RELIGION AND BANKRUPTCY

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From the time of its creation and throughout its evolution, bankruptcy law has affected and been affected by religion. Important aspects of current bankruptcy law, such as the discharge of debt[1] and the exemption of personal property,[2] originated in religious traditions before making their way into secular law.[3] At the same time, religious individuals and institutions are themselves often parties in bankruptcy cases,[4] and the Bankruptcy Code specifically protects religious contributions from avoidance as fraudulent transfers,[5] excludes them from consideration in connection with the dismissal of a bankruptcy case for reasons of abuse,[6] and allows them as a deductible necessary expense when calculating the debtor's disposable income.[7] While there has been some prior legal-academic commentary on the treatment of religious individuals and institutions in bankruptcy,[8] scant attention has been paid to the flipside interaction, religion's influence upon bankruptcy.

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[1] On bankruptcy discharge and its effects, see 11 U.S.C. §§ 524, 727, 1141 & 1328 (2006).

[2] 11 U.S.C. § 522 (exempting from collection certain debtor property, such as clothing, furniture, and tools of trade).

[3] *Deuteronomy* 15:1-3 (discharging loans in the Sabbatical year); *Deuteronomy* 24:6 (exempting from collection the trade tool of millstones); *Deuteronomy* 24:12-13 (exempting clothing); *Exodus* 22:25 (same). *But see* BABYLONION TALMUD, Tractate *Makkoth*, Folio 3b (establishing a mechanism that allows lenders to structure loans in a way to evade their discharge).

[4] Two recent examples are the church cases in Milwaukee and Wilmington. *See* Annysa Johnson & Paul Gores, *Milwaukee Archdiocese Files for Bankruptcy Protection*, MILWAUKEE J. SENTINEL Jan. 4, 2011; Ian Urbina, *Delaware Diocese Files for Bankruptcy in Wake of Abuse Suits*, N.Y. TIMES Oct. 20, 2009, at A14. More generally on the issue of church bankruptcies, see *Roundtable Discussion: Religious Organizations Filing for Bankruptcy*, 13 AM. BANKR. INST. L. REV. 25 (2005); Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. REV. 363 (2006).

[5] 11 U.S.C. § 548(a)(2).

[6] 11 U.S.C. § 707(b)(1).

[7] 11 U.S.C. § 1325(b)(2).

[8] David L. Gregory, *Some Reflections on Labor and Employment Ramifications of Diocesan Bankruptcy Filings*, 47. J. CATH. LEGAL STUD. 97 (2008); Theresa J. Pulley Radwan, *Keeping the Faith: The Rights of Parishioners in Church Reorganizations*, 82 WASH. L. REV. 75 (2007); Felicia Anne Nadborny, *"Leap of Faith" Into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate*, 13 AM. BANKR. INST. L. REV. 839 (2005); Allison Walsh Smith, *Chapter 11 Bankruptcy: A New Battleground in the Ongoing Conflict Between Catholic Dioceses and Sex Abuse Claimants*, 84 N.C. REV. 282 (2005); *Symposium: Bankruptcy in the Religious Non-Profit Context*, 29 SETON HALL LEGIS. J. 341–557 (2005).

To address this gap in the literature, we organized a symposium ("Religion and Bankruptcy: Perspectives Thereon and Treatment Therein") that brought leading thinkers together to examine *both* sides of the relationship between the two fields. And we are now delighted to present the symposium papers in this issue of the *American Bankruptcy Institute Law Review*.

The opening paper[9] is Professor Geoffrey Miller's novel approach to the interpretation of an ancient religious text, a passage from the Babylonian Talmud.[10] The passage concerns the calculation of a financial award against witnesses who falsely testify that a man divorced his wife, causing him to have to pay her the money due under their marriage contract. The damages that the Talmud requires the witnesses to pay the husband are less than what that the perjured testimony had forced the husband to pay his wife, and the question asked by Miller like others before him is why.

To explain the passage, Miller (who is the world's leading scholar in the application of economic analysis to ancient law[11]) unsurprisingly supplies an economic theory: that the Talmud discounts the damages to reflect the chance that even in the absence of the perjured testimony, the husband might still have had to pay his wife on the marriage contract if he were later to divorce or predecease her, a risk reduced but not eliminated by the chance that the husband (or his estate) might later go bankrupt.[12] Miller's paper demonstrates the economic sophistication of ancient religious law and in particular its sophistication with respect to the risk of insolvency and the attendant adjustments that courts and contracting parties must make in light of it.

Moving from ancient law to modern times, Professor Theresa Radwan's paper[13] concerns the issue whether debtors who seek discharge from student loan debt on grounds of "undue hardship"[14] undermine the case for discharge by engaging in post-petition religious tithing. While the Bankruptcy Code excludes tithing from consideration as a factor with respect to whether the debtor has engaged in abuse,[15] that exclusion arguably does not extend to the undue hardship inquiry. The cases go both ways[16] with Radwan charting a delicate path between them, arguing that

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[9] *Law and Economics versus Economic Analysis of Law*, 19 AM. BANKR. L. REV. 459 (2011).

[10] BABYLONIAN TALMUD, Tractate *Makkoth*, Folio 3a.

[11] For a selection of leading works by Miller and others in this field, see, ECONOMICS OF ANCIENT LAW (Geoffrey P. Miller ed., 2010).

[12] On the liability of a bankruptcy estate to the debtor's ex-spouse, see BABYLONIAN TALMUD, Tractate *Ketubot*, Folio 93a; Robert J. Aumann & Michael Maschler, *Game Theoretic Analysis of a Bankruptcy Problem from the Talmud*, 36 J. ECON. THEORY 195 (1985).

[13] *Sword or Shield: Use of Tithing to Establish Nondischargeability of Debt Following Enactment of the Religious Liberties and Charitable Donation Protection Act*, 19 AM. BANKR. INST. L. REV. 471 (2011).

[14] Student loans are generally non-dischargeable in bankruptcy, absent a showing of "undue hardship." 11 U.S.C. § 523(a)(8) (2006).

[15] 11 U.S.C. § 707(b)(1).

[16] *Compare In re* Durrani, 311 B.R. 496, 504 (Bankr. N.D. Ill. 2004) (tithing is not a bar to discharge for hardship debtors with a history of tithing), *with In re* Ritchie, 254 B.R. 913, 919 (Bankr. D. Idaho 2000) (tithing expenses cannot be considered in the hardship inquiry).

courts should take a case-by-case approach in light of the debtor's pre-petition tithing history. Radwan's paper highlights the importance that modern bankruptcy law attaches to religion through its protection of tithing while exploring the outer limits of how far that protection extends.

If there is one place in contemporary bankruptcy practice where one would most expect to find religious influences, that place would be the bankruptcy law of predominantly Muslim countries in which Islamic religious law plays a substantial role. Islam's special rules regarding finance seem to present an obvious need for a distinctively Islamic approach to bankruptcy law. Yet such is not the case according to Professor Haider Hamoudi, a leading scholar of Islamic law who investigated this issue in his symposium contribution.[17] Hamoudi's valuable study finds that while there are a few exceptions—for instance, *shari'a* law's requirement of debtors' prison remains on the books in the United Arab Emirates—the overwhelming majority of predominantly Muslim countries are more like Dubai, which has a fully secular bankruptcy law, than like the UAE, which does not. Indeed, even countries that in recent years have Islamized their laws, such as Qatar, Malaysia, Indonesia, and (amazingly!) Iran, still continue to have secular bankruptcy laws. As to why this may be, Hamoudi suggests two reasons: first, that Islamic finance is not relevant to modern commercial societies; and second, that to the extent Islamic finance is relevant, it is both transnational and practiced privately and thus need not be covered by secular domestic law. Regardless of whether one finds Hamoudi's explanations for the secularity of bankruptcy law in predominantly Muslim countries convincing, one cannot be anything other than impressed and startled by his important findings.

Combining modern corporate bankruptcy practice with timeless notions of Christian morality, Professor Lyman Johnson's paper[18] is an ambitious effort to use religious conceptions of faithfulness as a basis to "debar" the high officials of bankrupt firms and institutions from continuing in such employment post-bankruptcy once their faithlessness to stakeholders has become apparent. Arguing that faithfulness is an essential feature of the relationship between corporate fiduciaries and the firm or institution to which they owe their fiduciary duties, Johnson suggests that its demonstrated absence justifies debarment, that various areas of state and federal law already utilize debarment, and that bankruptcy is an appropriate venue to which the debarment remedy should be extended. Debarment should become a basic feature of bankruptcy practice, and this way bankruptcy courts could do some good not only for the parties with direct interests in the bankrupt entities whose cases they adjudicate but also for society at large and in particular for the stakeholders of similar, solvent institutions who would benefit from the protections that debarment orders provide.

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[17] *The Surprising Irrelevance of Islamic Bankruptcy*, 19 AM. BANKR. INST. L. REV. 505 (2011).

[18] *Debarring Faithless Corporate and Religious Fiduciaries in Bankruptcy*, 19 AM. BANKR. INST. L. REV. 523 (2011).

The final contribution comes from Professor Steven Resnicoff, whose paper[19] offers a comprehensive comparison between Jewish and American bankruptcy law along with an analysis of their interaction. Identified similarities between the two bankruptcy systems include the absence of debtors' prison, the exemption of tools of trade and other personal property that is essential to the debtor's subsistence, and the preservation of the debtor's capacity to contract and ability to practice a trade even in the wake of insolvency and default. Identified points of difference include Jewish law's relatively more extensive limitations on the discharge of debt and the independent moral obligation that Jewish law imposes to pay one's debts even if as a technical matter they have been legally discharged.

These differences come into some tension when the two systems interact, as in the situation of a creditor who seeks to enforce in rabbinical court a debt that has been discharged under U.S. bankruptcy law.[20] On this question, Resnicoff identifies and discusses a variety of approaches that are found among the authoritative sources of Jewish law. Alternative doctrinal bases for honoring a secular bankruptcy discharge under Jewish law include: (1) *yeush* ("loss of hope [of recovery]"), which operates as a kind of self-fulfilling abandonment with respect to discharged claims; (2) *dina d'malkhuta dina* ("the law of the land is law"), which subordinates underlying Jewish law to controlling secular law in a wide range of circumstances; and (3) *minhag hasoharim* ("merchant custom"), which assumes contracting parties to prefer that their transactions be governed by customary merchant law in lieu of otherwise controlling Jewish law. A complicating factor is that while the latter two doctrines can supersede otherwise applicable Jewish law in many circumstances, there are some circumstances, such as transactions between observant Jews who wish their relations to be governed by Jewish law, where these doctrines may not apply. A further complicating factor is that even if the debt is theoretically enforceable in rabbinical court, the members of the tribunal may themselves be bound by the automatic stay[21] and/or the discharge injunction[22] and thus may be powerless to enforce the obligation notwithstanding its ongoing viability as a matter of Jewish law. Resnicoff's bottom line is that while the question may be complicated, the dominant view within Jewish law would be to respect and enforce the secular discharge (as well as to permit debtors to obtain discharges to begin with). The actual differences between Jewish and U.S. bankruptcy law may thus be less pronounced than at first they appear.

Taken together, these symposium papers constitute a valuable contribution to the literature on religion and bankruptcy. We are grateful to the authors for their

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[19] *Jewish and American Bankruptcy Law: Their Similarities, Differences, and Interactions*, 19 AM. BANKR. INST. L. REV. 551 (2011).

[20] A subsidiary, related question is whether Jewish law permits debtors to obtain, or even seek, a secular discharge *ab initio*, given the religious obligation to pay one's debts and the religious prohibition against suing co-religionists in secular court.

[21] 11 U.S.C. § 362 (2006).

[22] 11 U.S.C. § 524(a)(2).

work, and we look forward to its favorable reception in both the academy and the bankruptcy community at large.