5 (1992).

95. ROSALIND HURSTHOUSE, ETHICS, HUMANS AND OTHER ANIMALS 147 (2000) [hereinafter HURSTHOUSE, ETHICS, HUMANS, AND OTHER ANIMALS]; see also SOLOMON, *supra* note 21, at 103 (defining Aristotelian virtue as "all-round personal excellence").

96. See Peter Koller, *Law, Morality, and Virtue*, in WORKING VIRTUE: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS, *supra* note 21, at 192, 192 ("The concept of virtue refers to the *character traits of persons*, their practical attitudes or dispositions, which have some motivating force for their conduct." (emphasis in original)); see also HURSTHOUSE, *supra* note 95, at 147 ("A virtue is . . . a good, or admirable, or praiseworthy *character trait* . . ." (emphasis in original)); MACINTYRE, *supra* note 19, at 191 (offering a "partial and tentative definition" of virtue as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods"); Cimino, *Virtue and Contract*, *supra* note 22, at 716 (noting that virtue is "just the right amount" of a particular trait (citation omitted)); Jeffrey Nesteruk, *Law, Virtue, and the Corporation*, 33 AM. BUS. L.J. 473, 476 (1996) (noting that virtues are "context-bound" and "cannot be defined in the abstract").

97. SOLOMON, *supra* note 21, at 107.

98. *Id.* at 109; see also MACINTYRE, *supra* note 19, at 149 (arguing that an "educated moral agent . . . does what is virtuous *because* it is virtuous"); Anthony Duff, *Virtue, Vice, and Criminal Liability*, in VIRTUE JURISPRUDENCE 193, 195–96. An example may be helpful. Honesty is a virtue represented by "the ideal of straight dealing, fair play, common knowledge, and open inquiry." See SOLOMON, *supra* note 21, at 192. To say that a person has the virtue of honesty refers both to the fact that a person generally tells the truth and to that person's disposition to truth telling. The virtue of honesty is something more than simply the principle "do not lie," because a truly honest person is one that does not even think of lying. See *id.* at 194–95. It is also not enough for a person to act out of obligation, fear of punishment, or for similar reasons. A person does not possess the virtue of honesty if she tells the truth for any reason other than because telling the truth is the right thing to do.

99. MACINTYRE, *supra* note 19, at 149.

100. See HURSTHOUSE, *supra* note 19, at 28; see also MACINTYRE, *supra* note 19, at 122, 149 (stating that "[v]irtues just are those qualities which sustain a free man in his role and which manifest themselves in those actions which his role requires" and that "[v]irtues are dispositions not only to act in particular ways, but also to feel in particular ways"); Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, in VIRTUE JURISPRUDENCE, *supra* note 35, at 214, 214 ("Virtue, for Aristotle, was . . . a quality of exemplary practical judgment by which the agent

like a person's despicable character traits and a disposition to act in accordance with that character trait.¹⁰¹

Virtues are not abstract concepts.¹⁰² In the abstract, virtues lack moral content; they gain meaning only in the context of human activity.¹⁰³ Considering a virtue in the abstract renders the content of that virtue incoherent and meaningless.¹⁰⁴ Put differently, “[v]irtues tend to be context-bound.”¹⁰⁵ For example, charity is often considered to be a virtue.¹⁰⁶ However, if a person is overly-charitable, that person may be considered foolish.¹⁰⁷ Consider both a single parent working a low-wage job to support his family and a wealthy socialite who doesn't have such concerns. Charity might require that each contribute a personally significant amount to the needy, but the absolute amount of each individual's charitable giving will depend on their particular circumstances. As a result, society might judge the single parent to be generous to a fault if he were to give his family's grocery money to a charitable cause instead of buying enough food for his children. Yet, society might consider the wealthy socialite stingy and lacking in charity if he donated twice as much to the same cause, because doing so does not deprive his loved ones of essential needs, and is a less personally significant amount. Because the virtue of charity is context-bound, society may fairly expect that the wealthy should contribute more to charity than the poor.¹⁰⁸

This example also highlights the Aristotelian concept of the “golden mean.” The golden mean suggests that virtues are just the right amount of a particular trait for a particular situation.¹⁰⁹ Virtues are not just

does right because the right is what he wants to do . . .”).

101. See HURSTHOUSE, *supra* note 95, at 147 (“[A] vice is a bad, or despicable or unpraiseworthy character trait.”).

102. See Nesteruk, *supra* note 96, at 476 (noting that “virtues are context bound”).

103. Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 338 (1993) (noting that virtues “acquire their coherence and meaning only by their unique capacity to assist a person to achieve excellence in particular varieties of human activity”).

104. *Id.*

105. MACINTYRE, *supra* note 19, at 123; SOLOMON, *supra* note 21, at 167; Nesteruk, *supra* note 96, at 476.

106. Caryn L. Beck-Dudley, *No More Quandaries: A Look at Virtue Through the Eyes of Robert Solomon*, 34 AM. BUS. L.J. 117, 119 (citing ST. THOMAS AQUINAS, SUMMA THEOLOGICA, at pt. II-II, qq. 1–27 (Fathers of the English Dominican trans., 1948)); see also HEIDI M. HURD & RALPH BRUBAKER, DEBTS AND THE DEMANDS OF CONSCIENCE: THE VIRTUE OF BANKRUPTCY (forthcoming April 1, 2014) (on file with author).

107. See *infra* notes 114–15 and accompanying text (discussing the golden mean).

108. The Bible also suggests as much: “For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more.” *Luke* 12:48 (King James).

109. See ARISTOTLE, *supra* note 23, at 372 (“[T]he equal is some intermediate between excess

labels, but rather involve choices along a spectrum. For example, the virtue of charity requires giving an appropriate amount: not so little as to be uncharitable and not so much as to be a spendthrift.¹¹⁰

Virtues are also role-related.¹¹¹ As the nature of appropriate action differs from role to role, we should expect people who occupy different roles to exhibit different virtues.¹¹² For example, we can contrast the respective roles of a judge and a legislator.¹¹³ Society has very different expectations for individuals occupying these positions. People might believe that a Congresswoman who aligns her views with those of her constituents on a contentious political issue is doing her job well and exhibits the virtue of prudence.¹¹⁴ By contrast, a judge who molded her views to those of the electorate would fairly open herself up to claims that she had behaved imprudently, perhaps even corruptly. In part, the difference between prudent and imprudent action depends on the actor because our conceptions of virtuous action are role-related. Legislators should be responsive to their constituents, but judges should decide cases based on principles divorced from popular sentiment.¹¹⁵

The contextual and role-dependent nature of virtue means that acting virtuously requires more than simplistic conformity to a code of behavior¹¹⁶ and that virtue cannot be reduced to definite and universal

and deficiency.”); *see also* Cimino, *Virtue and Contract*, *supra* note 22, at 716 (“Virtue involves making a choice between two extremes . . .”).

110. Bravery is the prototypical example used to explain the concept of the golden mean. The virtue of bravery refers to the mean between two opposite choices along the spectrum of fearfulness. At one extreme end of the spectrum is rashness. Rashness is the state of having a deficiency of fear. At the other end of the spectrum is cowardice. Cowardice is the state of having an excess of fear. A person having the virtue of bravery has the right amount of fear, given her particular situation. In this way, a brave person may be said to occupy the mean between rashness and cowardice. *See* Cimino, *Virtue and Contract*, *supra* note 22, at 716 (discussing the virtue of bravery).

111. MACINTYRE, *supra* note 19, at 129; SOLOMON, *supra* note 21, at 196 (discussing this point and adding that virtues also vary among different cultures); Nesteruk, *supra* note 96, at 476. Some empirical evidence suggests that roles are important in explaining behavior. *See, e.g.*, CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY* 123–25 (2005) (discussing evidence drawn from ultimatum games); Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in *MORAL SENTIMENTS AND MATERIAL INTERESTS* 3, 8–18 (Herbert Gintis et al. eds., 2005).

112. SOLOMON, *supra* note 21, at 196–97.

113. I am indebted to Jeffrey Nesteruk for this example. *See* Nesteruk, *supra* note 96, at 476–77.

114. Of course, we would also like our Congresspersons to have the virtues of honesty and integrity: to tell the truth, avoid shady or illicit dealings, and refuse bribes. *See* SOLOMON, *supra* note 21, at 169 (discussing the kind of integrity we hope for in politicians).

115. Nesteruk, *supra* note 96, at 476–77.

116. Virtues “cannot be dictated according to abstract rules or principles.” SOLOMON, *supra* note 21, at 109, 233. “There is no simple calculus or decision procedure” for business. *Id.* at

rules.¹¹⁷ The lack of definitive rules recognizes that a certain amount of subjectivity inheres in all decisions, but it does not mean that all decisions are correct just because a decision maker says so. Although somewhat fuzzier than deontological or consequentialist decision making, virtue ethics can provide guidance to decision makers. It does so through the use of the intellectual virtue known as practical wisdom (*phronesis*), which is discussed further below.¹¹⁸

*B. Three Reasons Why Virtue Jurisprudence Can Undergird a
Descriptive Theory of Bankruptcy Law*

Virtue jurisprudence offers an interesting new way of thinking about bankruptcy law, and is better suited than existing theories to explain some of bankruptcy law's key features for at least three reasons. First, virtue jurisprudence appears grounded in the same values and principles that underlie bankruptcy law.¹¹⁹ Second, adopting a virtue jurisprudential framework for analyzing how bankruptcy judges balance the competing demands of bankruptcy law's multiple dimensions and incommensurable ends can help provide a rich and fulsome understanding of the law.¹²⁰ In particular, *phronesis*—virtue jurisprudence's decision-making apparatus—can explain how bankruptcy judges reconcile these demands and arrive at an appropriate decision in a particular case.¹²¹ Third, virtue ethics' simultaneous consideration of means and ends can offer insights into how bankruptcy judges use their Bankruptcy Code-sanctioned discretion and commercial judgment.¹²² Each is discussed in greater detail below.

179. Nor is there one for bankruptcy.

117. Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1426 (1995); see also SOLOMON, *supra* note 21, at 179 (“[T]hose who try to follow such a calculus or procedure will almost inevitably get caught up in its simple-mindedness.”).

118. See *infra* Part II.B.2; see also *supra* notes 8–13 and accompanying text.

119. See Gordley, *Moral Foundations*, *supra* note 69, at 2–5 (discussing the moral foundations of private law); see also MACINTYRE, *supra* note 19, at 257 (suggesting that modern morality is Aristotelian). Particularly as compared to the creditors' bargain theory, virtue jurisprudence and bankruptcy law share a notably parallel vocabulary. See Korobkin, *Rehabilitating Values*, *supra* note 18, at 739–40 (noting that “the economic account . . . neglect[s] bankruptcy law's unique history and distinctive function[s]”).

120. Certain values take lexical priority over others despite a claim of incommensurability. See Nussbaum, *Flawed Foundations*, *supra* note 57, at 1202 (noting the “plural valued approach inspired by Aristotle”). As such, the notion of incommensurability does not mean that two values are incomparable. See generally Sunstein, *Incommensurability*, *supra* note 37 (noting that while “goods are not assessed along a single metric,” public and private choices can be evaluated).

121. *Phronesis* and practical wisdom are used interchangeably throughout this Article. See Feldman, *supra* note 35, at 58 (noting that *phronesis* is sometimes translated as “practical wisdom”); see also MACINTYRE, *supra* note 19, at 153 (discussing *phronesis*).

122. See, e.g., 11 U.S.C. § 1129(a)(11) (2012) (allowing the bankruptcy court to approve a

1. The Shared Language of Virtue

Both virtue jurisprudence and bankruptcy law evince concern with virtues such as honesty, fairness, equity, and justice.¹²³ To some extent, these virtues provide a foundation for all law;¹²⁴ however, bankruptcy law appears to draw particularly heavily on notions of virtue. The use of a shared, virtue-centric vocabulary suggests that a greater understanding of virtue jurisprudence can lead to insights about the Bankruptcy Code.

For example, both virtue jurisprudence and bankruptcy law emphasize virtues such as justice and equity.¹²⁵ In virtue jurisprudence, justice requires that each person receive what he or she is due, which is directly proportional to his or her merit.¹²⁶ Bankruptcy law mirrors this conception of justice in its focus on ensuring that similarly situated creditors receive equal distributions from the estate, unless they agree otherwise.¹²⁷ In this way, both virtue jurisprudence and the Bankruptcy Code evidence a shared concern with justice as equality.

The creditors' bargain theory suggests that bankruptcy law should focus relentlessly on economic efficiency, thereby ensuring that the

plan if it is feasible, but allowing the bankruptcy courts to define feasibility); *see also* Matthew Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to Section 363 Sales*, 62 CATHOLIC U. L. REV. 1, 8–9 (2012) (noting that bankruptcy judges enjoy an enormous amount of discretion in approving § 363 sales).

123. *See supra* notes 3–7 and accompanying text (discussing the relevance of these concepts to virtue ethics); *see also supra* note 5 and accompanying text (discussing specific Code sections that draw on these virtues).

124. Like most law, bankruptcy law was built on the foundations of virtue and crafted by lawmakers indoctrinated in the philosophy of virtue. *See* MACINTYRE, *supra* note 19, at 257 (discussing the “distinctive kind of morality” of the Aristotelian tradition which is “so predominant in modern conceptions of morality”); *see also* SOLOMON, *supra* note 21, at 17 (“Business . . . depends upon and presupposes the virtues and that basic sense of community and minimal mutual trust without which no activities of production or exchange or mutual benefit would be possible.”); *cf.* GORDLEY, *PHILOSOPHICAL ORIGINS*, *supra* note 31, at 1–10 (discussing the virtues underlying contract law).

125. *See supra* notes 3–7.

126. *See* SOLOMON, *supra* note 21, at 232 (“The basic idea is that justice has much to do with merit—giving each student what he or she *deserves* on the basis of effort and accomplishment.” (emphasis in original)).

127. The ability to claw back payments to creditors is grounded in an attempt to equalize distributions among creditors and avoid the debtor's ability to prefer one creditor over another. *See, e.g.*, 11 U.S.C. § 547 (providing bankruptcy trustees with the power to avoid preferential transfers); *see also* Sydney Krause, Homer Kripke & Charles Segilson, *The Code and the Bankruptcy Act*, 42 N.Y.U. L. REV. 278, 292 (1967) (“A cornerstone of the bankruptcy structure is the principle that equal treatment for those similarly situated must be achieved.”). There are, of course, many instances where the Code authorizes a departure from this norm. *See, e.g.*, 11 U.S.C. § 507 (providing priority payment of the claims of certain special interests). Nevertheless, these exceptions only help prove the rule.

pool of assets distributed to creditors is as large as possible.¹²⁸ This theory also suggests that ex ante contract rights should be respected to the greatest extent possible.¹²⁹ While bankruptcy law is concerned about efficiency and contract rights, it is also concerned about fairness, justice, and other similar principles, and with the notion that the enforcement of contracts “should not offend deeply held social norms.”¹³⁰ As a result, virtue jurisprudence may be better suited to provide a positive theory of bankruptcy law than alternative theories, which have a more limited focus because they do not rest on the same foundations.¹³¹

For example, 11 U.S.C. § 1114(g) provides that a court may not modify retiree benefit plans unless the court finds that, among other things, modification is necessary to permit the debtor’s reorganization, all “affected parties are treated fairly and equitably,” and modification is “clearly favored by the balance of the equities.”¹³² The Code’s references to fairness and equity are not defined, and courts appear to rely, in part, on a virtue ethical definition to give contest to these phrases.¹³³ One example is found in the 2006 case of *In re Kaiser Aluminum Corporation*.¹³⁴

In that case, the debtors were a corporate group of twenty-six companies involved in the aluminum industry (“Kaiser”). Due to weak industry conditions, credit lines that could not be rolled over, ongoing asbestos litigation, and legacy obligations to retirees, Kaiser filed for bankruptcy.¹³⁵ While in bankruptcy, Kaiser sought to terminate six of its pension plans, which covered more than 13,000 current and former

128. See *supra* notes 45–49 and accompanying text (explaining that the creditors’ bargain model provides that the optimal bankruptcy system should maximize the expected value of the assets of the bankruptcy estate).

129. See *supra* notes 45–49 and accompanying text.

130. See Warren, *Bankruptcy Policy*, *supra* note 14, at 780; *supra* note 5 (discussing specific Code sections that draw on these virtues).

131. See MACINTYRE, *supra* note 19, at 257.

132. The relevant text of 11 U.S.C. § 1114(g) reads:

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities.

133. See, e.g., *In re Kaiser Aluminum*, 456 F.3d 328 (3d Cir. 2006).

134. *Id.* at 330.

135. *Id.* at 331.

workers.¹³⁶ If Kaiser were able to shed these obligations, its ability to reorganize would be improved, but covered employees would end up receiving only those minimum benefits guaranteed by the Pension Benefit Guaranty Corporation (the “PBGC”).¹³⁷

In determining whether the debtor should be allowed to terminate its six pension plans, the court had to decide if the debtor could consider these pension plans in the aggregate, or if it was required to consider them on an individual basis. It was undisputed that if the debtor analyzed each plan separately, it was not necessary to terminate all six in order to facilitate the company’s reorganization.¹³⁸ In other words, the debtor had sufficient resources to meet its obligations under *some* of the pension plans *and* to reorganize. Employees who participated in plans that were not terminated would receive their full, expected benefits in the normal course. But employees who participated in plans that were terminated would receive only the PBGC-guaranteed minimum amounts, which were often substantially lower than the fully vested pensions due to plan participants. The statute is silent on whether decisions to terminate can be made using an aggregate approach or if each plan must be separately considered.

The Third Circuit allowed the debtor to terminate all six plans despite the PBGC’s objection.¹³⁹ Among other reasons, the court held that the plan-by-plan approach advocated by the PBGC was arbitrary and therefore inequitable within the meaning of § 1114(g).¹⁴⁰ The PBGC’s approach was arbitrary and inequitable because it would have forced the debtor to pick and choose among similar plans—often involving members of the same union—without any standards to guide its choices. The court’s focus on avoiding arbitrary and inequitable action reflects some of the same considerations that a virtue ethicist would use. Although the result was that more employees ended up receiving smaller pensions than they might have otherwise, the Third Circuit determined that this was the equitable result because it avoided arbitrary decision making.

Although the result in *In re Kaiser* is not an obviously just result, this case is an example of a court speaking in and drawing on virtue ethical terms to give content to some of the obligations of the bankruptcy courts. Admittedly, it is counter-intuitive to claim that equity has been

136. *Id.* at 332.

137. *Id.* at 333.

138. *Id.*

139. *Id.* at 347.

140. *Id.* at 342.

done when fewer individuals receive the benefits that they anticipated receiving. However, the Third Circuit clearly manifested a concern with avoiding arbitrary determinations, which lies at the heart of the virtue of equity. It is also important to note that if the court had explicitly considered the virtue of justice, it may well have reached a different conclusion. The *In re Kaiser* court appeared to use a partial conception of virtue jurisprudence to reach its conclusion. This Article suggests that judges should rely more explicitly on virtue jurisprudential conceptions of bankruptcy law in order to decide cases involving statutes that speak in virtue jurisprudential terms.

2. Practical Wisdom

Practical wisdom is a particular type of virtue—an intellectual virtue—that helps order and make sense of the potentially competing demands of the other virtues.¹⁴¹ Practical wisdom is particularly important to virtue jurisprudence because virtue jurisprudence does not offer a definite list of virtues that apply in a particular case.¹⁴² Instead, virtue jurisprudence offers a method for identifying the relevant virtues and for applying these inherently general virtues to particular cases. Practical wisdom can be understood as the intellectual quality of decision makers that enables them to perform this task well and thereby reach the correct result in a particular situation.¹⁴³

One way to think about practical wisdom is by considering the concept of the virtuous person.¹⁴⁴ A virtuous person is one who possesses and exercises only the virtues, and who shuns vice.¹⁴⁵ Whether or not such a person actually exists, the virtuous person sets the standard for how judges should think about how people ought to act.¹⁴⁶ In many ways, the virtuous person is a construct akin to the

141. See SOLOMON, *supra* note 21, at 174 (discussing practical wisdom).

142. See *supra* notes 111–17 (explaining that virtue is contextual and role-dependent, and therefore irreducible to a definite rule).

143. See Solum, *Natural Justice*, *supra* note 36, at 84 (“Practical wisdom is the virtue that enables one to make good choices in the choosing of legal ends and means.”); see also HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 19, at 40 (noting that practical wisdom “might be required both to interpret the rules and to determine *which* rule was most appropriately to be applied in a particular case” (emphasis in original)).

144. See HURSTHOUSE, *ETHICS, HUMANS, AND OTHER ANIMALS*, *supra* note 95, at 148 (discussing the “virtuous person” concept).

145. See Solum, *Theory of Judging*, *supra* note 27, at 189 (describing judicial virtues); see also HURSTHOUSE, *ETHICS, HUMANS, AND OTHER ANIMALS*, *supra* note 95, at 147 (contending that virtuous people condemn those who are “self-interested, mean, callous, cruel, spiteful, dishonest, silly and thoughtless, unjust, dishonorable, disloyal, lazy, unfair, irresponsible, uncaring, cowardly, materialistic”).

146. See HURSTHOUSE, *ETHICS, HUMANS, AND OTHER ANIMALS*, *supra* note 95, at 148.

reasonable person standard in contract law: it is a hypothetical decision maker against which judges can measure the appropriateness of certain actions in particular circumstances.¹⁴⁷

Practical wisdom requires the decision maker to take two actions. First, decision makers must identify the relevant virtues. And second, they must consider what decision these virtuous traits would dispose a virtuous person to make.¹⁴⁸ In easy cases, practical wisdom can be regarded as a working theory of the world on which people rely, perhaps unconsciously, when making decisions.¹⁴⁹ For example, a person possessing the virtue of honesty might instinctively return any excess change given to them by a clerk after having made a purchase. It is not necessary for a habitually honest person to reflect on the relevant virtues and the proper course of actions because they have internalized this decision-making process.

But practical wisdom is also a distinct form of judgment that enables a person to bring to bear her past experiences to help inform the right action to take in a new situation.¹⁵⁰ It can also be thought of as the combination of common sense, refined by practice and experience, and analogical reasoning.¹⁵¹ In more difficult cases, decision makers may need to reason more consciously about the relevant virtues and the actions a virtuous person would take. Put differently, decision makers may need to perform a sort of thought experiment to ascertain how a person possessing the specific virtues relevant to the particular situation

147. *Id.*; see also Cimino, *Virtue and Contract*, *supra* note 22, at 730–31 (contending that virtue jurisprudence can suggest common themes, provide guidance to judges, and give context to broad legal standards). Note that because virtue ethics is context specific, see *supra* text accompanying notes 99–105, the correct way to behave will differ with the circumstances. See Chapin Cimino, *Private Law, Public Consequences, and Virtue Jurisprudence*, 71 U. PITT. L. REV. 279, 282 (2010) [hereinafter Cimino, *Private Law, Public Consequences*] (asserting that practical wisdom “reject[s] formalism in favor of contextualism”); see also MACINTYRE, *supra* note 19, at 123 (noting the context-specific nature of virtues); Sunstein, *Incommensurability*, *supra* note 37, at 852–53 (contending “most answers must be developed in the context of particular problems”).

148. See Feldman, *supra* note 35, at 58–59 (contending that “good judgment in the choice and pursuit of one’s ends” is a virtuous trait); see also HURSTHOUSE, *ETHICS, HUMANS, AND OTHER ANIMALS*, *supra* note 95, at 147 (asserting that “[v]irtue ethics assesses people *and* actions in terms of the virtues and vices” (emphasis in original)).

149. See SOLOMON, *supra* note 21, at 195 (stating that virtues become engrained in a person’s character); Lawrence B. Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, in *VIRTUE JURISPRUDENCE*, *supra* note 35, at 142, 159–60 [hereinafter Solum, *Virtue-Centered Account*] (noting that judges using practical wisdom act unconsciously).

150. See Solum, *Virtue-Centered Account*, *supra* note 149, at 160 (asserting that “experience . . . is required for practical wisdom”).

151. See SOLOMON, *supra* note 21, at 175–76 (noting that “[d]ecision making . . . takes practice” and that good judgment can only be developed through experience).

would behave in that situation.¹⁵² Through this experiment, the virtuous decision maker engages in a virtue-centered decision process and chooses a “correct” decision from among the available alternatives.¹⁵³

The process by which bankruptcy judges evaluate the multiple demands of various potentially applicable but competing bankruptcy policies can be usefully compared to practical wisdom.¹⁵⁴ Bankruptcy courts must do more than simply balance the expected costs and benefits of a particular decision. Bankruptcy courts are courts of equity, and bankruptcy judges must be able to determine which rule is the most appropriate for a particular case and to correctly apply inherently general laws to the facts of that case.¹⁵⁵ Although this may seem simply like guesswork, excellent judges do not simply guess at the correct answer.¹⁵⁶ Rather, repeated encounters with similar problems refine a judge’s ability to analogize to similar cases, which can be developed into an internalized set of rules and procedures for deciding cases.¹⁵⁷

Although bankruptcy courts are generally required to follow black letter law when making decisions, as courts of equity it is expected that they must sometimes depart from the law in order to do justice in

152. See Feldman, *supra* note 35, at 52–53 (noting that “virtue ethics identifies particular traits as more or less worthy, asks what sort of acts these traits dispose a person to perform, and then rates acts according to whether or not they are of the kind a person possessed of worthy character traits would perform”).

153. This requires a context-specific, deliberative evaluation. *Id.* at 53. It belittles the role of judges to reduce such inquiries into questions of maximizing utility. See *id.* (noting the necessity of context-specific deliberation); see also HURSTHOUSE, VIRTUE ETHICS, *supra* note 19, at 12 (noting that virtues become “strongly entrenched” and are difficult to change, keeping a “virtuous person” virtuous).

154. See HURSTHOUSE, VIRTUE ETHICS, *supra* note 19, at 12 (noting that practical wisdom is the “ability to reason correctly about practical matters”).

155. See *id.* at 40 (contending that “a certain amount of virtue and corresponding moral or practical wisdom . . . might be required both to interpret the rules and to determine *which* rule was most appropriately to be applied in a particular case” (emphasis in original)); Solum, *Natural Justice*, *supra* note 36, at 173 (recognizing that judges must possess practical wisdom).

156. Through experience, judges digest and synthesize the various competing concerns and considerations involved in common disputes, so that their decision-making may appear spontaneous. See SOLOMON, *supra* note 21, at 233 (noting that the accumulation of precedent gives rise to more efficient decision-making). Acting virtuously develops into a kind of understanding as to how to act, but a person must also consciously aim to act virtuously and practice doing so. *Id.* at 5, 174; see also GROSS, *supra* note 13, at 105 (discussing the role of intuition in bankruptcy decision-making).

157. See Francis J. Mootz III, *Vico’s “Ingenious Method” and Legal Education*, 83 CHL-KENT L. REV. 1261, 1277 (2008) (recognizing that “expert practice is the source of formal knowledge about practice”).

particular cases.¹⁵⁸ This is sensible; the existence of consistently followed rules helps ensure predictability, certainty, and respect of legitimate expectations.¹⁵⁹ At the same time, granting bankruptcy courts the powers of equity allows them to fill the gaps left when legislators draft laws of general applicability. These powers also allow judges to make exceptions in cases where the straightforward application of the law would lead to unanticipated or unjust results.¹⁶⁰ In these ways, equity furthers legislative intent.

Equity is particularly important in the bankruptcy context, where bankruptcy judges have more than just the interstitial gap-filling power that all courts have.¹⁶¹ Several Code provisions specifically direct bankruptcy judges to consider equitable principles.¹⁶² In addition, section 105 of the Code is also a powerful tool in a bankruptcy judge's equitable arsenal.¹⁶³ Although several circuit courts have said that

158. See *Hecht v. Bowles*, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case.”); see also Colin Farrelly & Lawrence B. Solum, *An Introduction to Aristotelian Theories of Law*, in VIRTUE JURISPRUDENCE, *supra* note 35, at 1, 19 (“A common understanding of equity is that legal decision makers sometimes ought to depart from the rules in order to do justice in particular cases.”); Solum, *Virtue-Centered Account*, *supra* note 149, at 143 (same).

159. In a virtue jurisprudential account of the law, predictability and certainty are provided by the use of analogical reasoning, *stare decisis*, and by focusing on the consequences of decisions. See Sunstein, *Incommensurability*, *supra* note 37, at 858 (“Much of the relevant work here is done in two ways: through analogies and through understanding consequences”); see also GROSS, *supra* note 13, at 217 (noting that “prior decisions and legislative history can help guide the decision maker” when while leaving room for individualized justice); MACINTYRE, *supra* note 19, at 232 (contending that questions cannot be answered without prior formulations of “rules of justice”); SOLOMON, *supra* note 21, at 233 (noting that conflicts in law become well defined through “accumulation of precedents”).

160. See Solum, *Theory of Judging*, *supra* note 27, at 205 (contending that virtue theory allows exceptions for departures from rules); see also Farrelly & Solum, *supra* note 158, at 19 (asserting justice can require departures from rules).

161. Supreme Court cases like *Marrama* suggest that bankruptcy courts have broad equitable powers that non-bankruptcy courts do not enjoy. See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007) (noting that bankruptcy judges are given “broad authority” by § 105(a)).

162. See, e.g., 11 U.S.C. § 552(b)(1) (2012) (providing that prepetition security agreements cover related postpetition property unless “the equities of the case” require otherwise); *id.* §§ 1113(b)(1)(A), 1114(f)(1)(A) (allowing the rejection or modification of collective bargaining agreements and retirements savings plans, respectively, only if “all creditors, the debtor and all of the affected parties are treated fairly and equitably”); *id.* § 1129(b) (allowing cramdown unless the plan discriminates unfairly, or if it is not “fair and equitable”).

163. *Id.* § 105(a) provides:

The court may issue *any order*, process, or judgment *that is necessary or appropriate* to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(emphasis added).

section 105 does not change bankruptcy courts into roving courts of equity,¹⁶⁴ the Supreme Court recently confirmed that section 105 is a broad grant of equitable power to the bankruptcy courts.¹⁶⁵

For example, in *Malley v. Agin (In re Malley)*, the First Circuit upheld the bankruptcy court's decision to surcharge the value of an otherwise exempt asset as a remedy for a Chapter 7 debtor's fraudulent concealment of assets.¹⁶⁶ In other words, the court remedied the debtor's fraudulent failure to identify assets that could have been used to repay creditors by depriving him of an asset that he would have otherwise been able to keep for his own use. The First Circuit found that the surcharge order was "an appropriate and necessary way to vindicate" provisions of the Code requiring full and honest disclosure by a debtor of its assets.¹⁶⁷ The First Circuit upheld the bankruptcy court's exercise of its section 105 equitable powers, despite the

164. See *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (recognizing that § 105 "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity"); see also *S. Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985) (noting that "section 105(a) does not authorize the bankruptcy court to create rights not otherwise available under applicable law"); GROSS, *supra* note 13, at 227 ("The equitable powers derive from what is actually in the Code."); Timothy E. Graulich, *Substantive Consolidation—A Post-Modern Trend*, 14 AM. BANKR. INST. L. REV. 527, 553–54 (2006) (emphasizing that "section 105 is not an authorization to convert the court into a 'roving commission to do equity' and may be used only to implement powers already expressed in the provisions of the Bankruptcy Code" (citation omitted)); Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13, 38 (2006) ("According to this 'narrow view,' § 105(a) 'does not authorize bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.'" (citation omitted)).

165. See, e.g., *Marrama*, 549 U.S. at 375 (noting bankruptcy judges are given "broad authority" by section 105(a)); *In re Rodriguez*, 396 B.R. 436, 458 (Bankr. S.D. Tex. 2008) ("Courts . . . have used § 105 to grant plaintiffs a broad range of remedies . . ."); *In re Kellett*, 379 B.R. 332, 339 (Bankr. D. Or. 2007) (explaining that the Supreme Court "broadly interpreted" the bankruptcy court's authority under section 105(a) in *Marrama*); see also GROSS, *supra* note 13, at 227 (observing that bankruptcy courts frequently invoke section 105 "when they sense that the Code produces an unfair result"); Patrick D. Fleming, *Credit Derivatives Can Create a Financial Incentive For Creditors to Destroy a Chapter 11 Debtor: Section 1126(e) and Section 105(a) Provide a Solution*, 17 AM. BANKR. INST. L. REV. 189, 211 (2009) ("Section 105 could be interpreted to provide broad authority for disclosures of certain credit derivative positions to be obtained."). The extent of the court's equitable powers remains hotly contested. See, e.g., *Law v. Seigel (In re Law)*, 435 Fed. Appx. 697 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (June 17, 2013).

166. 693 F.3d 28, 28 (1st Cir. 2012); see also Alexander J. Nicas, *Malley v. Agin*, VOLO.ABI.ORG (Sept. 7, 2012), <http://volo.abi.org/malley-v-agin> (summarizing the case); Elizabeth Shumejda, *Exempt Assets May Be Surcharged to Remedy Debtor Misconduct*, ST. JOHN'S UNIV. BANKR. CASE BLOG (Jan. 28, 2013), <http://stjohns.abiworld.org/node/173> (same); cf. *In re Law*, 435 Fed. Appx. at 697 (affirming the lower court's grant of the surcharge motion).

167. *In re Malley*, 693 F.3d at 30; see also 11 U.S.C. § 521 (listing debtors' duties).

Bankruptcy Code's failure to specifically authorize surcharge orders as a remedy for section 521 violations.

The Code does not specifically address how to remedy the fraudulent concealment of assets, and the court had to determine what remedy—if any—was the most appropriate in this particular case. The court's process of explicitly considering various potentially applicable and potentially competing principles is akin to practical wisdom. The court had to consider its role as a court of equity, its powers under section 105, the interests of justice for creditors, the debtor's violation of his obligation to be truthful,¹⁶⁸ and whether the Code's silence suggested that no remedy was available.

There is not one clearly correct solution to the problem the court confronted.¹⁶⁹ Ultimately, the bankruptcy court decided that departing from the normal rules (i.e., allowing the debtor to keep his exempt assets) was an appropriate sanction for the debtor's dishonest conduct. The court fashioned a remedy to address the debtor's dishonest conduct despite the lack of a specific remedy set forth in the Code. In the absence of clear solutions, and confronted with the need to reconcile the competing demands of the Code and equity, courts, like the *In re Malley* court, explicitly reason in a manner reminiscent of practical wisdom. This is particularly true in cases where they must consider whether to depart from the express statutory text. For this reason, virtue jurisprudence may offer a rich understanding of decision making in the bankruptcy courts.

Even when bankruptcy judges exercise their equitable powers, their ability to do justice in a particular case remains constrained.¹⁷⁰ Bankruptcy judges, like other judges, are bound by *stare decisis*.¹⁷¹ In

168. See *In re Malley*, 693 F.3d at 29 (finding that the debtor failed to disclose approximately \$25,000 in assets).

169. Creditors' bargain theorists would likely disagree. Despite the difficulty of measuring and comparing the costs and benefits to parties in various hypothetical states of the world, creditors' bargain theorists would likely claim that one state of the world would be the most likely to maximize the pool of assets to be distributed and demonstrate the most respect for creditor rights.

170. Their equitable powers are derived from the Code itself. GROSS, *supra* note 13, at 227; see also *supra* note 156 (contending that judges use experience and knowledge to make decisions).

171. See Sunstein, *Incommensurability*, *supra* note 37, at 858 (describing the consistency that results from using precedent to inform legal reasoning); see also SOLOMON, *supra* note 21, at 233 (discussing the importance of precedent). Principles of *stare decisis* serve at least three valuable ends. First, they enhance *efficiency*. If appellate precedents are followed, there is no need to litigate the same issue repeatedly in different cases. After a question is decided in an appellate court, lower courts in that jurisdiction are obligated to follow that decision. Second, binding appellate precedents foster *consistency*. If each bankruptcy judge is free to decide an issue for

addition, analogical reasoning¹⁷² can be understood both as comprising a part of practical wisdom and serving to limit the discretion of lower court judges.¹⁷³ When combined with stare decisis, it should be clear that acknowledging that bankruptcy judges have wide-ranging powers of equity is not akin to sanctioning subjective and unprincipled decisions.¹⁷⁴ It does mean, however, that there may be several possible outcomes that are all correct because they are the product of virtuous decision making.¹⁷⁵

3. Virtue Jurisprudence Focuses on Both the Means and Ends of the Law

The symbiotic analysis of means and ends is the third leg of virtue jurisprudence's power to elucidate our bankruptcy laws.¹⁷⁶ A virtue jurisprudential approach requires decision makers to consider two questions: (i) what are the appropriate outcomes to pursue in a particular case; and (ii) what is the best way to achieve those outcomes. These two questions should not be collapsed into a single inquiry, such as

himself or herself, varying results are inevitable. The outcome of the legal questions is likely to depend on the identity of the judge. Binding appellate precedents thus foster fairness and equity among litigants. Third, binding appellate precedents foster *predictability* in the law. Individuals can know the law and base their conduct accordingly. Lawyers can know the law and advise their clients accordingly. Without binding precedent, the law is uncertain and the benefits of predictability are lost. *In re Cormier*, 382 B.R. 377, 411 n.41 (Bankr. W.D. Mich. 2008) (citing Erwin Chemerinsky, *Decision-makers: In Defense of Courts*, 71 AM BANKR. L.J. 109, 128 (1997)).

172. Analogical reasoning is commonly employed by judges to reach the correct outcome in cases. See Sunstein, *Analogical Reasoning*, *supra* note 60, at 787 (discussing the manner in which judges should reason to produce certain outcomes).

173. See Sunstein, *Incommensurability*, *supra* note 37, at 852 (dissecting analogical reasoning); see also Mootz, *supra* note 157, at 1293 (stating that analogical reasoning is “properly considered a body of knowledge, even though it cannot generate uniquely correct results in given cases by means of deduction”); John H. Farrar, Reasoning by Analogy in the Law 2 (Feb. 2009) (unpublished manuscript), available at <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2009/Judic%20Reas%20papers/farrar.pdf> (“The method used by Common Law judges in deciding cases is a form of practical reasoning, combining reasoning by analogy with reasoning by rule and principle.”).

174. Nevertheless, it is true that “[w]hat counts as ‘fair’ . . . is always in some sense a subjective judgment, based not just on the individual feelings and needs of the immediate participants, but on the larger collective consciousness as well.” SOLOMON, *supra* note 21, at 209; see also MACINTYRE, *supra* note 19, at 139 (arguing that conceptions of justice are always relative and that “[t]here is no such thing as ‘justice-as-such,’” but only context-specific justice (citation omitted)).

175. The lack of a “right answer” does not mean that it is impossible to reach a correct decision. Good judgment requires only that a person make the best decision available by following a virtuous decision-making process. SOLOMON, *supra* note 21, at 179.

176. See generally Cimino, *Virtue and Contract*, *supra* note 22, at 712 (contending that “virtue theory reasons about means and ends in a fully symbiotic way”).

what is the most efficient outcome.¹⁷⁷ Instead, virtue jurisprudence offers this method of reasoning about both the means and ends in order to explicitly consider both aspects of a problem and arrive at the virtuous decision for a particular situation.¹⁷⁸

This means-ends analysis distinguishes virtue jurisprudence from other practical philosophies that focus exclusively on the ends to be pursued (i.e., consequentialism),¹⁷⁹ or on one's duties under the law (i.e., deontology),¹⁸⁰ by forcing a decision maker to more explicitly account for both means and ends.¹⁸¹ Virtue jurisprudence also differs from consequentialist theories of law because the end it focuses on—*eudaimonia*—is both an internal and a multi-variable concept.¹⁸² As such, promoting the ability of each person to achieve *eudaimonia* may involve trade-offs between and among people.¹⁸³ And different means of promoting *eudaimonia* are likely to affect individuals differently. Therefore, virtue jurisprudence denies that all decisions can be reduced to a single inquiry without eliding the differential impact that such a move would have on distributional outcomes.¹⁸⁴

Because virtue jurisprudence is concerned with distributional outcomes, the means that people adopt to obtain particular outcomes are as relevant to virtue jurisprudential decision making as the outcomes themselves.¹⁸⁵ In addition, virtue jurisprudence recognizes that

177. This is, of course, just what the creditors' bargain theory requires. See MACINTYRE, *supra* note 19, at 198–99 (contending that the summing of happiness “makes no sense”).

178. See Cimino, *Private Law, Public Consequences*, *supra* note 147, at 299 (asserting that the “hallmarks of virtue jurisprudence” include “reasoning over both means and ends, and start[ing] from the premise that the ‘right’ result is probably found at the mean between the two extremes”); see also MACINTYRE, *supra* note 19 at 149 (noting that the exercise of virtue should be considered not only a means to an end, but also an integral part of the end itself).

179. See SOLOMON, *supra* note 21, at 113 (distinguishing virtue theory from utilitarianism which is a consequentialist theory).

180. See *id.* (distinguishing virtue theory from deontological theory).

181. See Cimino, *Virtue and Contract*, *supra* note 22, at 738 (“[U]nder a virtue theory approach, a court could more explicitly account for the parties’ intent as to means, as well as ends . . .”).

182. See Alexander, *supra* note 28, at 751 (claiming that human flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable); see also MACINTYRE, *supra* note 19, at 178 (noting the incommensurability of “internal goods and external goods”).

183. See MACINTYRE, *supra* note 19, at 198–99 (“[C]ultivation of the virtues always may and often does hinder the achievement of those external goods which are the mark of worldly success.”).

184. See Cimino, *Virtue and Contract*, *supra* note 22, at 716 (arguing that “a virtue is not a single, universal good in opposition to a single, universal bad”); see also MACINTYRE, *supra* note 19, at 149 (“The immediate outcome of the exercise of a virtue is a choice which issues in right action.”).

185. See Feldman, *supra* note 35, at 61; see also Cimino, *Virtue and Contract*, *supra* note 22,

different virtuous decision makers might choose quite different means to achieve the same end.¹⁸⁶ An important benefit of the virtue jurisprudential framework is that it forces decision makers to recognize that trade-offs between and among people will likely be necessary. As such, there is not necessarily a “best means” to adopt, just as there is not a single outcome to be achieved. Instead, there are a variety of solutions that a court might employ, each with its own benefits and drawbacks for particular parties-in-interest. Virtue jurisprudential theories highlight this fact and explicitly encourage the open and full consideration of both means and ends.

The Bankruptcy Code also encourages the explicit consideration of both methods and outcomes.¹⁸⁷ These Code provisions require a decision maker to consider both: (i) the ends to be achieved; and (ii) the best way to achieve those ends. They commonly do so by giving discretion to the bankruptcy judge to grant relief if “cause” exists.¹⁸⁸ “Cause” is rarely defined by the Bankruptcy Code. As such, these provisions require bankruptcy judges to consider what standards are relevant to its determination and how to apply those standards to the facts of a particular case.

For example, section 1104(a) allows a bankruptcy court to appoint a trustee to manage the debtor’s estate if the court determines that cause¹⁸⁹ exists or because appointment “is in the interests of creditors, any equity security holders, and other interests of the estate.”¹⁹⁰ However, the Code does not explain how judges should evaluate the interests of creditors, equity security holders, or the vague notion of “other interests of the estate.” Complicating matters further, section 1104(c) provides that if the court declines to appoint a trustee, it “shall

at 717 (discussing the interrelationship of means and ends). Virtue ethics’ unique focus on both the ends to be achieved and the appropriate means to achieve those ends sets virtue ethics apart from deontology and consequentialism. See Cimino, *Virtue and Contract*, *supra* note 22, at 732 (“[U]nlike consequentialism and deontology, [virtue] theory has an analytical focus on both the means and ends of law.”); see also MACINTYRE, *supra* note 19, at 149 (discussing virtue theory’s focus on means and ends); *supra* notes 118, 180.

186. See MACINTYRE, *supra* note 19, at 149 (“[A] number of quite different means may be employed to achieve one and the same end.”).

187. See, e.g., 11 U.S.C. § 105 (2012); *id.* § 107(c)(1); *id.* § 303; *id.* § 324; *id.* § 349; *id.* § 350; *id.* § 362; *id.* § 363; *id.* § 365; *id.* § 502; *id.* § 503; *id.* § 1104; *id.* § 1112; *id.* § 1113; *id.* § 1114; *id.* § 1121; *id.* § 1129.

188. See, e.g., *id.* § 105; *id.* § 107(c)(1); *id.* § 303.

189. Somewhat unusually, § 1104 defines cause. *Id.* § 1104(a)(1) defines cause to include “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause.” See *id.* § 1104(a)(1).

190. *Id.* § 1104(a)(2).

order the appointment of an examiner . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate”¹⁹¹ In other words, if a court determines that appointment of a trustee *is not* in the interests of parties to the case, the Code explicitly contemplates that the court might still find that appointment of an examiner *is* in the interests of those parties. But it does not instruct the courts on how to make these determinations. It does not explain how courts should evaluate the interests of the parties, whether appointment of an examiner or trustee better serves those interests, or how to compare potentially conflicting benefits and burdens on the parties.

Although the Code does not explain the circumstances under which bankruptcy judges should appoint an examiner rather than a trustee, it does provide a process for reaching that decision. The process set forth in the Code requires judges to consider the various interests of creditors, equity security holders, and other interest holders (the ends) and whether appointment of a trustee or an examiner is the best way to achieve those ends (the means). This means-ends analysis is the correct process to follow, but this process does not dictate a “correct” outcome. Instead, a “correct” outcome is reached by following this particular process. Similarly, virtue jurisprudence suggests that a “correct” decision is the decision made by a virtuous decision maker who engaged in a virtue-centered decision process.¹⁹²

IV. VIRTUE JURISPRUDENCE BETTER EXPLAINS SOME OF THE BANKRUPTCY CODE’S MOST SALIENT FEATURES

Virtue jurisprudence is a theory that helps to explain both bankruptcy law’s broad policy objectives and its specific content. The three examples that follow are areas of corporate bankruptcy law and policy

191. In full, § 1104(c) provides:

If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if—

- (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
- (2) the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

Id. § 1104(c).

192. This requires a context-specific, deliberative evaluation. *See* Feldman, *supra* note 35, at 59 (discussing practical wisdom).

that virtue jurisprudence helps explain and that other theories have failed to explain (or have failed to even attempt to explain). Virtue jurisprudence is better situated to explain these aspects of corporate bankruptcy law because it provides a decision-making framework that accounts for bankruptcy courts' equitable and discretionary powers, and because it accounts for bankruptcy law's focus on virtues other than efficiency.

A. Virtue Jurisprudence Explains Chapter 11's Focus on Job Preservation

One of Chapter 11's primary purposes is to preserve jobs.¹⁹³ Chapter 11 is most commonly associated with the reorganization of struggling business, and reorganization is usually thought to be job preserving. As a result, these two ends—reorganization and job preservation—are closely related (if not wholly distinct), and Congress¹⁹⁴ and the courts¹⁹⁵ have clearly stated that job preservation is one of Chapter 11's most important goals. A number of creditors' bargain theorists do not recognize that job preservation is an important goal that can be achieved through our bankruptcy system,¹⁹⁶ and even those who acknowledge that preserving jobs is important often deny that the bankruptcy system is the appropriate forum to deal with such issues.¹⁹⁷

These theorists generally claim that if bankruptcy law favors non-contractual counterparties (e.g., employees) at the expense of

193. See 123 CONG. REC. 35,444 (1977) (statement of Rep. Rodino) ("For businesses, the bill facilitates reorganizations, protecting investments, and jobs."); see also Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1614 (2009) (noting that Chapter 11's "overarching policy goal is to preserve going concerns and jobs"); Chrystin Ondersma, *Employment Patterns in Relation to Bankruptcy*, 83 AM. BANKR. L.J. 237, 239 (2009) (noting that failures in Chapter 11 can affect millions of employees); Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1210 (2005) [hereinafter Warren & Westbrook, *Contracting Out of Bankruptcy*] (estimating that, in 1994, approximately two million jobs were at risk in business bankruptcies, although this included consumer bankruptcy cases).

194. See 123 CONG. REC. 35,444 (1977) (statement of Rep. Rodino).

195. See, e.g., *In re Motors Liquidation Co.*, 430 B.R. 65, 84 (Bankr. S.D.N.Y. 2010) (noting the "substantial public interest" in preserving jobs (citing *In re Trans World Airlines, Inc.*, No. 01-00056, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001))); see also GROSS, *supra* note 13, at 224 (asserting that "the interests of workers were considered sufficiently important [and were] to be treated specially").

196. See, e.g., JACKSON, *supra* note 15, at 25 n.8.

197. See Robert K. Rasmussen & David A. Skeel, Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85, 87 (1995) ("Attempting to save jobs through an inefficient bankruptcy regime may therefore have the opposite of its intended effect."); see also Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 185 (1987) ("[I]t seems strange to worry about problems like those of former workers in bankruptcy and not elsewhere.").

contractual claimants (e.g., lenders), then the debtor's contractual counterparties will, *ex ante*, raise the cost of credit.¹⁹⁸ More expensive credit will decrease overall economic activity, which will, in turn, lead to less job creation. Thus, bankruptcy laws that focus on preserving jobs in specific instances will have the unintended consequence of decreasing overall employment in the economy.¹⁹⁹

In some ways, the creditors' bargain theorists are expressing a concern with fairness when they make such arguments. In business, fairness requires "a certain kind of 'attunement,' a sense of value and a willingness to exchange value for value," even in the absence of objective guideposts.²⁰⁰ Mutual agreement may be one of the only objective market signals to suggest that a bargain was fair.²⁰¹ As such, it is possible to conceive of the creditors' bargain theorists' focus on preserving *ex ante* contractual entitlements as an attempt to ensure fairness for a debtor's contractual counterparties. But it is a limited concern with fairness, one that is restricted to ensuring the fair treatment of a debtor's contractual counterparties.

The creditors' bargain theorists' exclusive focus on ensuring the fair

198. See Rasmussen, *Optimal Bankruptcy*, *supra* note 70, at 13–14 ("When a bankruptcy regime protects certain persons who have dealt with a bankrupt firm, this protection may come at the expense of others in society who would have obtained jobs but for the rise in interest rates caused by the bankruptcy regime."); see also Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 *IND. L.J.* 1, 2 (1987) ("These losses raise the cost of risk taking and cause lenders to reduce their willingness to make loans to consumers generally."); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 *NW. U. L. REV.* 1463, 1466 (2005) ("[T]he option of bankruptcy created a moral hazard problem and increases the risk associated with consumer lending . . ."); cf. Joshua Goodman & Adam Levitin, *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates* 14 (Harvard Kennedy Sch. Faculty Research, Working Paper No. RWP12-037 2012), available at <http://dash.harvard.edu/handle/1/9403179> (arguing that cramdown raises the cost of credit for some borrowers by ten to twenty basis points, but those same borrowers benefit from a sort of public insurance in the form of bankruptcy protection). *But see* Carlson, *supra* note 63, at 616–17 (contesting the claims that additional bankruptcy entitlements increase the cost of credit for "good" companies); *but see also* Feibelman, *supra* note 9, at 168 n.216 (noting that "the effect of a prior bankruptcy in an individual's ability to obtain credit is not well understood"); Warren & Westbrook, *Contracting Out of Bankruptcy*, *supra* note 193, at 1222 (arguing that many creditors will not raise the cost of credit because they are mal- or non-adjusting creditors); Zhang, *supra* note 54, at 6 (same).

199. See Rasmussen & Skeel, Jr., *supra* note 197, at 87; see also Aghion, *Improving Bankruptcy*, *supra* note 14, at 852 n.7 (suggesting that a general employment subsidy would be preferable to saving jobs by using the bankruptcy system). *But see* Warren & Westbrook, *Contracting Out of Bankruptcy*, *supra* note 193, at 1215 (arguing that alternatives to Chapter 11 have substantial inefficiencies that may swamp any purported efficiencies from change).

200. SOLOMON, *supra* note 21, at 210.

201. See Coleman, *supra* note 57, at 516 ("Exchanges among knowledgeable, rational persons in a free market are generally Pareto superior; rational individuals do not strike bargains with one another unless each perceives it to be in his or her own interest to do so.").

treatment of a debtor's contractual counterparties excludes considerations of fairness for non-contractual counterparties, such as employees, tort victims, and taxing authorities.²⁰² Nevertheless, if it were demonstrably true that Chapter 11's focus on preserving jobs in specific instances decreased the overall number of jobs in the economy, it would be reasonable to reconsider Chapter 11's focus on job preservation.²⁰³ However, the available empirical evidence does not clearly support the conclusions of the creditors' bargain theorists.²⁰⁴ But it does suggest that the arguments commonly made about why Chapter 11 should not focus on preserving jobs may be overly simplistic.²⁰⁵ And even if protecting jobs *did* raise the cost of commercial credit, it is far from clear that these costs are not offset by an increase in social welfare that may result because jobs are saved and human flourishing increased.²⁰⁶ For example, Joshua Goodman and Adam Levitin have suggested that small increases in the cost of credit that result from the existence of cramdown may be efficiency enhancing because cramdown creates a form of insurance that the market does not otherwise provide.²⁰⁷ In addition, the creditors' bargain theory ignores

202. See Warren & Westbrook, *Contracting Out of Bankruptcy*, *supra* note 193, at 1220 (defining involuntary creditors as having “no contractual relationship with the debtor”); see also Lucien Arye Bebchuk & Jess M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 908 (1996) (identifying four categories of nonadjusting creditors: (i) involuntary creditors, such as tort claimants; (ii) small claim holders, such as customers, employees and trade creditors; (iii) taxing authorities and government regulatory claimholders; and (iv) creditors who have extended credit on fixed terms).

203. In any case, it would still be useful to consider why Congress prioritized preserving jobs when it enacted Chapter 11.

204. See Feibelman, *supra* note 9, at 168 n.216 (noting that “the effect of a prior bankruptcy in an individual's ability to obtain credit is not well understood”); see also Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U. L. REV. 499, 505 (1994) (“The arm-chair empiricism of the law and economics school, driven by free market ideology, is bound to be error-ridden.”); Thomas J. Fitzpatrick IV & James B. Thomson, *Stripdowns and Bankruptcy: Lessons from Agricultural Bankruptcy Reform*, FEDERAL RESERVE BANK OF CLEVELAND (Aug. 3, 2010), <http://www.clevelandfed.org/research/commentary/2010/2010-9.cfm>. But see Goodman & Levitin, *supra* note 198, at 2 (discussing the impact of cramdown on mortgage interest rates).

205. See Block-Lieb, *supra* note 14, at 527–28 (arguing that “claims that bankruptcy law should have no goal other than to minimize the cost of debt capital . . . exaggerate[] the absence of socially beneficial effects for bankruptcy provisions that protect specific creditor groups”).

206. See Warren, *Untenable Case*, *supra* note 14, at 467 (arguing that bankruptcy's redistributive goals are “sufficiently important to justify slight inefficiencies”); see also GROSS, *supra* note 13, at 129 (presenting arguments in favor of curtailing creditor's ex ante rights in favor of debtor rehabilitation); Russell Hardin, *The Morality of Law and Economics*, in LAW AND PHILOSOPHY 331, 360 (11th ed. 1992) (noting that “we might have to give up some efficiency for other gains”).

207. See Goodman & Levitin, *supra* note 198, at 15 (finding that the availability of cramdown raised interest rates on certain debtors by 1–2% per month, but noting that this might be

that human flourishing is person-specific and that maximizing aggregate welfare may have unacceptable distributional outcomes.²⁰⁸ Congress may fairly have chosen to tolerate some level of aggregate inefficiency in an attempt to preserve jobs and create acceptable distributional outcomes, because human flourishing is person-specific.²⁰⁹

There are at least three other concerns that could have informed Congress' decision to orient Chapter 11 towards job preservation, concerns that a virtue jurisprudential understanding of bankruptcy law can help to explain. First, virtue jurisprudence recognizes that the loss of jobs can be more than just a side effect of closing a business: it can mean the loss of dignity for workers.²¹⁰ Second, shuttered businesses eliminate jobs, jobs that might be critical to a particular community. Communities that developed around one large employer can be easily decimated if that employer closes its doors and unemployed workers move on in search of other work, or seek relief in alcohol or narcotics.²¹¹ Third, virtue jurisprudence recognizes that the "losses flowing from the failure of a business are never completely absorbed by the parties who voluntarily elect to make an economic investment in the debtor-business."²¹² In part, this is because employees tend to be poor risk-spreaders because they can usually have only one job at a time.²¹³ These examples illustrate some of the social costs of business failure

"efficiency-enhancing by creating a form of insurance that the private market does not provide"). *But see* Feibelman, *supra* note 9, at 160 (contending that "bankruptcy serves the same social insurance functions" as many other common forms of insurance and suggesting that these other forms may be better vehicles for providing social insurance).

208. *See* Zhang, *supra* note 54, at 52–53 (arguing that it is an "uncomfortable fact that secured lending is a double-edge sword: it may benefit our society as a whole, but only if some of its members suffer a loss; it improves our well-being sometimes, but causes damage at others").

209. *See* Warren, *Untenable Case*, *supra* note 14, at 467; *see also* GROSS, *supra* note 13, at 138 (arguing that "[b]ankruptcy involves much more than maximizing creditors' recovery"); Hardin, *supra* note 206, at 360 (recognizing that a degree of efficiency may need to be sacrificed in favor of other interests).

210. *See* Martin, *supra* note 48, at 482 (recognizing that "job displacement has high social costs"); *see also* GROSS, *supra* note 13, at 119 (discussing the role of dignity and self-respect in the bankruptcy context); *cf.* Rasmussen, *Optimal Bankruptcy*, *supra* note 70, at 35–36 (suggesting that overall dignity among workers is increased when the overall number of jobs is maximized because "a person's self-respect stemming from employment" may increase with time).

211. *See* Martin, *supra* note 48, at 474 (discussing the "moral upheaval of losing a community" through job loss, which can eliminate or at least damage the links among people); *see also* Feibelman, *supra* note 9, at 166 (noting the hard to measure but still important "intangible costs, especially emotional costs" associated with financial collapse).

212. Ponoroff, *supra* note 76, at 495; *see also* Ondersma, *supra* note 193, at 248 (noting that workers develop job-specific skills that cannot be easily redeployed elsewhere).

213. *See* Zhang, *supra* note 54, at 8 (arguing that employees cannot mitigate risk through diversification); *see also* Ondersma, *supra* note 193, at 248 (noting that workers typically gain skills particular to only a certain job).

that a virtue jurisprudential understanding of bankruptcy requires judges to engage with. Virtue jurisprudence suggests that it is reasonable to consider whether shareholders and creditors are better situated to bear the costs of business closures than employees and their communities.²¹⁴ Virtue jurisprudence's engagement with such concerns allows it to make sense of a focus on job preservation, even if it comes at the expense of some aggregate inefficiency.

However, it may be the case that preserving jobs is economically efficient, but that the non-economic benefits are simply hard to measure.²¹⁵ Congress' acknowledgement that preserving jobs has independent value might be seen as building a bias into Chapter 11 toward a hard-to-measure end because of the likelihood of systemic undervaluation by efficiency-minded judges.²¹⁶ For example, many employees make firm-specific investments expecting to share in the rents and surpluses of a business, despite failing to protect those investments through "direct contracting, personal trust, or reputation."²¹⁷ In such cases, it would be inefficient (not to mention inequitable) to deny employees protections equal to or greater than those enjoyed by other creditors because the business should be viewed as a joint enterprise created through the owner's assets and the workers' labor.²¹⁸ In this way, Chapter 11's focus on job preservation might be viewed simply as taking a wider view of the efficiency rationale for bankruptcy and attempting to ensure that bankruptcy law maximizes the wealth of all parties affected by financial distress and not just

214. Employees, communities and others are usually deeply invested and may be affected deeply or even disastrously by business failure. They are rarely just disinterested spectators. See SOLOMON, *supra* note 21, at 122.

215. See GROSS, *supra* note 13, at 199 (noting that noneconomic values are "not always measured in traditional economic terms"); see also Feibelman, *supra* note 9, at 166 (noting that self-insurance costs are difficult to evaluate).

216. To be certain, the Code's protection for parties without formal legal rights (non-creditor interests) are derivative in nature and limited in scope, but they certainly exist. See Warren, *Bankruptcy Policymaking*, *supra* note 14, at 355 ("The Code accounts for the rights of other parties that a business failure affects by giving a failing company an opportunity to sell itself . . . in chapter 7 or to reorganize in chapter 11."); see also Warren, *Bankruptcy Policy*, *supra* note 14, at 787 ("The bankruptcy system goes so far as to anticipate the consequences of default on a host of potential creditors, including . . . future tort claimants who have not yet discovered their injuries or their legal rights . . .").

217. LoPucki, *Team Production Theory*, *supra* note 18, at 749; see also Francisco Cabrillo & Ben W.F. Depoorter, *Bankruptcy Proceedings*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 261, 272 (Edward Elgar & The University of Ghent eds., 1999) (noting that employees may "also expect the right to a part of the company assets as indemnity for the loss of their jobs").

218. See Martin, *supra* note 48, at 483 (noting that a joint enterprise is created through the owner's assets and the workers' labor (citing Joseph W. Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611 (1998))).

creditors.²¹⁹

There are costs to closing down businesses, dislocating workers, and disrupting communities.²²⁰ Virtue jurisprudence encourages judges to fully consider these costs, whereas the creditors' bargain model casts these costs as mere externalities.²²¹ Virtue jurisprudence explains Chapter 11's focus on job preservation because it understands human lives can be path-determinative and that human flourishing might be harmed by actions taken by debtors or their creditors.²²² Even assuming that closing down a business and selling off its pieces increases aggregate welfare, it is likely to hinder the ability of some citizens to flourish in the short-term.²²³ And it can short-circuit "long-term plans, deeply held commitments, and carefully constructed identities."²²⁴ This has a measurable cost, but only a theory that recognizes that human flourishing is a phenomenon of actual, living human beings,²²⁵ and that there is an "organic integrity and coherence to its individual experience that resists disassembly and substitution"²²⁶ can fully account for these costs. Virtue jurisprudence does so. By

219. See Korobkin, *Normative Theory*, *supra* note 46, at 119–20 (“[I]f maximizing social wealth is the ultimate ideal, then it becomes unclear why the principle of bankruptcy law should be to maximize only the wealth of creditors, rather than *all* parties affected by financial distress.” (emphasis in original)); see also GROSS, *supra* note 13, at 224 (arguing that § 1113 (relating to collective bargaining agreements) essentially forced courts “to take the interests of the community into account”); Martin, *supra* note 48, at 492 (rejecting the notion that non-creditor interests cannot be quantified).

220. See Martin, *supra* note 48, at 474 n.202 (discussing the “moral upheaval of losing a community” through job loss, which can eliminate or at least damage the links among people). “Meaningful life work is necessary on a large scale for the long-term sustainability of meaningful human existence.” *Id.* at 476; cf. Penalver, *supra* note 57, at 871 (discussing three goals that can be accomplished by laws that override private decisions and command land owners to “act in accordance with virtue”).

221. This blindness to the human costs of our bankruptcy policies may be a result of the use of a unitary metric of valuation, which ignores the possibility of qualitatively distinct valuations. See Sunstein, *Incommensurability*, *supra* note 37, at 783–84; see also *In re After Six, Inc.*, 154 B.R. 876, 883 (Bankr. E.D. Pa. 1993) (indicating the court was “appalled” at the failure to consider the debtor’s former employees employment prospects as a relevant factor in choosing a successful bid for the debtor’s assets).

222. “Meaningful life work is necessary on a large scale for the long-term sustainability of meaningful human existence.” Martin, *supra* note 48, at 476; see also Penalver, *supra* note 57, at 871.

223. See Feibelman, *supra* note 9, at 166 (noting the negative effects of financial collapse on individuals). *But see* Rasmussen, *Optimal Bankruptcy*, *supra* note 70, at 35–36 (arguing that “the longer one holds a job, the more one can prepare for the dislocations which occur if the job is lost”).

224. Penalver, *supra* note 57, at 881; see also Martin, *supra* note 48, at 483 n.237 (noting scholars who focus on the concerns of workers).

225. Penalver, *supra* note 57, at 881.

226. *Id.*

contrast, the creditors' bargain model treats humans as possessors of welfare, ready to be maximized, but argues—curiously—that bankruptcy is not the mechanism by which to promote human flourishing.

Recognizing that job displacement wastes human capital does not mean that jobs are always preserved, no matter the cost. That is neither sensible, nor what the Code or virtue jurisprudence requires. The extent to which jobs should be protected depends on various factors, such as the harm faced by the laid-off employees (and their families and communities), the employees' ability to protect themselves, and the potential harm to creditors and other parties. It may often be the case that after balancing all of the competing values at stake, the business is liquidated anyway and jobs are lost. But focusing on Chapter 11's jobs purpose may help to avoid particularly severe harms to employees, their dependents, and their communities, and ensures that harm to laid-off workers is fully considered.²²⁷ Only virtue jurisprudence addresses and accounts for Chapter 11's focus on job preservation; the creditors' bargain does not.

B. Virtue Jurisprudence Explains Chapter 11's Reorganization Bias

Chapter 11 is biased toward the rehabilitation of financially distressed companies and their reorganization into viable, going concerns.²²⁸ The Supreme Court has stated that the Bankruptcy Code's "fundamental purpose . . . is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."²²⁹ This purpose is also clearly evident from the

227. See Korobkin, *Normative Theory*, *supra* note 46, at 105 (discussing bankruptcy law's jobs purpose); see also Sunstein, *Incommensurability*, *supra* note 37, at 857.

228. See 123 CONG. REC. 35,444 (1977) (statement of Rep. Rodino) ("For businesses, the bill facilitates reorganizations, protecting investments, and jobs."); see also LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 184 (2005) (noting that in "the United States, managers have the option or reorganizing the firm"); Martin, *supra* note 48, at 436 n.26 ("[A]s long as rehabilitation is possible, it is clearly preferable to liquidation."); Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 143 (2005) (noting that the "1978 Act was designed to provide 'bankrupt businesses another opportunity to survive'" (citation omitted)); David Hahn, *Concentrated Ownership and Control of Corporate Reorganizations* 2 (Bar-Ilan Univ. Working Paper No. 6-03, 2003), available at http://www.biu.ac.il/law/unger/wk_papers.html (noting that in the United States, "financially ailing firms turn to reorganization and file a bankruptcy petition under Chapter 11").

229. *NLRB. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (citing H.R. REP. NO. 9505925, at 200 (1977)); see also *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (noting that the "paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor"); GROSS, *supra* note 13, at 138 ("Bankruptcy involves much more than maximizing creditors' recovery as measured in dollars and cents.").

Code itself. Some of the Bankruptcy Code provisions that foster the rehabilitation of debtors include: (i) the automatic stay of most actions against the debtor, its properties, and properties in the possession of the debtor upon commencement of a Chapter 11 case;²³⁰ (ii) the debtor's broad authority to obtain post-petition financing;²³¹ (iii) the authority to reject unfavorable executory contracts;²³² (iv) an expansive definition of "property of the estate";²³³ (v) broad powers to recover property of the estate removed from the debtor's possession in the months and years leading up to the commencement of a Chapter 11 case;²³⁴ and (vi) the debtor's broad powers to administer its bankruptcy case, including the exclusive right to file a proposed plan of reorganization.²³⁵

Chapter 11's reorganization bias has puzzled some theorists who subscribe to the creditors' bargain model.²³⁶ These theorists suggest that when the residual owners of a firm would prefer an outright sale of the firm to the highest bidder, allowing a company to be reorganized is inappropriate.²³⁷ These theorists assume that if the firm's residual owners prefer liquidation, then liquidation would maximize the economic value of the firm.²³⁸ They frequently suggest that Chapter 11 is flawed because it allows existing management to seek to reorganize the company even when reorganization is not value maximizing for the residual owners.²³⁹

230. 11 U.S.C. § 362 (2012).

231. *Id.* § 364.

232. *Id.* § 365.

233. *Id.* § 541.

234. *Id.* §§ 542–550; *see, e.g.*, United States v. Whiting Pools, Inc., 674 F.2d 144 (2d Cir. 1982) (holding that a Chapter 11 debtor can require the Internal Revenue Service to turn over tangible property seized by it), *aff'd*, 462 U.S. 198 (1983).

235. 11 U.S.C. § 1121.

236. *See* Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 128 (1986) ("[T]he entire law of corporate reorganizations is hard to justify under any set of facts and virtually impossible when the debtor is a publicly held corporation."); *see also* Barry E. Adler, *Bankruptcy and Risk Allocation*, 77 CORNELL L. REV. 439, 489 (1992) [hereinafter Adler, *Bankruptcy and Risk*] (asserting that "there is no need for bankruptcy reorganization, which serves no purpose other than reorganization"); Aghion, *Economics of Bankruptcy Reform*, *supra* note 14, at 529 ("We believe that there are serious theoretical and practical problems with Chapter 11."); Bradley & Rosenzweig, *supra* note 14, at 1050–52 (advocating the repeal of Chapter 11); Jackson, *supra* note 14, at 894 ("Reorganization proceedings provide nothing more than a method by which the sale of an enterprise as a going concern may be made to the creditors themselves."); Hahn, *supra* note 228, at 2 (noting the "continuous questioning" of reorganization under Chapter 11 by commentators).

237. *See, e.g.*, Baird, *supra* note 236, at 145.

238. *See, e.g.*, Hahn, *supra* note 228, at 28–29; *see also* Woo, *supra* note 53, at 1618, 1623 (noting the "standard assumption of value maximization").

239. *See, e.g.*, Hahn, *supra* note 228, at 29; *see also* Aghion, *Economics of Bankruptcy Reform*, *supra* note 14, at 529 ("Chapter 11 mixes two decisions together: the decision of who

Creditors' bargain theorists commonly offer two explanations for why management would seek to reorganize a company when its creditors (normally its secured creditors) believe that liquidation would be value maximizing. One claim is that existing management may be attempting to keep their jobs, if even for only a short time, by choosing to reorganize.²⁴⁰ Because these (managerial) job-preserving reorganization attempts are said to come at the expense of the residual owners,²⁴¹ many have called for the repeal of Chapter 11's reorganization provisions.²⁴²

Another persistent claim is that Chapter 11's reorganization provisions encourage shareholders of financially distressed firms to make inefficient production and investment decisions.²⁴³ Specifically, they encourage shareholders to "underinvest" in positive net value projects and "overinvest" in high-risk/large-return projects.²⁴⁴ The

should get what . . . and the decision of what should be done with the firm."); Bradley & Rosenzweig, *supra* note 14, at 1050–52 (arguing that Chapter 11 exclusively serves the interests of incumbent management to the detriment of all security holders). *But see* LoPucki, *Reorganization Realities*, *supra* note 61, at 1307 (suggesting that the work of the creditors' bargain theorists is unrealistic); *but see also* Tabb, *supra* note 17, at 808 (rejecting the notion that Chapter 11 should be repealed).

240. *See, e.g.*, Bradley & Rosenzweig, *supra* note 14, at 1050–52; *see also* Aghion, *Economics of Bankruptcy Reform*, *supra* note 14, at 529 (noting that management may desire to "tilt the outcome of the bargaining toward reorganization (and the retention of their jobs)"); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 *YALE L.J.* 1807, 1824–25 (1998) (noting that the firm "prefers the bankruptcy system that permits it to consume the most private benefits"). *But see* Woo, *supra* note 53, at 1661 (asserting that bank regulation can explain decisions to pursue liquidation even when reorganization would be value maximizing); *see also* Ponoroff, *supra* note 76, at 484 (noting that "empirical evidence reveals that more often than not the first thing to occur in public company reorganizations is the removal and replacement of old management"); Tabb, *supra* note 17, at 858 (same).

241. The creditors' bargain theorists' assertion that reorganizations come at the expense of the residual owners is premised on the assumption that the residual owners will always seek to maximize the value of their assets. *See* Woo, *supra* note 53, at 1616. This assumption has been severely critiqued, and is, at best, unreliable. *See id.* at 1617 (asserting that bank regulation can explain decisions to pursue liquidation even when reorganization would be value maximizing).

242. An illustrative list of such writings include: Adler, *Bankruptcy and Risk*, *supra* note 236, at 489; Baird, *supra* note 236, at 128; Bradley & Rosenzweig, *supra* note 14, at 1043; and Jackson, *supra* note 14, at 223.

243. *See, e.g.*, Bradley & Rosenzweig, *supra* note 14, at 1052–53. *But see* George G. Triantis, *A Theory of the Regulation of Debtor-in-Possession Financing*, 46 *VAND. L. REV.* 901, 920 (1993) (suggesting that bankruptcy courts exercise judicial supervision to ensure value maximizing investment decisions).

244. *See, e.g.*, Bradley & Rosenzweig, *supra* note 14, at 1053; *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 334–37 (1976) (discussing the incentive effects associated with debt); Stewart C. Myers, *Determinants of Corporate Borrowing*, 5 *J. FIN. ECON.* 147, 155 (1977) (noting that the existence of corporate debt can "reduce the present market value of the firm by weakening the corporation's incentive to undertake good future investments"); David A. Skeel,

alleged reason for these inefficient investments is that the minimal returns yielded by low-risk projects will be devoted largely to paying down debt obligations and that only high-risk projects offer any hope of providing a return to shareholders of a financially distressed company.²⁴⁵

Neither explanation appears to capture why Congress has favored reorganization. This is unsurprising because both of these claims depend on unreliable assumptions²⁴⁶ and limited empirical evidence.²⁴⁷ Such evidence that does exist does not appear to support the creditors' bargain theorists' claims.²⁴⁸ The economic analysis of law does not seem to be able to explain Chapter 11's reorganization bias and so it has limited itself to critiquing Congress for having favored reorganization. But since the creditors' bargain theorists' normative conclusions are premised on shaky foundations, alternative explanations may be well-

Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 935 (2003) (discussing the risk of overinvestment).

245. See Donald R. Korobkin, *The Unwarranted Case Against Corporate Reorganization: A Reply to Bradley and Rosenzweig*, 78 IOWA L. REV. 669, 708 (1993) [hereinafter Korobkin, *Unwarranted Case*] ("Economists observe that, in a capital structure with risky debt, shareholders may have incentives to reach investment and production decisions that are inefficient from the perspective of maximizing firm value."); see also Zhang, *supra* note 54, at 65–67 (discussing the underinvestment problem).

246. See, e.g., Woo, *supra* note 53, at 1661 (asserting that bank regulation can explain decision to pursue liquidation even when reorganization would be value maximizing).

247. The most common explanation for a managerial preference for non-value maximizing reorganizations is that it allows existing management to keep their jobs, if even for only a short time. However, empirical evidence suggests that senior managers usually suffer a loss of their jobs shortly before or soon after entering Chapter 11. See, e.g., Ponoroff, *supra* note 76, at 484 (noting that "empirical evidence reveals that more often than not the first thing to occur in public company reorganizations is the removal and replacement of old management"); see also Lois LoPucki & William Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly-Held Companies*, 141 U. PA. L. REV. 669, 685 (1993) (same); LoPucki, *Reorganization Realities*, *supra* note 61, at 1313 (same); Ondersma, *supra* note 193, at 247 (same); Robert K. Rasmussen, *The Search for Hercules: Residual Owners, Directors, and Corporate Governance in Chapter 11*, 82 WASH. U. L.Q. 1445, 1448 (2004) (same).

248. Evidence suggests that the efficiency effects of reorganization are ambiguous. Robert Gertner & David Scharfstein, *A Theory of Workouts and the Effects of Reorganization Law*, 46 J. FIN. 1189, 1209 (1991); see also Arturo Bris et al., *The Costs of Bankruptcy: Chapter 7 Liquidation vs. Chapter 11 Reorganization*, 61 J. FIN. 1253, 1269 (2006) (studying almost 300 corporate bankruptcy cases from Arizona and New York filed between 1995 and 2001 and concluding that reorganization appears to preserve asset values better than liquidations); Stuart C. Gilson, *Bankruptcy, Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control When Firms Default*, 26 J. FIN. ECON. 355 (1990) (suggesting "that corporate default engenders significant changes in the ownership of firms' residual claims and in the allocation of rights to manage corporate resources"); Korobkin, *Unwarranted Case*, *supra* note 245, at 708–11 (providing a detailed discussion of Gertner and Scharfstein's work as it relates to this claim); Skeel, Jr., *supra* note 244, at 935 n.66 (discussing empirical evidence suggesting that the underinvestment/overinvestment problem is something of a red herring).

taken.

By contrast, virtue jurisprudence is able to offer a positive explanation for Chapter 11's reorganization bias.²⁴⁹ Unlike the creditors' bargain and its narrow focus on economic efficiency, virtue jurisprudence simultaneously focuses on promoting multiple virtues and choosing the right means to do so. Whereas the economic analysis of law tends only to focus on bankruptcy law's effect on contractual counterparties,²⁵⁰ virtue jurisprudence considers the laws' effects on both contractual and non-contractual counterparties.²⁵¹ When bankruptcy judges are called on to evaluate non-monetary interests, such as the interests of the local community, they may believe that they lack an adequate medium to compare these interests with potentially competing economic concerns.²⁵² Although nothing inherent in economic theory forecloses consideration of non-contractual interests, non-contractual interests regularly receive short shrift in approaches based on economic theory.²⁵³

Chapter 11's reorganization bias can be viewed as an acknowledgement that it is difficult to make precise ex ante predictions about the efficiency of various economic arrangements, and that decision makers tend to elide hard-to-quantify costs or benefits.²⁵⁴ These valuable, but difficult to quantify ends include "maintaining

249. It is certainly true that if "welfare" were given a sufficiently capacious definition, the economic analysis of law might also be able to explain Chapter 11's reorganization bias. The point of this Article is not to suggest that virtue ethics is the only theory that can explain bankruptcy law, but that it does a better job than the existing theories. This Article does suggest, however, that the creditors' bargain theory gives short shrift to non-economic stakeholders and non-creditor interests.

250. See James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097, 2143 (1990) (noting that the common-pool analysis "is premised on the unspoken assumption that if the market value of the debtor's estate is maximized everything will be hunky dory"); Martin, *supra* note 48, at 437 n.31 (noting that law and economics scholars typically ignore concerns about community interests).

251. Bankruptcy may also be conceived as prioritizing future economic growth over short-term economic gains. See GROSS, *supra* note 13, at 138 ("Bankruptcy is concerned with rehabilitating debtors, which may not benefit creditors' short term recovery.").

252. Cf. Hon. Barry S. Schermer, *Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy—A Modern-Day Tale of Belling the Cat*, 72 WASH. U. L.Q. 1049, 1051 (1994) (discussing problems with adequately considering community interest).

253. See James W. Bowers, *Wither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 37 (1991) (discussing contractual interests).

254. See Miller & Waisman, *supra* note 228, at 144 ("Such provisions reflected Congress' intent to balance the interests of all parties involved in the Chapter 11 reorganization process."); see also GROSS, *supra* note 13, at 195, 199, 208 (taking the view that certain societal goods cannot be measured in economic terms).

employment, preserving the local tax base, and advancing community stability.”²⁵⁵ Virtue jurisprudence can account for the need to consider each of these goals because of the means-ends symbiosis. In addition, practical wisdom provides a method for reconciling the competing demands of corporate bankruptcies. Through the use of practical wisdom and by simultaneously considering means and ends, a virtue jurisprudential account can provide appropriate consideration of contractual and non-contractual interests. Chapter 11’s reorganization bias can be seen as an attempt to preserve the positive externalities of reorganization despite the difficulty in balancing competing, and perhaps inconsistent, goals.²⁵⁶

C. Virtue Jurisprudence Explains Chapter 11’s Examiner Provisions

Individual preferences are not exogenous; human beings have some control over shaping their own preferences.²⁵⁷ The endogeneity of human preferences leaves room for the law to actively educate citizens in virtue.²⁵⁸ Aristotle believed that one of the law’s central roles was to encourage a virtuous citizenry.²⁵⁹ But he believed that the law should do more to encourage virtue than merely prohibiting certain actions with the hope that citizens will avoid those actions out of fear of punishment.²⁶⁰ As previously discussed, the virtuousness of action is not judged by compliance with some set of pre-existing rules.²⁶¹

255. Warren & Westbrook, *The Success of Chapter 11*, *supra* note 57, at 625; *see also* 123 CONG. REC. 35,444 (1977) (statement of Rep. Rodino) (“For businesses, the bill facilitates reorganizations, protecting investments, and jobs.”); *In re Motors Liquidation*, 430 B.R. 65, 84 (Bankr. S.D.N.Y. 2010) (noting the “substantial public interest in preserving the value of TWA as a going concern” (citing *In re Trans World Airlines*, No. 01-00056, 2001 WL 1820326, at *14 (Bankr. D. Del. 2001))); GROSS, *supra* note 13, at 195; Butler & Gilpatric, *supra* note 15 at 282–83 (arguing that law and economics undervalues non-contractual relationships); Martin, *supra* note 48, at 437 n.31 (noting that law and economics scholars typically ignore concerns about community interests); Tabb, *supra* note 17, at 804 (noting the relevance of community interests).

256. *See* Martin, *supra* note 48, at 445 (discussing the consideration of “general societal interests”).

257. *See* ARISTOTLE, *supra* note 23, at 355 (“Though apparently there are many ends, we choose some of them”); *see also* Nussbaum, *Flawed Foundations*, *supra* note 57, at 1207–08 (noting that “we have some control over the shaping of our tastes”).

258. *See* Sunstein, *Incommensurability*, *supra* note 37, at 822 (noting the “effects of law on social attitudes”); *see also* MACINTYRE, *supra* note 19, at 154 (noting that some virtues can be acquired through teaching).

259. *See* ARISTOTLE, *supra* note 23, at 348 (asserting that happiness should be acquired for people and cities through virtue); *see also* Cimino, *Virtue and Contract*, *supra* note 22, at 715 (“Aristotle believed the most proper and central role of government was to make its citizens virtuous.”).

260. *See* ARISTOTLE, *supra* note 23, at 445–47 (discussing moral education).

261. Penalver, *supra* note 57, at 865; *see also* MACINTYRE, *supra* note 19, at 153 (asserting that “[t]he solution is the result of rough and ready reasoning” rather than the “application of a

Therefore, to help citizens become virtuous, the law should provide a framework that supports and encourages good decision making by citizens.²⁶²

One way of educating citizens and developing a supportive framework for their virtuous development is by showcasing examples of both virtuous and non-virtuous action.²⁶³ The Bankruptcy Code provisions regarding examiners can be seen as one way that bankruptcy law works to instill virtue in citizens.²⁶⁴ An examiner is an individual appointed in a bankruptcy case to perform certain specified duties, including investigating “the acts, conducts, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.”²⁶⁵ In short, examiners can help root out malfeasance, and also help parties-in-interest decide whether a business can be successfully reorganized.²⁶⁶ By exposing prior instances where parties have acted inappropriately and criticizing those actions, the Code’s examiner provisions can help teach future actors to make virtuous decisions.²⁶⁷ This is not about punishment; examiners who ferret out past wrongful actions do not prosecute those who have acted wrongfully.²⁶⁸ Instead, the

rule”).

262. Laws “cannot compel people to realize moral goods. . . . Their contribution to making men moral must be indirect.” Robert P. George, *The Central Tradition—Its Value and Limits*, in *VIRTUE JURISPRUDENCE*, *supra* note 35, at 1, 45.

263. See Cimino, *Virtue and Contract*, *supra* note 22, at 731 (noting the state’s obligation to educate its citizens in virtue).

264. See 11 U.S.C. § 1104(c) (2012), which provides, in relevant part:

[A]t any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or (2) the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

265. *Id.* § 1106(a)(3).

266. Examiners have other purposes as well, such as uncovering potential causes of action for the estate to pursue. See, e.g., Order Directing Appointment of an Examiner Pursuant to Section 1104(c)(2) of the Bankruptcy Code, *In re Lehman Bros. Holdings Inc.*, No. 08-13555, slip op. at 3–5 (Bankr. S.D.N.Y. Jan. 16, 2009) (ordering an examiner to investigate whether there were any colorable causes of action arising from the failure of Lehman Brothers).

267. Although it might also be seen as a stick with which to threaten future actors, acting out of fear of punishment is not virtuous. Virtuous behavior requires taking action for the right reasons.

268. Typically causes of actions uncovered by examiners are prosecuted, if at all, by the

appointment of examiners can serve to teach the right way to act by highlighting non-virtuous actions.²⁶⁹

By contrast, the creditors' bargain model would conceive of the question of whether to appoint an examiner as an option to be weighed via cost-benefit analysis. Creditors' bargain theorists would suggest that an examiner should not be appointed unless he or she is likely to uncover enough colorable causes of action such that appointment would essentially earn the estate a profit. Unfortunately, this view has taken root in certain courts.²⁷⁰ This view appears to misunderstand both the history of the examiner provisions²⁷¹ and the statutory text.²⁷² The appointment of an examiner is mandatory in cases where the debt threshold has been met and a party in interest or the United States Trustee requests appointment.²⁷³

The mandatory nature of examiner appointments cannot be explained through an efficiency analysis, but it can be understood from a virtue jurisprudential perspective.²⁷⁴ The law can help shape preferences—and therefore actions.²⁷⁵ Examiners serve to increase human flourishing by helping to make the many who are not virtuous more so by “shaming them, habituating, teaching, and then ultimately persuading them.”²⁷⁶

representatives of the unsecured creditors' committee.

269. The Bankruptcy Code provisions relating to examiners came about as part of a compromise in which the SEC took a step back from the active role it had under Chapter X of the Chandler Act. See Lipson, *supra* note 193, at 1638 n.117; see also Warren, *Untenable Case*, *supra* note 14, at 469. Although the role of the SEC diminished, the appointment of an examiner was intended to fulfill some of the duties that the SEC had previously played. See Lipson, *supra* note 193, at 1627.

270. See, e.g., *In re Rutenberg*, 158 B.R. 230 (Bankr. M.D. Fla. 1993); *In re GHR Cos., Inc.*, 43 B.R. 165 (Bankr. D. Mass. 1984); *In re Shelter Res. Corp.*, 35 B.R. 304 (Bankr. N.D. Ohio 1983).

271. See Lipson, *supra* note 193, at 1627 (noting that Congress created the examiner position to be, in part, a proxy for the “investigative functions played by the Securities and Exchange Commission and mandatory trustee under prior law”).

272. See, e.g., *Walton v. Cornerstone Ministries Invs., Inc.*, 398 B.R. 77, 82 (N.D. Ga. 2008) (noting that the meaning of the statutory text “‘depends on context’” (citation omitted)).

273. See, e.g., *In re Revco D.S., Inc.* 898 F.2d 498, 501 (6th Cir. 1990); *Cornerstone Ministries Invs., Inc.*, 398 B.R. at 84; *In re Loral Space & Comm., Ltd.*, No. 04-8645, 2004 WL 2979785, at *3 (S.D.N.Y. Dec. 23, 2004); *In re UAL Corp.*, 307 B.R. 80, 86 (Bankr. N.D. Ill. 2004); *In re Mechem Fin. of Ohio, Inc.*, 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988); *In re The Bible Speaks*, 74 B.R. 511, 514 (Bankr. D. Mass. 1987). But see *In re Residential Capital, LLC*, 474 B.R. 112, 118–20 (Bankr. S.D.N.Y. 2012) (stating, in dicta, that appointment is not mandatory).

274. See SOLOMON, *supra* note 21, at 7 (“[I]f one thinks of business as a ‘dog-eat-dog’ fight for survival or calculates all business decisions in the limited language of cost/benefit analysis, unethical behavior is bound to follow.”).

275. See Sunstein, *Incommensurability*, *supra* note 37, at 822 (noting “the effects of law on social attitudes”).

276. Claeys, *supra* note 19, at 919–20; see also MACINTYRE, *supra* note 19, at 154

Being more explicit about enshrining additional obligations to act virtuously into the law would help to constrain the behavior of non-virtuous actors, and over time, “teach them to act virtuously of their own accord.”²⁷⁷

CONCLUSION

Bankruptcy law and policy is formed and operated in a world that has imperfect markets, imperfect information, and significant transaction costs.²⁷⁸ Chapter 11 reflects these imperfections and messy realities, but few of the hypothetical bankruptcy models offered up by creditors’ bargain theorists do the same. And yet, creditors’ bargain theorists often compare their over-simplified, hypothetical bankruptcy models, such as Chameleon Equity²⁷⁹ or Contingent Equity,²⁸⁰ with our current system—Chapter 11.²⁸¹ Based on such comparisons, it is no wonder that they take the view that Chapter 11 is costly, cumbersome, and in need of significant reform, if not outright repeal.²⁸² However, while there is a lot to learn from thought experiments into hypothetical bankruptcy structures, it is important to extrapolate those conclusions back into the real world before making policy choices.²⁸³ Unfortunately, this crucial, final step is often omitted, impairing our ability to compare the idealized theories derived from the creditors’ bargain model to our actual bankruptcy laws.²⁸⁴

The creditors’ bargain model seems ill-equipped to account for Chapter 11’s complexities. By contrast, virtue jurisprudence has the ability to offer useful insights about under-theorized aspects of

(discussing moral education).

277. Penalver, *supra* note 57, at 871.

278. See Lynn M. LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 MICH. L. REV. 79, 81–82 (1992) (criticizing economic analysis for its assumption of “perfect capital markets and zero transaction costs”).

279. Adler, *Financial and Political Theories*, *supra* note 14, at 312, 327.

280. Bradley & Rosenzweig, *supra* note 14, at 1079.

281. See Butler & Gilpatric, *supra* note 15, at 277; cf. SOLOMON, *supra* note 21, at 220 (stating that virtue ethics confronts “the darkest dogma of traditional business thinking, the impoverished idea of *Homo economicus* who has no attachments or affects other than crude self-interest and the ability to calculate how to satisfy that interest vis-à-vis other people”).

282. See, e.g., Adler, *Bankruptcy and Risk*, *supra* note 236, at 489; Bradley & Rosenzweig, *supra* note 14, at 1052–53.

283. See LoPucki, *Reorganization Realities*, *supra* note 61, at 1311 (noting that Professor Adler has referred to Chameleon Equity as a “thought experiment”).

284. See *id.* (“Most economists are bad at reality; their simplistic models do not begin to capture phenomenological reality.”); see also Warren, *Bankruptcy Policymaking*, *supra* note 14, at 379 (“We must consider bankruptcy policies in light of their application to cases that arise in the real world.”).

bankruptcy law. By focusing on achieving a just result, the bankruptcy judge can quiet the chaos of financial distress that is often occasioned by a bankruptcy filing. The bankruptcy judge can help prevent creditors (and debtors) from aiming at cross-purposes because they lack a larger perspective as to their effects on the enterprise.²⁸⁵

In light of the frailty of human institutions, a consequentialist approach that seeks to distill every competing claim to a dollar figure (or some imaginary unit of welfare) and compare such claims on that basis may be the best way to promote human flourishing. It may be that, in order to overcome certain institutional weaknesses, we should resolve disputes by comparing claims according to a unitary metric, even though this will not reflect a fully adequate understanding of those claims.²⁸⁶ “[Assuming commensurability] makes things simple and orderly where they would otherwise be chaotic. In certain areas of the law, this may be a decisive advantage, all things considered.”²⁸⁷ If this is the argument that creditors’ bargain theorists wish to make, then they must make it. Creditors’ bargain theorists must claim that they can do better than any other system, or they must aim to do less. But it is for creditors’ bargain theorists to prove that their vision of the world is practically superior, despite being non-ideal.

Until recently, virtue ethics had more or less fallen out of favor. Deontological and consequentialist theories ruled the philosophical and legal academy, and the creditors’ bargain model dominated the corporate bankruptcy literature. Virtue ethics was rarely even mentioned. This seems, in part, because “[b]oth deontological ethics and utilitarianism stress the importance of broad general principles, which can then be applied to particular cases.”²⁸⁸ Whereas, it is the nature of virtue ethics “to start with the particular community and context and understand cases (and abstract principles) within that community and context.”²⁸⁹ Similarly, the Code often requires that bankruptcy judges make context-bound decisions in the exercise of their discretion.

One of the primary aims of this Article is to introduce virtue ethics into the corporate bankruptcy literature and to offer it as the right kind of theory to provide a way to understand the day-to-day dynamics of

285. See Korobkin, *Rehabilitating Values*, *supra* note 18, at 773 (noting that the bankruptcy process can be constructive for its participants).

286. Cf. Colin Farrelly, *Civic Liberalism and Judicial Review*, in *VIRTUE JURISPRUDENCE*, *supra* note 35, at 107, 129.

287. Sunstein, *Incommensurability*, *supra* note 37, at 853.

288. SOLOMON, *supra* note 21, at 113.

289. *Id.*; see also Farrelly, *supra* note 286, at 129.

bankruptcy law. Virtue ethics is less determinate than the creditors-bargain theory. But the inability to formulate general rules or prescriptions that can be followed in all situations is a result of virtue ethics' recognition that "much depends on the historical, cultural, economic and political situation of any given society."²⁹⁰

This Article has argued that virtue jurisprudence offers a potentially rich and fruitful descriptive account of the nature, means, and ends of bankruptcy law. It also has the potential to offer a unifying normative theory of bankruptcy law—a theory that simultaneously resolves some of the problems of existing theory and poses a new set of challenges. This next step will be addressed in a follow-up article.

290. Farrelly, *supra* note 286, at 129; *see also* GROSS, *supra* note 13, at 216 (discussing "contextualized decision making").