

Ep.83 Early Modern Debtors to Chapter 11: 15th-Century England Meets Modern American Bankruptcy

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Ishana Tripathi (IT) (00.23): Hello and welcome to INSOL Talks. Our episode today is truly special as we spend our conversation going back to the origins of modern-day bankruptcy and deliberate on how England and the United States brought enforce their existing bankruptcy regimes, if I may say so. Our guests today are the legendary Douglas Baird, a Harry A. Bigelow Distinguished Service Professor of Law at the University of Chicago Law School, and Doctor Fleur Stoker, a Herchel Smith teaching and research fellow in law at the Emmanuel College at the University of Cambridge.

Now Fleur is a legal historian, and Douglas, everybody knows you, so welcome both of you to INSOL Talks, and we are very excited to have you. Now here before we sort of get the ball rolling, and I open the floor to two of you to take us through the 1500s to today, I want to take a second to talk about how ideas for install talks come about.

Now our podcasts, which are run by the INSOL ERA group, emanate from work in progress conversations. And the credit for this discussion goes to you, Fleur, whose presentation sort of blew a lot of minds at a conference last year which explored the early history of English bankruptcy in its international and transnational context. So welcome again, and let's talk a little bit about the evolution of bankruptcy that has shaped current day law across the globe.

My first question, to get the tone in order, what were the primary social and commercial pressures that drove the earliest bankruptcy legislation in England. And how did those differ from the conditions that shaped the first US bankruptcy statutes and Fleur, because you are the historian, I'm going to open the floor with you.

Fleur Stoker (FS) (02.36): Thank you, Ishana, for inviting me to speak. The first English bankruptcy statute was the Statute of Bankruptcy of 1543, enacted during the reign of Henry VIII. The preamble tells us that it was introduced to deal with debtors who had fled, parts unknown or kept their houses, so thereby avoiding their creditors. The statute was therefore directed exclusively at fraudulent debtors and was fundamentally a creditors remedy. Its central innovation was that it created a collective process for dealing with an insolvent debtors' estate. Before the statute, creditors had to rely on the ordinary remedies of the common law, which generally operated only one creditor at a time. Those remedies could result in imprisonment or execution against particular assets, but they did not provide an effective mechanism for gathering together all the debtor's property and distributing it amongst the creditors as a whole.

The bankruptcy statute sought to address that problem. It empowered commissioners and, following the 1571 Act, the Lord Chancellor, to administer the process. They could seize the debtor's property, recover assets that had been fraudulently transferred or preferentially disposed of, and distribute the estate among the creditors on a pro-rata basis. Because bankruptcy was understood as a form of fraud, the statutory regime was fundamentally punitive, and that means that the bankrupt was treated as a wrongdoer and therefore there was no possibility to discharge the debtor. The objective was solely to maximize the assets available to creditors. Traditionally, lawyers and scholars have taken the bankruptcy statute as face value and explained the legislation simply as it stood there.

In my recent work, however, I argue that this is only part of the story. We have to look beyond the statutes alone. Certainly, the statute addressed fraud, but it was also part of a broader insolvency framework and a wider commercial policy. By creating clear rules for a collective administration of insolvent debtors, protecting creditors property rights, the legislation made lending less risky and encouraged extension of credit. So this broader economic context is important. During Henry VIII's reign, England relied heavily on credit, much of it obtained from merchants and financiers in Antwerp

and the Low Countries more generally. If England wanted to develop its own commercial economy, it needed institutions that would encourage people to lend. Bankruptcy law provided greater certainty that if a debtor failed, creditors would share the estate accordingly to established rules, rather than relying on these piecemeal common law remedies. In that sense, the legislation was not simply about punishing fraudulent debtors, it was also about making England more competitive as a commercial nation.

At the same time, it is important to remember that the bankruptcy statutes formed only one part of a broader insolvency framework. Alongside the statutes, an equitable insolvency jurisdiction developed in the Court of Chancery, and also it could be used in the Privy Council. There, creditors of debtors who fell outside of the bankruptcy statutes, often honest but insolvent debtors, could still seek collective relief and a pro-rata distribution of assets. As I've argued in my article, *The Forgotten History of Bankruptcy*, this equitable jurisdiction also developed mechanisms such as bills of conformity, which were early majority compositions, allowing cooperative debtors eventually to obtain relief.

Court of Chancery could grant an injunction preventing further proceedings at common law and effectively giving the debtor a discharge. This mechanism was abolished by legislation in 1624, and it was not until the Statute of Bankruptcy in 1705 that the statutory discharge reappeared. In many respects, this equitable jurisdiction bears a much more closer resemblance to our modern understanding of bankruptcy than these early statutory bankruptcy regimes. It recognized that insolvency was not necessarily the product of fraud, and that honest debtors could ultimately obtain relief, but never at the expense of the creditors.

IT (07.38): Thank you for that introduction Fleur. And let's just move to America to understand how these conditions differ. Douglas.

Douglas Baird (DB) (07.49): Yes, there is a similar story to be told in the US, but again, we are now looking towards the 18th Century and also the peculiar conditions of, of America, where America has always been a debtor nation. And there are also divisions inside the colonies. And there are also two different legal traditions. One was this Bankruptcy tradition where people look to English laws, and again, as Fleur said, look to the bankruptcy laws, not so much as a punitive mechanism, but as a collective mechanism that would require or enable creditors to work together to try to sort out the mess that was created by a common debtor.

At the same time, there emerged a separate strand of laws. These were called insolvency laws that were not aimed so much at collective remedies as they were at helping individual debtors who ended up in debtors' prison. And these provided discharges, though the discharge usually was just a discharge from imprisonment as opposed to a discharge from the debt itself. But in any event, what we had in the period when we were still a colony of Great Britain was two different traditions. One, this bankruptcy tradition, the other this insolvency law tradition. And in the bankruptcy tradition, which was not very well used, but at least it was conceived as a collective mechanism, and it was this bankruptcy tradition that was embraced by the framers of our Constitution.

And they saw this not so much as a punitive mechanism, but rather as an essential feature of an advanced commercial economy that was driven by credit and instruments of credit, and that such an economy needed a way to sort things out. I should say, though, that this bankruptcy power that was given to Congress was not exercised on a permanent basis till the end of the 19th century. So there were bankruptcy laws in 1800 and in 1840 and in 1867 but these laws didn't last for very long. So through the entire period of the nineteenth century, we had different sorts of mechanisms emerging that actually were very much like what Fleur is talking about and were not formally denominated as bankruptcy itself.

IT (10.12): I mean, thanks for that insight, Douglas. One of the things that's very interesting from the US perspective is that the US Constitution expressly grants Congress the power to enact uniform laws on the subject of bankruptcies. Now, why was that clause included, and how contested was it at the Philadelphia Convention?

DB (10.37): Well, it was included not because bankruptcy was very well known in the US at the time. It was not. But it was thought to be one of those sophisticated things that an advanced commercial economy had. So the bankruptcy power was perceived as something in the interests of the Northern States and the States and the Federalists themselves, and people who were worried about continuing to do business and continuing to borrow money from Great Britain. It was not heavily contested, though there was one objection that was raised to it, and the interesting objection that was raised was people pointed out that in England, bankrupts could be hanged, and they were afraid that if Congress had the power to pass bankruptcy laws, they would be able to impose the death penalty on debtors. And this is something that made framers uncomfortable, since quite a few of them were actually heavily in debt and a characteristic, again, of the United States, it's always been a debtor nation. And in the South, especially where you had plantation owners and so forth, the debts were quite large.

Now, again, they ultimately said, well, there's not a serious risk of that. And indeed, in Great Britain, the death penalty was not, in fact, not often, not often used. And when it was used, it was only for outright fraud committed during the bankruptcy process itself. But there was this spectre of bankruptcy as a punitive mechanism. But the rationale for putting it into the Constitution was not because it was a punitive mechanism. But as Fleur emphasized, it was perceived as this collective mechanism that was in the interest of creditors to sort out the mess.

IT (12.20): And because we've gone to the notion of death penalty and bankruptcy at a time where you are looking at Charles Dickens on the rise, it's only good to mention him because he's one of my favourite authors, and I've been waiting for this moment to mention him. I want to now segue back to olden days, if one would say with respect to the debtor's prison as a concept. Now Fleur, that is a question to you now. How did the debtor's prison shape attitudes to insolvency in England, and when and why did it fall away as a tool of enforcement? At what point, and for what reasons did English law begin to distinguish between the honest but unfortunate data and the fraudulent one? How was that distinction codified?

FS (13.18): So there's a very interesting question because, well, I think that debtor's prison can be seen as one of the most dark periods in the history of the English common law. But the whole story and all the questions that you ask are quite complicated and more complicated than it first appears. So the attitudes towards debtor's prison have changed throughout history. So as I already mentioned earlier, the medieval common law system allowed imprisonment for debt. So this was generally used where people were unwilling to pay their debts, but they probably could, or maybe one of their relatives could and they would pressure, with imprisonment for debt, they would pressure family members or business associates to satisfy the debt.

However, one of the principal aims behind the introduction of bankruptcy law was to reduce the need to imprison people for these debts, as it generally didn't benefit either the debtor or the creditor, and it was only there to encourage debtors to flee or to hide from their creditors. So bankruptcy law introduced a mechanism in the hope that people would not flee, because they would not longer have this debtor's prison hanging above their head. One of the principal aims behind the introduction of bankruptcy law was to reduce the need to imprison people for debt, because imprisonment generally did not benefit creditors or debtors, and they only encourage debtors to flee or to hide from their creditors.

So the bankruptcy regime, both for fraudulent debtors, but also for honest debtors with the bills of conformity that I mentioned earlier meant that the need for debtors prison was much lower. You can also see that in the numbers, when you look at the numbers of people incarcerated for debt, basically the numbers only go up from 1624. Whether that is a coincidence when bills of conformity were abolished or not, you just see a gradual line going up of imprisonment for debt from that point onwards, all the way up to the 18th and early 19th century. And then we get to your point about the debtors prisons of Charles Dickens and other Victorian writers.

So originally, bankruptcy law distinguished between fraudulent and honest debtors, as I set out earlier. However, the statute of Bankrupts of 1705 modified that distinction by introducing the

discharge of debts, both for fraudulent and honest debtors at the same time. So basically, from that point onwards, it didn't matter anymore whether you were fraudulent or not. It was only about the collective process. They just wanted debtors to cooperate with the bankruptcy process and thereby producing better outcomes for creditors and maintaining confidence in commercial life. However, this discharge only remained available to traders, so honest non traders could still end up in debtors' prison and there was also no equitable relief for them.

It was only the Insolvent Debtors Act of 1813 that allowed honest, insolvent traders to apply for discharge. And finally, imprisonment for debt was largely abolished in 1869, although it was even then, it was not even completely eliminated. There were still people imprisoned in England in the early, for debt in the early 20th century. Overall, English insolvency law increasingly recognised that cooperative debtors could better serve both their creditors and the wider commercial community with a discharge, rather than for imprisonment for debt.

IT (17.40): Thank you for that answer for now Fleur, because you used the term discharge, which is a hot topic amongst all insolvency scholars, and I suppose all of us have used it at least once or maybe 10,000 times in every paper that we've written. A question to ask here is with respect to English law being developed and developing the concept of discharge as a centre point of bankruptcy. And of course, it is very different from what one would look at from an American perspective. How would you compare the two approaches and their underlying philosophies? And I will, of course, start with you for a brief response and then move to Douglas for an elaborate one, because this is a contentious conversation.

FS (18.33): Well, both systems now recognize the value of giving an honest debtor a second chance. They have arrived from a different starting point. One of the conclusions that I've reached in my research is that the English discharge was originally designed to improve creditors recoveries by encouraging debtors to cooperate with the bankruptcy process rather than rehabilitate the debtor. I think that is different from the American philosophy that I think Douglas will explain later. I also think that there is a distinction between the two discharges of debt, where we see that while England has this discharge of debt, there is still so much more stigma attached to it, rather than in America, where I think a fresh start really means a fresh start.

IT (19.29): Now, Douglas, for you to effectively dispel the concept of discharge as being the same as the UK from a US perspective.

DB (19.39): Well, I think it's a complicated story over over several different dimensions, one of which is this temporal dimension which Fleur was talking about. The discharge in England didn't take hold till the Statute of Anne in 1705. But during the course of the 18th century, there was this evolving notion that, at least with respect to merchants, these are people who have to borrow money in order to send ships and engage in commerce.

You could imagine situations where you're an honest merchant and these ships have sunk. And this was, this type of misfortune was a sort of misfortune that made sense, at least for merchants to grant a discharge. And this is an idea that Blackstone talks about in his treatise, and for the United States, the only thing many lawyers knew about English law was what they read in Blackstone. So when they came to read Blackstone, they saw this idea of the honest but unfortunate debtor. But there it was the merchant debtor.

At the same time, we have this bankruptcy tradition and this notion that we have these honest debtors and their problems to be sorted out, who are merchants. There's also this separate tradition, which is that people borrow money, they can't always pay it back. And we need a variety of legal devices to protect them. And in any event, there was always this notion in the United States that if things didn't work out, you could move west and start again. And so, especially during the course of the 19th century, there was this idea that you could begin a new life, you could start all over again.

The United States is still one of the peculiar jurisdictions in the world in which your name is whatever you call yourself, you don't have to register with a local constabulary. You can simply go to a new

place and tell people what your name is and start your life over again. And so that idea is very much part of the American ethos. Though I should say this idea of the fresh start wasn't connected to or baked into the idea of bankruptcy law, because bankruptcy law wasn't a permanent part of U.S. law until 1898.

IT (21.51): I mean, it is a very unique space to be in. Douglas, when you look at the American ideology behind a fresh start. And because we've gone back to Blackstone, I want to just ask this question as a follow up, because some historians argue that the American Fresh Start Ideology is a distinctly cultural product. It is basically not doable anywhere else, and it is linked to the frontier of individualism and the mythology of reinvention. Do you find that persuasive, and does it hold up against historical evidence of today?

DB (22.29): Well, I think part of it is, is linked. And this, again, is not a bankruptcy story, but the story of the rise of the limited liability corporation. In the United States we have no tradition of directors being obliged to cease doing business with the firm becomes insolvent. We have this rather robust idea that you can start a business, you're incorporated, and if the business fails and you can't pay your creditors. Well, you shut down the business, the creditors take their losses, and then you start over again.

There are people like Henry Ford and the Ford Motor Company. The Ford Motor Company was actually Henry Ford's third try. The first one failed outright, and there were a lot of creditors that weren't paid. The second firm he was thrown out of. It's not correct to say that Henry Ford went bankrupt twice. He just failed twice, and in America, that's thought to be okay. It's thought to be the case that you start a business. It doesn't always work so you try again. And that's part of the American ethos. And it's not directly tied to the frontier, but it is part of the American consciousness that it's, it's thought to be okay to start a business and to fail. And that sort of attitude is not one you see, you see elsewhere. But that attitude of business failure being okay is something that I think is, is baked into our sympathy for bankruptcy and for the bankruptcy discharge and for the fresh start.

Though I should say historically, it's quite different than a lot of what we think about today when we think about bankruptcy discharge, because the bankruptcy discharge today matters the most for consumer debtors. And consumer debt is really a 20th century phenomenon. Until the 20th century, it wasn't really thought appropriate that if you're just an ordinary individual and you're responsible, why should you borrow money? You're not risking money in a business enterprise. Why? Why do you need to borrow? It wasn't really until the 20th century that we had consumer credit as a large component of our economy.

IT (24.38): I mean, at this juncture, I want to sort of segue into the 1900s and perhaps leave the 1500s, 1600s, 1700s and 1800s, that's a lot of centuries to skip over, behind and talk about the US Bankruptcy Reform Act of 1978, because that essentially is the turning point of modern day bankruptcy in the US. Now, while the US Bankruptcy Reform Act is widely regarded as the most important overhaul of American bankruptcy law in the 20th century, it is still looked at as a modern day instrument with very innovative features. What would you say were the key innovations and which have perhaps proved to be the most durable to Douglas?

DB (25.32): Well, the 18, uh the 1978 Bankruptcy Act has very deep roots, and one of the reasons why I would urge people to read Fleur's work is what she talks about this, origins of the idea that creditors get together and creditors collectively agree to sort out what there is and to agree to a discharge for the debtor. This idea of the composition, this idea of creditors getting together to work things out, is a part of, a major part of what is now modern Chapter 11. Modern Chapter 11 is not so much connected to the statute of Henry and the formal bankruptcy statutes, but to the compositions and equitable receiverships that emerged in America in the 19th century that were very closely connected to the spirit, at least of the compositions that Fleur talks about in her work.

I think the most decisive feature of the 1978 act that also distinguishes US law from many the law of many other jurisdictions is the way it empowers the debtor in possession. This idea that the people who ran the business, and indeed the people who might have actually run the business that failed and

borrowed too much money and so on continue to operate the business. And that's something that outside the US is sometimes regarded as very bizarre, which is why on earth would you take the same people who drove the truck off the cliff and allow them to continue to operate it? And so it's that debtor in possession feature that I think is the most striking, and the one which no American lawyers at least have to do the most explaining about.

IT (27.09): I mean, one of the things to also talk about here, Douglas, is when did corporate bankruptcy actually emerge as a distinct legal problem from individual insolvency in the US? What were the key cases and statutes that shaped its development?

DB (27.27): Well, the what we now think of as Chapter 11 was really an equitable process called the equitable receivership. And that was not codified until the 1930s. And so corporations could file for bankruptcy under the 1898 act. And there we did see compositions that were very much like what Fleur was talking about, but they traditional corporate reorganization, as we now understand it, was not codified until the 1930s, and the big cases that were responsible for its codification and gave it structure; and again, also distinguishes us restructuring law from other laws were cases. The two, I would point out, would be *Boyd vs Northern Pacific Railway* and *Case versus Los Angeles Lumber Products*.

And these cases are important because they establish the absolute priority rule. This idea that when we divide up the assets, the secured creditors get paid first in full, and until the most senior creditors are paid in full, the junior creditors can't get paid anything. This is now a class based right under the 1978 law. But still, the United States is committed to absolute priority. And that's not something we see Part 26A in the UK. It's not something we see in Europe where there's this embrace of relative priorities, something we haven't done in the US.

IT (28.54): Now keeping the US corporate reorganization, Chapter 11 theme. My last question to you in this sort of large question that I'm asking you is that the US Chapter 11 reorganization procedure is sometimes described as the most debtor friendly corporate rescue tool in the world. And here it's very interesting to understand its evolution. How did it evolve from the earlier Chapter 10 and Chapter 11 procedures under the Chandler Act of 1938, and perhaps just a second to be spent on what the Chandler Act is?

DB (29.36): Well, the Chandler Act is the major codification of these various equitable traditions that emerged beforehand. The big mistake of the Chandler Act was with respect to large corporate reorganizations. It had the mandatory appointment of a trustee to take over the business. The Securities and Exchange Commission had to write a report to decide on the future of the company. There was heavy judicial oversight and people, by 1978 understood that that was a catastrophic mistake. It was a catastrophic mistake because, sure, it's great to have process and a trustee and everything else, but that's not consistent with keeping the firm intact. And so the understanding and the impulse behind the 1978 Act was this recognition that a lot of firms are worth more alive than dead. And if you want to keep a firm intact, very often, the best way to do that is to keep the current management on board. This is especially the case with respect to small enterprises.

Now, obviously, if the person is dishonest or incompetent and unworthy, then you don't want to reorganize the business, but they're small businesses where if it's a mom-and-pop restaurant, remember a mom-and-pop restaurant without mom and pop is just a bunch of used kitchen equipment. It's not worth anything. If you really want to preserve the business, you need to keep the old managers in play. They're not going to stay around unless they continue to operate the business. They're not going to be employees. There's this idea that they can go off and start a completely different enterprise. It's in everyone's interest that they continue.

I should also say that one of the devices that has emerged, that has kept the structure of 1978 in place is that creditors have an enormous amount of power, and it's not at all unusual to see the managers being displaced. So even though it is true that there is a debtor in possession model, the people actually running the company may not be the people who ran it before bankruptcy. There's a difference when we have a corporate entity about the debtor in possession of thinking that

necessarily the people managing the company were the people who were responsible for its economic misfortunes, the creditors may very well have replaced the managers or induced the board to replace the managers before the bankruptcy even started.

So it's again, we do have the debtor in control. We do have this debtor in possession model, but the debtor in possession model is very largely moderated by the ability of creditors to have some influence over who's running the show.

IT (32.21): Thank you very much, Douglas, for setting the tone in terms of what Chapter 11 was, and of course, that what it is today has become a reference point for a lot of jurisdictions, including India. That is where I'm from. Now, one of the things that's important from a bankruptcy ecosystem perspective has been how moratorium stay and calm period has been viewed in different bankruptcy legal systems, and the US system is actually pretty unique when it comes to the entire concept of an automatic stay moratorium or calm period, as different jurisdictions name it. Could you just give us a little bit about how that particular concept came about and was shaped?

DB (33.13): Yes. Well, the basic, the basic concept is that if you have a debtor that has too few assets to pay off the debts, and we have a regime that is not a collective regime, that's a regime in which what's going to happen is that each creditor will look and say, wait a second. If I exercise my remedies and try to get paid in full today, I may get paid in full. Or if I wait and act collectively, and I'm simply a good citizen, at best I'm going to share pro-rata with everyone else and there's not enough to go around, so it's in my interest to act first.

Well, if you have a going concern and if you're trying to save the business, then that's catastrophic. That's madness. It's like the children's game of musical chairs. You have these destructive race to the assets. In the context of a 19th century railroad it doesn't make any sense if I'm a creditor and I levy on the left hand rails and you're a creditor and levy on the right hand rails, it'll destroy the railroad, and neither one of us is going to be left better off. And so we have this idea in bankruptcy that when there is a bankruptcy, everything stops. There is an estate that's created, and out of this estate, we're going to do the best we can. But in the meantime, creditors are stayed from exercising their individual actions. And so this is the image that we have. And so when you file for bankruptcy in the United States, theoretically everything comes to a stop.

Now, in practice, of course, the judge will allow the debtor to continue its operations. And even if you're technically a creditor, if your dry cleaner because you paid in advance, you're allowed to come in and continue to do business and so forth. And bankruptcy is, in practice transparent to the rest of the world, but not for trade creditors, not for employees, not for a lot of other people. Bankruptcy is massively disruptive because we have this idea that we bring everything to a dead stop. What we don't have in the United States, and this is a way in which, frankly, the United States actually looks worse than many insolvency jurisdictions, other places, is we don't have this ability to simply have a limited stay for a particular tranche of debt. That we have a firm, it has a set of bonds. It's not going to be able to pay those bonds off in full. These bonds need to be restructured. We don't have a bankruptcy mechanism in the United States that allows simply for those bondholders to stay their hands. We stay the hands of everyone and the effect of that is to make Chapter 11 extremely expensive. Even if what we need is a financial restructuring. Even if what we need to do is just restructure several tranches of funded debt. The current bankruptcy law doesn't allow us to do that the way, by contrast, the law in the UK does. And that's an area where a number of people think that bankruptcy reform in the United States would be very attractive.

IT (36.14): And because we're already in the 2000s, let's just do a comparative of the legal systems and their use for today. Both the US and UK systems have been periodically amended in response to crisis and to a large part, financial crisis; the Great Depression, the 1980s savings and loan crisis, the 2008 financial crisis, most recently Covid-19. Is that reactive, crisis driven reform a strength? Or would you say, is it a weakness of a common law insolvency system? Fleur, let me ask you this question first.

FS (36.57): Answering this as a legal historian, I would say that history shows that bankruptcy is not a modern problem, and it has existed in different forms over time. So what changes is not the basic

problem of insolvency, but the context. Each of the particular market failures that produced it. So in history, we have the South Sea bubble, the collapse of the Guernsey and Overend Bank, all sorts of financial, um, catastrophes that we see in modern day times as well.

In that sense, reactive reform is both a strength and a weakness of common law insolvency systems, because its strength is that it will be able to adapt to new commercial realities. So each crisis tends to teach us the economy and the legal system something new about risk and failure. And it would be unrealistic to expect of insolvency law to predict every form of economic collapse in advance. So the economy is too complex, and the crises often arise from risk that we never really fully understood before they actually materialized.

So I also think that English law has shown the capacity for adaptation. So in history you see really that the Court of Chancery, but also the legislature, of course, they try to change the law, but also, for example, try to prevent the collapse in the first place by new mechanisms. The development of the commercial trust after the South Sea Bubble shows also how equitable doctrines could be adapted to new economic circumstances. And I think that flexibility is also one of the strengths of the common law tradition. So at the same time, crisis driven reform is also a weakness because it means that the law only can change after the significant harm has already occurred. So it is a bit of both.

IT (39.06): Thank you for that historical background Fleur. Now, let's perhaps answer it from a modern-day perspective. And for that I move to you, Douglas.

DB (39.17): Well, there's always the danger that if you respond to a crisis, you're passing legislation that fights the last war. And so if you look at U.S. bankruptcy history, again, the Chandler Act that introduced Chapter X and Chapter XI, which we talked about, was 1930s New Deal legislation done in response to the Great Depression. And again, I don't think that law was, that law turned out to be a mistake, and it turned out not to work. But it was a necessary statutory reform that I would say misfired.

When we had a number of great scandals at the start of this century with Enron and Worldcom, there was widespread reform, this is Sarbanes-Oxley, that again gave a new level of regulation. It wasn't bankruptcy specific. It turned out to be costly. May also have turned out to be valuable, but at least it's quite contested. In the wake of the great financial crisis of 2008, we had Dodd-Frank. And this, I think, confronted the following question, which we hadn't thought about before, which is that bankruptcy is primarily a micro phenomenon. It looks at individual businesses and how we sort out the affairs of individual businesses.

It's not a macro piece of legislation. We don't really look at how the collapse of one firm will affect the rest of the firms in the economy. We sort of imagine there are lots of firms, some firms fail. We have to have a legal mechanism that deal, that deals with that. That's what bankruptcy law does. And we never really thought about bankruptcy law as addressing the problem of what if one particular firm is so important that its failure collapses an entire industry?

And that's an issue that we tried to confront with Dodd-Frank. Again, whether we did it successfully or not is, is, is not clear. But the history of bankruptcy is, is, is still being written. I think probably it's, it's best written in times where there's people can reflect and where people can think about what's going on. But again, things happen in moments of crisis. And we have to hope for the best.

IT (41.35): Thank you for that ray of positivity, Douglas. But running through history of both the systems, there seems to be a tension between the interests of creditors and debtors that still doesn't seem to have a soulful, right. And we are in the 20th century, and the later part of it, perhaps. Has that tension been resolved, or for the two of you, does it remain the central fault line in insolvency today? Simply put, does the existing ecosystem have enough strength for the future challenges? And Fleur perhaps I can move to you to answer first.

FS (42.20): I don't think that the tension can ever be really resolved because it's the defining characteristic of insolvency law. Throughout history, insolvency law has attempted to balance the

competing interests of creditors and seeking repayment and debtors seeking relief. And what has changed over time is not the existence of that conflict, but the legal mechanisms used to manage it. So English law has demonstrated quite considerable flexibility, and the Court of Chancery developed equitable principles that complemented the common law and bankruptcy introduced collective procedures in place of individual enforcement and later reforms, also developed statutory discharge and rescue mechanisms.

More recently, both the United Kingdom and the United States also have continued to adapt these insolvency regimes in response to these changing economic conditions that you set out. In that sense, the existing ecosystem is much stronger than it was historically because it provides a broader range of tools to deal with this financial distress.

However, I don't think that the current system is without weaknesses. So one issue that really concerns me is the stigma attached to insolvency, particularly in England. Although the law increasingly recognised that insolvency is often the result of economic circumstances rather than personal failure, many individuals remain very reluctant to seek advice and make use of the procedures available to them. Delaying engagement with creditors often worsens that position for both debtors and creditors, and also it undermines the effectiveness of the insolvency system itself.

I also think that insolvency law should be more clearly situated within the wider frameworks of private law. So historically, insolvency developed alongside the common law and equity, and many of its principles, remain rooted in these broader concepts of property and obligations and other commercial relationships. And maintaining those connections is important if insolvency law is to continue to adapt coherently in new economic challenges.

Overall, I believe that the existing insolvency ecosystem has sufficient strength to respond to future challenges. Not because it has resolved the tension between creditors and debtors, but because it has repeatedly demonstrated that it has the capacity to adapt. History suggests that insolvency law evolves alongside changes in commerce and society, and the challenges for future reform is therefore not to eliminate the tension between creditors and debtors, but to continue balancing those competing interests while reducing unnecessary barriers such as that stigma and preserving the flexibility that has characterised English insolvency law throughout history.

IT (45.23): Douglas, is the American ecosystem strong enough to withhold all the future challenges?

DB (45.31): Well, I'd like to be an optimist. I would also say that in thinking about this problem, it's perhaps important to think about the debtor creditor world in at least three different ways. I think if you're talking about funded debt, if you're talking about investors of capital to hold diversified portfolios, these people are grown ups. They invest in businesses, some succeed, some fail. They should have diversified portfolios. And if they do, then the fact that debtors fail shouldn't be a big problem. You know, the winners will be balanced out by the losers.

I think the more important thing to worry about here in terms of striking the important balance is, is to recognize two other facets. One facet is the following. We say creditors, and you might think it's a big bad bank that is lending money, but in fact, creditors includes victims of torts and includes small landlords, it includes small suppliers. These are also people who are supplying credit and they're not diversified. They are genuinely at risk. And when you think in the abstract about creditors, you need to worry that these small creditors, who might also be involuntary creditors, are also part of the picture.

Something else you need to bear in mind is that the debtor is not necessarily the corporation or the entrepreneur who has failed and wants to, has a limited liability corporation that's going to go again. Corporations come and go, and that's fine, and that's not a big deal. But again, as I mentioned before, consumer debt is now a huge part of the ecosystem. And we talk about consumers. You can be a consumer in your 20s, you can borrow money in the reasonable expectation you're going to pay it back, and then you have a life altering illness or something else that happens to you and you're carrying a huge amount of debt. You're carrying student debt, is a big thing in the in the United States; you have housing debt which may come to haunt you if there's a collapse in housing prices the

way there was in 2008. And these individual debtors who don't look at all like the merchants that that Fleur and I were talking about before, are a separate source of concern. And striking the balance here is a completely different problem. So I think in striking the balance, the important thing to remember is we're talking about many different problems and not just a single problem. But as for your basic question, my optimistic about the future? Absolutely.

IT (48.14): Optimism with a smile. And we got from the 1500s to the 2000s in less than an hour. So thank you both to effectively be so concise in creating the magic of history of bankruptcy today for this conversation. But I'm not going to let you go without a final quip here, Douglas, and I'm going to let the lady have the last word instead of the first word. Now to you, I have a question that could create a lot of controversy, but I'm going to ask it to you anyway. Is there a case, a judgment of a different court, or a piece of legislation that you think is underrated? And it is something that the historians of bankruptcy law have not given sufficient attention to. So a quick final quip. What is it?

DB (49.12): Well, I would, I would say it's the statute of Elizabeth in 1571. This is the law governing fraudulent conveyances. This has cast a huge shadow of American over American law. But when I talk to English lawyers over drinks, they never seem to have heard of it. And so it's absolutely stunning to me that this statute passed by Parliament in the 13th regnal year of Queen Elizabeth in 1571, something that completely dominates and casts a shadow over the entire American reorganization landscape. It's something that English historians seem to have forgotten, and I find that I find that that mystifying.

IT (49.53): Wow. I need to Google that. Now for the last word Fleur. If there's one thing you could change about how the history of insolvency law is taught to law students today, what would it be? And of course, Douglas and I are going to incorporate it in our curriculum immediately.

FS (50.14): Yeah. If I could change one thing in how the history of insolvency law is thought taught, I would place it much more in context. Like this whole discussion was originated by how bankruptcy law can be seen within an international and transnational context. And I think, insolvency law does not develop in isolation. It's response to financial crises, to changing commercial practices and political priorities, and also wider developments of private law. And understanding those narratives is, in my view, just as important as understanding the legislation itself, because it explains why bankruptcy policy changes when it does. I also would like to see in my own jurisdiction that insolvency law would have a much more prominent place within the teaching of private law. It's often just seen as a niche specialist subject, and I think it has just so many implications for contracts and property and trust and commercial law. And I think that if we place everything in a wider perspective, that everyone would benefit from that.

IT (51.36): Wow. That's a very big thing to have said. But a fantastic and positive notes to sort of end on. I want to seriously thank both of you for making this happen. I know in INSOL Talks is all about emerging trends. So you will see an ESG or an AI or something else related to cross border and international insolvency on the horizon all the time. But it's a bit of a breath of fresh air to take it back to the fifteen hundreds and then move forward, as we do with bankruptcy and with INSOL Talks. So till we meet again, thank you so much to both of you, and thank you to our listeners. Stay tuned for this episode and the next one.

Outro Music (54.24): If you have enjoyed this podcast, make sure to subscribe on your favourite podcast provider so you don't miss an episode. Contact us on LinkedIn and Twitter at INSOL international using the hashtag #INSOLTalks. The information provided is intended for a general audience and reflects the personal views of the participants. This podcast is distributed under a Creative Commons Attribution non-commercial no derivatives 4.0 International License. Thank you for listening.