The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy *

by

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A common theme in deliberations about consumer protection is how to achieve the ideal of individualized justice when the amount at stake in any particular dispute is small. By individualized justice I mean a decision that takes account of all the particularities of the parties and their interactions that would be relevant to the decision if the cost of inquiring into details were not a deterrent to doing so. In this article I explore the paradox that consumer bankruptcy, as practiced, has brought us closer to this ideal with respect to issues that would ordinarily be considered non-bankruptcy issues, while it has simultaneously deviated dramatically from this ideal with respect to some fundamental decisions central to bankruptcy law.

I. CONSUMER BANKRUPTCY AS CONSUMER PROTECTION

A. JUSTICE IN THE SMALL TRANSACTION - AN ELUSIVE GOAL

It is well known that for consumers, regardless of personal wealth, it is not practical to hire attorneys at normal rates to litigate many disputes sufficiently to achieve the individualized justice ideal. There is simply not enough money in dispute to justify the necessary investment in legal fees. Many consumer disputes are potentially as complicated, in terms of the needed factual investigation and the complexity of the legal issues, as highly litigated commercial disputes. In the name of consumer protection, over the years we have pursued two different strategies to

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overcome this barrier to individualized justice.

One strategy has been to make litigation cheaper, by facilitating pro se litigation. The small claims court movement has been the primary example of this approach. Small claims courts vary considerably around the country, but many of them are very user friendly.[1] Clerks' offices are often helpful to consumers who need assistance in completing the relevant documents. Nonetheless, repeated studies have shown that relatively few consumers bring their disputes to small claims courts.[2] Apparently most consumers either are unaware of this resource or are intimidated at the prospect of articulating their complaints in a legally relevant and convincing way. When consumers do appear, small claims courts often function well to realize individualized justice.[3]

A second approach to obtaining individualized consumer justice has been to provide the consumer with legal assistance at no cost or reduced rates. One example of this approach is the provision of free attorneys to the poor. While such attorneys have litigated many important consumer credit cases,[4] in recent years reductions in funding for legal aid programs have forced cutbacks in service.[5] Moreover, legal aid programs have never provided middle class consumers with access to individualized justice.

Another attempt to provide consumers with free legal services is the provision in many consumer protection statutes for recovery of attorney fees by the victorious consumer litigant. Such provisions, though quite common today, have not been highly successful in inducing a great deal of consumer-initiated litigation. Consumers are not likely to know about the statutes and to seek out attorneys. Attorneys could use lawyer advertising and other techniques to solicit consumer clients with appropriate complaints, but mostly they have not. Professor Stewart Macaulay has written most perceptively about the reasons private lawyers have tended to shy away from practices specializing in representation of consumers.[6]

My conclusion, which I have elaborated more fully elsewhere,[7] is that in most circumstances private remedies have not been an effective mechanism for obtaining individualized justice for the consumer, or for inducing compliance with consumer protection legislation. From a law enforcement perspective there is no substitute for aggressive public enforcement of consumer protection laws. But even an aggressive

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[1]*See, e.g.*, Thomas L. Eovaldi & Peter R. Meyers, *The Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?*, 72 NW. U.L. REV. 947 (1978).

[2]For an excellent summary of the literature at the time, *see* Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975).

[3]*See* William C. Whitford, *The Small Case Procedure of the United States Tax Court: A Small Claims Court That Works*, 1984 AM. BAR FOUND. RES. J. 797; Eovaldi & Meyers, *supra* note 3.

[4]*E.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[5]"The poor in 1991 were served by one-third fewer legal services attorneys than were available to them in 1981. Just getting to an office has become difficult for thousands of potential clients due to the 38% decline in the number of offices since 1981." National Legal Aid & Defender Association, Legal Services: The Unmet Need, at p. 1 (1992) (on file with author) (emphasis in original).

[6]Stewart M. Macaulay, *Lawyers and Consumer Protection Law*, 14 LAW & SOC. REV. 115 (1979).

[7]William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018.

public enforcement policy, which has been so lacking in recent years, cannot fully deliver individualized justice. Necessarily a public enforcement agency must pick and choose its cases, in an effort to have the maximum deterrent impact with the limited resources at its disposal.[8] This enforcement strategy can be effective in preventing and correcting commercial practices that systematically violate the rights of consumers, but it does not protect the consumer whose rights are determined by individual circumstances.

B. Growth of Consumer Bankruptcy and Development of a Consumer Bankruptcy Bar

The growth in consumer bankruptcy filings over the past two decades has been well chronicled. In the last decade alone, filings have more than doubled.[9] There has been much speculation about the causes for the increased filings. It is widely believed that the social stigma of bankruptcy has declined dramatically, somewhat analogously to the decline in the social stigma of divorce. The declining economic status of the lower middle class, coupled with the tremendous increase in the availability of unsecured credit card lending to this social class, has undoubtedly also been an important factor.[10] The massive revision of the bankruptcy laws in 1978 may also have been an important factor, because that revision considerably improved the extent of debt relief a typical consumer could obtain through bankruptcy.[11]

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[8]*See* Nancy D. Bernstine, *Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices*, 20 How. L.J. 247 (1977).

[9]In 1983 there were 348,872 bankruptcy cases filed. 24 Bankr. Ct. Dec. A7 (May 6, 1993). In 1993 there were 875,202 cases filed. 25 Bankr. Ct. Dec. A16 (April 28, 1994).

[10]*See Running to Stand Still*, The Economist, Nov. 10, 1990, at 19 ("[T]he stagnation or even decline in middle-class living standards since 1973 is a reality affecting most Americans, not a fiction of the statisticians."); *America's New Debtwagon*, The Economist, Dec. 1, 1990, at 93 ("After a decade of borrowing to buy cars, houses, and consumer durables, Americans are carrying a heavier burden of personal debt than ever before. . . . The damage was done between 1982–86; credit-card debt, car loans and other forms of consumer installment-debt grew at an annual rate of 9.5% a year, almost twice the rate of the 1970's.")

[11]Interestingly, two recent empirical studies have been unable to validate any causal relationship between the increased filing rates of the 1980's and the change in the bankruptcy law. Ian Domowitz & Thomas L. Eovaldi, *The Impact of the Bankruptcy Reform Act of 1978 on Consumer Bankruptcy*, 36 J. Law. & Econ. 803 (1993); Jagdeep Bhandari & Lawrence Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 Am. Bankr. L.J. 1 (1993). Domowitz & Eovaldi's study ended, however, with 1984, on the eve of the most rapid increase in bankruptcy filings. *See supra* note 9. Bhandari & Weiss' results are more ambiguous. Using regression equations over a 45-year period, they found that the ratio of household debt to household income was the primary determinant of personal bankruptcy filing rates. They were unable to show that the enactment of the Bankruptcy Code had an independent effect. At the same time, however, they found that the relationship between debt-paying capacity and annual personal bankruptcy filing rate "became more sensitive after the change in the bankruptcy laws in 1979. . . . [F]or every percentage increase . . . in debt . . . there was a larger increase . . . in the bankruptcy filing rate after the Code was enacted." Bhandari & Weiss, *supra*, at 12.

Whether or not the empirical studies can demonstrate a causal connection, it is hard to believe that the enactment of the Code has not had any effect on bankruptcy filing rates. It is indisputable that consumers can often achieve better economic results through bankruptcy today than they would have been able to achieve if the law had not been changed. To assume that this change has had no effect on decisions to file, one would have to make monumental changes in the usual assumptions about the responsiveness of humans to financial incentives in commercial matters. The empirical studies are useful, nonetheless, in showing that changes in economic conditions are far more important than legal changes in explaining the increase in bankruptcy filings.

Accompanying the increase in consumer bankruptcy filing rates has been the development of a sizeable consumer bankruptcy bar. Consumers usually do not file bankruptcy pro se.[12] Because the benefit of bankruptcy to a consumer is reasonably substantial, a debtor can justify payment of a higher attorney's fee for a bankruptcy than for a resolution of a particular dispute with a creditor. Attorney fees for a typical consumer bankruptcy range from approximately $300 to $2000, and vary considerably between different localities.[13]

Consumer debtor work at these rates is most likely to be profitable and attractive to an attorney who can develop a sufficiently large caseload to justify investment in routine procedures that reduce the cost per case. Much of the legal work in a consumer bankruptcy case consists of filling out forms, and paralegals can be trained to help the clients provide the needed information. But an investment in developing forms and training paralegals can only be justified if the costs can be spread over many cases.

The tremendous growth in consumer bankruptcy filing rates has both facilitated and been facilitated by the development in many communities of lawyers specializing in representing debtors in consumer bankruptcy cases. In our larger cities today debtors in consumer bankruptcy cases tend to be represented by consumer bankruptcy specialists. Even attorneys who specialize in business bankruptcy, or who represent creditors in consumer bankruptcies, often refer consumer debtors contemplating bankruptcy to attorneys who specialize in representing such clients.[14]

From a consumer protection perspective, the significance of this growth in a consumer bankruptcy bar has been nicely summarized by Professor Jean Braucher in a wonderful recent article describing the work of this section of the bar.

> From the perspective of consumer law generally, the most striking feature of consumer bankruptcy practice is that it exists. It not only exists—it is a booming practice area, one of the few where middle to lower-middle class consumers are not only served, but are the mainstay of the practice. The boom in consumer bankruptcy could be seen as an indictment of other supposed consumer remedies—if consumers had other methods of stopping collection activities they find intolerable, fewer would use bankruptcy.[15]

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[12]There has been a good deal of concern expressed recently about an increasing number of pro se filings, especially in California. *See generally, Consumer Bankruptcy: Roundtable Discussion*, 2 AM. BANKR. INST. L. REV. 5 (1994). Nonetheless, the best estimates are that the percentage of debtors filing pro se remains less than 15%. *See* Susan Block-Lieb, *A Comparison of Pro Bono Representation Programs For Consumer Debtors*, 2 AM. BANKR. INST. L. REV. 37, 41 (1994).

[13]*See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 546-47 (1993).

[14]*See generally id.*

[15]*Id.* at 525-26. *See also* Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675 (1991).

C. Consumer Bankruptcy as Consumer Protection

It is time for consumer advocates to think of consumer bankruptcy as a primary vehicle for delivering the elusive goal of consumer justice. Bankruptcy is capable of providing real relief with respect to unsecured credit. In the usual chapter 7 bankruptcy, unsecured creditors receive nothing, so in financial terms the discharge in bankruptcy is the equivalent of successfully asserting a defense to the claims.[16] And if the consumer debtor has unsecured debts of several thousand dollars or more, bankruptcy relief can be obtained at acceptable cost, with a lawyer who is both anxious for the business and easy for the consumer to find. Sending the consumer debtor with a grievance to a consumer bankruptcy attorney is clearly the path of least resistance.

Consumer bankruptcy is far from a perfect substitute for an ideal system of delivering individualized justice. Most obviously, claims are discharged to which the debtor has no defense along with those for which a defense exists. Creditors holding valid claims suffer losses in evident deviation from the goal of individualized justice.

From the debtor's perspective, there are many costs to filing bankruptcy in addition to the costs of hiring an attorney.[17] There remains some social stigma to bankruptcy. A discharge harms the debtor's credit rating and can make future borrowing difficult or more expensive.[18] Moreover, many debtors have ethical objections to obtaining a bankruptcy discharge for debts to which there is no defense. However, there is nothing about a discharge in bankruptcy that prevents a debtor from repaying loans that the debtor believes should be repaid.[19]

A debtor may also have to give up non-exempt property as a price of obtaining

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[16]Even in a typical chapter 13 bankruptcy, unsecured creditors receive less than might be imagined. Table II, column 5 shows the percentage of payments to creditors in chapter 13 plans that go to unsecured creditors without priority. On average, less than 23% of payments to creditors under a chapter 13 plan are made to these creditors. Payments to secured creditors are substantial in chapter 13, but often they are payments that the debtor would make even if she chose chapter 7, as the price for keeping the collateral. Payments to priority creditors are also often payments that would be made if the debtor chose chapter 7, since many priority debts, especially tax debts, are not dischargeable in bankruptcy.

[17]One cost is court filing fees. These are generally smaller than attorney fees, but still can be a significant barrier, especially to consumers with so few assets that they qualify for free legal services. Recently Congress mandated an experiment in six judicial districts to permit low income consumer debtors to apply for waiver of filing fees in bankruptcy. *See* Henry J. Sommer, *In Forma Pauperis in Bankruptcy: The Time Has Long Since Come*, 2 Am. Bankr. Inst. L. Rev. 93 (1994); Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting On and Beyond United States v. Kras*, 2 Am. Bankr. Inst. L. Rev. 57 (1994).

[18]Although it is commonly believed that bankrupt debtors cannot borrow at all, this is not true. However, the debtor may need higher income to obtain credit, borrowing limits on credit cards are likely to be lower, downpayments on car loans are higher, etc.

[19]Bankruptcy Code § 524(f), 11 U.S.C.A. § 524(f) (West 1993). The debtor can even legally bind herself to repay the loan under Bankruptcy Code § 524(c), if her bankruptcy attorney files the appropriate affidavit under § 524(c)(3), 11 U.S.C.A. § 524(c)(3) (West 1993). Normally, however, it is wiser for the debtor to avoid a reaffirmation, and simply to repay the debt voluntarily. A reaffirmed debt is difficult to discharge in a subsequent bankruptcy, should unforeseen circumstances make future payment difficult, because of the six-year bar on future discharges that accompanies a chapter 7 discharge. Bankruptcy Code § 727(a)(8), 11 U.S.C.A. § 727(a)(8) (West 1993).

a bankruptcy discharge.[20] Exemption statutes vary considerably from state to state, and in some jurisdictions they are not generous at all. Nonetheless, with pre-bankruptcy planning a debtor can normally minimize her non-exempt property at the time of filing. Such planning might include selling non-exempt property and reinvesting the proceeds in exempt property or giving non-exempt property to family members. While such transactions are potentially challengeable in bankruptcy, and could even provide a basis for challenging the debtor's entitlement to a discharge,[21] in practice such challenges are rare and pre-bankruptcy planning is a staple of the practice of most consumer bankruptcy specialists.

Although bankruptcy is an effective way to deal with unsecured debt, bankruptcy offers only limited relief from secured debt. The debtor can redeem some kinds of collateral from a security interest by paying only the fair market value of the collateral when it is less than the amount owing, and treating the deficiency like other unsecured credit.[22] But unless the debtor pays the fair market value of the collateral, she will lose it.

If the debtor claims a defense to a secured claim under the contract or consumer protection legislation, however, bankruptcy provides an efficient forum for asserting that claim. The litigation takes place in bankruptcy court, where delays in obtaining a hearing because of case backlog are less common than in general civil courts. And because the consumer debtor has an attorney for the bankruptcy, obtaining legal help in asserting the defense is practical. Often the bankruptcy attorney will assert a defense to a secured claim without charging an additional fee to the basic charge for the bankruptcy.[23]

In sum, consumer bankruptcy can frequently provide effective relief from a disputed claim, and the costs of bankruptcy are frequently less than is commonly supposed. Because of the seeming futility of providing for individualized justice to

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[20]In chapter 13 it is theoretically possible to keep non-exempt property, but then unsecured creditors have to be paid at least as much as the value of the non-exempt property, albeit over time. Bankruptcy Code § 1325(a)(4), 11 U.S.C.A. § 1325(a)(4) (West 1993). I develop the principal differences between chapter 7 and chapter 13 in notes 26-40 *infra* and accompanying text.

[21]Bankruptcy Code § 727(a)(2), 11 U.S.C.A. § 727(a)(2) (West 1993).

[22]Bankruptcy Code §§ 722, 1325(a)(5), 11 U.S.C.A. §§ 722, 1325(a)(5) (West 1993).

[23]*See* David A. Scholl, *Bankruptcy Court: The Ultimate Consumer Law Forum?*, 44 BUS. LAWYER 935 (1989). In practice the bankruptcy attorney commonly uses the existence of an arguable defense to negotiate a settlement with the secured creditor. The settlement often includes an agreement by the creditor to release the collateral upon payment of less than would otherwise have to be paid to redeem it.

Bankruptcy practice, like practice in other courts, is largely a settlement practice. Nonetheless, the efficiency of bankruptcy courts and procedure makes litigation in bankruptcy quicker and usually less expensive than litigation in other courts. So litigating defenses to secured claims in bankruptcy court is often a practical alternative if an acceptable settlement cannot be reached. Scholl, *supra* at 936-37, speculates that bankruptcy courts may also be generally more sympathetic to consumer defenses than are state courts of general jurisdiction. These facts, coupled with the representation of the debtor by an attorney, greatly strengthens the debtor's bargaining position in bankruptcy, as compared with a debtor trying to assert the same defense outside bankruptcy. It is likely that settlements of disputed secured claims are much more favorable to debtors within bankruptcy than without.

consumers in other ways, consumer advocates need to recognize that consumer bankruptcy can be a mechanism for enforcing consumer rights.[24]

Although consumer bankruptcy may be the best alternative we have, we need to remember that it is far from a perfect mechanism. There are injuries to merchants holding unsecured claims against whom the debtor has no valid consumer protection claim. Even the relatively low attorney fees in bankruptcy justify resort to this extraordinary remedy only when the amount at stake is relatively large; it is not a remedy that can be used practically when a debtor is involved in disputes of lesser amounts.[25]

Finally, reliance on bankruptcy as a consumer protection device does not send the same message to merchants as does effective relief obtained outside bankruptcy. When a debtor realizes a defense through bankruptcy, the merchant is likely to attribute its inability to collect to the bankruptcy rather than to a defense arising out of the transaction, even if that defense was a motivating factor in the consumer's decision to file bankruptcy. Consequently, realizing defenses through bankruptcy rather than directly is less likely to induce merchants to correct practices that are providing consumers with plausible defenses.

II. CONSUMER PROTECTION IN CONSUMER BANKRUPTCY

A. Choices in Consumer Bankruptcy

Consumer bankruptcy presents a new consumer protection problem. A debtor must make several choices in the bankruptcy case that critically affect the type of relief she will receive. The most basic choice is whether to file under chapter 7 or chapter 13, but under each chapter there are other choices to make. Consumers typically lack much information about these choices at the time they contemplate bankruptcy. The question becomes whether adequate processes exist to assist consumers to make these choices in an intelligent manner reflecting their best interests.

The considerations that bear on the choice between chapter 7 and chapter 13 have been fully described elsewhere.[26] Only the most important considerations are

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[24]A well-known consumer bankruptcy lawyer who practices with legal services agencies states:

> In any case, it is incumbent upon advocates of financially troubled clients to have a basic knowledge of what can be accomplished through the use of bankruptcy. Not only may such knowledge save a client thousands of dollars, a home, a car, or a job, but it may accomplish desired results better, faster, and with less expenditure of resources than any other means. The bankruptcy court may be a more favorable forum for the raising of affirmative claims and may dispose of them more quickly. And it may be malpractice not to make available to clients the powerful tools available in bankruptcy for solving their problems.

Henry J. Sommer, Consumer Bankruptcy Law & Practice 388 (3d ed. 1988).

[25]I am ignoring the possibility of filing bankruptcy pro se here, and perhaps even seeking a waiver of filing fees, because I believe these alternatives are not practical or available for the vast majority of consumers. *See* authorities cited in note 12 *supra*.

[26]William C. Whitford, *Has the Time Come For Repeal Chapter of 13?*, 65 Ind. L. Rev. 85 (1989); Teresa A. Sullivan, Elizabeth Warren & Jay L. Westbrook, As We Forgive Our Debtors, 231-42 (1989).

summarized here. There is usually a choice between the chapters, even though the Code provides for dismissal of chapter 7 petitions when the choice of chapter 7 would constitute "substantial abuse".[27] A recent study has shown that administration of the substantial abuse standard is uneven around the country.[28] In many districts virtually no chapter 7 petitions are challenged or dismissed as a substantial abuse. In some districts, however, debtors who could pay a substantial portion of the unsecured claims in a three-year plan under chapter 13 are prevented by the bankruptcy court from using chapter 7.[29]

In theory a basic difference between chapter 7 and chapter 13 is that the debtor is required to give up all non-exempt property in chapter 7, whereas in chapter 13 the debtor can keep this property, if the plan provides for sufficient payments over time to unsecured creditors.[30] Usually, however, any non-exempt property owned by a consumer at filing is fully encumbered,[31] so this consideration rarely looms large in making the chapter 7/13 choice.

A much more important consideration is the different ways in which secured creditors can be provided for in the two chapters. In chapter 7 a debtor normally either loses any property subject to a security interest or reaffirms the entire amount owing to the secured creditor.[32] In chapter 13 the debtor can forestall repossession of collateral other than a residence by paying over time the fair market value of the collateral when that is less than the amount owed.[33] For home mortgages in chapter

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[27]Bankruptcy Code § 707(b), 11 U.S.C.A. § 707(b) (West 1993).

[28]Wayne R. Wells et al., *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 CLEVE. ST. L. REV. 15 (1991).

[29]Whether a debtor can afford to pay a substantial portion of unsecured debts is normally determined from information provided on the schedules filed by the debtor when bankruptcy is initiated. These schedules include a statement of income and expenses, from which disposable income can be determined.

[30]The present value of the payments must at least equal the value of the non-exempt property that would be distributed to creditors in chapter 7. Bankruptcy Code § 1325(a)(4), 11 U.S.C.A. § 1325(a)(4) (West 1993).

[31]SULLIVAN, WARREN & WESTBROOK, *supra* note 26, at 202-05 (1989). One reason debtors have so few non-exempt assets at filing is because of the prevalence of exemptions planning. *See* note 21 *supra* and accompanying text.

[32]When the value of the collateral exceeds the amount owed the secured creditor plus any exemption of the debtor, the chapter 7 trustee normally sells the collateral in order to reap the excess value for the benefit of unsecured creditors. Where the value of the collateral is less than this amount, the trustee normally abandons the collateral. The secured creditor can then usually obtain relief from the automatic stay and repossess the collateral. Bankruptcy Code § 362(d), 11 U.S.C.A. § 362(d) (West 1993). If the collateral is tangible personal property intended for consumer use and also exempt, the debtor can release the collateral from the security interest by paying the secured creditor the fair market value of the collateral, even if that amount is less than amount owed. Bankruptcy Code § 722, 11 U.S.C.A. 722 (West 1993). Unless the creditor agrees otherwise, however, this payment must be in one lump sum, and normally the debtor is unable to do this. In some districts it is common for a chapter 7 debtor in this situation to reaffirm the entire amount of the debt in order to secure the creditor's agreement not to repossess. Bankruptcy Code § 524(c), 11 U.S.C.A. § 524(c) (West 1993). In other districts, however, reaffirmations are rare, and chapter 7 debtors may lose their collateral.

[33]The present value of the payments over time must equal or exceed the "allowed amount of [the secured] claim", which is the fair market value of the collateral at the time of filing or the amount owed, whichever is less. Bankruptcy Code § 1325(a)(5)(B), 11 U.S.C.A. § 1325(a)(5) (West 1993). Because the secured creditor must receive the present value of its secured claim, the creditor will receive interest from the date of confirmation, though not necessarily at the contract rate.

13 the debtor can forestall foreclosure if she proposes to make up arrears within a reasonable time and thereafter maintain the payments prescribed in the mortgage.[34]

Under each chapter there are also important decisions to be made.[35] The choices are more numerous when chapter 13 is chosen. There are many issues about whether to retain or give up collateral.[36] Another decision facing the chapter 13 debtor is how much to promise to pay unsecured creditors through the plan. The statute provides that a chapter 13 plan must devote all the debtor's "disposable income" to payment of debts for at least three years.[37] Within limits, the debtor controls how much income is considered "disposable", through adjustment of estimated living expenses.[38] From the face of the statute it would appear that a debtor with no disposable income could obtain confirmation of a plan providing for no payment to unsecured creditors (a so-called "zero payment plan"), but in practice most bankruptcy courts will not confirm a plan that proposes to pay less than some minimal amount to unsecured creditors.[39] Frequently debtors propose payment to unsecured creditors of a greater amount than the minimum needed to confirm a plan. Many consumers elect to propose "100%" plans, which provide that unsecured creditors will receive full payment, though without interest.[40]

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[34]It is not normally possible to "strip a lien" on a personal residence in chapter 13. Bankruptcy Code § 1322(b)(2), 11 U.S.C.A. § 1322(b)(2) (West 1993); Nobelman v. American Sav. Bank, 113 S. Ct. 2107 (1993). *See* Daniel C. Fleming & Marianne McConnell, *The Treatment of Residential Mortgages in Chapter 13 after Nobelman*, 2 AM. BANKR. INST. L. REV. 147 (1994).

Another important difference between chapter 7 and chapter 13 concerns the treatment of co-debtors. If the debtor chooses chapter 7, creditors are free to pursue co-debtors for payment from the moment of filing. In chapter 13, on the other hand, creditors are restrained from pursuing co-debtors if the debtor proposes to pay claims guaranteed by co-debtors in full over the life of the chapter 13 plan. Bankruptcy Code § 1301, 11 U.S.C.A. § 1301 (West 1993). Since co-debtors are frequently friends or relatives who have done the debtor a favor in becoming a co-debtor, debtors are commonly quite concerned to protect their co-debtors from efforts to collect the debt.

[35]In chapter 7 most of the decisions concern secured debt. *See* note 32 *supra* and accompanying text.

[36]*See* notes 32–33 *supra* and accompanying text. A less well-understood choice in chapter 13 respecting secured credit concerns the order in which creditors are paid under the plan. It is legally possible to devote all payments in the early months of the plan to payment of secured and priority creditors, and reserve any payments for unsecured creditors to later months. If the plan is not completed by the debtor, as occurs in more than half the cases, such an approach makes it more likely that, at the time of dismissal of the chapter 13 plan, secured creditors will be paid or nearly so, and it will be easier for the debtor to release the collateral from the security interest. Nonetheless, many chapter 13 plans provide for some immediate payment to unsecureds, and thereby delay the time when secured creditors will be paid in full.

[37]Bankruptcy Code § 1325(b), 11 U.S.C.A. § 1325(b) (West 1993).

[38]A debtor must file a list of current expenditures and current income with any bankruptcy petition. Bankruptcy Code § 521(1), 11 U.S.C.A. § 521(i) (West 1993). *See* Bankruptcy Official Form 6. The Chapter 13 trustee reviews these filings and can challenge a debtor's estimated expenditures if they are too high. How thoroughly chapter 13 trustees perform this role varies by district. In some parts of the country debtors have very considerable discretion to determine how much "disposable income" they have by estimating on the high or low side for expenditures (food, recreation, etc.), and in all districts there is probably some discretion in this respect.

[39]The amount of that minimal payment varies by district. *See* notes 44–45 *infra* and accompanying text.

[40]The survey conducted by the National Association of Chapter 13 Trustees, described at note 48 *infra*, found that in 28% of the cases reported the debtor proposed a 100% plan. As with the other data reported *infra* from this survey, there was great variation in this statistic between districts.

B. How Choices in Bankruptcy Cases Are Made in Practice.

The ideal of individualized justice, as well as the professional ideals of legal practice, require that a debtor's choices in bankruptcy be made by the debtor on an informed basis. The task of providing the debtor with the information needed to make those decisions falls on her attorney.

The evidence is now overwhelming that debtor decision-making in consumer bankruptcy departs radically from this ideal. Rather than making informed decisions reflecting their particular circumstances and personal goals, debtors are steered to particular choices by their attorneys. Too often, I believe, those choices reflect the best interests of the attorneys rather than the interests of debtors themselves. This is true with respect to both the basic chapter 7/13 choice and the many choices in formulating a chapter 13 plan.

Consumer bankruptcy specialists are very interested in having a routinized practice, with little necessity to appear in court for contested hearings. Routine, uncontested cases allow them to charge low fees, which in turn makes it easier to attract a sufficiently large clientele to justify investment in routinized procedures. The easiest way to insure that bankruptcy filings will be approved routinely is to steer clients to those choices favored by the local bankruptcy judges and bankruptcy trustees. If in a particular district this group believes that debtors with a steady income should file chapter 13 and pay as many debts as possible, attorneys are likely to steer such clients towards chapter 13. If the judges and trustees believe that a debtor choosing chapter 13 should repay a substantial portion of unsecured debt, plans proposing very limited payment to unsecureds are not likely to be proposed by the local bar.

The best evidence that attorneys are steering clients to a particular bankruptcy procedure, rather than facilitating informed choice by consumers, comes from the extreme variation in filing rates around the country. Table 1 shows the percentage of non-business bankruptcy filings that are filed under chapter 13 in all the judicial districts around the country. For 1993, those percentages vary from 2% in North Dakota and 3% in Vermont and South Dakota to 80% in Puerto Rico and 79% in the Western District of Tennessee. The percentages within each district have remained remarkably constant over time. Bankruptcy law is primarily federal. Although exemptions in bankruptcy are mostly determined by state law, exemptions only rarely influence chapter choice.[41] The inference is overwhelming that it is differences in what has been

A debtor can choose to file a five-year plan if he or she wants to pay unsecured creditors more than would be feasible over three years. The Code provides that a chapter 13 plan cannot exceed three years "unless the court, for cause, approves a longer period (of not more than 5 years)". Bankruptcy Code § 1322(c), 11 U.S.C.A. § 1322(c) (West 1993). Some courts will not approve a plan exceeding three years simply because a debtor wishes to pay creditors more. *See, e.g., In re* Greer, 60 B.R. 547, 554-55 (Bankr. C.D. Cal. 1986). Another reason for a debtor to elect to file a plan exceeding three years is to provide a longer period of time in which to pay secured creditors the minimum amounts to which they are entitled.

[41] *See* notes 30-31 *supra* and accompanying text.

TABLE 1
CHAPTER 13 FILINGS AS A %
OF TOTAL NON-BUSINESS FILINGS BY DISTRICT

CIRCUIT	DISTRICT	1990	1992	1993
D.C.		46	36	38
1ST	ME	23	17	13
	MA	18	17	18
	NH	9	8	8
	RI	6	6	7
	PR	76	80	80
2ND	CT	13	15	15
	NY, N	15	18	18
	NY, E	19	20	22
	NY, S	10	10	11
	NY, W	32	29	30
	VT	11	3	3
3RD	DE	24	30	28
	NJ	27	25	27
	PA, E	45	43	45
	PA, M	16	13	16
	PA, W	15	15	16
	VT	14	37	26
4TH	MD	34	26	27
	NC, E	43	48	55
	NC, M	78	72	74
	NC, W	69	61	59
	SC	49	45	47
	VA, E	21	22	24
	VA, W	14	14	15
	WV, N	8	6	8
	WV, S	9	14	13
5TH	LA, E	23	33	36
	LA, M	26	26	33
	LA, W	32	45	50
	MS, N	36	34	36
	MS, S	40	42	42
	TX, N	39	41	46
	TX, E	25	41	50
	TX, S	35	43	46
	TX, W	41	46	49
6TH	KY, E	21	13	17
	KY, W	22	22	22
	MI, E	22	24	27
	MI, W	29	21	23
	OH, N	19	21	21
	OH, S	28	29	30
	TN, E	45	53	54
	TN, M	57	51	52
	TN, W	73	76	79

CIRCUIT	DISTRICT	1990	1992	1993
7TH	IL, N	29	26	27
	IL, C	11	11	11
	IL, S	21	27	26
	IN, N	12	12	14
	IN, S	9	10	15
	WI, E	12	12	12
	WI, W	15	11	12
8TH	AR, E	54	46	47
	AR, W	26	29	32
	IA, N	3	3	3
	IA, S	11	11	11
	MN	29	26	29
	MO, E	39	45	44
	MO, W	14	13	15
	NE	35	25	23
	ND	4	2	2
	SD	7	5	3
9TH	AK	12	8	8
	AZ	23	21	20
	CA, N	29	25	24
	CA, E	19	19	20
	CA, C	18	15	17
	CA, S	38	32	27
	HI	10	6	5
	ID	33	29	29
	MT	10	11	14
	NV	28	23	23
	OR	27	29	32
	WA, E	17	16	17
	WA, W	23	24	23
	GUAM	6	13	12
	NMI	0	0	0
10TH	CO	26	26	25
	KS	19	17	20
	NM	11	16	17
	OK, N	7	18	17
	OK, E	9	10	12
	OK, W	12	18	18
	UT	29	26	27
	WY	11	8	8
11TH	AL, N	61	64	67
	AL, M	65	63	67
	AL, S	22	30	34
	FL, N	5	9	10
	FL, M	12	14	15
	FL, S	12	14	16
	GA, N	54	58	62
	GA, M	51	57	61
	GA, S	68	71	73
U.S. Total		29	28	30

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FED. JUDICIAL WORKLOAD STATISTICS

called "local legal culture"—primarily the attitudes of the local bankruptcy judges and trustees—that accounts for this tremendous variation in chapter 13 filing rates.[42]

There is also tremendous variation in the kinds of chapter 13 plans that are filed in different districts around the country. Our knowledge in this respect has been enhanced considerably by Professor Jean Braucher's wonderful recent study.[43] She studied in detail the consumer bankruptcy practice in four cities—Austin and San Antonio, both in the western district of Texas, and Dayton and Cincinnati, both in the southern district of Ohio. Each city has a separate chapter 13 trustee, although each pair of cities is in the same judicial district. Professor Braucher found that in each city there was an informal understanding that chapter 13 plans needed to propose a minimum payment to unsecured creditors if they were to be confirmed routinely, without challenge or questioning by the trustee. This "floor" percentage was 100 percent in San Antonio,[44] 25 to 33 percent in Austin, 70 percent in Cincinnati, and 10 percent in Dayton. Most lawyers in each city only proposed plans that satisfied or exceeded these "floor" percentages.[45]

Professor Braucher believes that a desire for a routinized practice is the most important reason for this pattern. Interestingly, she found that there were also other incentives for lawyers to acquiesce in the "local legal culture". Attorneys fees in chapter 13 were set substantially higher than chapter 7 fees in the Texas cities that she studied. She speculates that one reason for this fee disparity is that the bankruptcy judges wanted to provide attorneys an economic incentive to steer clients into chapter 13. In her judgment chapter 13 practice is generally more profitable for attorneys than chapter 7.[46]

Reputational considerations may also induce consumer bankruptcy specialists to conform to local legal culture. Consumer bankruptcy specialists practice mostly in small firms.[47] Investment in routinized bankruptcy procedures (forms, paralegals,

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[42]Teresa A. Sullivan, Elizabeth Warren & Jay L. Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence From the Federal Bankruptcy Courts*, 17 HARV. L. & PUB. POLICY 801 (1994); Braucher, *supra* note 13, at 556-61. *See also* Teresa A. Sullivan, Elizabeth Warren & Jay L. Westbrook, *Laws, Models, and Real People: Choice of Chapter in Personal Bankruptcy*, 13 LAW & SOCIAL INQUIRY 661, 692-700 (1988).

[43]Braucher, *supra* note 13.

[44]There was a further understanding in San Antonio that, if a plan was proposed for payment of less than 100%, it should be a five-year plan. Such plans could be confirmed, but only after careful examination by the trustee to see if the debtor could pay more.

[45]Braucher, *supra* note 13, at 532.

[46]*Id.* at 546-47, 550-51. Braucher discusses the common observation that chapter 13 cases can involve more work than chapter 7 cases, and that in some cases chapter 13 fees are not fully collected. She doubts that these factors can fully account for the fee disparity. In the Texas jurisdictions that she studied, chapter 13 fees were approximately double chapter 7 fees.

For a further discussion of chapter 13 fees by a judge and a trustee from San Antonio, which includes a suggestion that chapter 13 attorneys in that district may perform more services for clients than chapter 13 attorneys in other districts, *see Consumer Bankruptcy: Roundtable Discussion*, *supra* note 12, at 16-17 (comments of Judge Clark and Chapter 13 Trustee Olson).

[47]Twenty-five of the 43 consumer bankruptcy lawyers (all of whom represented debtors) interviewed by Professor Braucher for whom she obtained information about firm size were sole practitioners. Braucher, *supra* note 13, at 518.

even specialized library materials) increases overhead. The higher overhead makes the practice particularly vulnerable to reduced business. Though yellow page advertising, and even to some extent television advertising, is used by consumer bankruptcy specialists to maintain needed client loads, referrals from other attorneys in the local bar remains an important source of clients. Many attorneys may believe that referrals are less likely if they steer their clients towards unconventional bankruptcy options that force their clients to appear in court to defend the bankruptcy choices that are made.

Further evidence of variance in chapter 13 practice is provided by a previously unpublished survey conducted by the National Association of Chapter 13 Trustees (NACTT). The Association asked chapter 13 trustees around the country to report a great deal of data about chapter 13 plans in their districts. The Association has generously provided me the data, cumulated by United States Trustee Region.[48]

In the NACTT survey participating chapter 13 trustees (124 of 174, or 71%, participated) provided much of the information about cases in their districts as averages—e.g., the average proposed payout to unsecureds in confirmed plans. In the data made available to me, the Association had calculated unweighted averages of the averages reported by trustees in each region. Because these averages are unweighted, they are not estimates of what happens in the average case in each region. Nonetheless, the variations in the unweighted regional averages is evidence of variation in practices between regions.

Table 2 reports some of the most significant data contained in the NACTT study. Column 2 reports the unweighted average of the trustees' reports of the percentage of chapter 13 plans in each district in which the debtor proposed to pay 100% of unsecured debt. Column 3 reports a similarly unweighted average of each chapter 13 trustee's report of the average payment to unsecured creditors in plans in their district providing for less than 100% payout to such creditors. Both columns suggest a tremendous regional variation in chapter 13 plans. In region 8 (Kentucky and Tennessee) an unweighted average of 57% of the plans were 100% plans; the remaining plans proposed to pay an unweighted average of 55% of the unsecured claims. By contrast in Arizona (region 14), the comparable unweighted averages are only 6% and 14%. These are the extreme results: the unweighted averages in the other 20 regions ranged in between. As one might expect, regions with a higher than average percentage of 100% plans are more likely to report a higher than average proposed payout for plans paying less than 100%, though there are exceptions to this generalization.[49]

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[48]I owe a special debt of gratitude to William A. Chatterton, chapter 13 trustee in the Western District of Wisconsin, for helping me obtain this data and discussing its significance with me. One item of data reported by the chapter 13 trustees were chapter 13 filings as a percent of total filings in their districts. This data confirmed the conclusion drawn from Table 1—that there is tremendous variation in chapter 13 filing rates throughout the country.

[49]*E.g.*, Region 11 (Wisconsin and the Northern District of Illinois), where 38% of the plans are 100% plans, the second highest among the regions, but in the other plans the average proposed payout is only 22%, one of the lowest proposed averages.

TABLE 2
CHAPTER 13 PLAN DATA*

	U.S. TRUSTEE REGION	% of Confirmed Plans Proposing 100% Payout	Average Proposed Payout in Less than 100% Plans	% of Cases Closed As Completed	Payments to Unsecured as % of Payments Made to Secured, Priority & Unsecured
5	(LA; MS)	32(8)	34(11)	44(2)	33
AO	(AL; NC)	38(2)	42(15)	19(16)	31
2	(CT; NY; VT)	36(6)	29(14)	24(12)	30
21	(FL; GA)	37(5)	34(11)	19(16)	30
4	(MD; SC; VA; WV; D.C.)	29(12)	35(8)	30(9)	29
12	(IA; MN; ND; SD)	14(18)	29(14)	40(4)	26
16	(CA)	38(2)	44(3)	15(20)	25
19	(CO; UT; WY)	6(21)	25(18)	37(8)	25
18	(ID; MT; OF; WA; AK)	19(15)	32(13)	43(3)	25
1	(ME; MA; NH; RI; PR)	20(14)	40(6)	16(18)	24
13	(AR; MO; NE)	31(9)	43(4)	24(12)	21
11	(IL; WI)	38(2)	22(20)	39(6)	21
10	(IL; IN)	17(16)	29(14)	49(1)	21
9	(OH; MI)	33(7)	35(8)	40(4)	21
17	(CA; NY)	27(13)	25(18)	38(7)	20
7	(TX)	31(9)	56(1)	20(15)	18
15	(CA; HI; GUAM; NMI)	30(11)	35(8)	3(22)	18
8	(KY; TN)	52(1)	55(2)	26(10)	17
3	(DE; NJ; PA; VI)	15(17)	15(21)	19(16)	16
20	(KS; NM; OK)	11(20)	29(14)	26(10)	14
14	(AZ)	6(21)	13(22)	12(21)	11
6	(TX)	14(18)	40(6)	23(14)	10
	AVERAGE	28	34	31	23

Note: The numbers in the parentheses in columns 2, 3 and 4 indicate the region's rank on this criteria. Their regions are listed on the Table in the order of their rank in column 5.

*Source: NACTT Statistical Report, Regional Totals, June 10, 1993.

Column 4 shows the unweighted average of the reported percentage of chapter 13 cases closed in each district as successfully completed. Again, the percentages vary dramatically, but the data indicate that a majority of chapter 13 plans are not completed in all regions of the country. In some parts of the country over 80% of the closed cases were closed for reasons other than successful completion of the plan (the other cases were dismissed, converted to chapter 7, or transferred to another district). For the whole country the average reported rate for closing cases as completed is only 31%.[50]

[50]This result should be compared with the findings in Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L. REV. 17, 40-42 (1989). Studying only plans in the Buffalo Division of the Western District of New York, Girth found that 63% were eventually completed successfully, many after several modifications and extensions. It would appear from the NACTT data that the Buffalo division has achieved extraordinary results, far from typical for the country as a whole.

As one might expect, there seems to be an inverse correlation between proposed payout to unsecureds and likelihood of completion of the plan: of the 8 regions reporting a higher than average percentage of cases closed as completed, only 3 (regions 5, 9 and 11) reported a percentage of 100% plans above the national average and only 2 (regions 5 and 9) reported an average payout to unsecureds in other plans that was above the national average.

Column 5 of Table 2 reports the percentage of unsecured debt actually paid to unsecured creditors, as a percentage of the amounts paid to all pre-filing creditors under chapter 13 plans. This statistic is different from the others reported in Table 2, in that it is not a weighted average of averages reported by trustees. Rather, I calculated this figure directly from the total dollar payouts to different categories of creditors reported by participating trustees.[51] Once again there is considerable variation around the country.

Column 5 may report the most significant data in Table 2, because it is reasonable to assume that most of the payments to general unsecured creditors were made only because the debtor elected chapter 13. In chapter 7 it is rare for distributions to be made to general unsecured creditors in consumer bankruptcies. On the other hand, a very high percentage of payments made to secured and priority creditors in chapter 13 would have been made even if chapter 7 had been elected. Indeed, secured creditors often fare better in chapter 7 than in chapter 13.[52] Column 5 is an estimate, therefore, of how much creditors benefit in different regions from chapter 13 plans, and how much debtors could have avoided paying if they had chosen chapter 7.[53]

C. The Need For Reform

The picture of bankruptcy practice that I have painted is one of great diversity between different regions of the country. The current system appears to deviate sharply from the ideal of individualized justice that is the organizing principle of this essay. That ideal requires that the course of action chosen be the one that best serves the particular debtor's interests and personal values. The role of the attorney is to help the client make a judgment that serves the client's interests and values, not the interests of the attorney.

It is clear that, in many districts of this country, large numbers of debtors are selecting chapter 13 plans that provide for much greater payment to unsecured

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[51]In determining the base for this percentage, I excluded the chapter 13 trustees' fees and payments made to postpetition creditors. Practices vary considerably around the country with respect to adding postpetition debt to a chapter 13 plan.

[52]If the secured creditor is not allowed to repossess and get the value of its collateral immediately, the debtor commonly reaffirms the entire amount owing, whereas in chapter 13 secured creditors receive only the value of the collateral plus whatever percentage unsecured creditors generally receive on the balance. Priority creditors may receive nothing directly in chapter 7, but often their claims are non-dischargeable, and hence if the claims are not paid as part of the chapter 7 or 13 case, the creditor can pursue the debtor later in time.

[53]This is not a precise estimate, because some of the unsecured debt paid in chapter 13 would be non-dischargeable in chapter 7 under Bankruptcy Code § 523, 11 U.S.C.A. § 523 (West 1993).

creditors than the debtor would have to pay under other bankruptcy alternatives that should be available under any plausible interpretation of the law. That alternative would often be chapter 7, but it might also be a chapter 13 plan promising less payment to unsecured creditors. The variance in the percentage of 100% plans in different regions of the country, as shown in Table 2, implies, for example, that more debtors are selecting full payment plans than are legally required to do so. From the perspective of debtors' financial self-interests, there are too many chapter 13 cases in this country, and too many high payment chapter 13 plans. The most evident explanation for this pattern is that bankruptcy attorneys steer clients into plans favored by the local legal culture. This is also the conclusion of Professor Braucher.[54]

Attorneys who steer clients in this way may argue that, although they recognize that other bankruptcy alternatives are possible, approval would likely involve litigation, including possible appeals. While test case litigation might be in the interest of consumer debtors generally, the argument continues, it is rarely in the interest of a particular client, who would have to pay the attorney fees to establish precedents in that district. And there is no institutional device for solving this collective action problem, as the economists would call it.

Although there is undoubtedly some validity to this argument, I don't think it is sufficient to justify all the debtor steering that occurs in bankruptcy. I suspect, but cannot prove, that often it would be in the financial interest of the individual client to challenge the local convention, even at the expense of higher attorney fees, but the attorney refrains from advising such action because of concerns for the attorney's own reputation.

The extreme diversity in local legal culture that is responsible for the varying advice consumer debtors receive is a product largely of varying attitudes of bankruptcy judges and trustees in different parts of the country. Many people believe that debtors are better off if they repay as much of their debts as possible, because it is the more moral thing to do and the debtors will feel better about themselves in the future.[55] Other people find nothing morally objectionable to discharge of debts in

[54]*See* Braucher, *supra* note 13, at 555 ("It is clear . . . that many lawyers routinely steered clients into one chapter or the other. . . . Even lawyers who said they try to remain neutral and let the client decide often reported giving information in a way that suggested a favored choice.")

[55]In most parts of the country people familiar with bankruptcy practice no longer believe that chapter 13 is a better way to protect one's credit rating, at least in the short run, than chapter 7. Few creditors will extend new credit to a debtor on a tight chapter 13 plan which provides little disposable income with which to repay additional debt. A debtor who needs new credit is normally better off filing chapter 7 and getting a "fresh start".

However, in a few districts—including San Antonio, where the local legal culture strongly favors chapter 13—chapter 13 trustees have established "credit re-establishment" programs for debtors that successfully complete chapter 13 plans. The essence of these programs is to enlist the support of local merchants to extend credit to successful chapter 13 debtors. *See Consumer Bankruptcy: Roundtable Discussion*, *supra* note 12, at 35–36 (Appendix B). To the extent that merchants cooperate, protection of creditworthiness can be a legitimate reason for a debtor to select chapter 13, though under these programs credit becomes available only after completing a chapter 13 plan of three to five years duration.

chapter 7. Some people are concerned about the welfare of the community's business interests, which will suffer the losses if consumers unnecessarily discharge debt. Other people believe that creditors extend unsecured credit knowing the risks posed by the availability of bankruptcy, and they can take account of those risks in setting their creditworthiness standards and pricing strategy.

Apart from these policy concerns, judges and trustees can and do disagree in good faith about the requirements of the law. Chapter 7 does provide for dismissal of filings when they constitute a "substantial abuse",[56] and chapter 13 does require that a chapter 13 plan commit all the debtor's "disposable income" to debt repayment.[57] The meaning poured into these vague standards by judges and trustees is likely to reflect their views of what the law should require.

The lack of substantial change in chapter 13 filing rates over time in most districts, as shown in Table 1, suggests that more may be at stake than the attitudes of one or two people. Many of the districts in which chapter 13 rates are so high are districts which have been renowned for decades for extensive use of chapter 13. This suggests that "local legal culture" may be more than the bending of the will of the practicing bar to the views of the sitting judges and trustees. These officials, after all, are normally recruited from the local bankruptcy bar, and it should not be surprising if their views reflect the prevailing views of bankruptcy specialists in that community. Moreover, the practicing bar has some influence over the appointment of bankruptcy judges and chapter 13 trustees. The former are appointed by Circuit Courts of Appeal to 14-year terms,[58] and when the time for reappointment arises, there is an opportunity for the practicing bar to make their views known. Chapter 13 trustees are appointed by the United States Trustee for the region,[59] but again consultation with the local bar is customary. In sum, local legal culture may be a cause as well as a product of the views of the bankruptcy officials in a community.

The Bankruptcy Code is federal legislation, and except in the area of exemptions it is not significantly dependent on any state law that varies significantly between jurisdictions.[60] Nonetheless, the longstanding nature of much of the variance in consumer bankruptcy practice, when coupled with the decision of Congress to use such vague standards as "substantial abuse" and "disposable income" in the Bank-

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[56]Bankruptcy Code § 707(b), 11 U.S.C.A. § 707(b) (West 1993). *See* notes 27-29 *supra* and accompanying text.

[57]Bankruptcy Code § 1325(b), 11 U.S.C.A. § 1325(b) (West 1993). *See* notes 37-39 *supra* and accompanying text.

[58]28 U.S.C.A. § 151(a)(1) (West 1993).

[59]28 U.S.C.A. § 586(b) (West 1993).

[60]Although bankruptcy relies on state law to determine the validity and priority of a security interest, the Uniform Commercial Code has made the laws of different states substantially identical on such matters as they pertain to security interests in personal property. Various other sections of the Bankruptcy Code also rely on state law—*e.g.*, § 541, 11 U.S.C.A. § 541 (West 1993), which does not contain a federal definition of "property"—these references to state law are also not thought to introduce significant lack of uniformity in the administration of bankruptcy law.

ruptcy Code, raises the question whether the practices described in this article have been given congressional sanction.

Policy arguments could be made for regional diversity in the relief afforded through bankruptcy. Like any argument for federalism, it can be argued that the diversity provides many different laboratories, and by observation we can learn which bankruptcy system best serves the general interest. But because regional diversity in the administration of bankruptcy laws means granting consumers in some areas of the country less debt relief than similarly situated consumers receive elsewhere, it requires a considered decision. Experimenting with the welfare of human beings should not be undertaken lightly. There is little in the legislative history of the Bankruptcy Code to suggest that Congress intended diversity in the administration of consumer bankruptcy law. I do not think it is appropriate in such circumstances to conclude that present practices have congressional approval.[61]

The conclusion I reach is that we have serious problems because many consumer debtors do not make informed decisions about the form of bankruptcy relief they are to receive, and because in many parts of the country, from the perspective of debtor self-interest, too many debtors are being steered into chapter 13 cases and especially high-payment chapter 13 plans. A simple solution would be to induce the practicing bar to live up to the professional ideal of informed client decisions. I have argued above that this would solve a great deal of our current problems.[62] I know that it is possible for consumer debtor lawyers to act in a professionally responsible manner. Many already do in my home town of Madison, Wisconsin.[63] But they may be able to do so partly because the local legal culture here does not particularly encourage steering debtors into either chapter 13 or chapter 7.[64] I lack good ideas about how to persuade attorneys in other districts to act differently than they do now.

In the absence of a change in the style of bankruptcy law practice, the easiest solution to the problems that I have identified is to simplify the Bankruptcy Code so that consumers are not presented with so many choices. Not only might the choices under chapter 13 be restricted, but the basic choice between chapter 7 and 13 might be eliminated. Creditors have long pushed for elimination of the chapter 7 option for consumer debtors with steady income, but Congress has rejected their efforts. If we are to preserve the historic right of all debtors to file chapter 7 cases, then con-

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[61]For a similar conclusion about the legislative history, *see* Wells, *supra* note 28. He and his co-authors lament the lack of uniformity in the administration of the "substantial abuse" standard and call for congressional legislation to correct the situation.

[62]I assume that an attorney acting according to professional ideals would litigate if necessary to obtain approval of the form of bankruptcy relief that is in debtors' best interests. *See* text at note 12, *supra*.

[63]Professor Neustadter has observed and written about other bankruptcy lawyers who practice "client centered" law and apparently make a profit. Gary M. Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986).

[64]Table 1 shows that chapter 13 filing rates in both judicial districts in Wisconsin are approximately the national norm, which may reflect the "natural" chapter 13 filing rate—*i.e.*, the rate that would occur if the ideal of individualized justice were achieved nationally.

sideration needs to be given to repeal of chapter 13.

I first suggested this possibility three years ago.[65] Professor Braucher states that the proposal was, "to put it mildly, politically ahead of its time".[66] Because chapter 13 presently offers some consumers more effective relief than chapter 7, such a proposal would not be in the self-interest of all consumers. But given the evidence about the number of debtors who are inappropriately steered to chapter 13, I argued in the earlier article: "Any reasonable utilitarian calculus emphasizing the greatest good for the greatest number of debtors is likely to come down on the side of repeal (of chapter 13)."[67] I took that position on the basis of evidence that, from the perspective of consumer's financial self-interest, too many chapter 13 petitions were being filed in many regions of the country. Now we have additional evidence, from the NACTT survey, that too many high payment chapter 13 plans are being filed. This further strengthens the case for repeal.

III. CONCLUSION

This article is about a paradox. In our never-ending quest for individualized justice in the small transaction, consumer bankruptcy has emerged as simultaneously a great advance and a serious new problem. It is an advance because in the consumer bankruptcy area we have finally seen the development of a private legal practice that is routinized, relatively low cost, and capable of offering effective solutions to everyday consumer problems of large numbers of people. It is a problem because under current bankruptcy rules any consumer debtor entering the bankruptcy system must make a series of important choices, and there is increasing evidence that these choices are neither being made by the consumer debtor nor in the consumer debtors' best economic interests.

In conclusion I should add some caveats to what may be considered the somewhat extreme suggestions made in this article. I have suggested that consumer bankruptcy is often the most practical solution to merchant-customer problems, even though the consumer's financial situation does not otherwise point to a need for bankruptcy relief. While I believe this to be true, and that it is a point worth recognizing, there are many serious limitations on the adequacy of the relief afforded by bankruptcy, including a cost that is still substantial to many consumers in relation to the amount frequently in dispute.

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[65]Whitford, *supra* note 26.

[66]Braucher, *supra* note 13, at 506 n.19.

[67]Whitford, *supra* note 26, at 105. I also argued in the earlier article that many of the chapter 13 features that sometimes make it financially sensible for a consumer debtor to select that procedure should be incorporated into chapter 7. If debtors should be entitled to this kind of relief in bankruptcy—*e.g.*, the opportunity to cure home mortgage arrears over time, *see* Bankruptcy Code § 1322(b)(5), 11 U.S.C.A. § 1327(b)(5) (West 1993)—it makes little sense to condition the availability of such relief upon making payments to unsecured creditors under chapter 13. Under current law those unsecured creditors receive a windfall they would not have received but for the coincidence that the debtor needed bankruptcy relief on debts having no connection to the obligations to them.

Furthermore, it is not only the merchant with whom there is a dispute who suffers when a consumer declares bankruptcy and discharges all or most debt. In that respect, consumer bankruptcy departs dramatically from the ideal of individualized justice. And because it does, if consumer bankruptcy becomes too popular as a solution for everyday consumer problems, there will probably be a political backlash, a backlash that would undoubtedly include further restrictions on the availability of the bankruptcy remedy. Stated otherwise, recognition of the practicality of the consumer bankruptcy remedy should not lessen the energy with which we search for other paths to consumer justice, paths that point more directly and exclusively at the merchant-customer transaction that is in dispute.

My suggested response to the persistent problem of making choices within bankruptcy in consumers' best interests has been to simplify those choices by eliminating the chapter 13 option. Because I have made the suggestion before,[68] I know that it is controversial and unpopular. I recognize that there are many uses of chapter 13 that are beneficial to consumer debtors that would be lost.[69] A more perfect solution to the consumer choice problem within bankruptcy would include greater consistency among bankruptcy judges in the way they administer the Code, and greater fealty by the consumer bankruptcy bar to the professional ideal of informed client choice among the alternatives available. My despair about the practicality of this more perfect solution leads me to consider repeal of chapter 13. My fondest hope is that my despair proves to be misplaced.

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[68]Whitford, *supra* note 26.

[69]In my ideal world those beneficial uses of chapter 13 that are justifiable would be incorporated into chapter 7. *See* note 67, *supra*. I believe that some of the uses of chapter 13 that are beneficial to consumer debtors are not appropriate and should be eliminated, even from chapter 13. *See, e.g.*, Whitford, *supra* note 26, at 96-97 (discussing the superdischarge in chapter 13).