***Why the Theory of English and Welsh Bankruptcy Law is not yet written***

By

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***Abstract***

*This article identifies various reasons why the theory of English and Welsh bankruptcy law has not yet been written. By examining the four main participants who are involved in bankruptcy law it is shown that various factors impact on their ability to meaningfully engage with the theoretical side of bankruptcy law.*

*It is argued that this theoretical gap seriously damages the formulation of coherent bankruptcy policy. This in turn affects the substantive law and ultimately the stakeholders who are involved with bankruptcy as a whole.*

*Following this audit several suggestions are then made to address this grave lacuna. These include incentivising scholarship on bankruptcy theory, properly funding bankruptcy theory scholarship, holding frequent bankruptcy theory conferences, and valuing practitioner input through CPD weighted theoretical activity.*

**Introduction**

Bankruptcy law theory has suffered in the past in England and Wales from a failure of meaningful engagement.[[2]](#footnote-2) Whilst our American colleagues have been writing and thinking about bankruptcy law from a theoretical perspective for many decades, there has been a dearth of scholarly activity on this side of the Atlantic. Why is there a deficiency of theoretical contributions from English and Welsh academics and other professionals who are involved in bankruptcy law? This article attempts to answers this question and proposes several solutions to address the neglect.

The evidence is there to help us cogitate over and then build a broad theoretical model for bankruptcy law. In addition to our own creative deliberations, the law is well attested and clear. We have an overwhelming mass of pertinent materials stretching back more than five hundred years on which we can base our ruminations. The volume may in of itself be the problem with the lack of theoretical engagement. The materials include, *inter alia*, statute, case law, secondary sources, statistics,[[3]](#footnote-3) policy formulations (e.g. Law Commission and Government), empirical work,[[4]](#footnote-4) correspondence, reminiscences and diaries, and newspapers. This abundant material has never been used to formulate a coherent theoretical model of English and Welsh insolvency law. No attempt has ever been made to write an overarching theoretical treatment of English and Welsh bankruptcy law as a whole. Our hoarded wealth of materials has yet to yield interest.

Discrete theoretical points have been addressed in some particular departments, with some genuinely novel ideas being proposed, e.g. the praiseworthy work of Mokal and his novel authentic consent model,[[5]](#footnote-5) or Finch’s deployment of measures through which she evaluates corporate insolvency law,[[6]](#footnote-6) but these are isolated contributions.[[7]](#footnote-7) Otherwise what has been written merely summarises what has previously been proposed, generally by our American colleagues, in a broad swathe of general treatment.[[8]](#footnote-8) There is no novelty with a genuine and unique overarching English and Welsh contribution to theoretical debates and theories on bankruptcy law. Compared to social sciences more broadly, English and Welsh bankruptcy law is seriously lacking in theoretical underpinnings.

Four main groups of participants exist within bankruptcy law. Hitherto, these protagonists have been unwilling, or incapable, of undertaking the required theoretical work on bankruptcy law. This is due to various reasons. These include, *inter alia*, (1) priorities, (2) skills sets, (3) motivation, (4) knowledge, (5) incentivisation and any number of other exigencies. The cumulative effect of these impediments is to preclude meaningful engagement with bankruptcy theory. This in turn has effected the formulation and practice of bankruptcy law and the legal rules upon which it is based. We are currently hampered by this lack of depth in our policy formulations and by extension our final legislative provisions. Until we have deeply mulled on what it is we are trying to achieve with our bankruptcy system it foolhardy to formulate and promulgate rules that do not reflect any form of theoretically inspired and informed approach. We are legislating for bankruptcy in a half-cocked manner. This legislating activity may be driven by commercial practicalities with almost constant tinkering at the edges or to provide short term headlines that an issue is being address. Or it may also just reflect that we are traditionally a nation of shopkeepers, as opposed to philosophers. Either way, the legislation and the results that flow from that legislation in terms of policy outcomes are incoherent. We cannot flirt with the idea of a new Cork II[[9]](#footnote-9) without serious engagement with the theoretical side of the subject,[[10]](#footnote-10) an activity that has been almost entirely absent in this jurisdiction. This article suggests a number of ways in which this theoretical lacuna can be addressed.

In terms of territory there is a fine line between what could be called a theory of bankruptcy and the policy considerations that underlie it. So for example policy could be seen to be: (1) the preservation of assets for creditors as a general body; (2) the realization and distribution of the value of those assets in some orderly fashion out of the common pot; and, (3) the establishment of priorities (or not). These all require a class remedy so as to avoid the chaos of individual remedies. Finally, in the modern age, we have rehabilitation.[[11]](#footnote-11) Differentiating these qualities of a bankruptcy law from the theoretical discussion that underpins them is not always an easy task but if we are alive to the proximity of policy and theory we can progress through an exposition of theory in a considered manner. We must be conscious of the overlap.

The article is divided into two parts. In part one we examine the various participants who are involved in bankruptcy law in England and Wales and we explore the reasons why they have shied away from engagement in theoretical debate. We see that various competing factors remove their chance to engage with the root and foundations of bankruptcy law. In part two we respond to this audit[[12]](#footnote-12) and examine several solutions that will potentially eradicate the theoretical void that currently gapes in English and Welsh bankruptcy law scholarship. These techniques will help encourage and solidify deep theoretical scholarship, bringing it forward to a position of acknowledged importance. A conclusion then follows.

**(1) The Participants**

And now why is English and Welsh bankruptcy theory unwritten? There are four main groups who are involved in the day to day minutiae of bankruptcy law who could have contributed work on the theory of bankruptcy law. An examination of these participants will shed light on the lack of bankruptcy theory in this jurisdiction. These participants do not include the obvious stakeholders, namely, creditors and debtors, with their multiplicity of types, needs and motivations. Nor do they include other bit part and occasional players who occasionally exercise control and influence on the bankruptcy market, e.g. distressed debt professionals, hedge funds, asset based lenders, etc. These participants could also legitimately claim consideration in the following exposition, but for space, and the fact that they have also neglected to engage in the theoretical side of the subject. We will now explore why each of our four main participants has singularly failed to address the theoretical underpinnings of bankruptcy law.

(A) Insolvency Practitioners (IPs)

Bankruptcy practice can be hectic, time pressured and emotive. The pressure and demands of meeting chargeable hours,[[13]](#footnote-13) managing with the employees caught up in the insolvency process, the pressure of getting in new business,[[14]](#footnote-14) the complications attaching to large scale insolvencies,[[15]](#footnote-15) communication issues, compliance and regulation issues, professional body monitoring, all contribute to a heavy burden for the modern IP. The typical IP’s focus is understandably on administering the insolvent estate and satisfying the demands of compliance with pertinent regulations.

There is insufficient time or willingness to engage in deeper background issues such as bankruptcy theory. Their main imperative, as with the majority of professionals, is profit wealth maximization. Theory is simply unimportant to this stakeholder on a day to day basis. Consequentially, theory is neglected, despite it being a fundamental foundation of the very provisions and policy approaches that the IPs are implementing at the coal face with debtor and creditor stakeholders.

When there is meaningful engagement with bankruptcy policy it is either superficial or geared towards facilitating some professional objective, some biased agenda which is designed to benefit the IP and any professional objectives. But this is policy and not theory upon which the policy is based.

There has been some noteworthy cross-over work undertaken by IPs. Katz and Mumford[[16]](#footnote-16) and Morgan[[17]](#footnote-17) have already provided interesting statistical analysis of bankruptcy practice. But this isn’t theory, it is empirical work designed to help normative engagement with the black letter law.

Largely speaking the fertile materials are to theoretical for an IP to engage with as a matter of course. Time pressures and the exigencies of practice preclude useful engagement.

(B) Lawyers

The lawyers who are involved in bankruptcy law can be divided into judges, barristers and solicitors. Each has a different type of engagement with bankruptcy law, and bankruptcy law theory, so it is unwise to lump them all together into one amorphous pot. Before we consider them individually we will examine some broader issues that relate to all three types of lawyer.

As a general point law is studied in isolation. Whilst the advent of minor and major courses has ameliorated the silo nature of the teaching of law at undergraduate level, it still remains a distinct and insulated discipline. Perhaps the most important problem for lawyers grows from this approach. Lawyers are trained with the logic of authority, much like historians are trained with the logic of evidence, the older the better.[[18]](#footnote-18) With legal history work it tends to mean lawyers are “prone to anachronism.”[[19]](#footnote-19) With legal theory it may lead to a reticence to engage. The logic of authority, the newer the better, and the pursuit of black letter law solutions tends to cause the traditional lawyer to steer clear of matters of theory. This does not mean that the lawyer is defective, indeed, a person may be an excellent lawyer and know very little about the remoter parts of bankruptcy theory.

There are further discipline specific difficulties.

Solicitors

Apart from three noteworthy exceptions[[20]](#footnote-20) solicitors are generally focused on similar objectives to IPs when they are working on an insolvency, namely, profit wealth maximization in terms of fee income, client care, and regulatory oversight.[[21]](#footnote-21) Perhaps most importantly though solicitors will be acting on instructions from their client. This activity is their primary focus. Time pressure rarely allows a deeper engagement with the theoretical side of the subject.

There are exceptions to this rule. Anderson’s cross-over work on corporate insolvency has been a remarkable contribution, as has Calnan’s work on taking security[[22]](#footnote-22) and proprietary interests in insolvency.[[23]](#footnote-23) Servian’s doctoral work on bankruptcy history also provided a foundation for his future work as a solicitor.[[24]](#footnote-24) However, these works are wholly doctrinal, as the authors probably intended. A theoretical treatment was obviously not what they thought their audience required.

Barristers

A number of barristers have also been involved in writing about bankruptcy law from a doctrinal perspective. Theory is rarer but there are examples. Mokal, for example, is now the living embodiment of what this article is proposing. Following his transition from academia to practice at the Bar he now represents a practitioner (barrister) who is deeply immersed in theoretical bankruptcy law, particularly the law and economics approach. Having stakeholders who are thus armed can only aid the science.

Additionally, there are also members of the bar who write in tandem with academics, however, this is largely doctrinal work, e.g. Briggs.[[25]](#footnote-25) However, it is a truth universally accepted that successful practitioners, by and large, do not have the time to write because of case work and time pressures.

Ultimately, it may be argued that it is not the job of barristers or solicitors to write about bankruptcy theory. They are being paid by clients to work for them and to get a result or otherwise advise them.

Judges

Some members of the judiciary are certainly keen to engage in the academic side of bankruptcy. In a 2014 public lecture the former Chief Registrar in Bankruptcy,[[26]](#footnote-26) Dr. Stephen Baister, sounded a rallying call to arms for personal insolvency research. He stated that too much emphasis had been put on the corporate side of the subject and that insufficient consideration has been given to the personal side, namely, personal insolvency, in the shape of bankruptcy, Individual Voluntary Arrangements (IVA), Debt Relief Orders (DROs), etc.[[27]](#footnote-27) Baister noted:

*“It is regrettable that both judicially and academically increasing attention is being given to corporate insolvency and less and less to the insolvency of individuals. (I say regrettable because, in my view (and that of others), the law of individual insolvency is more complex and more subtle than its corporate equivalent). Bankruptcy deserves better.”*[[28]](#footnote-28)

He continued with a plea:

*“…to give more academic attention to personal insolvency and less, perhaps, to the more obscure reaches of its corporate counterpart.”*[[29]](#footnote-29)

Baister is not alone in sounding the bugle call to arms. In 2003 Ziegel expressed similar concerns to the Society of Legal Scholars.[[30]](#footnote-30) This did elicit a response from English scholars,[[31]](#footnote-31) but if Baister is still critiquing the situation that Ziegel highlighted some twelve years before then we obviously still have a problem.

Baister highlights an important point regarding the balance of insolvency scholarship. In corporate insolvency when a company is at its useful end and has been liquidated it is disposed of, i.e. struck off the register of companies. In essence its very existence is terminated. It ceases to be. We cannot obviously do the same with human beings who have become insolvent. We cannot strike them off.[[32]](#footnote-32) A more nuanced and careful approach is required. If there is a dearth of serious scholarship therefore on the personal side of the subject then the way in which we treat personal insolvents is obviously not receiving sufficient attention. This is the crux of Baister’s point. Might we do things better if closer attention is paid to the subject by a greater critical mass of individuals looking deeply at the issues. The answer must be yes. Many hands make light work; two (or more) minds are better than one (or a few)! But this discussion is for another place.[[33]](#footnote-33)

However, the main point to be drawn from Baister and Ziegel’s statements is that this is still black letter law scholarship that they are encouraging. It is not deep theoretical engagement with bankruptcy law more generally. Judges who write on our subject, e.g. Mithani,[[34]](#footnote-34) also approach the subject from a doctrinal perspective.

If theoretical discussion of bankruptcy law takes place within the English and Welsh judiciary it must be occurring in the UK Supreme Court, if not in lower tribunals. Is this happening and what is the evidence? Discussion of the six most important insolvency cases in the UK Supreme Court since its creation[[35]](#footnote-35) showed that there has been a concentration on the meaning of insolvency, provable debts and expenses, contracting out of the statutory insolvency regime and limitations on cross-border insolvency co-operation. Within those judgments there is little in the way of theoretical engagement.

In *Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd,*[[36]](#footnote-36)a case on contracting out of the statutory scheme of insolvency that makes reference to the work of Professors Worthington and Goode, we see discussion of policy, but no engagement with underlying theory. On policy for example it is noted, “The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.”[[37]](#footnote-37) Some enunciation of why this was the policy in its broader context is lacking.

In *Mills v. HSBC Trustee (CI) Ltd*,[[38]](#footnote-38) a case on provable debts and expenses, we see no theoretical engagement but some brief discussion of policy when Lord Walker notes, “If the policy of the law underlying the rule against double proof is powerful enough to oust statutory set-off, is there any good reason why it should not have the same effect on the equitable rule?”[[39]](#footnote-39)

In *Rubin v. Eurofinance SA*,[[40]](#footnote-40) a case on cross-border insolvency co-operation, we see some evidence of engagement with the history and purpose of universalism. Lord Collins uses Story who in turn couches his discussion in theoretical terms, but both are really engaging in a doctrinal assessment of inter-jurisdictional co-operation and rules. He notes:

*“The meaning of the expression “universalism” has undergone a change since the time it was first used in the 19th century, and it later came to be contrasted with the “doctrine of unity.” In 1834 Story referred to the theory that assignments under bankrupt or insolvent laws were, and ought to be, of universal operation to transfer movable property, in whatever country it might be situate, and concluded that there was great wisdom in adopting the rule that an assignment in bankruptcy should operate as a complete and valid transfer of all his movable property abroad, as well as at home…”*[[41]](#footnote-41)

In *Joint Administrators of Heritable Bank Plc v. Winding Up Board of Landsbanki Islands HF*,[[42]](#footnote-42) a case on cross-border insolvency co-operation, we see no reference to bankruptcy theory. In *BNY Corporate Trustee Services Ltd v. Eurosail-UK 2007-3BL Plc*,[[43]](#footnote-43) a case on the meaning of insolvency, we see no reference to bankruptcy theory. In *Bloom v. Pensions Regulator*,[[44]](#footnote-44) a case on insolvency and pensions, we see no reference to bankruptcy theory. So there is no deep theoretical engagement in the highest cases in the land. Some would say, why should there be theoretical discussion? The court is undertaking a doctrinal analysis of specific legal provisions. It is not undertaking a broad discussion of the theoretical underpinnings of the entire corpus of English and Welsh bankruptcy law. The court is undertaking a specific role of dispute resolution. That said engagement with policy may be expected, if not theory.

The judiciary’s job is to decide disputes which is in the public interest. Even in the Supreme Court the Supreme Court Justices will not theorise. Why should they? It would be inappropriate to do so. They haven’t carried out empirical studies. They haven’t consulted interest groups. Neither could they. They are impartial judges of final appeal who at times explain how legal issues should be tested in lower courts. In fact it could be an abuse to use a dispute to introduce a pet theory.

Extra-judicial writing and comment is of course now permitted following the abolition of the *Kilmuir Rules*[[45]](#footnote-45) by Lord Mackay in November 1987. He felt the rules interfered with judicial independence.[[46]](#footnote-46) Blackstone,[[47]](#footnote-47) Denning[[48]](#footnote-48) and Sedley[[49]](#footnote-49) are famous examples of judges who have written in this way.[[50]](#footnote-50) Denning did however cause some controversy with his comments on the composition of juries.[[51]](#footnote-51) This episode certainly tainted what had otherwise been a remarkable and unlikely equalled career. Millet’s memoirs touch briefly on bankruptcy issues,[[52]](#footnote-52) but to date there has been no serious engagement with bankruptcy theory by any judge writing extra-judicially.

So the practical day to day material that insolvency lawyers engage with equips them well for engagement with the theoretical side of the subject, Indeed, these practitioners possess the requisites for the work but are unlikely to attempt it.

(C) Academics

Traditionally, English and Welsh bankruptcy academics have concentrated on five broad areas of scholarship. These are: (1) corporate insolvency; (2) cross-border insolvency, (3) the history of insolvency, (4) personal insolvency, and, (5) security aspects of insolvency. The work tends to be black letter in focus maintaining the early links that were created between the academy and practice by scholars such as Goode, Fletcher, Milman, Keay, Finch, Worthington and Rajak. The work that was done, perhaps obviously, tended to reflect the interests of those scholars.

English and Welsh bankruptcy law scholarship is in relative infancy compared with our American and Canadian cousins. If we must fix a date at which English and Welsh bankruptcy scholarship becomes articulate and continuous 1978 is perhaps the best date we can choose. Fletcher had just finished his first book[[53]](#footnote-53) and the Americans had promulgated their Bankruptcy Reform Act of 1978.[[54]](#footnote-54) Whilst written by an academic, albeit with close links to practice, Fletcher’s 1978 work is still black letter in focus. There were of course two earlier bankruptcy Ph.D.s, in 1965[[55]](#footnote-55) and 1927 respectively.[[56]](#footnote-56) Both focused on the history of bankruptcy. These contributions were both one-offs and not part of a continuum of academic treatment so cannot be accounted as the genesis of the subject.

Because of these early links and synergies it is perhaps to be expected that there is little in the way of meaningful work on the theoretical side of our subject.

It is trite to suggest the demands of teaching and administration deflect us from the theoretical work. Something else is afoot. More junior scholars who have flourished under the early pioneers of the subject have obviously been influenced by the early interests, whether that be for example, cross-border (Fletcher and Mevorach) or comparative (Fletcher and Adebola). Because we have had no theoreticians we have had no disciples of the English and Welsh equivalent of Jackson, Baird, Warren or Gross.

American Advances

As noted in the introduction, and hinted at in the preceding paragraph, our American cousins have been considering bankruptcy law issues from an academic perspective for a much longer period than we have here in England and Wales. Indeed, from at least 1927[[57]](#footnote-57) every angle of approach seems to have been taken with bankruptcy theory, every idea crushed and thrashed and tested to its core.

Why have Americans advanced the topic more speedily than their English and Welsh cousins? First, the law degree in America is a postgraduate degree (the Doctor of Juridical Science – JD). American scholars therefore have to undertake a different undergraduate degree, and a different type of training, before commencing their JD work. This can be in all manner of disciplines imaginable, including philosophy, history, economics, etc. This means that the typical JD student will have already been exposed to different approaches, schools of thought, etc, to the typical LL.B. student who is enrolling for their first degree as an undergraduate. It is noteworthy that the scholar (now a practitioner) at the vanguard of what theoretical work there has been done in England and Wales has an undergraduate economics degree which accounts for his thorough grasp of efficiency.[[58]](#footnote-58)

Secondly, Americans have had to contend with a choice of law issue that was largely removed from England and Wales in the late 19th century.[[59]](#footnote-59) Two separate debt enforcement jurisdictions existing simultaneously in American, namely, state law of debt enforcement and the federal law of bankruptcy. The difference between what state law can offer, as compared with federal bankruptcy law, has exercised the minds of American scholars since the late 1970s in a way that could not be replicated in England and Wales. The tension afforded American scholars the opportunity to reframe approaches to bankruptcy law teaching and scholarship as they sought to explain why federal bankruptcy law existed and what it did differently to state law. The lens of law and economics was chosen by one notable American scholar to shed light on the differences between the two regimes.[[60]](#footnote-60)

Thirdly, the use of Chapter 11 bankruptcy by American companies in terms of strategy[[61]](#footnote-61) has certainly bolstered both academic and commercial interest in the subject. The vast majority of New York law firms claim to have a bankruptcy practice[[62]](#footnote-62) to advise on these strategic objectives, whether they are to, *inter alia*, rescue the corporation, negotiate a reduction in liabilities to creditors, plan a reorganisation, sell constituent elements of the business, obtain access to the automatic stay, compose with creditors, downsize the business, reduce the number of employees, ease cash flow difficulties, pursue or defend litigation, or, merge with another company.

Springing from the state and federal tension two major schools of bankruptcy theory have developed in America that trace their origins to a number of well-known bankruptcy professors who have debated what bankruptcy law is for.[[63]](#footnote-63) There is the law and economics school led by Jackson with his celebrated, yet controversial, creditors’ bargain theory.[[64]](#footnote-64) His main collaborator and disciple is Baird.[[65]](#footnote-65) The opposing jurisprudential school of bankruptcy law theory argues for a broader view of bankruptcy law that respects the interests of numerous stakeholders, and not just the narrow interests of creditors. This school is led by senator, formerly professor, Warren[[66]](#footnote-66) and Korobkin.[[67]](#footnote-67) This school also includes Gross as an exponent of a broad communitarian approach to bankruptcy law design that takes in to account the interests of the community as one vitally important stakeholder.[[68]](#footnote-68)

There are also important outliers from the collectivist hegemony such as Adler who has proposed *ex ante* approaches to corporate indebtedness,[[69]](#footnote-69) and his novel *“Chameleon equity”,* a form of debt for equity exchange.[[70]](#footnote-70) More recently, Adler has argued that many investors would forswear the bankruptcy process if possible.[[71]](#footnote-71)

Much of this work is fuelled by the protagonists’ broad and careful early training across a number of disciplines.[[72]](#footnote-72) This multi-disciplinarity leads to work that helps inform the theoretical debate, e.g. analysis of the empirical position upon which theoretical debates can then be based.[[73]](#footnote-73)

As with this article, American bankruptcy law scholars also tend to mull on and explore various methodological approaches that they can bring to bankruptcy law scholarship. These include sociological,[[74]](#footnote-74) anthropological,[[75]](#footnote-75) philosophical, psychological and economic.[[76]](#footnote-76) These various approaches in turn inform and bolster the treatment of bankruptcy law design.

There has been recent cross over with Walters leaving our shores to join colleagues at the Illinois Institute of Technology, but this is unusual.[[77]](#footnote-77) Traffic has not all been westward however. Relatively recently, Ramsay, a Scot by birth, returned to Kent University having been a long time employee of Osgoode Hall Law School in Canada.[[78]](#footnote-78) This cross-jurisdictional influence will certainly aid analysis and goes some way to answer Maitland’s point that all work should be comparative in nature.[[79]](#footnote-79)

Bankruptcy law research at doctoral level

There is certainly no shortage of bankruptcy work at doctoral level. However, it is devoid of full length engagement with bankruptcy theory. Bankruptcy history is well catered for.[[80]](#footnote-80) There are a number of other English and Welsh insolvency law doctoral contributions which discuss modern insolvency law and related issues. However, again none are theoretical. They focus on corporate rescue,[[81]](#footnote-81) Chapter 11,[[82]](#footnote-82) set off,[[83]](#footnote-83) cross-border insolvency,[[84]](#footnote-84) insolvent charities,[[85]](#footnote-85) receivership,[[86]](#footnote-86) directors in insolvency,[[87]](#footnote-87) transaction avoidance,[[88]](#footnote-88) personal insolvency,[[89]](#footnote-89) agency bankruptcy,[[90]](#footnote-90) proprietary remedies,[[91]](#footnote-91) and other related areas.[[92]](#footnote-92)

There are also of course a number of insolvency Ph.D./D.Phil contributions on aspects of modern insolvency law which, like Markham Lester’s *Victorian Insolvency*,[[93]](#footnote-93) have subsequently been published as books. Mokal,[[94]](#footnote-94) Mevorach,[[95]](#footnote-95) Parry[[96]](#footnote-96) and Omar[[97]](#footnote-97) have all seen their Ph.Ds (D.Phil in Omar's case) go into print and Fletcher’s *The Law of Insolvency*, can also trace its origins back to his own Ph.D.[[98]](#footnote-98) Insolvency Ph.Ds by publication have also been awarded to Pond[[99]](#footnote-99) and Walton[[100]](#footnote-100) on the basis of cumulative refereed article contributions to the subject.

Could the failure of academics to meaningfully engage with the theoretical side of our subject be due to a lack of incentivisation? Most academics will not have an eye on the external baubles that their work may bring, whether that be external funding, fellowships,[[101]](#footnote-101) professional recognition,[[102]](#footnote-102) honorary silk,[[103]](#footnote-103) royal honours[[104]](#footnote-104) or even higher accolades. A concentration on doctrinal work has not meant a lack of public recognition in the past within the discipline of insolvency. The highest honours have been awarded to the legal academy, albeit on an incredibly rare basis. There has been one law professor recipient of the Nobel prize, Ronald Coase, and his work was in the field of law and economics.[[105]](#footnote-105) If such awards incentivize theoretical work, they are there.

Another reason maybe be methodological. There are a number of legal methodologies that have been used over time to conduct legal research, e.g. doctrinal or black letter law, historical, sociological (including socio-legal),[[106]](#footnote-106) law and economics, comparative,[[107]](#footnote-107) critical legal theory, law and anthropology, empirical, participatory, community based, or a mix of the above.[[108]](#footnote-108) Slavish adherence to one methodological approach may have caused some scholars to shy away from engagement with the theoretical aspects of bankruptcy law. As noted above, the traditional methodology employed in bankruptcy law scholarship in England and Wales has tended to be doctrinal. This in turn influenced successive generations of scholars. Further engagement with the panoply of methodologies must be encouraged if bankruptcy law scholarship is to improve in terms of depth and breadth.

If it is not methodological narrowness that is the issue perhaps it is just an unwillingness to engage with legal theory *per se*. Again there are a plethora of legal theories that provide gateways into thinking about and framing bankruptcy law. The main schools of legal theory all provide an insight into thinking about bankruptcy law whether from the perspective of natural law, positive law theory, legal realism, Marxist approaches to law,[[109]](#footnote-109) feminist legal theory, economic analysis of law, etc.[[110]](#footnote-110) There is therefore no shortage of approaches that can be brought to an analysis of bankruptcy law. Yet we still find little engagement with these approaches from English and Welsh scholars.

Perhaps a lack of diversity and homogeneity of the most widely cited English and Welsh bankruptcy scholars is a contributing factor to the lack of theoretical work? Jacoby has argued that this imbalance has impacted the development of American bankruptcy scholarship, particularly in relation to the receipt of public values within bankruptcy.[[111]](#footnote-111)

Whatever the reason, there have been none of the great debates that have taken place in other jurisdictions on bankruptcy law, as discussed above, or allied subjects where for example, vibrant exchanges typified the early nineteen thirties in corporate law scholarship.[[112]](#footnote-112) Where our American cousins are discussing the confluence of theory and practice into an ideal bankruptcy,[[113]](#footnote-113) we are still languishing in the scholastic equivalent of the paleolithic age of theory discussion, let alone its effect on practice.

(D) Government

Governmental engagement with the underlying theory of bankruptcy law in England and Wales is non-existent, at least in the published materials. Policy seems to be created in a vacuum of theory, with the mantra of repetition being more prevalent. Plus a change!

Take the work of the Cork Report as a prime example.[[114]](#footnote-114) There was no academic presence on the panel, let alone a theoretical input. Academics did submit evidence to the committee but its contents tended to reflect the practical links averred to above.

The time pressures created by the Brexit farrago will only add to the lack of meaningful engagement with theoretical matters.

**(2) What then can be done?**

There are numerous things that can be done to address the gap in theoretical scholarship identified in this article.

The best way to encourage more theoretical work is to free up time so that work can be done. This will provide time for thoughtful contemplation so that matters of deep theory can be mulled on. This time has to be funded so the best way to make this space available is through the encouragement of greater funding for bankruptcy theory scholarship, whether from the professions or research funding bodies.[[115]](#footnote-115) This funding could be for doctoral work, fellowships or one off research projects. The culmination of this theoretical work could of course be an academic prize. This bankruptcy theory prize, like the Yorke prize in legal history, would be awarded for the best paper on bankruptcy theory in a given time period.

Incentivizing practitioners to undertake theoretical work on bankruptcy law could be achieved by giving weight to theoretical work as part of Continuing Professional Development (CPD) activity. If theoretical outputs (books, articles, conference papers, etc) from practitioners were given such weight we might see more contributions from this group. Theoretical contributions from these participants is important for its own sake but also because of their professional obligations, for as the father of modern bankruptcy law, Basil Montagu, once opined:

*“…professional duties consist, not merely in activity and in publication upon some practical part of professional knowledge, which repay themselves; but in availing ourselves of every opportunity to visit and strengthen the route and foundation of the science itself."*[[116]](#footnote-116)

“Every” should include theoretical discussion of bankruptcy law.

Edited collections on bankruptcy theory, such as that published by Bhandari and Weiss in 2008,[[117]](#footnote-117) should be encouraged. These will provide a space in which the bankruptcy theory work can be read and disseminated. The best source for these essays is of course conferences or workshops. Our American colleagues provide models for these events[[118]](#footnote-118) including a recent 2018 symposium at the University of Pennsylvania which included some interesting retrospective insights from Jackson.[[119]](#footnote-119)

On the 1st and 2nd April 2020 the *University of Liverpool Interdisciplinary Conference on Bankruptcy and Insolvency Theory 2020*[[120]](#footnote-120) will take place in the Gallery, Foresight Centre, University of Liverpool. Gross is a confirmed keynote speaker. She will address the influence and applicability of the communitarian approach more broadly, most particularly as it relates to education, pedagogy and institutional success. Further discrete contributions will include, *inter alia*, Wood discussing the application of Schumpeter’s *“Gales of Creative Destruction”* to English and Welsh insolvency law.[[121]](#footnote-121) Marxist approaches to bankruptcy law will also be discussed.[[122]](#footnote-122) An edited collection will be published building on the conference papers.

In the interim there are scholars chipping away at discrete elements of bankruptcy theory. Since leaving practice as a solicitor, and joining the LSE, Patterson has commenced an interesting line of enquiry into theoretical ideas. In her 2015 contribution she undertakes a comparative US/UK examination of bankruptcy theory as it applies to large scale restructuring.[[123]](#footnote-123) This is an important contribution to bankruptcy law theory from an English and Welsh perspective, but like Mokal’s earlier work it is discrete and focused on one specific aspect of English and Welsh bankruptcy law. More broadly, Nsubuga has demonstrated how theory can enliven bankruptcy scholarship in the context of employees within insolvency.[[124]](#footnote-124) More of this work is needed. Still we await an overarching treatment of English and Welsh bankruptcy theory.

**Conclusion**

Time is of the essence. If we do not address the void in English and Welsh bankruptcy law theory scholarship then all future policy and legislative work in this area will lack credibility. It is incumbent on all the participants discussed here to grasp the nettle and set about responding to the solutions here proposed. This is particularly important when calls for a *Cork II* are being made on an increasingly frequent basis. If this new reform work is to have validity and credibility it must be underpinned by proper theoretical consideration which goes beyond discrete contributions.

It is in all stakeholders’ interests to have a meaningful engagement with the theoretical underpinnings of our subject. These make up the foundations of our approaches to dealing with insolvent estates and must be seriously considered. In the future this may take the form of a global theoretical code or approach as more and more transactions are being made cross border.

Despite this call to arms, perhaps at the end of the day it is for academics, the Insolvency Service and the Law Commission to research and theorise in relation to bankruptcy law theory. But with a little help from our practitioner friends, both lawyer and accountant, so much more can be achieved.

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2. A brief note on terminology (perhaps re-enforcing the American dominance of bankruptcy theory). In this article the term “bankruptcy” is used in the broad American sense. As such it includes both corporate and personal insolvency regulation and does not treat the term as solely applying to personal insolvency, as it does in normal English and Welsh legal usage. [↑](#footnote-ref-2)
3. See: <https://www.gov.uk/government/statistics?departments%5B%5D=insolvency-service>. There are some gaps, for example charity insolvency. Neither the Insolvency nor the Charity Commission keep a record of charity insolvency. See further: Tribe, J. *Charity Insolvency*, in: Briggs, N (Ed). *Tolley’s Insolvency Law*. LexisNexis, London, 2019. [↑](#footnote-ref-3)
4. See for example: Van Der Eijk, C. & Frisby, S. *Report on the pilot assessment of the performance of insolvency office holders European Bank for Reconstruction and Development* (2013). [↑](#footnote-ref-4)
5. See: Mokal, RJ. *Corporate Insolvency Law: Theory and Application*. Oxford University Press, Oxford, 2005. Hereafter *Mokal Insolvency*. [↑](#footnote-ref-5)
6. The measures are: (1) Efficiency, (2) Expertise, (3) Accountability, (4) Fairness. See the latest edition, now co-authored with Milman: Finch, V & Milman, D. *Corporate Insolvency Law: Perspectives and Principles.* 3rd ed. Cambridge University Press, Cambridge, 2017. [↑](#footnote-ref-6)
7. See also Tribe’s Insolvency Narrow Realism Theory (Tribe, J. *Framing Insolvency Law: Aspiration, Reality and the “Insolvency Narrow Realism Theory*. In Society of Legal Scholars 2017 108th Annual Conference *'The Diverse Unities of Law'*. University College Dublin. (2017, September 5). See further: Tribe, J. *Corporate Insolvency Law: Challenging Orthodoxies in Theory, Design and Use*. Edward Elgar (forthcoming). [↑](#footnote-ref-7)
8. See for example: Van-Zweiten, K. *Goode’s Principles of Corporate Insolvency Law*. 5th Ed. Sweet & Maxwell Ltd, London, 2018, Chapter Two *(“The Philosophical Foundations of Corporate Insolvency Law*”). Hereafter *Van-Zweiten.*  [↑](#footnote-ref-8)
9. It is thirty seven years since the Cork Committee published their seminal report of 1982. See further: *Cork Report, Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, See also: Cork, K. *Cork on Cork: Sir Kenneth Cork Takes Stock.* Macmillan, London, 1988, Chapter 10. See also the Government’s response to Cork: *A Revised Framework for Insolvency Law* (Cmnd 9175, 1984). The original Cork materials are contained here: <http://www.thecorkarchive.com>. See also: Carruthers, BG & Halliday, TC. *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*. Clarendon, Oxford, 1998. [↑](#footnote-ref-9)
10. A number of participants at the 2018 Enterprise Act 2002 anniversary conference at Aston mooted the idea of a new Cork Committee to revisit the foundations of our insolvency laws. See the collected papers in issue two of Insolvency Intelligence for 2019. [↑](#footnote-ref-10)
11. On these qualities of a bankruptcy law see: Baister, S. *The Uses of Bankruptcy* (forthcoming). See also: Tribe, J. *The Kekhman quintessence: what is English personal insolvency law for?* (2015) NBILeJ, 3(18), pp. 331-367. [↑](#footnote-ref-11)
12. For a similar audit, but of legal history scholarship, see: Baker, JH. *Why the History of English Law has Not Been Finished* (2000) Cambridge Law Journal, Vol. 59, Issue 1, pp. 62-84. Hereafter *Baker History*. This paper and Baker’s both adapt their titles from Professor FW Maitland’s inaugural lecture as Downing Professor of the Laws of England, University of Cambridge. See: Maitland, FW. *Why the History of English Law is not Written*, in: Fisher, HAL. (Ed). *Collected Papers of Frederic William Maitland*. Cambridge University Press, Cambridge, 1911, p.491. Hereafter *Maitland Written*. [↑](#footnote-ref-12)
13. On problems around IP remuneration see: Tribe, J & Hunt, S. *The remuneration taboo: Yearwood-Grazette and Freeburn* (2010) Insolv. Int, 23(9), 139-142. [↑](#footnote-ref-13)
14. Wood, J. *Assessing the effectiveness of the UK’s insolvency regulatory framework at deterring insolvency practitioners’ opportunistic behaviour* (2019) Journal of Corporate Law Studies. [↑](#footnote-ref-14)
15. e.g. Olympia & York (*Re Olympia & York Canary Wharf Holdings Ltd & Ors* [1993] B.C.C. 866) . [↑](#footnote-ref-15)
16. Katz, A. and Mumford, M. *Study of Administration Cases Report to the Insolvency Service.* October 2006. [↑](#footnote-ref-16)
17. Morgan, S. *Causes of Early Failures in Individual Voluntary Arrangements.* March 31, 2008. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.1393808> [↑](#footnote-ref-17)
18. On this distinction see: *Maitland Written*. See further: Plucknett, TFT. *Maitland’s View of Law and History* (1957) 67 LQR, 174-194. [↑](#footnote-ref-18)
19. *Baker History*, p.63. [↑](#footnote-ref-19)
20. Anderson, H. *The Framework of Corporate Insolvency Law*. Oxford University Press, Oxford, 2017. [↑](#footnote-ref-20)
21. On the nature of the modern legal profession see: Abel R & Sommerlad, H & Schultz, U & Ole, H (Eds). *Lawyers in Society*. Hart Publishing, Oxford, 2019. [↑](#footnote-ref-21)
22. Calnan, R. *Taking Security*. 4th ed. Jordan Publishing Ltd, 2018. [↑](#footnote-ref-22)
23. Calnan, R. *Proprietary Rights and Insolvency.* 2nd ed. Oxford University Press, Oxford, 2016. See also his: Calnan, R. *Principles of Contractual Interpretation*. 2nd ed. Oxford University Press, Oxford, 2017. [↑](#footnote-ref-23)
24. Servian, MS. *Eighteenth Century Bankruptcy Law: From Crime to Process*. Unpublished Ph.D. thesis, University of Kent at Canterbury, 1985. [↑](#footnote-ref-24)
25. Briggs, J & Tribe, J. *Muir Hunter on Personal Insolvency*. 78th Ed. Sweet & Maxwell Ltd, London, 2018. [↑](#footnote-ref-25)
26. Changed in 2018 to Chief Insolvency and Companies Court Judge. See: *The Alteration of Judicial Titles (Registrar in Bankruptcy of the High Court) Order 2018*, SI: 2018,no.130. [↑](#footnote-ref-26)
27. On these procedures see: Tribe, J & Morgan, S & Smyth, N. *Personal insolvency law in practice.* Jordan Publishing Ltd, Bristol, 2013. [↑](#footnote-ref-27)
28. Baister, S. *Shooting from the Hip*. A paper delivered to the INSOL Academic Forum, Istanbul 8th October 2014, at page 11. [↑](#footnote-ref-28)
29. *ibid.* [↑](#footnote-ref-29)
30. See Ziegel's unpublished *“Consumer Insolvencies: A Neglected Area of Study in English Insolvency Law?”* a paper delivered at the 2003 Oxford Society of Legal Scholars conference, where he notes the, “paucity of English legal writing” on personal insolvency. See also: Ziegel, J. *Comparative Consumer Insolvency Regimes--A Canadian Perspective.* Hart Publishing, Oxford, 2003, p.8, where he notes: “In the United Kingdom, until quite recently, consumer insolvencies were not regarded as a major legal and social issue and this perception is reflected in the very modest volume of legal and non-legal literature.” Professor Ziegel is not alone in the advancement of an American/Canadian perspective on English insolvency law scholarship, see further: Adler, M. *The Overseas Dimension: What can Canada and the United States Learn from the United Kingdom? (*1999) 37 Osgoode Hall L.J. 415 at p.420. [↑](#footnote-ref-30)
31. Tribe, J. *Personal Insolvency Law: Debtor Education, Debtor Advice and the Credit Environment: Part 1* (2007) Insolvency Intelligence, Vol. 20, No. 2, pp. 23-28. [↑](#footnote-ref-31)
32. For capital punishment in the context of bankruptcy see: Tribe, J. *Bankruptcy and capital punishment in the 18th and 19th centuries.* (2009) Insolvency Intelligence, 22(3), pp. 44-47. [↑](#footnote-ref-32)
33. Tribe, J. *Matchmaking in Insolvency*. (Forthcoming). [↑](#footnote-ref-33)
34. Mithani, A (Ed). *Mithani: Directors’ Disqualification*. LexisNexis (loose-leaf, 3.vols), 2018. [↑](#footnote-ref-34)
35. Anderson, H. *Six of the best: the record of the Supreme Court in the insolvency cases decided in its first four years* (2014) J.B.L, 3, 194-206. Hereafter *Anderson Best.* [↑](#footnote-ref-35)
36. [2011] UKSC 38; [2012] 1 A.C. 383 (SC). [↑](#footnote-ref-36)
37. [2012] 1 A.C. 383, para.104, per Lord Collins. [↑](#footnote-ref-37)
38. [2011] UKSC 48; [2012] 1 A.C. 804 (SC). [↑](#footnote-ref-38)
39. [2012] 1 A.C. 804, para.48 (*per* Lord Walker, with whom Baroness Hale, Lord Clarke and Lords Collins agreed). [↑](#footnote-ref-39)
40. [2012] UKSC 46; [2013] 1 A.C. 236 (SC). [↑](#footnote-ref-40)
41. *per* Lord Collins, in: *Rubin and another v. Eurofinance SA and others (Picard and others intervening) In re New Cap Reinsurance Corpn Ltd (in liquidation), New Cap Reinsurance Corpn Ltd and another v Grant and others* [2012] UKSC 46, [2013] 1 A.C. 236, para.17. [↑](#footnote-ref-41)
42. [2013] UKSC 13; [2013] 1 W.L.R. 725 (SC). [↑](#footnote-ref-42)
43. [2013] UKSC 28; [2013] 1 W.L.R. 1408 (SC). See further: Walton, P. *Inability to pay debts: Beyond the Point of No Return?* [2013] JBL 212. [↑](#footnote-ref-43)
44. [2013] UKSC 52; [2014] A.C. 209 (SC). [↑](#footnote-ref-44)
45. On the *Kilmuir Rules* and the Earl of Kilmuir generally see: Duxbury, N. *Lord Kilmuir: A Vignette.* Hart Publishing, Oxford, 2015. See also: Tribe, J. *Vignettes of Liverpool Legal History: (4) David Maxwell Fyfe: The Earl of Kilmuir – the Second Liverpool Lord Chancellor*. Liverpool Law, Liverpool Law Society. 2017. [↑](#footnote-ref-45)
46. See further: Mackay, J. *The Administration of Justice.* Stevens & Co, London, 1993. [↑](#footnote-ref-46)
47. See further: Blackstone, W. *Commentaries on the Laws of England*. 5th Ed, Clarendon Press, Oxford, MDCCLXXIII., printed for William Strahan, Thomas Cadell, and Daniel Prince. 8vo., 4 vols. [↑](#footnote-ref-47)
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49. e.g. Sedley, S. *Law and the Whirligig of Time*. Hart Publishing. 2018; Sedley, S. *Lions under the Throne Essays on the History of English Public Law*. Cambridge University Press. 2015; Sedley, S. *Ashes and Sparks: Essays On Law and Justice*. Cambridge University Press. 2011; Sedley, S. *The Making and Remaking of the British Constitution*. London: Blackstone Press. 1997. [↑](#footnote-ref-49)
50. See also the comprehensive database of extra-judicial speeches by United Kingdom Supreme Court Justices: <https://www.supremecourt.uk/news/speeches.html> [↑](#footnote-ref-50)
51. See further: *“Noted British Judge Quits After charges of Racicism in Book*.” In, New York Times, May 29, 1982. [↑](#footnote-ref-51)
52. See: Millett, P. *As in Memory Long.* Wildy, Simmonds & Hill, London. 2015. [↑](#footnote-ref-52)
53. Fletcher, IF. *Law of Bankruptcy.* Macdonald and Evans, Plymouth, 1978. [↑](#footnote-ref-53)
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55. Cadwallader, FJJ. *In pursuit of the merchant debtor and bankrupt: 1066-1732*. Unpublished Ph.D. thesis. University College London, University of London. June 1965. [↑](#footnote-ref-55)
56. Treiman, I. *A History of the English Law of Bankruptcy, with Special Reference to the Origins, Continental Sources, and Early Development of the Principal Features of the Law.* University of Oxford. Unpublished D.Phil thesis. 1927. [↑](#footnote-ref-56)
57. See further: Swaine, RT. *Reorganisation of Corporations: Certain Developments of the Last Decade* (1927) 27 Colum.L.Rev 901. See also: Bonbright, JC & Bergerman, MM. *Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganisation* (1928) 28 Colum.L.Rev 127. [↑](#footnote-ref-57)
58. See: Mokal, RJ. *On Fairness and Efficiency* (2003) 66 MLR 452. [↑](#footnote-ref-58)
59. On the use and abolition of an individual debt enforcement technique, as opposed to a collectivized regime, see: Tribe, J. *The Imprisonment for Debt Jurisdiction* (2018) Insol.Int, (31(3)), 92-100. [↑](#footnote-ref-59)
60. See: Jackson, TH. *A Retrospective Look at Bankruptcy's New Frontiers* (2018) 166 U. Pa. L. Rev. 1867, at 1870. [↑](#footnote-ref-60)
61. See: Delaney, KJ. *Strategic Bankruptcy: How Corporations and Creditors use Chapter 11 Bankruptcy to their Advantage.* University of California Press, California, 1999. [↑](#footnote-ref-61)
62. See: Rosen, LM & Vris, JL. *A History of the Bankruptcy Bar in the Second Circuit*, in: *The Development of Bankruptcy & Reorganisation Law in the Courts of the Second Circuit of the United States*. Bender, New York, 1995, p.155. [↑](#footnote-ref-62)
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64. See further: Jackson, TH. *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain* (1982) Yale Law Journal, Vol. 91, No. 5, pp. 857-907. See also: Baird, DG & Jackson, TH. *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy* (1984) The University of Chicago Law Review, Vol. 51, No. 1, pp. 97-130. See also: Jackson. TH & Scott, RE. *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain* (1989) Virginia Law Review, Vol. 75, No. 2, Symposium on the Law and Economics of Bargaining (Mar., 1989), pp. 155-204. [↑](#footnote-ref-64)
65. See: Baird, D. *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren,* (1987) 54 *University of Chicago Law Review* 815. [↑](#footnote-ref-65)
66. See for example, Warren, E. *Bankruptcy Policy* (1987) The University of Chicago Law Review, Vol. 54, No. 3 (Summer, 1987), pp. 775-814. See also: Warren, E. *Bankruptcy Policymaking in an Imperfect World* (1993) Michigan Law Review, Vol. 92, No. 2, pp. 336-387. [↑](#footnote-ref-66)
67. See: Korobkin, DR. *Rehabilitating Values: A Jurisprudence of Bankruptcy* (1991) Columbia Law Review, vol.91, no.4, pp.717-789. [↑](#footnote-ref-67)
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70. Adler, BE. *Financial and Political Theories of American Corporate* Bankruptcy (1993) 45 Stan.L.Rev 311. [↑](#footnote-ref-70)
71. See further: Adler, BE. *The Creditors’ Bargain Revisited* [2018] University of Pennsylvania Law Review, vo.166, p.1853. [↑](#footnote-ref-71)
72. e.g. Warren (BSc in speech pathology and audiology, University of Houston, 1970); Baird (BA in English, Yale College, 1975); Gross (BA, Smith College, 1974); Skeel (BA, University of North Carolina, 1983); Westbrook (BA, Political Science/Philosophy, University of Texas at Austin, 1965). [↑](#footnote-ref-72)
73. Warren, E & Westbrook, JL. *Contracting out of Bankruptcy: An Empirical Intervention (*2005) Harvard Law Review, vol.118, vol.4. pp.1197-1254. [↑](#footnote-ref-73)
74. See: White, MJ. *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy* (1991) Law & Society Review, vol.15, No.3, pp.685-709. [↑](#footnote-ref-74)
75. Korobkin, DR. *Bankruptcy Law, Ritual, and Performance* (2003) Columbia Law Review, Vol. 103, No. 8, pp. 2124-2159. [↑](#footnote-ref-75)
76. See: Baird, D & Casey, A & Picker, RC. *The Bankruptcy Partition* (2018) Coase-Sandor Working Paper Series in Law and Economics, No. 844, University of Chicago Law School. [↑](#footnote-ref-76)
77. <https://www.kentlaw.iit.edu/faculty/full-time-faculty/adrian-walters> [↑](#footnote-ref-77)
78. <http://www.kent.ac.uk/law/people/academic/Ramsay,_Iain.html> See his empirical and comparative work on personal insolvency: Ramsay, I. *Personal Insolvency in the 21st Century A Comparative Analysis of the US and Europe*. Hart Publishing Ltd, Oxford, 2017. [↑](#footnote-ref-78)
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80. See further: Cadwallader, FJJ. *In pursuit of the merchant debtor and bankrupt: 1066-1732*. Unpublished Ph.D. thesis. University College London, University of London. June 1965; Cooke, RM. *The Foundations of the Law of Bankruptcy*. University of Manchester, LL.M. thesis. 1924; Coull, DC. *The Prevention of Fraud prior to bankruptcy – a comparative study*. Unpublished Ph.D. thesis. University of Aberdeen, 1974; Hertzler, JR. *The Reform of Imprisonment for Debt during the Interregnum and Later Stuart Periods*. Unpublished University of Wisconsin Ph.D. dissertation, Madison, I967; Servian, MS*. Eighteenth Century Bankruptcy Law: From Crime to Process*. Unpublished Ph.D. thesis, University of Kent at Canterbury, 1985; Treiman, I. *A History of the English Law of Bankruptcy, with Special Reference to the Origins, Continental Sources , and Early Development of the Principal Features of the Law*. University of Oxford. Unpublished D.Phil thesis. 1927. See also: Tribe, JP. *Debtor treatment themes in personal bankruptcy policy development from the early-modern period to the present day - plus ça change (plus c'est la même chose*). Unpublished Ph.D. thesis, University College London, 2012. Duffy's book also stems from his own Ph.D. thesis: Duffy, IPH. *Bankruptcy and Insolvency in London during the Industrial Revolution*. Garland Publishing, Inc. New York & London. 1985. A slightly earlier treatment was also published by Noel (Noel, FR. *A History of the Bankruptcy Law*. C. H. Potter & co., 1919). [↑](#footnote-ref-80)
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92. See: Constantinides, S. *Going-concern assessments for financially distressed firms: a comparative study of auditors, bankers and insolvency practitioners*. University of Nottingham, 2002. See also: Lennox, CS. *Bankruptcy, audit reporting and auditor choice*. University of Oxford, 1998. See also: Zhu, R. *Comparing statistical methods and artificial neural networks in bankruptcy prediction*. University of Warwick, 1997. See also: Ozkan, A. *Costs of financial distress and capital structure of firms*. University of York, 1996. See also: Stelzer-O'Neill, B. *The losses suffered by creditors in bankruptcy in the UK and Germany*. City University, 1991. [↑](#footnote-ref-92)
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101. Professor Sarah Worthington QC (Hon) FBA, whose fellowship of the British Academy is an example. Professor Michael Lobban FBA has also written extensively on the history of English and Welsh bankruptcy law. See: See further: Lobban, M & Cornish, WR & Anderson, JS & Cocks, R & Polden, P & Smith, K. *The Oxford History of the Laws of England, volumes XI-XIII*. Oxford 2010, volume XII, at Chapter IV (bankruptcy) and V (imprisonment for debt). [↑](#footnote-ref-101)
102. e.g. an academic being made a bencher (or Master in the case of Gray’s Inn) of one of the four Inns of Court, e.g. Professor Ian Fletcher QC (Lincoln’s Inn); Professor Louise Gulifer QC (Gray’s Inn); Professor Sir Roy Goode QC (Inner Temple), and; Professor Sarah Worthington QC (Middle Temple). [↑](#footnote-ref-102)
103. Professor Ian F. Fletcher QC (Hon), Professor Sir Roy Goode QC (Hon), Professor Sarah Worthington QC (Hon), Professor Louise Gullifyer QC (Hon) and His Honour Judge Abbas Mithani QC (Hon) being recipient bankruptcy specific examples. [↑](#footnote-ref-103)
104. Professor Sir Roy Goode’s knighthood and earlier CBE being bankruptcy specific examples. [↑](#footnote-ref-104)
105. Coase, R. *The Nature of the Firm* (1937) Economica, Vol.4, Issue.16, p.386. [↑](#footnote-ref-105)
106. e.g. Tribe, J. *Bankruptcy Courts Survey: 2005 - Final Report: A Pilot Study*. Kingston Business School Occasional Paper, No.59: ISBN: 1-872058-88-4. January 2006. [↑](#footnote-ref-106)
107. e.g. Tribe, J. *Discharge in personal insolvency: an historical and comparative examination* (2012) Insolvency Law Journal, 20(1), pp. 240-263. [↑](#footnote-ref-107)
108. e.g. Watkins, S & Burton, M (Eds). *Research Methods in Law*. 2nd Ed. Routledge, London, 2013. See also: Van Hoecke, M. (Ed.), *Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline?* Hart Publishing, Oxford, 2011. [↑](#footnote-ref-108)
109. See further: Collins, H. *Marxism and the Law*. Oxford University Press, Oxford, 1982. [↑](#footnote-ref-109)
110. See further: Wacks, R. *Understanding Jurisprudence: An Introduction to Legal Theory.* 5th ed. Oxford University Press, Oxford, 2017. [↑](#footnote-ref-110)
111. See: Jacoby, M. *Corporate Bankruptcy Hybridity* (2018) 166 U. PA. L. REV. 1715. [↑](#footnote-ref-111)
112. See for example the managerialism thesis: Berle, AA. & Means, GC. *The Modern Corporation and Private Property.* Macmillan, New York, 1932. Or Berle & Dodd’s debate on directors duties: Dodd, ME. *For Whom are Corporate Managers Trustees* (1932) Harvard Law Review, Vol. 45, Issue 7, pp. 1145-1163. See also: Berle, AA. *For Whom Corporate Managers are Trustees: A Note* (1932) Harvard Law Review, Vol. 45, Issue 8, pp. 1365-1372. [↑](#footnote-ref-112)
113. See: Baird, DG & Rasmussen, RK. *The End of Bankruptcy* (2002) 55 Stan. L.Rev, 751. [↑](#footnote-ref-113)
114. *Op cit*, n.7. [↑](#footnote-ref-114)
115. On current noteworthy example is the Insolvency Lawyers’ Association (ILA) *ILA Paul Bromfield Insolvency & Restructuring Research Scholarship*. See: http://www.ilauk.org/about\_us/ila\_paul\_bromfield\_insolvency\_and\_restructuring\_research\_scholarship [↑](#footnote-ref-115)
116. Montagu, B. *Some Observations upon the Bill for the Improvement of the Bankrupt Laws*. Butterworths, London, 1822, p.73. [↑](#footnote-ref-116)
117. Bhandari, JS & Weiss, LA (Eds). *Corporate Bankruptcy: Economic and Legal Perspectives*. Cambridge University Press, Cambridge, 2008. [↑](#footnote-ref-117)
118. See for example the Washington University School of Law’s 1994 Interdisciplinary Conference on Bankruptcy and Insolvency Theory. [↑](#footnote-ref-118)
119. See: Jackson, TH. *A Retrospective Look at Bankruptcy's New Frontiers* (2018) 166 U. Pa. L. Rev. 1867. See further: <https://www.law.upenn.edu/live/news/7493-law-review-symposium-tackles-new-frontiers-of> [↑](#footnote-ref-119)
120. See further: <https://twitter.com/TribeBankruptcy/status/1089915541542891523> [↑](#footnote-ref-120)
121. See further: Schumpeter, J. *Capitalism, Socialism and Democracy*. 1942. [↑](#footnote-ref-121)
122. See further: Tribe, J. *Marxist and Schumpeterian Perspectives on Corporate Insolvency Law: Handmaiden or Bulwark against Creative Destruction?* in, Corporate Law Teachers’ Association – *Possible Futures for the Company and for Corporate Law*. University of Auckland Faculty of Law, New Zealand, 3-5 February 2019. [↑](#footnote-ref-122)
123. Patterson, S. *Rethinking Corporate Bankruptcy Theory in the Twenty-First Century* (2015) Oxford Journal of Legal Studies, pp.1-27 [↑](#footnote-ref-123)
124. Nsubuga, HJ. *Corporate Insolvency and Employment Protection: A Theoretical Perspective (*2016) 4(1) NIBLeJ 4. [↑](#footnote-ref-124)