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Has the Time Come to Repeal Chapter 13?

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The wonderful book by Sullivan, Warren and Westbrook sheds light on many questions about consumer bankruptcy that have been long-debated. It also raises a new one—has the time come to repeal Chapter 13? This question is briefly discussed by the authors.¹ Because in my judgment it deserves serious consideration, in this article I will develop the argument for repeal in some detail.

The case for repeal is based on the data showing that what Sullivan, Warren and Westbrook call the “economic model” can account for only a small part of debtor choice between Chapter 13 and Chapter 7.² Multiple regression analysis using five economic variables accounted for only 12% of the variance.³ Sullivan, Warren and Westbrook believe that what they call “local legal culture” accounts for a much greater part of debtor choice. By local legal culture they mean essentially that actors in the legal system “steer” debtors towards one chapter or the other.

The data that strongly suggests the importance of local legal culture is the wide variance in the proportion of Chapter 13 filings between districts. In the districts sampled by Sullivan, Warren and Westbrook, that variance ranged from 2.8% to 49.6%, a dramatic difference indeed. Differences in filing rates of this order even existed between bankruptcy districts in the same state, meaning the differences in exemption levels cannot account for the variance. Furthermore, Sullivan, Warren and Westbrook show that differences in the economic or social conditions of the petitioners cannot account for the variance. Instead they infer that in different localities consumers are receiving different advice from lawyers and other actors in the legal system about whether to file a Chapter 13 or a Chapter 7

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1. T. SULLIVAN, E. WARREN & J. WESTBROOK, AS WE FORGIVE OUR DEBTORS 223, 339-40 (1989) [hereinafter AWFOD].

2. AWFOD, *supra* note 1, ch. 13. The essential parts of this chapter were earlier published as a law review article. Sullivan, Warren & Westbrook, *Laws, Models, and Real People: Choice of Chapter in Personal Bankruptcy*, 13 LAW & SOC. INQUIRY 661 (1988).

3. Sullivan, Warren & Westbrook, *supra* note 2, at 686. This data is consistent with the conclusions of Professor White, who found that “economic variables” could account for only a small part of individual debtor behavior in bankruptcy. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 50 (1987).

proceeding. The prevailing pattern of advice in a given community is what they mean by local legal culture.⁴

The importance attached to local legal culture by Sullivan, Warren and Westbrook in explaining variance in Chapter 13 filing rates does not mean that all consumer bankrupts are "steered" to one of the chapter proceedings. Gary Neustadter's sensitive case study of the practices of six consumer bankruptcy lawyers demonstrates that what he calls a "client centered" approach to consumer bankruptcy counseling is often used.⁵ The "client centered" lawyer explains the options to consumers and lets them make a meaningful choice between chapters after achieving an understanding of the principal advantages and disadvantages of each. In my own community of Madison, Wisconsin, I know consumer bankruptcy lawyers who conduct themselves in this way.

Sullivan, Warren and Westbrook's work supports the importance of local legal culture primarily by discounting other possible explanations for the variance in Chapter 13 selection. But they are not able to measure variance in consumers' ethical values that bear on the 7/13 choice. Particularly in districts that have mid-range (*i.e.*, average) Chapter 13 filing rates, a good deal of the choice between chapters may be attributable to differences in the values of the consumer bankrupts. Yet, it seems unlikely that the values of consumers in different districts vary enough to account for the extreme differences in Chapter 13 filing rates that Sullivan, Warren and Westbrook found, especially since some of these districts were in the same states. Their conclusion that many consumers are "steered" to one or the other chapter proceeding, particularly in districts with extreme Chapter 13 filing rates, seems unavoidable.⁶

Sullivan, Warren and Westbrook base their study on 1981 filings, but as Table I reveals, the variance in Chapter 13 filing rates continues today. Table I shows, by district, the percentage of "non-business bankruptcy filings" that were filed under Chapter 13, as reported by the Administrative Office of the United States Courts.⁷

4. For similar conclusions on the determinants of the Chapter 13 vs. Chapter 7 choice, see Boren, *An Analysis of Changes In the Use of Chapter 13 Since the Enactment of the Bankruptcy Reform Act of 1978*, 23 AM. BUS. L.J. 451 (1985).

5. Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFFALO L. REV. 177 (1986).

6. In his case study Neustadter documented that there are lawyers who consistently steer their clients to one chapter or another. *Id.*

7. I have constructed Table I from data reported in ADMIN. OFF. U.S. CT[s]., FED. JUDICIAL WORKLOAD STATISTICS, Dec. 1988, 68-69 (Table F-2). There are well recognized difficulties with the categories used to compile these data, a principal one being a lack of a reliable basis for separating "business" from "non-business" filings. Sullivan, Warren and Westbrook report that many former self-employed entrepreneurs are wage earners when they file. These debtors are reported as consumer bankrupts, even though most of the debt is business debt. AWFOD, *supra* note 1, ch. 6. Nonetheless, the differences in Chapter 13 filing rates between districts are so great that the Table is strong evidence of the continuing importance of local legal culture.

TABLE I
Chapter 13 Filings as a % of Total Non-Business Filings
By District, for 1988

<u>Circuit</u>	<u>District</u>	<u>% Filings Under Ch. 13</u>	<u>Circuit</u>	<u>District</u>	<u>% Filings Under Ch. 13</u>
D.C.		41	7th	IL, N	25
1st	ME	14		IL, C	8
	MA	17		IL, S	11
	NH	9		IN, N	10
	RI	3		IN, S	7
	PR	66		WI, E	14
2nd	CT	7		WI, W	15
	NY, N	16	8th	AR, E	54
	NY, E	13		AR, W	24
	NY, S	9		IA, N	2
	NY, W	28		IA, S	9
	VT	5		MN	24
3rd	DE	19		MO, E	27
	NJ	29		MO, W	15
	PA, E	49		NE	23
	PA, M	9		ND	3
	PA, W	13		SD	7
	VI	38	9th	AK	7
4th	MD	32		AZ	16
	NC, E	45		CA, N	28
	NC, M	82		CA, E	18
	NC, W	62		CA, C	19
	SC	53		CA, S	37
	VA, E	17		HI	9
	VA, W	15		ID	26
	WV, N	6		MT	8
	WV, S	8		NV	30
5th	LA, E	24		OR	22
	LA, M	23		WA, E	12
	LA, W	27		WA, W	22
	MS, N	28		GUAM	0
	MS, S	45		NMI	0
	TX, N	37	10th	CO	24
	TX, E	22		KS	16
	TX, S	31		NM	5
	TX, W	39		OK, N	5
6th	KY, E	19		OK, E	6
	KY, W	19		OK, W	9
	MI, E	20		UT	33
	MI, W	30		WY	7
	OH, N	21	11th	AL, N	61
	OH, S	26		AL, M	64
	TN, E	42		AL, S	22
	TN, M	56		FL, N	4
	TN, W	73		FL, M	8
				FL, S	9
				GA, N	51
				GA, M	46
				GA, S	57

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FED. JUDICIAL WORKLOAD STATISTICS, December 1988, 68-69 (Table F-2).

I. THE CASE FOR PROTECTING THE UNINFORMED FROM CHAPTER 13

The importance of local legal culture in determining a locality's Chapter 13 filing rate raises the fundamental question of whether the Bankruptcy Code should continue to provide consumer debtors with a choice between Chapters 7 and 13. In a great many circumstances, this choice is being made for petitioners, as they are "steered" to one chapter or the other. In a culture that has traditionally emphasized consumer sovereignty, the ideal solution would be adoption of reforms to insure that most consumer bankrupts make an informed choice between chapters. I will argue subsequently, however, that such a system cannot practically be devised. If consumer choice is not possible, in my view the selection of a bankruptcy procedure should be one that informed persons would agree best serves the material interests of the petitioner concerned. I believe that in a great many circumstances where Chapter 13 is selected for a consumer debtor, this standard is not met. Though selection of Chapter 13 is sometimes in a debtor's material best interests, in this section I will argue that we will serve the best interests of the greatest number of debtors by eliminating the Chapter 13 option,⁸ thereby compelling all consumer debtors to use the Chapter 7 procedure.⁹

The argument for repealing Chapter 13 rests on the assumption that it is not practical to alter existing bankruptcy practice so that most consumers make an informed and self-interested choice between Chapters 7 and 13. This is an assumption that is easily defended. We know, from the information provided by Sullivan, Warren and Westbrook, that on the whole consumer debtors who choose bankruptcy are not a well-off lot.¹⁰ Usually when they resort to bankruptcy their immediate concern is to obtain the benefits of the automatic stay in order to stave off a threatened foreclosure, wage garnishment, etc. Both chapters satisfy this immediate need, undercutting any incentive to learn about the differences between the two procedures. If the debtor is to make an informed choice between chapters, the learning will usually have to result from somebody's effort to educate the debtor about the differences between the two procedures. Moreover, that

8. As mentioned earlier, I am only elaborating an argument suggested briefly by Sullivan, Warren and Westbrook. AWFOD, *supra* note 1, at 223, 339-40.

9. In most parts of the country, a consumer can elect a Chapter 11 proceeding, though few do. It is possible that if Chapter 13 were unavailable, attorneys would steer consumers to Chapter 11 in greater numbers than they do now. So long as Chapter 11 remains as it is, this development would not be subject to the same criticisms that I will direct towards the present system. This is because, at present, Chapter 11 does not require, as a condition of plan confirmation, that a consumer devote all disposable income over a three-year period to payments under the plan. *Compare* 11 U.S.C. § 1325(b) (1988). In any event, except for this footnote, I will ignore the possible availability of Chapter 11 proceedings in this article.

10. AWFOD, *supra* note 1, ch. 12.

education will have to come after the debtor has made the decision to resort to bankruptcy; it is hard to imagine that general consumer education, as in high school classes, or disclosures made at the time of credit extension could do the job.¹¹

The focus, therefore, is on the debtor's attorney. No doubt it is good professional practice for a debtor's attorney to outline the pros and cons of each chapter, insisting—consistent with Neustadter's "client centered counselling" model¹²—that the debtor make an informed choice between the two. Yet, as Neustadter recognizes, attorneys earn only modest fees from a consumer bankruptcy. For the practice to be profitable, the lawyer must handle each case expeditiously and spend a minimum amount of time conferring with the client. These goals are best served if the attorney effectively makes the decision about which chapter to pursue, avoiding the necessity of instructing the client about such complicated matters. Sullivan, Warren and Westbrook observe that attorneys often specialize in Chapter 7 or Chapter 13 cases, no doubt because the fee structure places a premium on standardization.¹³ I suspect that these attorneys are especially likely to steer potential clients to a procedure (the one in which they specialize) rather than referring clients to a different attorney when a different procedure would be more appropriate.¹⁴

It seems unlikely that consumer bankruptcy practice will ever escape the pressures just described. Even if attorney fees are raised, what would insure that this would result in increased attorney sensitivity to the need for clients to make an informed choice about chapter proceeding? In 1984, three years after Sullivan, Warren and Westbrook's study, Congress enacted legislation requiring a consumer debtor's attorney to certify that she had explained the relief available under both Chapter 7 and Chapter 13.¹⁵ Neither Neustadter nor I expect that this provision has had much impact on the nature of attorney-client interaction.¹⁶ From time to time proposals have been advanced to have government officials instruct consumer bankrupts about the advantages and disadvantages of different bankruptcy procedures, but these

11. See Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit Contracts*, 63 VA. L. REV. 841 (1977).

12. See Neustadter, *supra* note 5.

13. On the importance of handling consumers' legal matters, for which only a small fee can be earned, in a routine manner, see generally Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979).

14. Neustadter, *supra* note 5, describes the practice of two consumer bankruptcy attorneys who specialize in Chapters 13 and 7 respectively, and who, as I have predicted, tend to steer potential clients into the chapter in which they specialize.

15. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 322, 98 Stat. 357 (1984). The requirement is now embodied in Official Form 1, Exhibit B. 11 U.S.C. § 342(b) (1988) also requires the court clerk to provide consumer debtors with a notice specifying the chapter choices available.

16. Neustadter, *supra* note 5, at 249-50.

proposals have not been enacted and there is no current prospect that they will be.¹⁷

If informed consumer choice about bankruptcy procedure is not a viable option for many, perhaps most, consumer debtors, on what basis ought the choice of procedure be made? It is my contention that if the choice is to be made for consumers, the chapter that informed professionals would select as most likely to serve the consumer's material interests ought to be chosen. Of course, when consumers make an informed decision about chapter procedure, considerations besides material best interests play a role. Debt repayment, for most Americans, involves deeply felt moral considerations. Nonetheless, in our individualistic culture, there is a deep aversion to having one person make a moral judgment for another. Hence, it seems to me that if choice of chapter procedure is to be made for consumers, it should be based on objective material grounds rather than on moral grounds. It is not acceptable for one person (*e.g.*, the debtor's attorney) to decide that a debtor should file under Chapter 13 because she can afford to pay debts and that is the moral thing to do, if Chapter 7 is a statutorily available procedure and would better serve the debtor's material interests.

Further support for this position comes from the legislative history of the 1984 amendments to the Bankruptcy Code. At the time, the credit industry lobbied hard for legislation requiring debtors with a regular income to make a showing that a Chapter 13 plan was infeasible before being allowed to file under Chapter 7. The proposal was rejected.¹⁸ If Congress has decided not to compel individuals to pay debts they can afford to pay before choosing Chapter 7 relief, it must also be inappropriate for individuals (*e.g.*, the debtor's attorney) to impose that position on debtors on moralistic grounds.

The data gathered and reported by Sullivan, Warren and Westbrook indicate that the determiners of local legal culture are not in many cases acting in accordance with the material interests of petitioners when influencing the Chapter 7/13 choice. If they were, we would not find the variance

17. The proposals are described in Neustadter's Buffalo Law Review article. *Id.* at 250-52. The Commission on the Bankruptcy Laws, formed in the early 1970's, estimated that it would take four hours per debtor to provide this instruction. *Id.*

18. For a summary of the arguments for rejecting such a proposal, see Vukowich, *Reforming the Bankruptcy Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1142-48 (1983). At the time the credit industry's proposal was rejected, Congress did adopt section 707(b), authorizing a bankruptcy judge to dismiss a Chapter 7 petition if she determines that a Chapter 7 discharge is "a substantial abuse of the provisions of this chapter." There is ambiguity in the legislative history as well as on the face of the statute about the purpose of this provision, but a considerable majority of courts do not interpret the "substantial abuse" standard as being satisfied whenever the debtor has prospects of future income sufficient to fund a Chapter 13 plan. See Wells & Kurtz, *A Critical Analysis of Bankruptcy Code Section 707(b)*, 36 CLEV. ST. L. REV. 385 (1988).

in Chapter 13 filing rates that are reported. Sullivan, Warren and Westbrook report the economic and social conditions of individual petitioners cannot account for the variance in Chapter 13 filing rates. And it seems unlikely that factors such as the importance of a good credit rating can account fully for the variance, though it is probably true that choosing Chapter 13 is more effective in avoiding the stigma of bankruptcy in some jurisdictions than others.¹⁹ The more likely explanation for the variance in Chapter 13 filing rates is the difference in the willingness of local bankruptcy attorneys to steer petitioners to Chapter 13 even when Chapter 7 would be more in their material interests.

These differences emerge for various reasons. In some communities there is more widespread belief that morality requires repayment of debts if at all possible, and attorneys absorb the community mores. There are also circumstances in which it is in the financial self-interest of the attorney to steer clients to Chapter 13, and no doubt differences also exist between communities in the frequency with which attorneys yield to such incentives. Attorneys have a self-interest in steering clients to Chapter 13 when the debtor is financially unable to pay the attorney's fee in a lump sum "up front." Because the debtor's attorney fee is an administrative expense, it can be and is typically paid out of the first few Chapter 13 payments. Even when a Chapter 13 plan fails, as most do,²⁰ these initial payments are usually made, and hence the debtor's attorney receives her fee. If a Chapter 7 plan is filed, the debtor can promise to pay her attorney out of post-filing earnings, but it is widely believed that the likelihood of performance of such promises is less than the likelihood that some payments will be made under the Chapter 13 plan.

The local bankruptcy judge also has a good deal of power to influence the behavior of attorneys who regularly practice before her. Suppose a judge believes that as many debtors as possible should file under Chapter 13, because she believes it is in the public interest for creditors to get paid in order to keep interest rates down for non-defaulting consumers. If an attorney persists in steering clients towards Chapter 7 in the good faith belief that such is in their material interests, this judge can schedule hearings under section 707(b).²¹ Even if the attorney is able to prevail at these hearings, or on appeal, having to attend too many such hearings can undercut the economics of a law practice specializing in consumer bank-

19. I have been told by persons claiming to know that merchants in Birmingham, Alabama, where Chapter 13s have their longest history, distinguish in evaluating creditworthiness between former bankrupts who chose Chapter 13 and those who chose Chapter 7. I think it is unlikely that merchants in many other locales draw that distinction with any frequency.

20. See *infra* text accompanying note 24.

21. Section 707(b) authorizes a judge to dismiss a Chapter 7 petition if the debtor has primarily consumer debts and the judge finds that "granting of relief [under Chapter 7] would be a substantial abuse of the provisions of this chapter." 11 U.S.C. § 707(b) (1988).

ruptcies. Going along with the judge's preference is invariably a tempting course. This phenomenon must account for the very high Chapter 13 filing rates in a number of jurisdictions. Conversely, if a judge disfavors Chapter 13, perhaps feeling that it imposes undue hardship on the debtor, she can discourage their filing by conducting extensive inquiries into the feasibility of any Chapter 13 plan.²² The need to prepare for and participate in a lengthy confirmation hearing can effectively discourage lawyers from steering clients to Chapter 13, and this phenomenon probably accounts for the very low Chapter 13 rates in some jurisdictions.²³

Suppose consumer debtors were uniformly compelled to choose Chapter 7, instead of acting in accordance with the value preferences of local bankruptcy elites. Would bankruptcy proceedings better serve the material interests of consumer bankrupts as a whole than they do today? Although there are circumstances in which Chapter 13 is in a consumer debtor's material interest, there is overwhelming evidence that many debtors elect Chapter 13 contrary to their personal material interests. This evidence is the high failure rate for Chapter 13 plans. Sullivan, Warren and Westbrook estimate the failure rate at about 67%.²⁴ This failure rate is not surprising when one discovers that Sullivan, Warren and Westbrook found that Chapter 13 debtors, as a group, were only modestly better off than Chapter 7 debtors, and that very few of the latter group could have afforded to pay a significant percentage of their debts if they had elected Chapter 13.²⁵

When a plan fails, the debtor usually loses the most significant material benefits of Chapter 13. The superdischarge is not available, even if the debtor wins a hardship discharge.²⁶ The debtor is likely to lose collateral after the plan fails, unless perchance she has paid off the debt before dismissal or conversion of the proceeding.²⁷ And exempt property, as well as cosigners, will once again be subject to execution. What is the point of living under the regimen of a Chapter 13 plan for a few months, if in the

22. Feasibility is one of the conditions of confirmation of a Chapter 13 plan. 11 U.S.C. § 1325(a)(6) (1988).

23. For a description of how bankruptcy judges can influence the behavior of attorneys practicing before them with respect to the Chapter 13 election, see AWFOD, *supra* note 1, at 248-51.

24. *Id.* at 215-17.

25. *Id.* at 208-15.

26. 11 U.S.C. § 1328(c) (1988).

27. A debtor could file Chapter 13 anticipating ultimate failure, continuing the Chapter 13 plan only long enough to pay off a secured claim, paid first under the applicable Chapter 13 plans. In this circumstance filing Chapter 13 could be in the debtor's material interest even though the plan fails, but I assume this phenomenon accounts for a very small portion, if any, of Chapter 13 failures. For a discussion of this use of Chapter 13, suggesting an unsecured creditor can successfully object to confirmation of a plan proposing payments to secured creditors first, see L. LoPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS 572-74 (1985).

end benefits such as these will be denied when the proceeding is converted to a Chapter 7?

The high failure rate for Chapter 13s, together with the data provided by Sullivan, Warren and Westbrook on the financial capability of Chapter 13 debtors as a group, suggests that local legal culture is causing many more consumer bankrupts to file under Chapter 13 than would if they were acting in their best material interests. Repeal of Chapter 13 would be one solution to this problem. An alternative would be to assign to an independent expert the task of reviewing all Chapter 13 petitions and objecting to those that seem improvident and destined to fail. The United States Trustee, if deemed sufficiently independent of local legal culture, seems like an obvious candidate for such a job. The task would be enormous, however, given the volume of Chapter 13 petitions. As with the proposal to establish a federal bureaucracy to counsel consumer debtors on bankruptcy procedure,²⁸ it is very unlikely that Congress would provide the necessary resources to carry out the task conscientiously. Repeal of Chapter 13 is the more viable alternative.

In sum, the argument for repeal of Chapter 13 rests on the finding of Sullivan, Warren and Westbrook that a great many debtors electing Chapter 13, perhaps most of them, do not do so as a result of an informed and self-interested choice, but because they are steered to that alternative by local bankruptcy elite, most likely their attorney. Moreover, there is reason to believe that for most debtors directed to Chapter 13, the election of Chapter 7 would have better served their material interests. These debtors have been directed to Chapter 13 because others believe that this procedure better serves their personal moral interests, or perhaps better serves the public interest by decreasing credit losses and thus lowering overall interest rates. In our culture we are normally averse to one individual imposing her personal moral views on another, or compelling another person to forego a material benefit for the sake of the general community. Such decisions should either be compelled legislatively or made by the person foregoing the material benefit. Hence, the many less-than-voluntary Chapter 13s must be viewed as a cost of maintaining the Chapter 13 option, and I have argued that it is probably not practical to reduce these costs by better educating consumer debtors to make their own decisions about bankruptcy chapter. There are circumstances in which a consumer debtor can serve her material interests by electing Chapter 13, as will be discussed in depth in the next section. Nonetheless, any reasonable effort to calculate the greatest good for the greatest number of consumer bankrupts is likely to come down on the side of repeal of Chapter 13. The costs most likely exceed the benefits.

28. See *supra* note 17 and accompanying text.

II. IS CHAPTER 13 NEEDED FOR THE INFORMED DEBTOR?

To many, repeal of Chapter 13 will seem like an extreme response to the problem identified by Sullivan, Warren and Westbrook. Some individual debtors do make an informed and self-interested choice in favor of Chapter 13. Many will feel it is better to preserve a choice for those who inform themselves sufficiently to exercise the choice than it is to deny it for the benefit of those who for whatever reason do not. Because our society worships freedom, it may be appropriate to sacrifice the material interests of the majority in order to preserve choice for the few who can exercise it in an informed manner.

In the balance of this article, my intent is to lessen the force of this argument for preserving Chapter 13 by demonstrating that many of the principal benefits that an informed consumer debtor might seek to achieve through Chapter 13 can be substantially achieved in other ways, either outside bankruptcy or through a Chapter 7. To the extent that material benefits of a Chapter 13 election cannot otherwise be obtained, I will argue that they are benefits that, for policy reasons, either should not be available in Chapter 13 or should be available under both Chapters 7 and 13. While this is not necessarily an argument for repeal of Chapter 13 in the present circumstance, it does support repeal once desirable reforms in Chapter 7 are enacted.

The principal benefits from choosing Chapter 13 are: (1) the debtor wishes to repay some debts, for reasons of personal morality or in order to sustain continuing relations with some creditors, and Chapter 13 provides a mechanism for doing so; (2) the debtor wants to avoid the stigma of bankruptcy; (3) the debtor needs the superdischarge to avoid a burdensome liability not otherwise dischargeable; (4) the debtor cannot receive another Chapter 7 discharge because of the six-year bar, but is still eligible for a discharge in Chapter 13; (5) the debtor needs to avoid repossession of a necessary asset (other than a home) and can avoid default only by stretching out payments to secured creditors; (6) the debtor needs to cure late payments on a home mortgage while avoiding foreclosure; (7) the debtor wants to keep non-exempt property; and (8) the debtor wants to protect cosigners from execution until she can pay. I will discuss these benefits in the order listed.

A. Moral Desires to Repay Debt

It is a common misassumption that only Chapter 13 debtors repay unsecured debts. However, we know that reaffirmations have been a common feature of Chapter 7 practice, so much so that the 1978 Code regulated them.²⁹ It is not as often recognized that after discharge Chapter 7 debtors

29. 11 U.S.C. § 524(c)-(d) (1988).

can and often do repay discharged creditors without first obligating themselves to do so in a reaffirmation agreement. Common reasons for such payments are that the debtor feels a moral obligation to repay a particular creditor (*e.g.*, a relative who helped her out in difficult circumstances), or the debtor wants to retain an advantageous ongoing relationship (*e.g.*, with a particular credit card issuer).

For the debtor who wishes to repay only some creditors—probably the situation of most debtors—Chapter 7 will often be a preferable procedure to Chapter 13. There is no legal impediment preventing a Chapter 7 debtor from preferring those creditors deemed deserving of repayment, while avoiding payment to other creditors. Although courts have allowed debtors to prefer some creditors in Chapter 13 plans, generally not just any creditor can be preferred.³⁰

To be sure, Chapter 13 may have marginal advantages for a debtor who wishes to repay creditors. If the jurisdiction has an efficient Chapter 13 trustee, the debtor may benefit from having her advice in formulating a realistic budget for repayment of debts. Probably more importantly, once the plan is confirmed, the formality of the proceeding, the gentle reminders by a Chapter 13 trustee of the need for payment, and the need to go to court if the plan is to be modified, can provide a useful spur to performance. But there are possible nonbankruptcy alternatives to these Chapter 13 advantages. For example, in many parts of the country, debt amortization services (sometimes operating under the name “credit counselling”) are provided by community service organizations, such as the Chamber of Commerce. Personal loan companies provide a similar service through debt consolidation loans. However, these nonbankruptcy alternatives often provide a debtor less disinterested advice than does a conscientious Chapter 13 trustee,³¹ and the cost of using them is likely to be higher than the fees charged by a Chapter 13 trustee. So while there are some advantages to retaining Chapter 13, the basic point remains that a repeal of Chapter 13 would not prevent a debtor from voluntarily repaying discharged creditors if she so desired.

B. Avoiding the Stigma of Bankruptcy

It is sometimes argued that a debtor who completes a Chapter 13 plan and receives a discharge is less stigmatized than a debtor who receives a Chapter 7 discharge. That may be true in some localities,³² and it may be a reason to retain Chapter 13. But it is unlikely that the difference in stigma

30. See 5 COLLIER ON BANKRUPTCY ¶ 1322.05[2] (L. King 15th ed. 1989).

31. See Felsenfeld, *Consumer Credit Counseling*, 26 BUS. LAW. 925 (1971).

32. See *supra* note 19 and accompanying text.

is large, and in most communities it is probably non-existent. Both proceedings are under the Bankruptcy Code, and both involve a substantial discharge of debt.³³ Moreover, there is nothing in a Chapter 7 discharge that prevents a debtor from voluntarily repaying those debts which, in the moral sense of the community, are specially deserving of repayment. If a debtor does so, I suspect in most communities she would suffer no more stigma (and perhaps less) than a typical Chapter 13 debtor.

C. *The Superdischarge*

There is no doubt that the availability of the superdischarge³⁴ is a sensible reason for some debtors to choose Chapter 13 under the current statutory scheme. There is no other way to discharge even a portion of some debts (*i.e.*, the portion not paid under a Chapter 13 plan). If Chapter 13 were repealed without changes in the rules defining what debts are excepted from a Chapter 7 discharge, debtors with debts now dischargeable only under the superdischarge would be worse off.

Although the superdischarge is a distinctive feature of Chapter 13, its existence may not represent good policy. Commentators usually state that the legislative purpose in adopting the superdischarge was to provide an incentive for debtors to elect Chapter 13.³⁵ The implicit premise underlying this justification is that public policy will be served if more debtors select Chapter 13, presumably on the assumption that more debts will be repaid that way. What is lacking in this justification of the superdischarge, however, is any rationale for sacrificing the interest of creditors holding claims that would be excepted from a Chapter 7 discharge. These creditors suffer when a Chapter 13 plan is proposed and completed that pays them less than they would collect after a Chapter 7 discharge.³⁶ The beneficiaries of this suffering are different creditors—those who will receive greater payment under a

33. Before the 1978 Code, under the old Chapter XIII, Chapter 13 plans normally had to propose payment of 100% of unsecured debts. At the time it was widely believed that a debtor who successfully completed such a plan did suffer less stigma. See generally LoPucki, "Encouraging" Repayment Under Chapter 13 of the Bankruptcy Code, 18 HARV. J. ON LEGIS. 347 (1981). Today, however, the typical Chapter 13 plan proposes far less than full payment. In Sullivan, Warren and Westbrook's sample, the mean level of proposed payment in Chapter 13 plans was 51% of unsecured debts. AWFOD, *supra* note 1, at 36.

34. The superdischarge, provided by 11 U.S.C. § 1328 (1988), is granted to a Chapter 13 debtor upon successful completion of a plan. It discharges the debtor from all debts except alimony and child support obligations, and those long term debts for which contractual payments were merely maintained under the Chapter 13 plan. In a Chapter 7 proceeding, many more debts are excepted from the discharge. 11 U.S.C. § 523 (1988).

35. See AWFOD, *supra* note 1, at 232-33.

36. The "best interests" test—13 U.S.C. § 1325(a)(4) (1988)—does not protect these creditors because they do not contemplate payment "in" Chapter 7 but after it. Because nondischarged creditors can expect to be one of a very few creditors after a Chapter 7 discharge, if the debtor has regular income the prospects of payment are often substantial.

Chapter 13 plan than under Chapter 7. But if incentives to choose Chapter 13 are desirable because public policy is better served when Chapter 13 is elected, the public or creditors generally should bear the cost of those incentives instead of taxing only those few creditors whose claims would be excepted from discharge but for the availability of the superdischarge.

I suspect that Congress chose the superdischarge as a method for providing an incentive to elect Chapter 13, because it believed that many of the exceptions to discharge were not proper ones in any event.³⁷ From this perspective, the superdischarge does little harm worthy of concern to the creditor losing the benefit of a discharge exception. But this rationale for the superdischarge suggests that Congress should also eliminate the questionable exceptions from a Chapter 7 discharge. If the purpose is to punish the debtor who fails to elect Chapter 13, what justification is there for rewarding an undeserving creditor (with an exception from discharge) if a debtor fails to elect Chapter 13?³⁸ If a penalty for electing Chapter 7 is deemed appropriate, a higher Chapter 7 filing fee would seem a better way to go.³⁹

D. *Relief from the Six-Year Bar*

The six-year bar requires that a debtor who has received a discharge in an earlier Chapter 7 proceeding cannot receive a second Chapter 7 discharge in a proceeding filed less than six years after the commencement of the

37. For example, there was considerable controversy about whether to continue the exception from discharge for debts obtained through use of a false financial statement. See Schuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 STAN. L. REV. 735 (1971).

38. See LoPucki, *supra* note 33, for an earlier suggestion that the Chapter 13 incentives should be made available to Chapter 7 debtors.

39. The question just raised becomes more pressing when one recognizes that some debtors, even though well informed, may not have a practical opportunity to elect Chapter 13. If a debtor's obligations and living expenses are large in respect to anticipated future income, a feasible Chapter 13 plan must propose very low or even no payments to unsecured creditors. Although there was at one time a great deal of controversy about the confirmability of a zero or minimal repayment plan, since the 1984 amendments the weight of authority is to the effect that such plans can be confirmed, providing the debtor commits all "disposable income" to the plan for a three-year period. *E.g.*, Educational Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987). The requirement that a debtor devote all disposable income to a repayment plan for a three-year period has been applicable to all Chapter 13 plans since the 1984 amendments. 11 U.S.C. § 1325(b) (1988). However, practitioners often assume that debtors without resources should not file zero or minimal repayment plans under Chapter 13, and that local bankruptcy courts would be reluctant to approve such plans. They are burdensome to a Chapter 13 trustee, whose fees are a percentage of payments into a plan. The very low Chapter 13 rates for some districts, as revealed in Table I, *see supra* text accompanying note 8, suggest that in those districts Chapter 13 plans are not being filed by the badly off, and thus they lose the advantage of the Chapter 13 incentives, such as the superdischarge. If financially distressed debtors do not have practical access to Chapter 13, it seems particularly inappropriate to saddle debtors who choose Chapter 7 with an exception to discharge that cannot be justified in its own right.

first proceeding.⁴⁰ Under the superdischarge provisions, however, a debtor can receive a discharge in a Chapter 13 proceeding filed within the six-year period, providing she completes the plan successfully.⁴¹ Probably more importantly to most debtors, during the pendency of the Chapter 13 proceeding, the debtor is protected by the automatic stay even though a second Chapter 7 discharge is unavailable because of the six-year bar.

This special benefit of Chapter 13 cannot be achieved in any other way.⁴² And assuming that a six-year bar is to be a feature of Chapter 7, as it has been for many years, there is much to be said for extending the benefit of the automatic stay to a debtor who wishes to repay debts from future income. In this way, the debtor and her creditors can obtain the efficiency advantages of a collective proceeding that Dean Jackson identifies as the *raison d'être* for bankruptcy.⁴³

Moreover, granting a Chapter 13 discharge to a debtor under the six-year bar is not subject to the same criticism advanced in the preceding section. In this circumstance, the superdischarge is being used to overcome an objection to discharge rather than an exception to discharge.⁴⁴ Since all creditors benefit from an objection to discharge, they all make a sacrifice when a superdischarge is granted. And providing the Chapter 13 plan treats all creditors similarly, they all share in whatever creditor benefits result from it. This is not a situation in which one creditor makes a sacrifice for the benefit of other creditors.

The more substantial question is whether Chapter 13 should provide the only avenue for relief from the six-year bar. The rationale for the six-year bar is to retard bankruptcy abuse—to make it more difficult for the debtor to repeatedly run up debts in anticipation of discharging them in bankruptcy. The data collected by Sullivan, Warren and Westbrook raises questions about whether this kind of debtor behavior occurs frequently enough to justify the six-year bar, which deprives debtors of a Chapter 7 discharge

40. 11 U.S.C. § 727(a)(8) (1988).

41. In recent years a practice has emerged of filing a Chapter 13 plan very shortly after receiving a Chapter 7 discharge, for the purpose of dealing with debt not discharged in the Chapter 7 proceeding. This is sometimes called a "20"—first a "7," then a "13." See *In re Strause*, 19 Bankr. Ct. Dec. (CRR) 170 (S.D. Cal. 1989).

42. Technically, a debtor under the six-year bar could file a second Chapter 7 proceeding and receive the benefit of the automatic stay until it was lifted by court order or the Chapter 7 proceeding (which would not provide a second discharge) was concluded. This period would be much shorter than the period of protection provided by a Chapter 13 proceeding, however, even if the Chapter 13 plan is not successfully completed.

43. T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986). The assumption is that transaction costs would make it very difficult to negotiate the equivalent of an automatic stay outside bankruptcy—that is, a multi-party standstill agreement in which the debtor's creditors would agree not to resort to state collection remedies.

44. See *supra* text accompanying notes 34-39.

even in situations of real hardship.⁴⁵ If the bar is not to be repealed entirely, at least a case can be made for a hardship discharge within Chapter 7 for debtors under the six-year bar, a position considered and rejected when the Bankruptcy Code was adopted.⁴⁶ If such an exception were adopted, then Chapter 13 would not be needed to provide relief to debtors who otherwise would face hardship because of the six-year bar.

E. Stretching Out Secured Creditors

Under Chapter 7, the only way to prevent foreclosure of property subject to a security interest in default, absent the consent of the creditor to a revised payment plan, is to redeem the collateral by paying the secured creditor the value of the property in a lump sum.⁴⁷ Debtors in financial distress typically have difficulty raising substantial amounts of cash for this purpose. Consequently, an informed debtor might choose Chapter 13, which permits retention of collateral so long as the present value of payments promised secured creditors over time equals the value of the collateral.⁴⁸ In effect, it is possible to redeem collateral by installments in Chapter 13.

There is no complete substitute for this use of Chapter 13. Collateral frequently has its highest use-value in the hands of the consumer rather than some other possessor. This is partly because owners develop sentimental attachments to their property, and partly because of the added value that results from familiarity with the operational idiosyncrasies of the property (e.g., a car that starts in damp weather only if handled in a certain way).⁴⁹ In the absence of regulation, a secured creditor would have an incentive to expropriate this extra use-value by threatening foreclosure unless the con-

45. AWFOD, *supra* note 1, ch. 11. Contrary to the position of this article, Sullivan, Warren and Westbrook are careful not to criticize the six-year bar, which they apparently endorse.

46. The hardship exception to the bar was recommended by the Commission on the Bankruptcy Laws. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES 174-75 (1973).

47. 11 U.S.C. § 722 (1988). 11 U.S.C. § 521 (1988) requires the debtor to declare an intention to redeem within 30 days of filing and to make the redemption payments within 45 days of filing. Case law has established that redemption payments under section 722 cannot be by installment. *In re Bell*, 700 F.2d 1053 (6th Cir. 1983); *In re Davis*, 20 Bankr. 212 (Bankr. C.D. Ill. 1982).

48. This is the confirmation standard with respect to secured debt under 11 U.S.C. § 1325(a)(5)(B) (1988).

49. For further development of this "lost value" hypothesis, see Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970); Whitford, *The Appropriate Role of Security Interests in Consumer Transactions*, 7 CARDOZO L. REV. 959 (1986). For a view that there is no "lost value" when collateral is repossessed, see Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & ECON. 117 (1983).

sumer paid the creditor in excess of the benefits of repossession.⁵⁰ While the creditor would presumably be willing to accept payment by installments, providing the debtor did not present an unacceptable credit risk, the creditor would be likely to insist that the present value of those installments exceed the market value of the collateral, in order to capture some of the debtor's extra use-value for itself.

Chapter 13 permits redemption by installments without payment of this premium. The question becomes whether it is good policy to make this benefit available only to a debtor who elects Chapter 13. The policy analysis turns in part on whether the secured creditor under a Chapter 13 plan receives a fair return for being forced to delay repossession. Usually, I suspect, the creditor does not. The discount rate used to determine present value is likely to be some general market rate, yet the debtor is high risk, as evidenced by her appearance in a bankruptcy proceeding. If that is the case it is hard to defend forcing this creditor to give up value, as compared to the returns of a Chapter 7 proceeding, so that other unsecured creditors might receive more.

If, on the other hand, the secured creditor does receive fair value in return for being forced to delay repossession, a bankruptcy rule that prevents the creditor from being able to force repossession seems fair. It is possible to argue that secured creditors have bargained for the right to exploit the "lost value" resulting from repossession, and should be allowed to carry through on their bargain.⁵¹ But that is not the position of our current bankruptcy laws, which include the right to redeem collateral in Chapter 7 at a fair market value, not a value negotiated with the creditor for those debtors who can afford to do so. These laws presumably reflect the judgment that consumer debtors cannot be expected to fully appreciate the risks they take when extending a security interest, including the risk of strengthening the creditor's bargaining position, as a disparity is created between the goods' market value and their idiosyncratic value to the debtor. I tend to agree with this view for reasons I have advanced in justifying other restrictions on creditor's repossession rights.⁵²

What is hard to justify is restricting the right to redeem by installments to debtors in Chapter 13. Under the present scheme, if a debtor fails to choose Chapter 13, a secured creditor in effect receives a windfall, by being

50. Carrying out such threats would be in the self-interest of the secured creditor only on the assumption that the creditor is similarly situated with respect to many consumer debtors and has an interest in investing in a reputation of carrying out such threats. This assumption seems reasonable, however. Whitford, *supra* note 49, at 964.

51. This is an example of the "hostage" theory that has been much touted by Robert Scott in his recent articles. *E.g.*, Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901 (1986); Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730 (1989).

52. Whitford, *supra* note 49, at 979-85.

able to exploit the lost value phenomenon in its subsequent negotiations with the debtor about redemption payments. If a debtor is to be penalized for not electing Chapter 13, it would be more appropriate to adopt a penalty that is neutral as between creditors, or benefits them all equally. This could be accomplished by permitting both Chapter 7 and Chapter 13 debtors to redeem by installments, providing the discount rate used to estimate present value is a fair one, and then increasing Chapter 7 filing fees.

My conclusion with respect to stretching out payments to secured creditors is very similar to my analysis with respect to the superdischarge. The right to redeem by installments is indisputably a reason for an informed debtor to select Chapter 13. But either this benefit of Chapter 13 should not be available at all or it should be available to both Chapter 7 and Chapter 13 debtors. If either of these policy alternatives were adopted, then it would not matter if Chapter 13 were repealed.

F. Curing Home Mortgage Defaults

In a Chapter 13 plan, a debtor who has fallen into arrears in payments on a home mortgage may prevent foreclosure while curing the arrears over the course of the plan.⁵³ Under Chapter 7, on the other hand, after discharge and termination of the automatic stay, a debtor who wishes to forestall foreclosure must pay the arrears in a lump sum or secure the mortgagee's agreement to a refinancing.

The provisions on home mortgage arrearages are very similar to the provisions discussed above permitting a Chapter 13 debtor to stretch out payments to redeem collateral. The policy analysis is also similar. If the purpose of treating the Chapter 13 debtor specially with regard to home mortgage arrearages is to provide incentives to file Chapter 13, it is difficult to justify sacrificing the rights of some creditors (mortgagees), for the benefit of others who will collect more under Chapter 13. If on the other hand, Congress believes that debtors should be able to forestall foreclosure while making up arrearages over time, then it is difficult to justify granting a windfall to the real estate creditor where Chapter 7 is chosen. Any disincentive to election of Chapter 7 should take some other form.

G. Preserving Non-Exempt Property

The ability to keep non-exempt property has traditionally been cited as a primary reason why an informed debtor might choose Chapter 13. Under Chapter 13, if a debtor completes a plan, unpaid debts are discharged,

53. 11 U.S.C. § 1322(b)(5) (1988). The debtor must also keep up current mortgage payments under the plan. 11 U.S.C. § 1322(a)(2) (1988).

freeing unencumbered, non-exempt property from the claims of past creditors. Under Chapter 7, on the other hand, unencumbered, non-exempt property is an asset for the benefit of unsecured creditors.

Not all debtors with unencumbered, non-exempt property will elect Chapter 13 for this reason. A Chapter 13 plan cannot be confirmed unless the present value of the future payments to each unsecured creditor equals or exceeds what that creditor would receive under Chapter 7.⁵⁴ Hence the value of the payments to Chapter 13 creditors must exceed the value of the non-exempt property preserved from execution. An informed debtor will choose this option only where the value of the property to her (*i.e.*, its subjective value) exceeds whatever measure of value (presumably some objective market value) is chosen for determining the minimum required value of Chapter 13 payments.

Where property has a value to the debtor that is substantially higher than its market value, it is usually because it has considerable sentimental value to the debtor. If the property has substantial market value nonetheless—vacation homes that have been in a family for several generations commonly fall into this category—even in the absence of Chapter 13 a debtor will often be able to protect such an asset from execution. Assuming the asset is unencumbered,⁵⁵ a debtor with regular income commonly can borrow money by offering the asset as collateral, and then use the loan proceeds to pay whatever debts created the need to turn to bankruptcy. Where the debtor cannot borrow sufficient money, it is commonly because her regular income is insufficient to meet loan payments in the subsequent months. But then her income is probably also insufficient to support a Chapter 13 plan that pays unsecured creditors enough to be confirmable without giving up the vacation home or whatever other asset is in question.⁵⁶

Sometimes property with sentimental value has a very low market value. A minimally just exemptions law ought to allow the debtor to declare such assets exempt, even in a Chapter 7 proceeding. Otherwise we are likely to get such unseemly spectacles as a trustee in bankruptcy seizing a family pet and seeking to sell it back to the debtor at its idiosyncratic value. Such a result is particularly perverse in a bankruptcy system that permits a debtor to redeem encumbered property at its market value. The federal exemptions

54. 11 U.S.C. § 1325(a)(4) (1988).

55. If it is fully encumbered, the problem is more difficult. By filing Chapter 13, the debtor might be able to stretch out payments to the mortgagee. In Chapter 7, there might not even be a right to redeem upon paying the market value of the asset, since section 722 is limited to tangible personalty. Of course, I would argue that section 722 should be amended to permit redemption, by installment, of realty as well. *See supra* text accompanying notes 47-54.

56. To be confirmable, a Chapter 13 plan must pay each unsecured creditor at least as much as it would get in a Chapter 7 proceeding, where the unencumbered asset would be seized for the benefit of unsecured creditors. 11 U.S.C. § 1325(a)(4) (1988).

in bankruptcy permit a debtor to declare as exempt property with low market value but high sentimental value,⁵⁷ but unfortunately those exemption provisions are not mandatory, and a majority of states have chosen to opt out of the federal exemptions. In some circumstances, therefore, Chapter 13 is a desirable refuge for debtors with property of the type under consideration in this paragraph. But a better solution than continuation of Chapter 13 would be amendment of the exemption laws to insure that all debtors, including those choosing Chapter 7, could protect such property from execution.

H. Protecting Cosigners

A creditor can be restrained from proceeding against a cosigner of the debt if a Chapter 13 plan provides for full payment to the creditor concerned.⁵⁸ Since cosigners are commonly friends, relatives, co-workers or even employers—all persons with whom the debtor desires to maintain relationships—this ability to forestall action against the cosigner provides a strong incentive for some debtors to elect Chapter 13. No equivalent provision exists for Chapter 7 debtors. If a Chapter 7 proceeding is filed and the debt is in default, the creditor can proceed immediately to collect from cosigners.

In practice, even without the formal authority to restrain action against co-debtors, a Chapter 7 debtor will frequently be able to achieve that result. Providing the debtor has sufficient regular income to make future payments—and if she does not, then she is not a fit candidate for Chapter 13 anyway—she can offer the creditor with rights against a cosigner a reaffirmation, conditioned on agreement to postpone collection against the cosigner. The offer will often be attractive to the creditor. The debtor comes with a fresh Chapter 7 discharge, freeing herself from many of the obligations that made payment difficult in the past. And collection from the cosigner will often involve the extra transaction costs associated with collecting from somebody reluctant to pay.

In those instances in which the cosigner can only be protected in Chapter 13, is this a feature of Chapter 13 whose uniqueness to that procedure can be justified on policy grounds and thus serve as a rationale for maintaining that procedure? My analysis here is similar to that advanced with respect to stretching out payments to secured creditors. On the one hand, if the primary purpose for allowing a cosigner stay is to provide debtors an

57. Useful in this respect is the so called "wild card" exemption, that permits a debtor to exempt any asset or assets not exceeding \$400 in value (or more, if the homestead exemption is not fully utilized). 11 U.S.C. § 522(d)(5) (1988). This provision is especially useful in protecting assets with high sentimental value but low market value.

58. 11 U.S.C. § 1301 (1988).

incentive to choose Chapter 13, it is difficult to justify depriving a creditor who has negotiated for a cosigner agreement in order to benefit other creditors.⁵⁹ On the other hand, there are sound debtor protection reasons for providing an ability to forestall action against cosigners. If the debtor has strong reasons to want to avoid action against cosigners, and the creditor realizes this, it puts the creditor in a position to exact particularly favorable repayment terms from the debtor. Although the cosigner arrangement results from volitional agreement, many debtors probably do not fully appreciate their potential future vulnerability when they assent.⁶⁰ However, if the conclusion is that for these reasons protection should be available to the debtor, it is difficult to justify limiting protection to debtors who devise a confirmable Chapter 13 plan promising full payment to the creditor concerned and typically at least some payment to other creditors.⁶¹ If a debtor were to propose full payment to such a creditor and nothing to other creditors, the Chapter 13 plan would be equivalent to the Chapter 7 proceeding coupled with an affirmation agreement that I suggested previously in the text. At a minimum, Chapter 7 should be amended to restrain creditors from proceeding against cosigners in consumer cases if they have been offered reasonable reaffirmation agreements by the debtor. But if that happened, there would be no need to maintain Chapter 13 in order to provide the informed debtor an opportunity to restrain action against cosigners.

CONCLUSION

I have attempted to make the case that even if debtors all made informed choices between Chapters 7 and 13, Chapter 13 should be repealed. I have done so by trying to show that no legitimate interest of debtors would be sacrificed by such action. To be sure, there are special benefits debtors can achieve through resort to Chapter 13. Some of these, I have argued, can be achieved or mostly achieved in other ways. As to the others, my analysis has turned on whether the benefits are to provide debtors with an incentive to choose Chapter 13 or whether they are viewed as needed debtor protections in the collection process. Where the reason is the first of these

59. By hypothesis, the creditor would prefer immediate resort against the cosigner over payment through a Chapter 13 plan. Otherwise the creditor would be willing to agree to a reaffirmation with the debtor, and Chapter 13 would not provide a unique procedure by which the debtor can forestall action against the cosigner.

60. Essentially the issue here is very similar to the question discussed above, whether we should protect debtors from creditor exploitation of the difference between the market value of collateral and its idiosyncratic value to the debtor.

61. It is generally accepted today that within a Chapter 13 plan a debtor can discriminate in favor of creditors with cosigner agreements. 5 COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 1322.05[1].

alternatives, I have argued that there is little justification for sacrificing the interests of one creditor for the benefit of others. If there are to be special rewards for choosing Chapter 13, they ought to be provided by creditors who benefit from that choice, or from the general purse. Alternatively, where the benefits to the debtor from choosing Chapter 13 are needed debtor protections, I have argued that mostly they are protections that should be available in Chapter 7 as well as Chapter 13. If the purpose of not extending the protections to the Chapter 7 debtor is to punish her for not making the more publicly desirable Chapter 13 election, there is little rationale for allocating the proceeds of that punishment to one creditor only. If Chapter 7 were amended to provide the protections, then debtors could enjoy these protections even if Chapter 13 is repealed.

We live in a second or third best world. Although sound arguments may exist for amending Chapter 7 to provide greater debtor protections, in the absence of such amendment a case can be made for retaining Chapter 13 so that debtors have at least one avenue of access to desirable debtor protections. Before jumping to that conclusion, however, account has to be taken of the startling data collected by Sullivan, Warren and Westbrook. This data supports the inference that many, probably most, debtors electing Chapter 13 do not do so as a result of an informed and self-interested choice, but rather because they are led to that alternative by local bankruptcy elite. Moreover, there is reason to believe that most of these debtors have elected Chapter 13 even though election of Chapter 7 would have better served their material interests. These less-than-voluntary Chapter 13s must be viewed as a cost of maintaining the Chapter 13 option. Any reasonable utilitarian calculus emphasizing the greatest good for the greatest number of debtors is likely to come down on the side of repeal. Only somebody who attaches greater value to maximizing choice for a few informed debtors than to protecting the material interests of many uninformed debtors—perhaps on the theory that given enough initiative and assertiveness the latter could usually protect themselves—is likely to be willing to pay the price of maintaining the option between the two consumer bankruptcy procedures.

