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The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success

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THE AFFORDABILITY PARADOX: HOW CONSUMER
BANKRUPTCY'S GREATEST WEAKNESS MAY ACCOUNT
FOR ITS SURPRISING SUCCESS

ANGELA LITWIN*

ABSTRACT

When the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) made consumer bankruptcy more expensive for all debtors, it inadvertently reignited a debate about how to make the system more affordable for its neediest beneficiaries. Even before BAPCPA, consumer bankruptcy suffered from the irony that those who needed it the most were often too poor to take advantage of its relief.

The seemingly obvious solution to this problem is to eliminate the major cost that consumer bankruptcy filers bear, that of paying their own lawyers. But in our rush to undo the harm caused by BAPCPA's worsening of the affordability problem, we risk moving consumer bankruptcy too far in the opposite direction and undermining the benefits that a judicial system with paid consumer lawyers has provided. The cost increases driven by BAPCPA were not a bankruptcy-only event, but rather were part of a broader movement in which policymakers generally sought to make safety net programs less accessible. Consumer bankruptcy's lawyer- and judge-based framework may have protected it from the worst effects of this trend.

* Assistant Professor, University of Texas School of Law. I would like to thank Marianne Culhane, Robert Lawless, Katherine Porter, Elizabeth Warren, and the other participants of the "Borrowing to the Brink" Conference at the University of Iowa's Obermann Center for Advanced Studies. I also thank Gordon Bermant, Jean Braucher, William Forbath, Judge Eric Frank, Richard Hynes, Ronald Mann, Rafael Pardo, John Pottow, David Skeel, Henry Sommer, James Spindler, Maureen Thompson, Jay Westbrook, Alan White, and Bill Whitford for helpful comments on earlier drafts. I extend additional thanks to the Honorable Judge Elizabeth Stong for initially inviting me to present this data. Kimberly Huysler, Michelle Jacobson, and Yujin Kim provided excellent research assistance.

TABLE OF CONTENTS

INTRODUCTION	1935
I. ABUSE AND REDISTRIBUTION	1942
A. <i>Moral Ambivalence</i>	1943
B. <i>Stigma Crisis</i>	1946
C. <i>Ineffectiveness by Design</i>	1950
II. ACCESSIBILITY THROUGH A PRO SE LENS	1955
A. <i>Methodology</i>	1957
B. <i>Canaries in an Inaccessibility Coal Mine</i>	1959
1. <i>The Rate of Pro Se Bankruptcies</i>	1959
2. <i>The Likelihood of Success</i>	1970
a. <i>A Possible Rise in Pro Se Failures over Time</i>	1971
b. <i>Causation and Losing on Technicalities</i>	1976
C. <i>Conclusion to the Data Analysis</i>	1980
III. RADICAL SIMPLIFICATION: THE CALL FOR AN ADMINISTRATIVE BANKRUPTCY SYSTEM	1980
A. <i>A Brief History of Consumer Bankruptcy's Almost-ran</i>	1981
B. <i>Why Administrative Bankruptcy</i>	1986
IV. THE CASE FOR CAUTION	1988
A. <i>Our Dysfunctional Administrative State</i>	1989
1. <i>Procedural Barriers</i>	1990
2. <i>Unmet Legal Needs</i>	1994
3. <i>Low-Quality Decision Makers Making Low-Quality Decisions</i>	1998
B. <i>Bankruptcy's Distinguishing Characteristics: Would They Be Enough?</i>	2006
C. <i>The Benefits of Professionals</i>	2009
1. <i>Lawyers as Consumer Advocates</i>	2011
2. <i>A Paid Bar</i>	2013
3. <i>Lawyers as Lobbyists</i>	2014
4. <i>Professionalism and Effectiveness</i>	2018
CONCLUSION: SOME THOUGHTS ON REFORM	2022

INTRODUCTION

When BAPCPA made consumer bankruptcy more expensive for all debtors, it inadvertently reignited a debate about how to make the system more affordable for its neediest beneficiaries. Even before BAPCPA, consumer bankruptcy suffered from the irony that those who needed it the most were often too poor to take advantage of its relief.

The seemingly obvious solution to this problem is to eliminate the major cost that consumer bankruptcy filers bear: that of paying their own lawyers. But in our rush to undo the harm caused by BAPCPA's worsening of the affordability problem, we should not move the system too far in the opposite direction. Consumer bankruptcy's system of paid legal professionals appears to have played a protective role with respect to the recent statutory changes. The type of reform embodied by BAPCPA was not a bankruptcy-only phenomenon, but was instead part of a broader movement in which policymakers sought to make many redistributive programs less accessible. Consumer bankruptcy's lawyer- and judge-based framework appears to have shielded it from the worst effects of this trend.

In 2005, Congress passed the first major bankruptcy reform in nearly three decades.¹ BAPCPA's congressional proponents were driven by moral outrage at what they perceived to be the large number of consumers shirking their debts—and by the considerable lobbying efforts of the consumer credit industry, which drafted the bill.² The new legislation was billed as a way of preventing high-income, “can-pay” debtors from walking away from their debts in Chapter 7.³ Bankruptcy filers with relatively high incomes and low

1. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

2. See, e.g., Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 96 n.16; Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 518 (2005).

3. Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail?*, 82 AM. BANKR. L.J. 349, 351 (2008).

expenses would now be required to complete a repayment program in Chapter 13 or to forgo bankruptcy relief altogether.⁴

But instead of limiting the changes to those affecting higher-income debtors, Congress implemented sweeping reforms that increased the procedural burdens for everyone. Although the heart of the bill was the means test that bars relatively well-off debtors from Chapter 7,⁵ BAPCPA also subjected all filers to increased paperwork,⁶ stricter deadlines,⁷ new prerequisites such as credit counseling,⁸ and mandatory dismissals for myriad procedural mistakes.⁹ These new technical requirements caused many commentators to worry that the statute's real effect would be to increase costs and reduce the bankruptcy access of all debtors, especially the worst off.¹⁰ At least one scholar has persuasively argued that a decline in overall accessibility was, in fact, the main point.¹¹

This use of procedural barriers to reduce substantive access highlights the extent to which BAPCPA did not take place in a bankruptcy vacuum, but rather was a part of a broader contraction of the social safety net. The term "bureaucratic disentanglement" was developed in the welfare literature to describe this reform strategy, that of using purported abuse-prevention tools to decrease overall program use,¹² and it applies equally well in the bankruptcy context.

The parallels do not end there. Consumer bankruptcy filers are stigmatized like government benefits recipients,¹³ and the changes enacted by BAPCPA mirror those wrought by welfare reform in the 1990s in important ways.¹⁴ Most critically, these programs are threatened by the same underlying moral anxiety: the fear that they

4. 11 U.S.C.A. § 707(b)(2) (West 2010 Supp.).

5. See *infra* note 50 and accompanying text.

6. See 11 U.S.C.A. § 521.

7. See *id.* § 521(i).

8. See *id.* § 109(h).

9. See *id.* § 521(i).

10. See, e.g., Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 *FORDHAM J. CORP. & FIN. L.* 407 (2002).

11. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 *U. ILL. L. REV.* 375, 378-79. Professor James J. White has made a similar point, although he argues in more hypothetical terms. James J. White, *Abuse Prevention 2005*, 72 *MO. L. REV.* 863, 874 (2006).

12. See *infra* notes 92-94 and accompanying text.

13. See *infra* Part I.B.

14. See *infra* Part I.C.

enable a strategic few to receive something for nothing while others work for what they get.¹⁵ All redistributive programs are subject to a deep ambivalence rooted in this fear of abuse.¹⁶ These pressures mean that a system may become only so effective before it draws negative attention. Bankruptcy is particularly vulnerable because of the consumer credit industry's permanent interest in encouraging these fears.¹⁷

BAPCPA's attempts at bureaucratic disentanglement have been partially successful. The number of consumer bankruptcy filings plummeted in the wake of BAPCPA, although empirical analysis has found no decrease in the percentage of high-income bankruptcy filers who were suspected of abusing the system.¹⁸ This suggests that the dramatic decline in program use was not a targeted, abuse-related reduction and that BAPCPA was operating less like a surgical scalpel than a blunt knife. The new procedural barriers introduced by BAPCPA are a likely cause of this decrease.¹⁹ Anecdotal accounts from the time of implementation suggest that many debtors were intimidated by the new law.²⁰

Technical hurdles may also reduce access indirectly by raising legal costs. Procedural complexity increases the amount of time lawyers must invest in each case and therefore the amount they must charge to remain in business. In this context, it is not surprising that one of BAPCPA's major effects was a rise in the cost of representation.²¹ Debtors who cannot afford the higher legal fees may delay or forgo bankruptcy.²²

15. See *infra* note 63 and accompanying text.

16. See Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 25 (1998) (applying the phrase "fear of abuse" to the consumer bankruptcy context).

17. See *infra* notes 59-64, 468-79 and accompanying text.

18. Lawless et al., *supra* note 3, at 353.

19. See *infra* notes 105-13 and accompanying text.

20. See, e.g., Braucher, *supra* note 2, at 122 ("In the weeks before October 17, 2005, the general effective date of the new law, fear of the coming changes produced a huge spike in filings. Attorney advertising and media accounts about the new law had tended to make consumer debtors think they should act fast to avoid higher costs and new barriers.") (internal citations omitted).

21. See *infra* notes 145-52 and accompanying text.

22. See Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 290, 323-24 (2010); *infra* Part II.

The access problem does not end once a debtor reaches the courthouse. Debtors for whom post-BAPCPA lawyers are out of reach have an additional option: to file for bankruptcy without one. Thus, the experiences of filers who proceed pro se can serve as one way to examine changes in the system's accessibility. This Article provides original data on that point.

My empirical analysis indicates that the percentage of pro se debtors has increased post-BAPCPA, despite the fact that these cases are not succeeding.²³ The pro se debtors I studied had statistically significantly lower incomes and asset levels than their represented counterparts, which may signify that the expense of hiring a lawyer was a barrier to representation.²⁴ In addition, the high pro se failure rate since 2005 suggests that it is reasonable to equate the inability to afford a lawyer with having less than full access to the bankruptcy system.²⁵

If this is the case, then consumer bankruptcy lawyers may generally have become unreasonably expensive. Even debtors who do hire lawyers struggle to afford them, and they may be paying for technical complexity in the form of lawyers' fees they can ill afford. There is emerging evidence that legal costs play a key role in determining when debtors file for bankruptcy, with some delaying their bankruptcies by many months in order to save up for representation.²⁶ Every month a debtor spends saving up for an increasingly expensive bankruptcy lawyer is a month in which she has lost substantive bankruptcy rights for procedural reasons.

But the success of BAPCPA's attempt at bureaucratic disentanglement is far from complete. These pro se findings are disastrous from the perspective of consumer bankruptcy before 2005, but they appear more benign when compared with the record of U.S. safety net programs that have taken the other path and attempted to establish systems that can function without the expense of claimant lawyers.

23. See *infra* Part II.B.2.

24. See *infra* notes 184-92 and accompanying text.

25. See *infra* Part II.C.

26. See Mann & Porter, *supra* note 22, at 323-24; *infra* note 146 and accompanying text.

The main approach has been an administrative one.²⁷ Instead of a court-based system for determining safety net relief, these programs are run by executive branch agencies in which civil servants dispense benefits in informal proceedings. Theoretically, these agencies should be more efficient than courts and less costly for claimants, who are not necessarily expected to hire counsel. Because administrative systems appear to save their financially distressed claimants this major expense, the idea of converting consumer bankruptcy to such a system has attracted multiple generations of reformers.²⁸ This idea has garnered renewed interest in the wake of BAPCPA's exacerbation of consumer bankruptcy's affordability problem.²⁹

The theoretical advantages of organizing safety net programs under executive agencies, however, have frequently not materialized in practice. Administrative benefits systems such as welfare, social security disability, and veterans' benefits have a long, troubled history in the United States.³⁰ These programs tend to create technical barriers that dwarf those imposed by BAPCPA and leave claimants mired in bureaucracy for years at a time.³¹ They suffer from shortages of lawyers available to help claimants navigate these hurdles.³² Additionally, the caliber of the officials who make benefits decisions tends to decline over the life of a program.³³ Currently, a significant portion of the frontline decision makers in these administrative benefits systems lack college degrees.³⁴ The cumulative effect of these trends is that the quality of decision making tends to be poor. Claimants suffer through multiple rounds of appeals, remands, and further appeals before reaching a final result.³⁵

Viewed through this lens, consumer bankruptcy is a relative success in terms of accessibility.³⁶ Despite an initial drop in the wake of BAPCPA, bankruptcy filings have once again reached pre-

27. *See infra* Part III.

28. *See infra* Part III.A.

29. *See infra* notes 268-80 and accompanying text.

30. *See infra* Part IV.

31. *See infra* Part IV.A.1.

32. *See infra* Part IV.A.2.

33. *See infra* Part IV.A.3.

34. *See infra* note 375 and accompanying text.

35. *See infra* Part IV.A.3.

36. *See infra* notes 383-93 and accompanying text.

2005 levels.³⁷ In addition, my data show that, despite some post-BAPCPA setbacks, the overwhelming majority of Chapter 7 bankruptcy filers still receive their discharge from debt without any need for appeal.³⁸ Similarly, despite an increase in pro se filers, bankruptcy has vastly lower pro se rates than similar administrative benefits programs.³⁹

And these programs do provide a similar benefit.⁴⁰ The Chapter 7 discharge as currently used is essentially a legal redistribution from parties that can better afford it to parties in financial distress. There are real differences between bankruptcy and other redistributive systems,⁴¹ but ultimately, the facts of these programs matter less than the perception of them. Policymakers driven by the moral anxieties discussed above have not always appreciated the distinctions between bankruptcy and poverty programs.

But bankruptcy's relative success at avoiding the worst problems that emerge when moral reformers try to curtail a program suggests that there must be some major difference. This Article argues that consumer bankruptcy's location in the judicial branch may have helped safeguard it from procedural sabotage.⁴² Factors such as paid attorneys, high-quality judges, and the prestige-enhancing association with its corporate cousin help separate it from welfare programs. Consumer bankruptcy attorneys contribute to the smooth running of the system, protect their clients from overreaching, and lobby against bankruptcy legislation that could potentially harm consumers. Judges drawn from the top tiers of the legal profession provide another bulwark against the type of long-term decline seen in administrative programs. And the relationship with corporate bankruptcy helps attract a high caliber of professionals to all areas of the field. This combination has resulted in a judicial system that

37. Posting of Bob Lawless to Credit Slips Blog, <http://www.creditslips.org/creditslips/2010/06/us-bankruptcy-filings-at-same-level-as-before-2005-law.html> (June 10, 2010, 14:47 CST).

38. See *infra* notes 391-93 and accompanying text.

39. See *infra* notes 429-36 and accompanying text.

40. See *infra* Part IV.B.

41. These include the facts that the bankruptcy benefit is in the form of debt cancellation rather than income and that it involves private, rather than taxpayer, funds. See *infra* Part IV.B.

42. See *infra* Part IV.C.

appears to accomplish its administrative functions more effectively than many administrative programs do.

In other words, when struggling, bankrupt consumers hand over much-needed funds to their lawyers, they are paying for more than representation in their individual cases.⁴³ They are paying for the fact that much of the administrative work necessary to process their bankruptcies will be completed by people they have hired, rather than by government officials operating under the pressures of bureaucratic disentanglement. They are paying for the continued development of a community of lawyers and judges that wants consumer bankruptcy to work.

This is the affordability paradox.⁴⁴ Consumer bankruptcy's Achilles' heel has always appeared to be the fact that too many of its intended beneficiaries were "too poor even to go bankrupt."⁴⁵ But the forcing of costs onto consumer debtors who were ill-equipped to bear them may have also been responsible for a system that has remained relatively accountable to their interests in the face of intense moral anxiety about its underlying goals.

There is no perfect "solution" to this paradox, except perhaps to look for middle ground. Consumer bankruptcy is indeed in need of simplification reform, and this Article is not meant to minimize the importance of that task. Rather, my goal is to underscore that consumer bankruptcy in its current form has a number of strengths that could be jeopardized by moving to a system that places less emphasis on lawyers and judges. Reform efforts should focus instead on eliminating technical barriers within the judicial framework we have.

Part I of this Article explains the enactment of BAPCPA in terms of bureaucratic disentanglement and the fear of abuse. Part II provides an empirical analysis of bureaucratic disentanglement in action, using pro se cases as a measure of accessibility. Part III outlines the history of calls for an administrative consumer bankruptcy system and explores the reasons why it seems so appealing. Part IV argues

43. See *infra* Part IV.C.1.

44. In some ways, such a paradox should not be surprising. The literature on institutional choice posits that the question of who decides is always going to be a choice between "highly imperfect alternatives." NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 5 (1994).

45. *United States v. Kras*, 409 U.S. 434, 457 (1973) (Stewart, J., dissenting).

that the judicial nature of consumer bankruptcy has been crucial to its relative success.

I. ABUSE AND REDISTRIBUTION

The story of the events leading up to the most important consumer bankruptcy reform in three decades has not lacked for attention in the legal literature. Much of the scholarship has been devoted to demonstrating two seemingly contradictory propositions. The first is that the reason for reform articulated most frequently and passionately by BAPCPA's congressional advocates was the need to prevent relatively high-income, "can-pay" debtors from abusing the system.⁴⁶ The second is that, despite this expressed intent, the law's design meant that its impact would be felt well beyond this group of suspect debtors.⁴⁷

But less attention has been paid to the question of why the discussion took this precise shape. Why was the rhetoric about high-income filers when, empirically, there appeared to be so few of them?⁴⁸ Why, if the problem was these "can-pay" debtors, was the law virtually guaranteed to raise costs for all filers?⁴⁹ Why were the data about these two questions so ineffective at penetrating the debates?

These questions may be phrased in specific statutory terms as well. BAPCPA's mechanism for screening out relatively well-off filers was the means test: if a debtor's income was higher than the median for her family size in her state, she would then have to demonstrate that her family's debts and expenses accounted for a large percentage of this income each month.⁵⁰ Otherwise, she would be ineligible for a quick discharge of debt in Chapter 7. Why then

46. See, e.g., Lawless et al., *supra* note 3, at 351-52; Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 6 (2010).

47. Lawless et al., *supra* note 3, at 385; Pardo, *supra* note 46, at 31.

48. Braucher, *supra* note 2, at 94; Lawless et al., *supra* note 3, at 360 fig.2.

49. See, e.g., Braucher, *supra* note 2, at 110 (referring to "an unannounced credit industry agenda to burden access to consumer bankruptcy").

50. This is actually a simplification. Among other complications, many of the allowable expense levels are set by Congress, rather than determined by the family's actual expenses. 11 U.S.C. § 707(b)(2)(A)(ii) (2006), amended by Pub. L. No. 111, §§ 320, 327, 124 Stat. 3459, 3557 (2010).

did the statute appear to require all debtors, even those with incomes well below their state's median levels, to endure the time-consuming process of listing and documenting their every expense?⁵¹

One answer is that bankruptcy reformers were following a well-worn path in the history of the contraction of the U.S. safety net. American policymakers have long regarded programs with a redistributive element, such as consumer bankruptcy, with a degree of suspicion.⁵² When the rates of program usage rise, this suspicion can harden into a conviction that beneficiaries must be abusing the system. But the definition of abuse becomes confused—applying simultaneously to specific nonneedy persons taking advantage of a program's generosity and to the entire growing population of beneficiaries, who must somehow be abusing the system because there could not possibly be such a large number of people in genuine need. This can result in a very specific type of reform, one in which procedures theoretically designed to ensnare only actual bad-faith abusers exert a downward pressure on the accessibility of the entire system.

A. *Moral Ambivalence*

Consumer bankruptcy liquidation is, in essence, income support.⁵³ In theory, the “deal” provided by Chapter 7 is that the debtor will surrender all nonexempt assets and, in exchange, will receive a “fresh start,” free of most unsecured debt.⁵⁴ But in reality, few consumers in Chapter 7 have any nonexempt assets⁵⁵ and receive their fresh start mostly free of charge.⁵⁶ The most common use of the

51. *Id.* § 707(b)(2)(C). The Bankruptcy Rules Committee ultimately decided that below-median debtors did not need to complete the expense-related paperwork. Bankruptcy Form 22A Part III, line 15. The significance of this interpretation will be discussed in Part IV.C.4.

52. *See infra* Part I.B.

53. Mechele Dickerson has also made the argument that bankruptcy is a form of public assistance. A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 272 (2001) (“Since, however, discharging debts provides an economic benefit to debtors, the bankruptcy system should be treated as one that provides public assistance benefits.”).

54. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 115 (6th ed. 2009).

55. *Id.* Indeed, this is the very reason why administrative bankruptcy seems so appealing. *See infra* Part II.B.

56. More accurately, the only charges they pay are the ones discussed in this Article, the

discharged debt has been to provide income and medical care during times of personal economic crises, such as job loss, illness, or divorce.⁵⁷ These are the same reasons why people turn to welfare, disability benefits, and veterans' support. Social security disability and veterans' benefits are distinguishable from bankruptcy in that they provide long-term financial support and have additional, noneconomic eligibility criteria, but welfare is short term and poverty-based.⁵⁸ In some ways, the main difference in the legal benefit provided by welfare and bankruptcy is one of asking permission for income support to be provided in the future versus asking forgiveness for income support used in the past.

American society is fundamentally uncomfortable with this type of support, and bankruptcy is subject to this discomfort as much as welfare. Professor Jay Westbrook has referred to it in the bankruptcy context as the "fear of abuse."⁵⁹ The credit industry has used the term "credit morality."⁶⁰ In addition, prominent critics of consumer bankruptcy have argued that bankruptcy is no different than other safety net programs. One of the dissenting opinions to the Report of the 1997 National Bankruptcy Review Commission argued for a debate "over whether bankruptcy relief should be means-tested like all other programs available in the social safety net."⁶¹ The most prominent dissenter, Judge Edith Jones of the Fifth Circuit, has made this argument more forcefully elsewhere:

[I]t is not inconsistent to have means testing in bankruptcy the same way[] that we means test every other part of our social safety net in this society. Welfare, food stamps, social security, disability, [and] medicaid all are means tested. Bankruptcy is

"procedural" charges, such as lawyer and filing fees, that support the system itself. *See infra* notes 185-202 and accompanying text.

57. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 15-22 (2000).

58. Welfare recipients have always cycled in and out of the program and are currently time-limited by law. *See, e.g.*, Randy Albelda, *Fallacies of Welfare-to-Work Policies*, 577 *ANNALS AM. ACAD. POL. & SOC. SCI.* 66, 67, 71 (2001).

59. Westbrook, *supra* note 16, at 25.

60. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 191 (2001). Skeel also notes the appearance of this theme in the welfare debates. *Id.*

61. Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in *REPORT OF THE NAT'L BANKR. REVIEW COMM'N* (1997), <http://govinfo.library.unt.edu/nbrcreport/24commvi08.html>.

part of the social safety net. It ought to be means tested as well.⁶²

A profound moral ambivalence attaches to all social safety net programs; they are surrounded by a fear that some people are getting something for nothing while others are working hard for everything they receive.⁶³ Professor Mechele Dickerson describes this as a violation of societal norms of reciprocity.⁶⁴ This anxiety is especially pronounced in the welfare and bankruptcy contexts, where there is no characteristic, such as disability or age, that clearly prevents beneficiaries from supporting themselves.

Although advocates may argue that welfare and bankruptcy claimants suffer from some combination of systemic disadvantages, economic instability, and simple bad luck,⁶⁵ there is always the rejoinder that maybe they just did not work hard enough.⁶⁶ For welfare, the argument is: “Why should my tax dollars support this person to stay at home when I’m working?” In bankruptcy, the fear is less obvious because the benefit comes from credit issuers rather than taxpayers, although this does explain the credit industry’s hard-fought effort to establish the existence of a “bankruptcy tax.”⁶⁷ But the same surface egalitarianism still hangs in the air: “Why should they get to discharge their debts when I’m working to pay off mine?” More recently, a different version of this question has been particularly prominent: “Why should their mortgages be modified when I resisted the temptation to buy or refinance during the housing boom?”⁶⁸

62. Jensen, *supra* note 2, at 501 (quoting *Bankruptcy Reform Act of 1998—Part I: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 15 (1998)).

63. See Dickerson, *supra* note 53, at 268-70.

64. *Id.* at 268.

65. See SULLIVAN ET AL., *supra* note 57, at 15, 52.

66. For example, in the unemployment context, some economists have theorized that high rates of joblessness can be traced to people choosing not to work. See, e.g., Posting of Casey B. Mulligan to New York Times Economix Blog, <http://economix.blogs.nytimes.com/2008/12/24/are-employers-unwilling-to-hire-or-are-workers-unwilling-to-work/> (Dec. 24, 2008, 06:30 EST).

67. See Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. (NO. 2) 77, 77, 83-85 (2004).

68. See, e.g., John D. Geanakoplos & Susan P. Koniak, *Matters of Principal*, N.Y. TIMES, Mar. 5, 2009, at A31.

This ambivalence is what motivates the fear that program beneficiaries have lost their sense of morality. It is also what drives policymakers to impose procedural barriers that make program access more difficult. Fundamental fears of abuse mean that consumer bankruptcy may only get so simple before countervailing forces start exerting upward pressure on the preponderance of procedural hurdles in the system.⁶⁹

B. Stigma Crisis

Among those who fear abuse, stigma is considered the first defense. Shame will deter potential beneficiaries from using the safety net any more than necessary.⁷⁰ When the number of claims rises dramatically, this trend is followed by what I term a “stigma crisis”—the emergence of the belief that the increase could only be due to a decline in stigma.⁷¹ Researchers may respond by documenting the ways in which stigma is still alive and well,⁷² but this is

69. Professor Iain Ramsay has articulated a similar concern in the context of Canadian proposals for immediate debt relief:

[F]rom a creditor's viewpoint this may be perceived as potentially reducing returns and providing little check on “undeserving” debtors who avail themselves of the process. Creditors may interpret routinization as producing “too many” bankruptcies and possibly as inconsistent with a moral regulation model of bankruptcy where individuals are investigated, sorted and rehabilitated through a process of “reintegrative shaming.”

Iain Ramsay, *Market Imperatives, Professional Discretion, and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399, 402 (2000) (quoting JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1988)).

70. See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 215 (2006).

71. Mechele Dickerson explicitly ties this belief that bankruptcy has lost its stigma to the attack on entitlement programs generally. Dickerson, *supra* note 53, at 272 (“[G]iven the recent assault on entitlement politics, it is not surprising that critics of the Code feel that it has caused debtors to lose their sense of personal and social responsibility and to engage in bankruptcy opportunism.”). Though this Article makes a similar argument, it is worth noting that the concern about the declining stigma of bankruptcy dates at least as far back as the eighteenth century. Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1307 n.424 (2010).

72. See, e.g., Derek S. Witte, *The Bear Hug that Is Crushing Debt-Burdened Americans: Why Overzealous Regulation of the Debt-Settlement Industry Ultimately Harms the Consumers It Means to Protect*, 14 TEX. REV. L. & POL. 277, 282-83 (2010) (arguing that “many individuals who likely could qualify for post-reform individual bankruptcy still refuse to do so because of

beside the point. A stigma crisis is not based on an examination of shame levels, but rather on the increase in program use.⁷³

With welfare, the rise in claims began in the early 1970s,⁷⁴ and the fear that this increase was due to shameless abuse became a fixture of our national political culture by the time of Ronald Reagan's first presidential campaign.⁷⁵ In the bankruptcy context, the stigma crisis reached a boiling point in the mid-1990s, as the number of consumer cases filed annually passed the 1 million mark for the first time in 1996.⁷⁶ Congress began considering the first of BAPCPA's predecessor bills the next year.⁷⁷

The alarm over a decline in stigma does not emerge because of data about shame levels, but instead reflects a direct response to the increase in program usage. Alan Greenspan encapsulated this connection with his famous statement that "personal bankruptcies are soaring because Americans have lost their sense of shame."⁷⁸ Similarly, Judge Edith Jones testified before Congress that: "The increase in medical expenses, divorce, and losses of jobs simply cannot explain the increase [in bankruptcy filings] that we face today. I think gambling is involved. I think there is a decreased social stigma."⁷⁹ Many others have followed suit. The statements of

the social stigma attached to bankruptcy" and reviewing a study supporting this argument).

73. See, e.g., Sullivan et al., *supra* note 70, at 214 ("The primary justification for this wholesale revision of the accessibility of the consumer bankruptcy system has been the repeated claim that the extraordinary increase in bankruptcy filings is the consequence of declining stigma.").

74. See, e.g., U.S. HOUSE OF REPRESENTATIVES COMM. ON WAYS & MEANS, WHERE YOUR MONEY GOES: THE 1994-95 GREEN BOOK 324 (Brassey's 1994) ("Between 1970 and 1993, the number of recipients has increased 91 percent, from 7.4 million in 1970 to 14.1 million in 1993.").

75. See, e.g., Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 653-55 (2009) (discussing the growth of societal distrust of welfare recipients in the 1970s).

76. Administrative Office of the U.S. Courts Bankruptcy Statistics, 1990-2002 Calendar Year Bankruptcy Filings by Chapter and District 27, available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/1990-2002_Filings_Ending_December.pdf. Other commentators have found this moment significant. See, e.g., David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 311 (1999) ("Particularly since nonbusiness filings broke through the psychologically important one-million barrier in 1996, words like 'crisis' and 'scandal' have become increasingly familiar in all sorts of discussions about bankruptcy.").

77. See, e.g., Jensen, *supra* note 2, at 493.

78. Sullivan et al., *supra* note 70, at 216.

79. Jensen, *supra* note 2, at 496.

policymakers expressing alarm over the decline in bankruptcy stigma have been extensively documented.⁸⁰ What has not been previously noted is the large number that explicitly connect their belief in this loss of stigma with the increase in filings.⁸¹

The tenor of the welfare debates was even harsher, with policymakers comparing recipients to alligators and wolves,⁸² but the belief in the correlation between increasing program use and declining stigma was present. In the welfare context, this relationship is mediated by dependency theory. This theory posits that the availability of welfare reduces work incentives and creates dependency, which creates a culture of poverty and decreases recipients' ability to attain employment in the future, which, in turn, drives a further increase in welfare use.⁸³ Its crudest manifestation appeared in the "don't feed the alligators" signs that some representatives held up during the welfare debates.⁸⁴ The analogy referred to wild alligators that become dependent on human-supplied food and unable to fend for themselves.⁸⁵ A decline in stigma is implicit in this argument because, if potential welfare beneficiaries felt enough shame, this shame would counteract the reduced work incentives and stop the welfare rate from rising. The increase in welfare use was so important to the drive to change the program that statistics

80. See, e.g., 147 CONG. REC. 13,355 (2001) (statement of Sen. Durbin) (describing his rejection of the popular belief in the erosion of bankruptcy stigma); Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 485-88 (2006); Sullivan et al., *supra* note 70, at 216; Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 411 (2003).

81. See, e.g., Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 4-5 (1998) (quoting Rep. George W. Gekas: "[O]ur nation had seen an alarming increase in the number of bankruptcy filings.... The so-called bankruptcy of convenience is a new phenomenon, borne out of the loss of stigma the word bankruptcy once, but no longer, carried."); Efrat, *supra* note 80, at 486 n.25 (quoting Sen. Orrin Hatch: "[T]he explosion in bankruptcy filings has less to do with causes and more to do with motivations. The stigma of bankruptcy is all but gone."); Sullivan et al., *supra* note 70, at 216 (quoting Sen. William Frist: "[B]ankruptcy has become so common that it has lost the stigma it had even a short generation ago."); Vance & Barr, *supra* note 80, at 411 (quoting Sen. Charles Grassley: "[W]e have had a general lack of shame or personal responsibility that used to be associated with paying bills or not paying bills and the filing of bankruptcy.");

82. See, e.g., Sylvia A. Law, Review Essay, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 475 (1997).

83. *Id.*

84. *Id.*

85. *Id.*

about it were included in the official congressional findings at the beginning of the reform statute.⁸⁶

A stigma crisis is impervious to data. In the bankruptcy field, many researchers, most notably Professors Sullivan, Warren, and Westbrook, have devoted careers to illuminating the economic hardships debtors undergo before filing for bankruptcy.⁸⁷ Thorough empirical scholarship has also persuasively documented the strong relationship between credit card expansion and bankruptcy filings.⁸⁸ Either body of research would account for an increase in bankruptcy use without a decline in debtor morality. In contrast, empirical support for the proposition that stigma levels are falling has been minimal.⁸⁹ Similarly, the data on welfare use has so thoroughly undermined dependency theory that the question of why there exists such a large disparity between fact and policymaking has become a major issue in the literature.⁹⁰

But stigma crises do not abate in the face of data to the contrary. Professor Margaret Howard has explained how this happened in the debate leading up to BAPCPA: although the debate “looks to be a disagreement about empirical facts[,] ... [i]n fact, a normative and deeply entrenched ideological position is being clothed in empirical rhetoric, and data will not shake it loose.”⁹¹ In many ways, the threat of stigma crisis means that a redistributive program is acceptable only as long as it is little used.

The ultimate end of a stigma crisis is reform. When stigma is perceived to be incapable of stopping abuse, the law must take its place.

86. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(5), 110 Stat. 2105, 2110 (codified at 42 U.S.C. § 601 (2006)) (“The number of individuals receiving aid to families with dependent children (in this section referred to as ‘AFDC’) has more than tripled since 1965.”).

87. SULLIVAN ET AL., *supra* note 57, at 15-22.

88. RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 53-67 (2006).

89. As Professors Sullivan, Warren, and Westbrook point out, much of the scholarship attempting to document the decline in stigma is inferentially circular, in that it attempts to demonstrate the decrease in stigma by elaborating on the increase in filings. The more sophisticated studies then attempt to use process of elimination and attribute anything left over to a decline in stigma. Sullivan et al., *supra* note 70, at 216-17 & nn.15-16.

90. Law, *supra* note 82, at 491-93.

91. Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 442-43 (2001) (reviewing SULLIVAN ET AL., *supra* note 57).

C. Ineffectiveness by Design

With stigma considered ineffective, the next step is to banish abusers from the system. The difficulty begins with the definition of abuse. There is a general consensus that using the social safety net without need is abusive. But when a stigma crisis is at its height, this lack of need tends to become a presumption.⁹² If an increase in program use means that its beneficiaries have lost their sense of shame, then the new wave of supplicants must be filing because they are shameless, not because they are in need. In the eyes of stigma crisis proponents, the very use of these programs becomes almost inherently abusive.⁹³ When the fear of abuse becomes paramount, there are no nonabusive beneficiaries, or certainly not as many as use these programs.

Thus, the goal of forcing abusive filers from the system transforms into one of indiscriminately forcing a large number of filers from the system. The rising tide of claims must somehow be stopped. But when the political consensus extends only to abuse prevention, not program-use prevention, this goal cannot be approached directly. The result is a concept known as "bureaucratic disentanglement."⁹⁴

Developed in the welfare literature, bureaucratic disentanglement posits that certain programs are ineffective not because policymakers failed to identify the best procedures but as the result of conscious choices intended to reduce program usage.⁹⁵ Policymakers who want to eliminate a program, but who do not have the power to do so outright, instead impose more politically feasible procedural

92. Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 5-6 (1984).

93. See, e.g., Howard, *supra* note 91, at 448 (describing the logic behind the arguments for a stricter means test under § 707(b) thusly: "Why, then, do means-testing proponents remain dissatisfied? Possibly because they believe that § 707(b) should be applied more often than it is. If that is the case, however, how do they know? The probable explanation is their belief that, if § 707(b) were applied every time the facts would justify it, the bankruptcy rates would be lower than they are.").

94. Lipsky, *supra* note 92, at 5.

95. There are other reasons why policymakers might have an interest in making bureaucracies inaccessible. Professor Morris Fiorina argues that legislators benefit from unresponsive bureaucracies because they can then earn voter loyalty by solving the bureaucratic problems of their constituents. MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 40-47 (2d ed. 1989).

hurdles.⁹⁶ These new hurdles are usually billed as necessary for program integrity, a goal to which it is difficult to object, but there is knowledge that they will screen out deserving beneficiaries as well.⁹⁷

Bureaucratic disentanglement provides a broader theory for what many bankruptcy commentators have already noted in the context of BAPCPA: that the decrease in access to bankruptcy may have been the goal of the new procedural requirements, not a side effect. Professor James J. White has explained BAPCPA precisely this way:

By raising the cost in hundreds of little ways, you might make bankruptcy unpalatable to many who currently take bankruptcy. Put more pejoratively, you might then be tempted to sabotage, to fling your shoes into the bankruptcy machinery, in the hope of slowing it down. And even if the bankruptcy organism and its friends in Congress could block overt substantive changes in the law, they might not be able to recognize the impact of or to resist changes that parade as benign process and procedural improvements. Nor would you be obliged to admit that the true reason for advocating these bureaucratic changes was to degrade the machinery of bankruptcy; these rules could be justified as palliatives for acknowledged ills of the system.⁹⁸

Bureaucratic disentanglement maps onto bankruptcy reform in other ways as well. It is often accompanied by a reduction in decision-maker discretion,⁹⁹ something Congress attempted with

96. Lipsky, *supra* note 92, at 6 (arguing that bureaucratic disentanglement is “pursued in periods of uncertainty over and ambivalence about the social welfare contract, when policy elites favoring a more restricted social welfare state are unable to proceed straightforwardly to realign it”).

97. *Id.* (“[Policymakers] tend to undertake their actions in the name of other political values, such as the need for efficiency, spending reductions, fairness, or promotion of the work ethic, and to disregard the distributional consequences.”).

98. White, *supra* note 11, at 874; *see also* Mann, *supra* note 11, at 378-79.

99. Lipsky, *supra* note 92, at 12.

BAPCPA.¹⁰⁰ It also thrives in technical areas of law,¹⁰¹ of which bankruptcy is certainly one.

The architects of the current bankruptcy system have implemented bureaucratic disentanglement in a way that parallels its use in poverty programs, although bankruptcy is far behind welfare in this respect. With BAPCPA, bankruptcy began to employ some of the mechanisms that the welfare system has used for years: an emphasis on fraud and pressure on system actors to limit access.

The extremity of the fraud prevention measures currently employed by welfare programs highlights the extent to which bankruptcy has only dipped its toe in these waters. A number of states now require fingerprinting, home searches, and criminal record checks as part of the initial welfare application process.¹⁰² The stated goal of these procedures is to deter fraud by insuring that applicants do not have other sources of income, and more specifically, that they are not receiving benefits from another state's system.¹⁰³ But studies have shown that they cost much more to implement than they save through fraud reduction,¹⁰⁴ which suggests that their real financial goal is cost savings through a reduction in program use.

By comparison, the antifraud procedures introduced by BAPCPA seem relatively tame. The submission of detailed tax documentation and pay stubs is burdensome, but they are not humiliating.¹⁰⁵ Yet

100. See, for example, the mechanized means test in current § 707(b)(2) which replaced the "substantial abuse" test under pre-2005 § 707(b)(2). Lawless et al., *supra* note 3, at 356. In some ways, Congress was facing the same choice it has when delegating authority to administrative agencies: whether to rely on agency expertise through broad mandates or to write detailed, rule-based statutes that constrain agency discretion. See, e.g., JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002).

101. See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *CLINICAL L. REV.* 427, 455 (2000) ("One of Lipsky's central insights was that disentanglement is effected outside of public scrutiny, in the devilish details left to expert administrators and street-level bureaucrats.").

102. Gustafson, *supra* note 75, at 643, 644-45, 675 tbl.1, 697-99.

103. See *id.* at 675.

104. *Id.* at 660, 666, 677-78.

105. See *infra* note 141 and accompanying text. Interestingly, the impact of the one arguably humiliation-oriented BAPCPA requirement, credit counseling, has been less severe than predicted, largely due to the U.S. Trustee's willingness to approve Internet- and phone-based counseling. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-203, *BANKRUPTCY REFORM: VALUE OF CREDIT COUNSELING REQUIREMENT NOT CLEAR* 19 (2007), available at

these measures do impose a real cost, and they were introduced despite a lack of compelling evidence that consumer bankruptcy fraud was a significant problem. They too were always more likely to generate savings—in this case, to creditors—by a reduction in bankruptcy use than by a reduction in fraud.¹⁰⁶

The second major disentitlement mechanism BAPCPA introduced is pressure on system actors to reduce access to bankruptcy. Specifically, Congress wanted to limit the number of consumer Chapter 7 cases.¹⁰⁷ It did so with substantive procedures such as the means test in § 707(b)(2),¹⁰⁸ but also more subtly by altering the incentives of consumer bankruptcy attorneys. Section 707(b)(4)(A) permits fines against an attorney who brings a Chapter 7 case that is deemed to be abusive under the means test.¹⁰⁹ This may create a conflict of interest in a situation where a client is in danger of failing the means test, because an attorney has an incentive to steer her into Chapter 13, even when it is not in the client's best interests. More generally, several provisions under § 707(b)(4) authorize sanctions and fees against consumer bankruptcy lawyers who bring cases under Chapter 7, but presumably do not apply to attorneys with cases in Chapter 13, again making Chapter 13 more desirable for attorneys, regardless of client interests.

These provisions illustrate a bankruptcy-specific point as well. The reform's drafters appeared to be less interested in removing high-income filers from the entire system than from Chapter 7 in particular. Chapter 7 evokes more fears of abuse because debtors do not need to make any payments in exchange for their discharge. Chapter 13, on the other hand, has always required at least three years of repayment before a discharge is granted.¹¹⁰ BAPCPA's drafters probably would have preferred that debtors pay their creditors outside bankruptcy rather than in Chapter 13, but Chapter 13 repayment appears to have fallen on the correct side of the moral line.

<http://www.gao.gov/new.items/d07203.pdf>.

106. Mann, *supra* note 11, at 378-79.

107. See Katherine L. Swise, *Reconciling the Irreconcilable: Calculating a Debtor's Projected Monthly Income Under § 1325(b) in Light of the BAPCPA Amendments*, 2010 U. ILL. L. REV. 719, 726-27.

108. *Id.*

109. 11 U.S.C. § 707(b)(4)(A) (2006).

110. *Id.* § 1322(d).

These anti-Chapter 7 incentives, however, have largely been ineffective. Section 707(b)(4) is rarely used,¹¹¹ and I could not find a single case in which an attorney was fined under the means-test-specific § 707(b)(4)(A). Moreover, there were already similar, more intractable conflicts of interest inherent in the Code, the most important being that legal fees are payable out of the estate in Chapter 13, but not in Chapter 7.¹¹² The pressure on attorneys to file Chapter 13 cases regardless of client needs was also already intense in judicial districts that favored repayment.¹¹³ Nevertheless, Congress's attempt to reduce Chapter 7 use via attorney incentives shows that it was taking a page from the bureaucratic-disentitlement handbook.

Welfare provides several examples of where bureaucratic disenfranchisement may lead if used more effectively. From the early 1980s through the present, state food stamp programs have been penalized by the federal government if their administrative error rates exceed certain levels—with the definition of error including only improper awards of benefits, not improper denials.¹¹⁴ This resulted in dramatic reductions in food stamp use.¹¹⁵ It also had another effect that is particularly interesting from a disenfranchisement perspective: a number of states increased the frequency with which beneficiaries had to come to the welfare office to recertify their

111. See David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 294-95 (2007) (arguing that, because they are subject to Rule 9011 standards, the § 707(b)(4) sanctions provisions are less threatening to consumer attorneys than they appear). Most of the cases that have resulted in fines levied against attorneys under § 707(b)(4) are ones in which the attorney engaged in such extreme conduct that sanctions might have been warranted without the new provisions. See *Karen v. Kane (In re Kane)*, No. 09-12470, 2010 Bankr. LEXIS 2167, at *4-6 (Bankr. N.D. Cal. July 11, 2010) (authorizing sanctions under § 707(b)(4)(D) in case of actual fraud on the part of the debtor attorney); *Lafayette v. Collins (In re Withrow)*, 405 B.R. 505, 515 (B.A.P. 1st Cir. 2009) (upholding sanction under § 707(b)(4) when the debtor's schedules and amendments were riddled with inconsistencies and inaccuracies). *But see In re Trudell*, 424 B.R. 786, 791-92 (Bankr. W.D. Mich. 2010) (scheduling a hearing under § 707(b)(4)(D) when the debtors received a large tax refund after their original schedules estimated that none was due).

112. 11 U.S.C. § 330(a)(4)(B).

113. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 546, 558 (1993).

114. David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1104-12 (2005); see also William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1212-13 (1983).

115. Super, *supra* note 114, at 1111.

eligibility.¹¹⁶ This increased program administrative costs, but probably decreased total costs and false positive errors by reducing program use.¹¹⁷

These types of incentives have been used at the caseworker level as well. With the rise of the bureaucratic model of welfare administration in the 1960s and 1970s, departments began conducting time studies of precisely how many minutes and seconds caseworkers should spend on each task in their job description.¹¹⁸ This led to time pressures that incentivized caseworkers to prioritize speed over accuracy.¹¹⁹ Furthermore, workers often would be even better off if they avoided tasks associated with ongoing cases altogether. By the time of welfare reform in the mid-1990s, these pressures led to frontline workers refusing to accept valid applications and misinforming claimants that certain benefits no longer existed.¹²⁰

II. ACCESSIBILITY THROUGH A PRO SE LENS

Although the bankruptcy system has just begun to engage in bureaucratic disentanglement, its results can already be seen. Because consumer bankruptcy filers bear a portion of the system's costs in the form of attorney's fees, the reduction in accessibility attributable in part to bureaucratic disentanglement can be measured in concrete terms. An increase in technical requirements means an increase in legal fees, which means a decrease in the ability of consumers to afford representation.¹²¹ This, in turn, creates a number of difficulties, such as debtors delaying bankruptcy to save up for legal fees or paying lawyers money they would otherwise use for necessities. One of these difficulties is a growing pro se problem.

116. *Id.* at 1110-11.

117. *Id.* at 1111.

118. Simon, *supra* note 114, at 1218-19.

119. *Id.* at 1219. In 1971, Stanley and Girth proposed evaluation based on speed as one way that an administrative consumer bankruptcy system could increase efficiency, unaware of the disasters that this idea would precipitate in other programs. DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 215 (1971).

120. See, e.g., Randal S. Jeffrey, *The Importance of Due Process Protections After Welfare Reform: Client Stories from New York City*, 66 ALB. L. REV. 123, 159-60 (2002) (describing how NYC welfare officers routinely misinformed applicants that expedited food stamps had been eliminated by welfare reform).

121. See *infra* notes 144-52 and accompanying text.

A pro se increase, particularly in the face of negative pro se outcomes, therefore suggests that the system may have grown unreasonably expensive in general and that all consumer bankruptcy filers may be paying for unnecessarily cumbersome procedures in the form of rising lawyer fees, an expense they can ill afford. Thus, pro se data may provide an important measure of whether consumer bankruptcy has become too technically complex. Both the rate of unrepresented debtors and the outcomes of their cases are important indicators of the system's accessibility to all debtors.

Using data from the Consumer Bankruptcy Project (CBP), I examined these two pro se measures before and after BAPCPA. I limited this analysis to data from Chapter 7 because, as discussed in Part I, much of the bureaucratic disentanglement strategy employed in BAPCPA appears to be aimed at driving debtors from Chapter 7 rather than out of the system altogether.¹²² In addition, as the analysis below demonstrates, pre-BAPCPA Chapter 7 was running smoothly, whereas the degree to which Chapter 13 provides meaningful bankruptcy relief has been controversial for many years.¹²³

According to this analysis, the percentage of Chapter 7 debtors whose substantive bankruptcy rights were negatively affected by procedural technicality did, in fact, increase after BAPCPA. Pre-BAPCPA Chapter 7 had an extremely low rate of pro se cases,

122. See *supra* notes 107-13 and accompanying text. Chapter 13 filers have, of course, been subject to increased procedural hurdles as well. But Chapter 13 was technically complex even before BAPCPA, and the redistributive/bureaucratic disentanglement analysis I am using does not apply to repayment bankruptcy in the same way.

123. Only a minority of those who file under Chapter 13 ever receive their discharge. See Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 476, 479 (2006) (finding a discharge rate of only 33 percent among Chapter 13 debtors who filed in seven districts in 1994). In addition, wide geographic variations in the use of Chapter 13 and in the amount of repayment proposed have raised concerns about whether local legal norms have been trumping debtors' ability to choose Chapter 13 in accordance with their own interests and with the Code. See, e.g., Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1298 n.12, 1320 (2006); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 833, 864 (1994). These trends have led one commentator to propose abolishing Chapter 13 altogether. See generally William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989).

meaning that bankruptcy attorneys were affordable at this point. In addition, every debtor who did file pro se successfully received a discharge. The results of both measures changed after 2005. The percentage of pro se cases rose statistically significantly, especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined. And the reasons for these failures are telling. The entire post-BAPCPA increase in negative pro se outcomes is attributable to cases in which the debtors were alleged to have made technical errors.

Thus, pro se Chapter 7 debtors after BAPCPA encountered disentanglement through procedural hurdles twice: first in the form of unaffordable attorneys and, second, more directly through technical requirements they could not meet on their own. But the success of pre-BAPCPA Chapter 7 is notable as well. It demonstrates that the affordability problem is not a result of a lawyer-based system per se, but rather of its specific implementation.

A. Methodology

The data presented below are from the 2001 and 2007 iterations of the CBP. The CBP has been the leading national study of consumer bankruptcy for nearly thirty years.¹²⁴ Once a decade, or more frequently when there are major legislative changes, CBP researchers gather data on consumer debtors.¹²⁵ This Article uses data collected from written questionnaires and bankruptcy court records in 2001 and 2007.¹²⁶

The 2001 CBP generated a sample of 1250 consumer bankruptcy filers from five U.S. judicial districts, which were chosen to reflect a diverse array of bankruptcy characteristics.¹²⁷ Participants were recruited to complete written questionnaires in person when they arrived at bankruptcy court for their meeting with trustees and creditors.¹²⁸ This written survey collected demographic data not

124. See Lawless et al., *supra* note 3, at 387, 391.

125. *Id.*

126. For a discussion of these two studies, see *id.* at 389-97.

127. SULLIVAN ET AL., *supra* note 57, at 266 (explaining the district selection process for the 1991 CBP); Lawless et al., *supra* note 3, at 389-90 (stating that the 2001 CBP used the same districts as the 1991 CBP, except for the substitution of the Northern District of Texas for the Western District of Texas).

128. Lawless et al., *supra* note 3, at 389.

available from court records and solicited information about participants' credit usage and recent economic history.¹²⁹ Researchers then coded data from participants' court records, including financial information and developments in their bankruptcy cases.¹³⁰

The 2007 CBP was a national,¹³¹ systematic sample of consumer bankruptcy filers, the first of its kind.¹³² Data were collected from 2438 debtors.¹³³ Participants were selected from the population of consumers who filed bankruptcy during a five-week period in February and March of 2007.¹³⁴ Researchers solicited respondents by mail, asking for their participation in the written questionnaire, and obtained a response rate of 50.6 percent.¹³⁵ The written survey was an expanded version of the instrument used in 2001 and contained many identical questions. Researchers then coded detailed financial and legal information from participants' bankruptcy court records.¹³⁶ Cross-checks were done to insure coder accuracy.¹³⁷ Researchers also tested for response bias and found few significant demographic or financial differences between the study respondents and those who did not return questionnaires.¹³⁸ Principal investigators from the 2007 CBP have published a detailed account of the study's history and methodology in an article presenting the first findings from the 2007 data.¹³⁹

129. *Id.* at 390.

130. *See id.* at 389-91.

131. Because the 2001 CBP contains data from five judicial districts, analysis that compares findings from the two years uses a geographic subset of the 2007 data.

132. The author was part of a team of principal investigators who conducted this study. The other researchers were David U. Himmelstein, Melissa Jacoby, Robert Lawless, Katherine Porter, John Pottow, Deborah Thorne, Elizabeth Warren, and Steffie Woolhandler. Teresa Sullivan also provided guidance. For a detailed description of the 2007 CBP methodology, see Lawless et al., *supra* note 3, at 391-97.

133. *Id.* at 393. Additional participants were included in an oversample of elderly bankruptcy filers. *Id.* at 391. Those observations, however, are not included in this analysis.

134. *See id.*

135. *Id.* at 392.

136. *See id.*

137. The error rate was 0.2 percent for questionnaire coding and 0.8 percent for the court records. *Id.* at 394-96.

138. The only significant difference between the two groups in the study was that Chapter 7 filers were slightly overrepresented as compared to Chapter 13 debtors. This discrepancy is not relevant to the current Article, which relies on only Chapter 7 data.

139. Lawless et al., *supra* note 3, at 387-98 app. I.

B. Canaries in an Inaccessibility Coal Mine

When the bureaucracy in a consumer legal system reaches an unsustainable level, one of the first concrete consequences will be a pro se problem. We should expect pro se cases to occur more frequently as the fees of the lawyers who navigate this thicket of technicality rise. These pro se filers should also be less successful, and a major contributing factor to this failure should be their entanglement in technicalities unrelated to substantive bankruptcy issues. This is precisely what appears to have occurred in the wake of BAPCPA.

1. The Rate of Pro Se Bankruptcies

Changes in the pro se rate over time tend to support the theory that the procedural hurdles added by BAPCPA are making Chapter 7 bankruptcy too technical.¹⁴⁰ There is little question that BAPCPA increased the technical requirements of consumer bankruptcy. Although access to Chapter 7 was substantively restricted by the means test, BAPCPA included many provisions unrelated to a debtor's means that made it more technically challenging. Debtors must complete more paperwork and must document the information contained in that paperwork more fully.¹⁴¹ BAPCPA added deadlines throughout the consumer provisions of the Code and made dismissal mandatory when they were not met.¹⁴² Mandatory dismissal was added as a sanction for other technical mistakes as well.¹⁴³

During the debates over BAPCPA, many commentators predicted that the increase in technical formality and burdens on lawyers¹⁴⁴ would result in increased legal fees.¹⁴⁵ This would lead to, among

140. See *infra* tbl.1.

141. See 11 U.S.C. § 521 (2006). Although some of this paperwork does relate to the debtor's means, some is duplicative (requiring pay stubs in § 521(a)(1)(B)(iv) and tax returns in § 521(e)(2)(A)(i)), and some is not means-related (expenses apparently required for all debtors under § 521(a)(1)(A)(II)).

142. See, e.g., *id.* § 521(i).

143. See, e.g., *id.* § 521(j).

144. BAPCPA also placed new burdens directly on debtor's lawyers. See, e.g., *id.* §§ 526-28. These requirements probably contributed to the increase in legal fees, and thus to the number of pro se cases, but should not have affected the outcome of pro se cases.

145. See, e.g., Braucher, *supra* note 10, at 408.

other problems,¹⁴⁶ an increase in consumers filing pro se. The predicted increase in lawyers' fees has taken place. A major government study found that Chapter 7 attorneys' fees increased by 51 percent between early 2005 and 2007, from a mean of \$712 to \$1,078.¹⁴⁷

A similar rise in pro se filings has occurred. The percentage of Chapter 7 debtors who filed pro se rose significantly between 2001 and 2007.¹⁴⁸ According to CBP data, the rate of debtors who filed for bankruptcy pro se in 2007 was 3.6 percent.¹⁴⁹ Methodological considerations, however, make it improper to compare this 3.6 percent figure directly to the pro se rate found in 2001. Because the 2001 and 2007 CBP drew their samples differently, adjustments must be made.¹⁵⁰ The 2007 CBP was a national sample, whereas the 2001 CBP collected data from five judicial districts.¹⁵¹ This makes it necessary to limit the 2007 data to those five districts when comparing the two years. The 2007 Chapter 7 pro se rate for the five districts surveyed in 2001 was 5.3 percent. This is an increase of more than 250 percent from 2001, when 2 percent of debtors in the CBP sample were unrepresented.¹⁵²

146. There are two other major negative results. The first is that a large portion of consumer filers delay bankruptcy over a period of several months because they need that time to save up for their lawyers' fees. See Mann & Porter, *supra* note 22, at 323-24. Second, some debtors undoubtedly give up and do not file. *Id.* at 290. Although it is impossible to quantify the number of debtors who choose not to file for bankruptcy due to its costs, *id.* at 301-02, scholars have used changes in filing rates across amendments to the Bankruptcy Code to argue that this population may be quite large, Lawless et al., *supra* note 3, at 351. Together with filing pro se, these three possibilities represent the primary options faced by individuals who want to file for bankruptcy but cannot afford it. We may think of them as the triad of problems we should expect to arise when lawyers are unaffordable.

147. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-697, BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 22 (2008), available at <http://www.gao.gov/new.items/d08697.pdf> [hereinafter GAO DOLLAR COSTS REPORT].

148. See *infra* tbl.1.

149. Out of a sample of 1611 Chapter 7 debtors in 2007, 58 filed pro se.

150. See Lawless et al., *supra* note 3, at 389-91.

151. Those five districts were Eastern District of Pennsylvania, Central District of California, Northern District of Texas, Northern District of Illinois, and Middle District of Tennessee. *Id.* at 388-90.

152. See *infra* tbl.1.

Table 1. Rate of Chapter 7 Pro Se Filings, 2007 Five-District Subsample and 2001 Sample

	<i>Represented</i>	<i>Pro Se</i>	<i>Percent Pro Se</i>	<i>Total</i>
<i>2007</i>	177	10	5.3	187
<i>2001</i>	698	14	2.0	712
Difference between years significant at p<.05 using Fisher exact.				

One limitation of this analysis is the possibility of response bias. It could be the case that fewer pro se filers responded to the CBP survey in both years. Pro se filers have lower incomes and are less likely to be homeowners.¹⁵³ This might mean that they move more often and therefore were less likely to have received the 2007 questionnaire, which was sent by mail. Pro se debtors may also be more intimidated when they arrive at the courthouse. This may have made them less likely to complete a questionnaire in 2001, when debtors were approached in person in court. Either possibility would depress the CBP pro se rates in ways that are difficult to predict.

This concern is alleviated somewhat for the 2007 sample by a General Accounting Office (GAO) study.¹⁵⁴ GAO used a sample generated by the Administrative Office of U.S. Courts (AOUSC). The data was drawn directly from court records without the need for debtor consent and so avoids any potential response bias.¹⁵⁵ GAO found a 2007 Chapter 7 pro se rate of 5.9 percent.¹⁵⁶ This is quite similar to the CBP Chapter 7 rate of 5.96 percent, which emerges after certain other factors discussed below are accounted for.

In addition to the CBP, there are three other empirical analyses that provide data on the change in the Chapter 7 pro se rate since BAPCPA,¹⁵⁷ one of which is the GAO report. These studies, however,

153. See *infra* notes 184-200 and accompanying text.

154. See GAO DOLLAR COSTS REPORT, *supra* note 147.

155. *Id.* at 2.

156. *Id.* at 27.

157. See *supra* notes 46, 147 and accompanying text; see also *infra* note 168 and

have drawbacks that limit their applicability to this question. Although they found that the rate of pro se filers in Chapter 7 declined after BAPCPA, two of them have methodological features that make them less useful than the CBP on this point. In addition, the role of nonlawyer bankruptcy petition preparers further muddies the waters. Thus, despite the results of these studies, the best estimate of changes in the national rate of pro se filings is likely the CBP's.

The first study is the GAO report discussed above, which BAPCPA itself required GAO to complete.¹⁵⁸ Congress directed GAO to study the costs of the new bankruptcy law, and GAO's report includes an analysis of pro se cases as one of these potential costs.¹⁵⁹ Although the GAO study contributes significantly to the literature on bankruptcy reform's costs, the authors of the study were unable to obtain comparable pre- and post-BAPCPA data sets with which to examine the pro se rate.¹⁶⁰

GAO found that the percentage of pro se filers in Chapter 7 declined from 11 percent in early 2005, before BAPCPA's passage, to 5.9 percent in 2007.¹⁶¹ However, the 2007 figure was generated by the AOUSC,¹⁶² whereas GAO drew its own sample for the 2005 figures.¹⁶³ Because the two studies used different parameters for selecting their subjects, it is difficult to assess the comparability of their results.¹⁶⁴

The second study that furnishes information on the pro se rate before and after BAPCPA is Professor Rafael Pardo's census of

accompanying text.

158. GAO DOLLAR COSTS REPORT, *supra* note 147, at 1.

159. *Id.* at 4.

160. *Id.* at 42-44.

161. *Id.* at 4. The 2005 sample included data from February and March, so it avoided most of the dramatic increase in filings that occurred in the wake of BAPCPA's passage in April of 2005. *Id.* at 8. But BAPCPA was debated intensively during the months prior to its passage, and experts were predicting its imminent passage, so some filers may have been influenced before April.

162. *Id.* at 27.

163. *Id.* at 43-44.

164. For example, the AOUSC's data included business cases, which accounted for 4 percent of the observations, *id.* at 27 n.44, whereas GAO had no business cases in its 2005 sample, *id.* at 43 tbl.5. Further differences may exist, but it is impossible to be sure because the GAO Report does not provide information on how the AOUSC data was collected. The GAO's findings on the increase in legal fees do not suffer from this same limitation. In that case, GAO drew both samples itself. *Id.* at 22.

Chapter 7 debtors who filed in the Western District of Washington from 2003 through 2007.¹⁶⁵ Professor Pardo was primarily examining a different question, but he noted that 18 percent of Chapter 7 debtors in his study filed pro se before BAPCPA, compared to 13 percent afterwards.¹⁶⁶ However, for reasons discussed below, the particular measure he used to capture the pro se rate varies considerably by geographic area,¹⁶⁷ so this single-district comparison can probably not be generalized nationally.

The third data set comes from a short report published by the U.S. Trustee Program (USTP). The study uses USTP data to find that the Chapter 7 pro se rate declined by approximately 2 percent (from a little under 8 percent to just under 6 percent) between 2004 and 2008.¹⁶⁸ This report does not explain its methodology, but it does not appear to have the limits of the other two, except with respect to the preparer issue, discussed next.

Another difficulty in reconciling studies is created by bankruptcy petition preparers. Instead of hiring a lawyer or filing entirely on their own, many debtors use paid, nonlawyer petition preparers to help them complete their bankruptcy paperwork.¹⁶⁹ These are front-end services that aid debtors with the initial paperwork and then have no further involvement in the case.¹⁷⁰ The quality of their work has been questioned in the bankruptcy community, with some

165. See Pardo, *supra* note 46.

166. *Id.* at 18 n.60.

167. The Clerk's Office for the Western District of Washington did not identify preparer cases in the data set it provided to Professor Pardo, so his pro se rate most likely includes these cases. E-mail from Rafael I. Pardo, Professor of Law, Univ. of Wash. School of Law, to Angela Littwin, Assistant Professor of Law, Univ. of Tex. School of Law (Aug. 30, 2010, 06:39 CST) (on file with author). And as discussed below, use of petition preparers varies widely across judicial districts. See *infra* notes 169-83 and accompanying text.

168. Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCPA Bankruptcy Filings*, http://www.justice.gov/ust/eo/public_affairs/articles/docs/2008/abi_200808.pdf (table entitled "Percentage of Cases Filed Pro se by Quarter January-March 2008"). Although this report uses data from the AOUSC and the USTP, *id.* at 1 n.1, it appears that the data for this table is from the USTP, as it excludes North Carolina and Alabama, which are not covered by this program. See About the United States Trustee Program & Bankruptcy, http://www.justice.gov/ust/eo/ust_org/about_ustp.htm (last visited Mar. 14, 2011).

169. GAO DOLLAR COSTS REPORT, *supra* note 147, at 28.

170. See *id.* at 28 n.46.

arguing that they often do debtors more harm than good.¹⁷¹ The CBP's findings on their effectiveness will be discussed below.¹⁷²

Petition preparers make calculating the pro se rate difficult for two primary reasons. First, they are geographically concentrated, making their distribution among bankruptcy districts uneven.¹⁷³ This makes it difficult to obtain a reliable preparer rate without a national sample.¹⁷⁴

Second, it is not always clear whether a case is pro se or preparer filed. Preparers are supposed to sign petitions they handle,¹⁷⁵ but they may frequently neglect to do so.¹⁷⁶ This means that any given pro se case may have, in fact, been filed by a petition preparer, making it extremely difficult to measure the nonpreparer pro se rate. The other studies handled this issue by grouping pro se and preparer bankruptcies together.¹⁷⁷ Thus, the GAO rate of 5.9 percent includes both pro se and preparer cases.¹⁷⁸ This is close to the 5.96 percent combined rate found by the CBP, providing some cross-verification for both studies.¹⁷⁹ Professor Pardo's rate is much higher, which may be due to the concentration of petition preparers in the district he studied.¹⁸⁰

171. See Philip Tedesco, *In Forma Pauperis in Bankruptcy*, 84 AM. BANKR. L.J. 79, 100 n.63 (2010) (citing A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or Vulture?*, 2 AM. BANKR. INST. L. REV. 353, 358 (1994)); Mary M. Testerman, *Bankruptcy Paralegal Regulation and the Bankruptcy Reform Act of 1994: Legitimate Legal Assistance Options for the Pro Se Bankruptcy Debtor*, 23 CAL. BANKR. J. 37, 37 (1996).

172. See *infra* Part II.B.2.b.

173. For example, in the 2007 CBP, preparer cases were concentrated within a minority of judicial districts. More than 20 percent of cases in the District of Arizona were filed by preparers, whereas no other district had more than 10 percent. Most districts had no preparer cases at all. See also Braucher, *supra* note 10, at 416-17 (noting the perils of using document preparers, as well as commenting on California's high rate of pro se filings).

174. This is why I do not report any preparer data from the 2001 CBP. Its five-district sample makes these figures undependable.

175. See Official Bankruptcy Form B19 (Official Form 19) (2007), available at http://www.ilnb.uscourts.gov/forms/Official_Bankruptcy_forms/Form_19_1207.pdf.

176. Telephone Interview with Mary Fox, Pro Se Bankruptcy Law Clerk, E. Dist. of N.Y. (Dec. 15, 2009); Telephone Interview with Henry Sommer, Bankruptcy Attorney (Dec. 7, 2010).

177. GAO DOLLAR COSTS REPORT, *supra* note 147, at 28; E-mail from Pardo, *supra* note 167.

178. GAO DOLLAR COSTS REPORT, *supra* note 147, at 27-28.

179. CBP (2007).

180. The Western District of Washington was one of only five judicial districts in the 2007 CBP where three or more cases were filed by petition preparers, suggesting that preparer cases may be overrepresented in that court. The majority of the districts studied had no preparer cases.

Although combining the pro se and preparer cases alleviates one issue, it raises another. There are, in fact, major differences between the two groups. As will be discussed later in this Section, in the 2007 CBP, preparer cases were different demographically and in outcome from both pro se and lawyer cases.¹⁸¹ In particular, debtors who used petition preparers had much better case outcomes than pro se debtors,¹⁸² suggesting that the two groups face distinct bankruptcy barriers. The existence of statistically significant differences also suggests that the CBP's pro se data is uncontaminated enough by preparer-filed bankruptcies to allow useful analysis of the two groups. The overall conclusion is that, although the petition-preparer issue means that none of the studies can perfectly capture changes in the pro se rate after bankruptcy reform, the CBP's finding of a significant increase is probably reliable.¹⁸³

But before naming procedural complexity as a major correlate with the increase in pro se cases, we need to assess the relationship between the increase in legal prices associated with it and the pro se trend. Although causation cannot be inferred with certainty from the available data, income is clearly tied to the likelihood of representation by an attorney. The relationship between income and pro se status suggests that the rising cost of lawyers is at least partially contributing to the increase in pro se cases.

Data from the 2007 CBP show that unrepresented debtors had significantly lower incomes at the time of bankruptcy.¹⁸⁴ This suggests that cost played a major role in the decision of whether to hire a bankruptcy lawyer.¹⁸⁵ According to CBP data, income was a statistically significant predictor of whether a debtor hired a lawyer, even when controlling for other potentially relevant factors such as

181. *See infra* tbls.3a, 4.

182. *See infra* tbls.3a, 4.

183. Further support comes from the findings of more recent preliminary analysis, which suggests that the pro se trend has increased since 2007. *See* Posting of Bob Lawless to Credit Slips Blog, *supra* note 37 (finding a combined pro se and preparer rate of 10.1 percent in a national random sample of Chapter 7 filers from July and August 2010).

184. *See infra* tbl.2.

185. The additional costs BAPCPA imposed on consumer debtors would augment the effect of increases in legal fees. In Chapter 7, filing fees increased from \$155 to \$245. 28 U.S.C. § 1930(a)(1)(A) (2006). Consumers were also required to receive credit counseling and financial education. 11 U.S.C. §§ 109(h), 727(a)(11). The GAO study found these to cost an average of \$100 per consumer in 2007. GAO DOLLAR COSTS REPORT, *supra* note 147, at 31.

education, race and ethnicity, age, homeownership, prior bankruptcies, assets, and bankruptcy chapter.¹⁸⁶

The more income a filer had, the more likely she was to hire a lawyer.¹⁸⁷ Table 2 shows the results of logistic regression models that estimate the odds of a debtor filing for bankruptcy with a lawyer.¹⁸⁸ Debtors using preparers and filing pro se were grouped together for purposes of this regression.¹⁸⁹ The results are shown as odds ratios, which compare the probabilities of certain events occurring under a given set of circumstances.¹⁹⁰ For example, Table 2 shows that the odds of using lawyers for African American debtors were about 60 percent less than the odds for white debtors.¹⁹¹ The

186. See *infra* tbl.2. Four other factors were statistically significant. The first two, home ownership and education, are discussed in a separate piece about this data. Angela Littwin, *The Do-It-Yourself Mirage: Complexity in the Bankruptcy System*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katherine Porter, ed.) (forthcoming 2011). The third factor was unencumbered assets, which is discussed later in this Article. The final significant factor was race. Even when controlling for the other relevant factors, the odds of African American households being represented were approximately 50 percent less than households of other races. See *infra* tbl.2. I ran the same regression with Asian American, Hispanic, and multi-racial/multi-ethnic households, but none of these results were significant. See *infra* tbl.2. The potential causes of this gap are as varied as they are familiar. The myriad possibilities include discrimination, geographic disparities in lawyer advertising, social isolation, and distrust of the legal system. Understanding which, if any, of these factors is contributing to the relationship between race and pro se filings would require an in-depth analysis that is beyond the scope of these data.

187. See *infra* tbl.2.

188. I also ran probit regressions for this regression as well as the one in Table 3b. Both analyses produced similar results as those reported in this Article. The same variables were significant in the same directions, and the odds ratios were quite similar.

189. I originally ran a multinomial regression with all three outcomes (lawyer, preparer, and pro se). The sample size of the preparer category was so small that the result did not show any difference. Both the lawyer and pro se outcomes were essential to my research question, so I had to decide how to handle the preparer cases. Three options were possible: (1) add the preparer cases to the lawyer cases; (2) add the preparer cases to the pro se cases; or (3) drop the preparer cases from this analysis. Fortunately, all three options yielded functionally equivalent results. In each case, the same variables were statistically significant in the same direction. The only differences were the size of the effect and, to a lesser extent, the degree of statistical significance. The alternate regressions are available upon request.

190. See John Kraemer, Note, *An Empirical Examination of the Factors Associated with the Commutation of State Death Row Prisoners' Sentences Between 1986 and 2005*, 45 AM. CRIM. L. REV. 1389, 1401 (2008) (explaining odds ratios).

191. When an odds ratio is less than 1, the percentage is obtained by subtracting the result from 1. So, in Table 2, the odds of hiring a lawyer among non-Hispanic black filers would be 61.8 percent less than among non-Hispanic white filers in the model with demographic variables. The odds ratio decreased when I added bankruptcy variables as well. See *infra* tbl.2.

precise relationship between legal representation and income is more difficult to state in plain English, but a family that earned \$3,000 per month would be significantly more likely to hire a lawyer than a family that earned \$2,000, although the relationship is not linear.¹⁹² Three models are presented to show more precisely the relationship between income and the other factors. The first model is a bi-variate analysis that includes only income and legal representation. The second model adds controls for basic demographic factors like race and ethnicity, education, and age. The third model includes the demographic variables and also adds the bankruptcy-specific variables of home ownership, prior bankruptcy, and whether the household had more than minimal unencumbered assets at the time of bankruptcy.

Table 2. Factors Correlated with Having Legal Representation: 2007 Chapter 7 Data (Expressed as Odds Ratios)

	Bi-variate Model	Model with Demographic Variables	Model with Demographic and Bankruptcy Variables
lnIncome (log of income)	1.170 ^a (0.058)	1.168 ^a (0.059)	1.139 ^b (0.061)
Non-Hispanic White (reference category)			
Non-Hispanic Black		0.382 ^a (0.104)	0.442 ^a (0.122)
Other Races and Ethnicities		0.824 (0.232)	0.944 (-0.271)

192. Because the distribution on incomes in this sample does not form a normal curve, it was necessary to convert those values into logs. *See infra* tbl.2.

No College (reference category)			
Some College		0.801 (0.213)	0.765 (0.206)
College Degree		0.722 (0.231)	0.629 (0.204)
Household Age		1.006 (0.009)	1.001 (0.008)
Homeownership			1.973 (1.290)
Prior Bankruptcy			1.088 (0.541)
Unencumbered Assets (whether the debtor had at least \$1,000 more in assets than in secured debt)			1.764 ^b (0.408)
Observations	1611	1611	1611
Log Likelihood	-357.851	-350.472	-343.736
Pseudo R ²	0.0164	0.0367	0.0635
a: p<0.01, b: p<0.05, c: p<0.10 A flag variable was added in the model for missing values. None of the differences between missing values and nonmissing values were statistically significant. ¹⁹³ Source: 2007 Consumer Bankruptcy Project			

There are other financial variables important in assessing a debtor's financial health, but measures such as assets and debt loads are less likely to be indicative of a debtor's ability to obtain

193. For missing information in the independent variables, I used the mean imputation or the mode imputation method. Whenever I used missing imputation, I created a dummy variable for missing in each variable and added them in the model. Therefore I was able to adjust the missing effect in the model.

money for a lawyer. Consumers in bankruptcy tend to have very few assets besides their homes.¹⁹⁴ Most filers are so indebted by the time they reach bankruptcy that borrowing more against their homes—or any other assets, for that matter—would rarely be an option.¹⁹⁵ In addition, another recent study suggests that two of the main ways debtors obtain the money to hire bankruptcy lawyers include saving over the course of several months and using immediate cash infusions such as tax refunds and paychecks.¹⁹⁶ A debtor's ability to use either of these approaches is highly dependent on her income.

A substantial minority of debtors, however, did have nonminimal assets, and the presence of assets was a statistically significant factor in the decision to hire a lawyer. The odds of using a lawyer were approximately 1.8 times greater for debtors with at least \$1,000 in unencumbered assets than for those without.¹⁹⁷ This suggests that having some assets weighed in favor of hiring a lawyer, perhaps because those assets could be used to pay for an attorney or because having assets gave a debtor more to lose in a pro se bankruptcy.

Not surprisingly, pro se debtors were, in fact, worse off along assets-related measures. They had many fewer assets upon arrival in bankruptcy. The median asset value for pro se and preparer debtors in Chapter 7 was \$7,927, compared to \$24,000 for debtors with lawyers.¹⁹⁸ Both groups had negative net worth figures. Pro se and preparer debtors had a median net worth of negative \$32,607, compared to the slightly more modest negative \$30,732 for repre-

194. See Lawless et al., *supra* note 3, at 367.

195. The median net worth in the 2007 sample was negative \$24,634, meaning that the median consumer's debts were \$24,634 higher than her assets. *Id.* at 405.

196. Mann & Porter, *supra* note 22, at 319-24.

197. I defined "unencumbered assets" to mean the value of assets a debtor had beyond her level of secured debt. For example, if a debtor had \$10,000 worth of assets and \$9,000 worth of secured debt, she would have \$1,000 of "unencumbered assets" under this calculation. This would be \$1,000 of value that she could theoretically liquidate and use to pay a lawyer. I chose \$1,000 as the cut-off because it was a convenient point near the current median Chapter 7 attorney fee of \$1,078. See *supra* note 148 and accompanying text. I recognize that the value of a debtor's assets and the level of her secured debt do not directly align in the sense that debtors do not report the amount of their unencumbered assets on their petitions. But this variable should still serve as a rough proxy for the ability to use assets to pay for counsel. I ran the regression in Table 2 with several variations of the assets variables and obtained similar results for all robust versions of it.

198. CBP (2007).

sented debtors. The one area in which unrepresented debtors appeared to be in better shape was in the ratio of debt to income, which measures how long it would take a debtor to pay off her debts if she used all her income to do so. For both types of debtors, the median was more than three years, but it was slightly higher for represented debtors.¹⁹⁹ This probably does not mean that pro se debtors are meaningfully better off in this way. It is most likely a result of the fact that represented debtors may be more likely to be homeowners and therefore have higher levels of secured debt.²⁰⁰

Thus, there appears to be a correlation between pro se status and particularly severe financial limitations, suggesting that there is a relationship between the increase in legal fees and the rise in pro se filings that simultaneously occurred. There are other possibilities, however. The rate of pro se filings may have increased because of other, nondisentitlement features of BAPCPA. For example, BAPCPA added a provision allowing fee waivers for the first time.²⁰¹ This may have encouraged debtors who could afford neither attorney fees nor filing fees to consider bankruptcy. There is empirical support for this possibility. In a study using an enlarged version of the 2007 CBP data, researcher Phil Tedesco found that 71.2 percent of pro se filers applied for a fee waiver.²⁰² It is impossible to know whether they would have filed for bankruptcy anyway. It could be the case that pro se filers learned of the fee waiver only after deciding to file, for example from the clerk's office. But the availability of the fee waiver certainly could have contributed to the rise in pro se filings.

2. *The Likelihood of Success*

An increase in pro se filings is not a negative event if a system handles these cases well. But when pro se filers are disproportionately subject to negative outcomes, it becomes a matter for concern.

199. Represented debtors had a median debt-to-income ratio of 3.36, whereas the median for pro se and preparer debtors was 3.01.

200. Indeed, secured debt-to-income ratios were higher for represented debtors (median .56) than for unrepresented debtors (median .29).

201. 28 U.S.C.A. § 1930(f) (West Supp. 2010).

202. Tedesco, *supra* note 171, at 92 fig.4. Tedesco supplemented the 2007 CBP data with an additional sample drawn from the larger CBP database of all cases filed during February and March 2007. *Id.* at 86 n.32.

Pre-2005 Chapter 7 was remarkably successful in its handling of pro se cases. Not a single one in the 2001 CBP database was dismissed. Chapter 7 appears to have declined in this respect by 2007, when pro se debtors fared significantly worse than their represented counterparts. These findings are even more troubling when one considers the reasons pro se debtors were doing so badly. Technical errors played a disproportionately large role in 2007 pro se dismissals, which means that many pro se cases are not being heard on the merits.

a. A Possible Rise in Pro Se Failures over Time

The goal for most debtors declaring bankruptcy in Chapter 7 is to obtain a discharge of debt.²⁰³ Once the court grants this discharge, the debtor is no longer legally responsible for most previously acquired unsecured debt. Thus, a debtor's ability to obtain this discharge is a good measure of success for a Chapter 7 bankruptcy case.

If a Chapter 7 debtor received a discharge of debt, I coded it as a positive outcome. If, on the other hand, the case was dismissed without a discharge or converted to a Chapter 13, that counted as a negative result.²⁰⁴ These negative outcomes might occur for either substantive reasons (for example, failing the means test) or procedural ones (for example, failing to file the proper documentation), although as I discuss below,²⁰⁵ procedural dismissals are much more likely.

Pre-2005 Chapter 7 was successful in this respect.²⁰⁶ There was no significant difference between the outcomes of pro se and represented debtors. All pro se debtors were able to obtain a discharge. By 2007, Chapter 7 had changed. In that year, 17.6 percent of

203. As discussed below, some debtors may file for the benefit of the automatic stay, which halts all collections processes during the bankruptcy. See 11 U.S.C. § 362 (2006). These types of filings, however, are less likely in Chapter 7, because the main reason for automatic-stay-driven bankruptcies is to halt foreclosures on assets, and Chapter 7 does not protect assets.

204. It is important to note that there are other possible negative outcomes that fall short of dismissal. Although these measures are beyond the scope of the current Article, pro se debtors may be more likely to lose collateral due to procedural mistakes or to reaffirm debts when not in their best interests.

205. See *infra* Part II.C.

206. See *infra* tbl.3a.

unrepresented debtors had their cases dismissed or converted. In contrast, only 1.9 percent of debtors with lawyers met this fate—a large and statistically significant difference. Debtors with petition preparers fared better than pro se debtors but not as well as those with legal representation. Their dismissal rate was 5.3 percent.

A regression analysis showed that these results were still significant when controlling for education, race and ethnicity, income, age, homeownership, prior bankruptcy, whether the debtor had any nonminimal unencumbered assets at the time of filing, and the completeness of the bankruptcy petition.²⁰⁷ In the regression, represented debtors were almost ten times more likely to receive a discharge than their pro se counterparts when controlling for these other factors. The difference between debtors who used petition preparers and their pro se counterparts, however, was not statistically significant.

The only other interesting variable was one that measured whether the debtor had filled out any of the required forms and schedules. The purpose of this variable was to examine the possibility that pro se debtors were faring badly because they were filing “skeleton petitions,” bankruptcy filings with none of the supporting documentation. The main reason to do this is to take advantage of the automatic stay, which halts all collection activity at the moment of filing.²⁰⁸ This variable was not statistically significant, suggesting that it is unlikely to be driving the pro se trend.²⁰⁹

Finally, there may always be additional unobservable factors for which I cannot control. But this analysis suggests that filing pro se dramatically escalates the chance that a Chapter 7 bankruptcy will not provide a person with debt relief.

207. *See infra* tbl.3b.

208. 11 U.S.C. § 362.

209. The skeleton petition variable was significant in other versions of this regression. Not surprisingly, failure to complete any documentation was associated with negative outcomes. However, only 9 cases out of all 1602 in Chapter 7 met this criterion, so it probably was not a meaningful factor in the outcome results.

Table 3a. Representation and Case Outcomes in Chapter 7 Bankruptcy in 2001 and 2007

2001 Consumer Bankruptcy Project

Type of Representation	Positive Outcome	Negative Outcome	Percent Negative Outcome	Total
<i>Lawyer</i>	447	3	0.7	450
<i>Pro Se</i>	13	0	0	13
<i>Total</i>	460	3	0.6	463
Difference between lawyer and pro se outcomes was not statistically significant.				

2007 Consumer Bankruptcy Project

Type of Representation	Positive Outcome	Negative Outcome	Percent Negative Outcome	Total
<i>Lawyer</i>	1479	28	1.9	1507
<i>Petition Preparer</i>	36	2	5.3	38
<i>Pro Se</i>	47	10	17.6	57
<i>Total</i>	1562	40	2.5	1602
Difference between lawyer and pro se outcomes was significant at $p < .05$ using Fisher exact. Differences between preparer and other conditions were not statistically significant.				

Table 3b. Odds of Positive Outcome in Chapter 7 Bankruptcy (Logistic Regression)

	Bi-variate Model	Model with Demographic Variables	Model with Demographic and Bankruptcy Variables
Pro Se (reference category)			
Petition Preparer	3.830 ^c (3.085)	2.900 (2.378)	2.414 (2.006)
Lawyer	11.239 ^a (4.463)	8.472 ^a (3.582)	9.507 ^a (4.232)
Non-Hispanic White (reference category)			
Non-Hispanic Black		0.566 (0.247)	0.512 (0.230)
Other Races and Ethnicities		0.854 (0.360)	0.830 (0.358)
No College (reference category)			
Some College		0.702 (0.296)	0.675 (0.294)
College Degree		0.427 ^c (0.195)	0.415 ^c (0.197)

InIncome (log of income)		1.063 (0.093)	1.095 (0.097)
Household Age		1.000 (0.013)	1.004 (0.014)
Homeownership			1.265 (1.012)
Prior Bankruptcy			0.558 (0.374)
Unencumbered Assets (whether the debtor had at least \$1,000 more in assets than in se- cured debt)			1.078 (0.407)
All Forms and Schedules Missing (Reference category) Some or All Forms Completed			11142265.883 (1.127e+10)
Observations	1602	1602	1602
Log Likelihood	-173.643	-168.272	-163.932
Pseudo R ²	0.0719	0.1006	0.1292
<p>a: p<0.01, b: p<0.05, c: p<0.10</p> <p>Interaction between homeowner and chapter is not statistically significant.</p> <p>A flag variable was added in the model for missing values. None of the differences between missing values and nonmissing values were statistically significant.²¹⁰</p> <p>Source: 2007 Consumer Bankruptcy Project</p>			

210. For the treatment of missing information in the independent variables, see *supra* note 193.

b. Causation and Losing on Technicalities

The higher failure rate among pro se debtors is not necessarily troubling in and of itself. Although the above data suggest a strong correlation between pro se status and negative bankruptcy outcomes, they cannot show causation, and there are explanations that do not implicate the bankruptcy system's treatment of these cases. For example, there could be non-BAPCPA factors, such as general economic conditions, that could be influencing changes in the pro se rate. Another possibility is that bankruptcy lawyers are providing a screening function by declining to represent debtors with poor cases. This would leave the pro se pool with a disproportionate share of cases that were likely to be dismissed without a discharge. This seems unlikely in Chapter 7, where the main eligibility screen is the means test,²¹¹ which low-income debtors pass more easily. The significantly lower incomes of pro se filers actually make them a better pool of bankruptcy candidates.

There could also be other unobserved factors that are increasing the chances of a pro se debtor having her case dismissed. For example, some pro se debtors may be sorting themselves into the wrong chapter by filing Chapter 7 with too much income or Chapter 13 with too little. Again, this is unlikely in Chapter 7, because pro se filers, as a group, do not have "too much" income. The lower incomes of pro se debtors make them even less likely to fail the means test than represented debtors.

A closer examination of the motions brought against consumer debtors, however, provides support for the idea that the bankruptcy system itself is playing a role. Pro se debtors do not appear to be losing disproportionately on substantive grounds. Rather, the motions to dismiss brought against them suggest that the issue is technical problems with their petitions.

BAPCPA added so many procedural hurdles to the Bankruptcy Code that the 2007 CBP added a new variable: the technical deficiency motion.²¹² In 2001, the CBP recorded motions to dismiss and challenges to the discharge brought against debtors, but did not

211. 11 U.S.C.A. § 707(b) (West Supp. 2010).

212. CBP (2007).

sort these motions into subcategories.²¹³ In 2007, when a creditor or trustee brought such motions, the CBP coded it as substantive or technical.²¹⁴ The technical problems cited ranged from failing to update tax records, to filling out forms incorrectly, to missing the deadline for stating whether the debtor intended to surrender her house or car.²¹⁵ The technical deficiency motion category also included orders to show why a case should not be dismissed that are issued automatically by the clerk's office when a petition is incomplete.²¹⁶

These technical difficulties appear to account for all the problems pro se debtors were experiencing.²¹⁷ If one excludes the cases in which the debtor was alleged to have had technical issues, pro se filers actually fared slightly better in Chapter 7 than their represented counterparts, with every single pro se receiving a discharge.

Technical deficiencies are more likely to affect unrepresented debtors negatively in two ways. First, pro se debtors may file their bankruptcy petitions incorrectly in the first instance. Second, among bankruptcy petitions that do contain errors, lawyers may be able to better correct such problems and avoid dismissal. The data provide support for both possibilities.²¹⁸ Pro se debtors were significantly more likely than their represented counterparts to face such motions. In addition, they were significantly less likely to correct these deficiencies and avoid dismissal.

Chapter 7 technical deficiency motions were filed in 43.1 percent of pro se cases, but in only 16.7 percent of cases in which the debtor had legal representation.²¹⁹ This difference was statistically significant. As was the case with outcomes, debtors who used petition preparers had results that fell in between, with a rate of 34.2 percent.

213. CBP (2001).

214. CBP (2007).

215. See 11 U.S.C. § 521 (2006).

216. CBP (2007).

217. See *infra* tbl.4.

218. See *infra* tbl.4.

219. The rate of technical deficiencies in cases in which the debtor was represented may have declined since the time of the study. Many lawyers were probably still learning the new law in 2007, which may have contributed to the relatively high percentage of incorrect petitions among represented debtors.

Table 4. Deficiency Motions in Chapter 7, by Representation, 2007

<i>Type of Representation</i>	<i>Number of Cases with Technical Deficiency Motions</i>	<i>Total Number of Cases</i>	<i>Percentage with Technical Deficiency Motions</i>
<i>Pro Se Debtors</i>	25	58	43.1
<i>Debtors Using Petition Preparers</i>	13	38	34.2
<i>Represented Debtors</i>	253	1515	16.7
<i>Total</i>	291	1611	18.1
Difference between pro se and lawyer cases was statistically significant at $p=.000$ using Yates chi-square. Difference between preparer and pro se cases was not statistically significant. Difference between preparer and lawyer cases was statistically significant at $p<.01$ using Yates chi-square.			

Lawyers also appear to have a major impact on whether such deficiencies are corrected.²²⁰ Cases in which a lawyer was retained were much less likely to be dismissed in response to a technical deficiency motion than pro se cases. In fact, 40 percent of pro se cases that faced technical deficiency motions were ultimately dismissed, whereas the rate for represented debtors was only approximately 7 percent.²²¹ This difference was statistically significant.

220. See *infra* tbl.5.

221. It was not possible to tell whether the case was dismissed as a result of the technical deficiency motion or for some other reason, but the fact that both occur in a disproportionate number of pro se cases is suggestive.

Table 5. Chapter 7: Chances of Dismissal or Conversion After a Deficiency Motion, by Representation, 2007

<i>Type of Representation</i>	<i>Number of Cases with Technical Deficiency Motions</i> ²²²	<i>Number with Positive Outcome</i>	<i>Number with Negative Outcome</i>	<i>Percentage with Negative Outcome</i>
<i>Pro Se Debtors</i>	25	15	10	40.0
<i>Debtors Using Petition Preparers</i>	13	11	2	15.4
<i>Represented Debtors</i>	248	231	17	7.4
<i>Total</i>	286	257	29	10.1
Difference between pro se and lawyer cases was statistically significant at $p < .001$ using Fisher exact. Difference between preparer and pro se cases was not statistically significant. Difference between preparer and lawyer cases was not statistically significant.				

These differences in outcome suggest that lawyers are able to comply with the onerous paperwork requirements of bankruptcy, even if they occasionally fail to do so at the outset of a case. This is not surprising. Lawyers are more likely to understand the motions and to know how to correct the deficiencies. They also have better access to the other parties to discuss settling the matters and, indeed, better access to case records and forms. Although bankruptcy lawyers typically file cases and amendments electronically, a pro se debtor may need to take off work to address a problem.

222. Figures in this column may be smaller than the corresponding ones in Table 4 due to the exclusion from this table of cases with unknown or ambiguous outcomes.

C. Conclusion to the Data Analysis

The data presented in this Article appear to provide support for the argument that bankruptcy embarked on a course of bureaucratic disenfranchisement with BAPCPA. The statute's procedural hurdles seem to be having a negative impact on access to bankruptcy both directly, through technical deficiency motions, and indirectly, through legal costs.

The experiences of pro se debtors may shed light on both of these points. Their lack of legal knowledge leaves them more vulnerable to technical mistakes. And they represent one manifestation of the bankruptcy lawyer affordability problem. Their increasing numbers suggest that lawyers are becoming too expensive, a result with implications for all consumer bankruptcy filers. Represented debtors may not be forfeiting their bankruptcy discharge, but they are probably still paying legal fees they can ill afford for assistance in navigating what may be an unnecessarily high level of technicality.

In some ways, however, these failures may be less surprising than the success of pre-BAPCPA Chapter 7, which had very few pro se cases and handled them equitably. Until 2005, the bankruptcy chapter used by the majority of consumers was fully accessible to represented and pro se debtors alike. This achievement suggests that an effective judicial consumer bankruptcy system, one that meets the needs of the most vulnerable debtors, is possible and within reach. This latter point is crucial to keep in mind as we consider the case for administrative consumer bankruptcy.

III. RADICAL SIMPLIFICATION: THE CALL FOR AN ADMINISTRATIVE BANKRUPTCY SYSTEM

The empirical analysis discussed in Part II suggests an important question. If the cost of consumer bankruptcy after BAPCPA is so problematic, why was the cost before BAPCPA not nearly as bad? Pre-BAPCPA filings did not require lawyers in the sense that pro se filers could manage on their own, but the overwhelming majority of debtors still used attorneys. And the median legal fee in Chapter 7 may have been closer to \$700 than \$1100, but \$700 is still a large sum to a family on the verge of financial collapse. Why not go to the

root of the problem and eliminate the need for this expense altogether? Many have proposed just that.

A. A Brief History of Consumer Bankruptcy's Almost-ran

The most prominent alternate vision of American consumer bankruptcy has been administrative bankruptcy: the restructuring of the system as an administrative program rather than a judicial institution.²²³ The process would become informal, removing the need for consumers to pay for representation.²²⁴ In his history of American bankruptcy law, Professor David Skeel calls the lack of a consumer bankruptcy administrator the “dog that didn’t bark,” referring to a Sherlock Holmes story in which a clue is significant due to its absence.²²⁵ Professor Frank Kennedy has similarly noted that virtually every nonparticipant who has studied the American system has proposed administrative bankruptcy as the obvious solution to its various ills.²²⁶

The absence of administrative consumer bankruptcy has not been for lack of trying. Until the debates that culminated with the passage of BAPCPA in 2005, every major bankruptcy reform effort of the past century has been met with a challenge from administrative bankruptcy proponents. From the inception of a permanent bankruptcy system in 1898 to the reforms of the Great Depression, and again during the enactment of the modern Bankruptcy Code in

223. Other systems are also considering a similar step. For example, there has been a recent push to experiment with administrative “health courts” to handle medical malpractice claims. See, e.g., Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59 (2008).

224. Of course, the consumer bankruptcy system could be restructured around administrative decision makers without reducing the number of lawyers, or it could decrease the need for lawyers while maintaining its judicial nature. However, the roles of lawyers and judges are linked; one of the major goals of a nonjudicial system is to reduce the need for lawyers. In addition, I argue that both the court system and the presence of a substantial number of lawyers have been important in protecting consumer bankruptcy from bureaucratic disenfranchisement.

225. SKEEL, *supra* note 60, at 89-90.

226. Frank R. Kennedy, Foreword, *A Brief History of the Bankruptcy Reform Act*, 58 N.C. L. REV. 667, 670 (1980) (“When any student not involved as a functionary within the system has examined bankruptcy administration as it has evolved in this country, the resulting report has frequently recommended a diminution of the judicial character of bankruptcy and reduced involvement of judicial personnel in the process.”).

the 1970s,²²⁷ administrative consumer bankruptcy was the dominant alternative for reforming the system, although it was rejected on each occasion.²²⁸ More recently, there has been renewed interest in the idea since BAPCPA's exacerbation of some of the current system's flaws.²²⁹ It is easy to see why. Judicial apparatus is expensive, and the overwhelming majority of consumer bankruptcy cases are nonadversarial in nature.²³⁰ This Part will briefly discuss the shape these proposals have taken and the arguments that support them.

After a century of false starts, in 1898 Congress enacted what would become a permanent consumer bankruptcy system,²³¹ and it was judicial in nature. The late nineteenth-century debates over administrative bankruptcy were of an entirely different character than those of later generations. The relevant issues in the 1890s were concerns about federal overreaching and costs.²³² In short, pro-creditor interests, which wanted a federal bankruptcy law, had to reassure pro-debtor interests that the new system would be neither too intrusive nor expensive.²³³ This reassurance took the form of cutting from the legislation all the administrative oversight that had been proposed in earlier bills.²³⁴ What emerged was a court-based system managed by referees, the predecessors of federal bankruptcy judges.²³⁵ Though much would change over the next century, the judicial system would remain.

The Depression-era proposal for administrative consumer bankruptcy grew out of a New York judicial investigation that resulted in the legal and criminal sanctioning of nearly two dozen bankruptcy attorneys.²³⁶ In the wake of this scandal, President Hoover

227. See Ann Morales Olazábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 322-23 (2003).

228. See generally Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

229. Ronald J. Mann, *Making Sense of Nation-Level Bankruptcy Filing Rates*, in CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 225, 225 (Johanna Niemi, Iain Ramsay & William C. Whitford eds., 2009).

230. See *infra* Part III.B; see also Mann & Porter, *supra* note 22, at 336.

231. SKEEL, *supra* note 60, at 24-25.

232. *Id.* at 40.

233. *Id.*

234. *Id.* at 40-41.

235. *Id.* at 41.

236. *Id.* at 77.

appointed his Solicitor General, Thomas Thacher—who, as a district judge, had authorized the New York investigation—to examine bankruptcy practice nationally.²³⁷ The nationwide report found that bankruptcy practice was riddled with conflicts of interest and controlled by professionals who benefitted from them.²³⁸ The proposed solution was administrative bankruptcy.²³⁹ The Thacher report called for the creation of a civil service division under the Attorney General.²⁴⁰ Judicial officers would continue to be the ultimate decision makers, but the new administrative officials would select bankruptcy trustees, and the role of lawyers would be significantly reduced.²⁴¹ The judiciary committees of both houses of Congress held hearings on the Thacher proposal, but it never made it out of committee.²⁴² New Deal legislators eventually enacted sweeping bankruptcy reform, but the Chandler Act of 1938 did not include any new administrative structures for the consumer system.²⁴³

Calls for administrative consumer bankruptcy emerged again three decades later with David T. Stanley and Marjorie Girth's groundbreaking empirical study.²⁴⁴ In 1971, the Brookings Institute published their findings in a book that has become a classic in the field.²⁴⁵ Their research helped set in motion a push for reform that culminated with the enactment of the modern Bankruptcy Code in 1978,²⁴⁶ though the resulting consumer system would bear little resemblance to the one they had proposed.

At the conclusion of their study, Stanley and Girth criticized bankruptcy as a “dreary, costly, slow, and unproductive process.”²⁴⁷ They attributed many of its shortcomings to the use of a “judicial system to try to solve problems that are by nature adminis-

237. *Id.*

238. *Id.*

239. *Id.* at 78-79.

240. *Id.* at 79.

241. *Id.*

242. *Id.* at 74.

243. *Id.*

244. See STANLEY & GIRTH, *supra* note 119, at 6-8.

245. *Id.*

246. See Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1472 n.35 (2005).

247. STANLEY & GIRTH, *supra* note 119, at 197.

trative.”²⁴⁸ Their solution was the creation of an independent federal agency that would administer all bankruptcy cases except complex business reorganizations.²⁴⁹ Civil servants would staff the agency,²⁵⁰ which would emphasize the fast, informal resolution of proceedings.²⁵¹ Administrative law courts would decide contested issues.²⁵² Most consumer debtors would not need legal representation.²⁵³

Around the same time, Congress established its own Commission on the Bankruptcy Law of the United States (the Commission) to study the system and to draft legislation.²⁵⁴ The Commission’s bill²⁵⁵ was, in some ways, just as administrative in nature as Stanley and Girth’s proposal. It would have created a federal agency that would have handled all bankruptcy cases, whether individual or corporate, liquidation or reorganization.²⁵⁶ Contested matters would have proceeded to a court, rather than an administrative law forum,²⁵⁷ but so few consumer cases were contested that its enactment would have nearly eliminated judicial involvement in that part of the bankruptcy system.²⁵⁸

But like its Depression-era predecessor, the Commission’s administrative bankruptcy bill never made it to a congressional vote.²⁵⁹ Interest groups, particularly those representing lawyers and bankruptcy referees (now judges), rallied against the bill,²⁶⁰ creating an atmosphere that David Stanley summarized thusly: “there is no constituency for creating the agency.”²⁶¹ The National Conference of

248. *Id.* at 197-98.

249. *Id.* at 199-213.

250. *Id.* at 203-04.

251. *Id.* at 215.

252. *Id.*

253. *Id.* at 204.

254. Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J.L. & POL. 893, 909 (1997); Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 942-43 (1979).

255. EXECUTIVE DIR., COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137 (1973).

256. SKEEL, *supra* note 60, at 139.

257. Kennedy, *supra* note 226, at 672-73.

258. Barnes, *supra* note 254, at 911-12.

259. *Id.* at 919.

260. A detailed interest-group analysis of these events is presented in Part IV.C.3.

261. Barnes, *supra* note 254, at 913 (quoting *Revising the Bankruptcy Law*, BUS. WK., Feb. 24, 1975, at 99 (internal quotation marks omitted)).

Bankruptcy Referees²⁶² introduced an alternate bill that preserved the judicial components of the system.²⁶³ The Bankruptcy Code of 1978 that eventually grew out of this process was a compromise between the two bills and their supporters, but there was no compromise on the administrative-judicial issue. The new Code strengthened the judicial nature of the process, enhancing the status of bankruptcy judges and lawyers²⁶⁴ and ensconcing bankruptcy firmly within the federal court system.²⁶⁵

Although Congress has not considered administrative consumer bankruptcy legislation since the 1970s, calls for its enactment have continued. For example, in the 1990s, bankruptcy expert Kenneth Klee—in his role as the legislative chair of the influential National Bankruptcy Conference²⁶⁶—testified before the House Judiciary Committee that an administrative agency could manage consumer bankruptcy more effectively than the current system.²⁶⁷

More recently, as BAPCPA has engendered renewed interest in bankruptcy costs, administrative bankruptcy has become more appealing again. Professor Ronald Mann has most effectively made the recent argument.²⁶⁸ Mann's proposal addresses the situation in which the argument for an administrative system is the strongest: low-income, low-asset (LILA) cases in which the debtor will never have the means to repay any meaningful amount of the debt owed.²⁶⁹ He argues that, for these debtors, "processing at the lowest possible transaction cost should be the goal" and that the most effective way to reduce these transaction costs would be through an

262. This group is now the National Conference of Bankruptcy Judges. Kennedy, *supra* note 226, at 673.

263. *Id.*

264. See generally Robert L. Eisen & David K. Smrtnik, *The Bankruptcy Reform Act of 1978—An Elevated Judiciary*, 28 DEPAUL L. REV. 1007 (1979).

265. See generally Barnes, *supra* note 254 (arguing that bankruptcy's position within the federal court system acts as an obstacle to legal reform).

266. Braucher, *supra* note 10, at 450 n.182.

267. See *Should Consumer Bankruptcy Be an Administrative Procedure?*, 4 CONSUMER BANKR. NEWS, Nov. 10, 1994.

268. See Mann, *supra* note 229, at 225; see also Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal To Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 615-16 (2000) (arguing that a streamlined administrative consumer system would more efficiently accomplish the goals of both creditors and other interest groups than the BAPCPA predecessor bill that was then before Congress).

269. Mann, *supra* note 229, at 243.

administrative system.²⁷⁰ Under his system, the state's main role in LILA cases would be the prevention and detection of fraud.²⁷¹ Presumably, the debtor would submit a petition to an administrative agency, which would grant a discharge unless there was suspicion of fraud. Mann suggests that cases could be resolved in a matter of days or weeks, rather than months.²⁷² Mann elaborates on this proposal in an article he co-authored with Professor Katherine Porter, arguing that "the system should operate differently for people in irretrievable distress. With these debtors having so little income and few assets, the model should be a streamlined administrative proceeding with low fees for access."²⁷³

B. Why Administrative Bankruptcy?

The arguments for converting consumer bankruptcy from a judicial to an administrative process are clear: judicial apparatus is expensive and appears to be unnecessary in the overwhelming majority of cases. This Section fleshes out these arguments, presenting the strongest case for administrative bankruptcy, in order to contrast it with the case for retaining a judicial system, which is discussed in Part IV.

The data analyzed in Part II suggest that the current system is, indeed, prohibitively expensive for debtors. Technical hurdles mean that debtors have difficulty succeeding in bankruptcy without lawyers, leaving those worst off to choose between delaying bankruptcy for months and forgoing its relief altogether.

And this judicial machinery cannot be justified by a high number of controversies to resolve. There is no doubt that in Chapter 7, the percentage of consumer cases with contested matters has always been miniscule. As Professor Elizabeth Warren has stated, "Bankruptcy is essentially the nonlitigation approach to the resolution of unmet legal obligations."²⁷⁴ No matter which way one parses the

270. *Id.* at 243-44.

271. *Id.* at 244; Mann & Porter, *supra* note 22, at 338.

272. Mann, *supra* note 229, at 244.

273. Mann & Porter, *supra* note 22, at 338. For an additional description of Mann's proposal, see Ronald Mann, *A New Chapter for Bankruptcy*, N.Y. TIMES, Mar. 12, 2010, at A27.

274. Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 918 (2005).

data, it is clear that, until recently, Chapter 7 consumer bankruptcy has not been an adversarial process and that this has been the case for at least nearly fifty years.

As far back as 1964,²⁷⁵ Stanley and Girth found that most creditors did not participate in consumer liquidations²⁷⁶ and that they objected to the discharge even less frequently, at a rate of 1 percent.²⁷⁷ Data from the 2001 CBP suggest a similar trend. In that year, only 1.9 percent of Chapter 7 debtors faced a motion to dismiss or objection to the discharge.²⁷⁸

There was little change in substantive objections after BAPCPA. If one excludes technical deficiency motions, the percentage of cases with objections to discharge or motions to dismiss rose to 4 percent in 2007, a statistically significant change, but a small number nonetheless.²⁷⁹ When technical deficiency motions are included, the percentage of debtors facing one of these motions rises to 21 percent. This percentage, however, is not directly comparable to the 1.9 percent from 2001 because the CBP used different coding methodologies for this variable in the two years.²⁸⁰ For the most part, on a substantive level, Chapter 7 remains a nonadversarial process.

This does not mean, however, that we should abandon judicial consumer bankruptcy in Chapter 7. The reasons why retaining our system of lawyers and judges is nonetheless important are the subject of Part IV.

275. STANLEY & GIRTH, *supra* note 119, at 7 (stating that their sample consists of cases that closed in 1964).

276. *Id.* at 77.

277. *Id.* at 91. Trustees objected slightly more often, at a rate of 3 percent. *Id.*

278. Motions to dismiss or objections to discharge were brought in 15 of the 778 Chapter 7 cases.

279. It is significant at $p < .05$ using the Pearson chi-square test.

280. In 2007, the technical deficiency motions category included automatic orders to show cause issued by the clerk's office, as well as motions brought by a trustee or creditor. The 2001 CBP, on the other hand, did not include these orders to show cause in its motion variables. Because of this, we cannot compare the total percentage of motions brought in each year. However, the 2007 CBP only included the orders to show cause in the technical deficiency motions variable, not in any of its substantive motions categories, so the rates of substantive motions brought in each year are comparable. The increase from 1.9 to 4 percent is a valid contrast.

IV. THE CASE FOR CAUTION

Administrative bankruptcy proponents frequently look to the bankruptcy systems of Europe and other countries for models of how a U.S. administrative system could function.²⁸¹ But it seems just as likely that, in practice, such a system would come to resemble other U.S. administrative programs, such as welfare or disability benefits. These programs have a difficult history and a reputation for producing hostile bureaucracies that render them highly inaccessible. In contrast, despite all the new procedural barriers, bankruptcy does a much better job of providing the legal benefit for which it was designed.²⁸²

And yet, as discussed in Part I, administrative safety net programs have a surprising amount in common with bankruptcy. Both types of systems serve a financially distressed, stigmatized population. Both programs must guard against the perception that their beneficiaries are getting something for nothing. Both employ the strategy of "bureaucratic disentanglement," using procedural barriers as a way of reducing substantive rights.²⁸³ But bankruptcy has adopted this approach just recently with BAPCPA, and that statute has been only partially successful in its attempt to discourage its beneficiaries.

One reason for this difference may be that consumer bankruptcy is a judicial system. Factors such as a paid bar, a strong bench, and the prestige-enhancing association with corporate bankruptcy may play a protective role in separating consumer bankruptcy from "poor people's programs," which all too often become poor programs.

281. See, e.g., Mann, *supra* note 229, at 242-44.

282. This Article focuses on only the policy arguments against administrative consumer bankruptcy, but such a system might raise constitutional concerns as well. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (holding that the Bankruptcy Code enacted in 1978 included an unconstitutional grant of judicial authority to non-Article III decision makers, because, inter alia, bankruptcy fell outside the scope of the public rights doctrine that permits Congress to delegate the power to "determin[e] matters arising between the Government and others" to the legislative and executive branches (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929))).

283. See *supra* Part I.C.

A. Our Dysfunctional Administrative State

When Stanley and Girth published their landmark study in 1971, the public had more faith in government's ability to improve the lives of ordinary citizens. Their administrative proposal depended on a strong confidence in the modern efficiency of administrative agencies and the civil service meritocracy.²⁸⁴ They argued that an executive agency would be more efficient than judicial consumer bankruptcy because federal agencies have better incentives to develop effective programs and management.²⁸⁵ That optimistic vision of the administrative state has since been widely discredited.

The conception that replaced it is one of complex bureaucracy staffed by indifferent officials. Professor Jerry Mashaw, a disability benefits expert, perhaps best summarized this newer vision of the administrative state. When discussing the frequent use of the term "Kafkaesque" to describe the Social Security Administration (SSA), he noted wryly that "Kafka gained many of his impressions of administrative processes as a bureaucrat in an agency dispensing disability benefits."²⁸⁶

Generally, the type of informal, nonadversarial²⁸⁷ system Stanley and Girth envisioned for consumer bankruptcy has not been successful in other contexts. In programs such as welfare, social security disability, and veterans' benefits, claimants have fewer process protections than they do in bankruptcy, but just as much need for them. And this loss in process does not appear to be compensated with a corresponding gain in efficiency. These administrative programs share several negative characteristics, some of which bankruptcy has avoided altogether, and others which it manifests, but to a lesser degree. A brief comparison with these three analogous U.S. administrative programs reveals that, even with the new law, bankruptcy has more manageable procedural

284. STANLEY & GIRTH, *supra* note 119, at 198-200.

285. *Id.* at 200, 218.

286. JERRY L. MASHAW, BUREAUCRATIC JUSTICE 91 n.9 (1983).

287. STANLEY & GIRTH, *supra* note 119, at 215. The Social Security Administration (SSA) and the Department of Veterans Affairs (VA) also characterize their processes as informal and nonadversarial. See Steven K. Berenson, *Legal Services for Struggling Veterans—Then and Now*, 31 *HAMLIN J. PUB. L. & POL'Y* 101, 120 (2009) (discussing the VA); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 *COLUM. L. REV.* 1289, 1299 (1997) (discussing the SSA).

hurdles, more widespread legal representation, and higher quality decision making.

Welfare, social security disability, and veterans' benefits are obviously not the only administrative systems that serve the financially distressed. Programs such as unemployment, workers' injury compensation, and even retirement-based social security serve comparable goals. I chose these three, not for their representativeness, but because they are plausible worst-case scenarios for consumer bankruptcy. My argument is not that administrative bankruptcy would inevitably replicate their exact pathologies, but rather that bankruptcy could face broadly similar problems if it were reformed without close attention to these negative possibilities. In addition, examining these programs' weaknesses provides a useful contrast that illuminates consumer bankruptcy's strengths.

Welfare is probably the closest analog to bankruptcy, in that the most important eligibility requirement for both is a lack of income.²⁸⁸ I added social security disability and veterans' benefits to address the potential objection that, despite the recent negative rhetoric about consumer bankruptcy filers, they are still not as deeply stigmatized as welfare recipients. The examples of social security disability and veterans' benefits demonstrate that dysfunctionality may occur even when the beneficiary population is regarded neutrally or with admiration.

1. Procedural Barriers

The most pervasive of the negative features of benefits systems are procedural barriers that prevent applicants from receiving benefits. In the welfare context, officials engage in what one commentator characterizes as "verification extremism."²⁸⁹ The failure to meet steep paperwork, documentation, and other administrative requirements plays a major role in the denial and termination of

288. This is true only of Chapter 7 bankruptcy, not of Chapter 13 bankruptcy. Chapter 7 is the more appropriate comparison because it serves most of the low-income, low-asset filers who are the primary target for administrative-bankruptcy reform. *See, e.g.*, Mann & Porter, *supra* note 22, at 290 n.5 (citing the 2007 CBP sample, in which 95.1 percent of Chapter 7 cases were denominated as "no asset" cases); *see also* Mann, *supra* note 229, at 243.

289. David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 242 (1998).

benefits.²⁹⁰ In California, for example, beneficiaries complete detailed initial paperwork, annual renewal paperwork, and quarterly or monthly reports of any financial changes, which may include minor changes in household expenses.²⁹¹ Not surprisingly, a census of California cases in December 2008 found that 45 percent of terminated cases were ended due to paperwork problems.²⁹² This type of procedural hurdle is not limited to California or to strict measures enacted with welfare reform during the 1990s. For most of the 1980s, federal regulations required all food stamp recipients to attend budgeting meetings at their welfare office every month. At these meetings, they could lose their benefits for failing to provide documentation of any changes in their household budgets.²⁹³

Another major reason for denying and terminating benefits is missed appointments with caseworkers. Although at first glance, keeping an appointment with one's welfare officer does not sound technically difficult, these appointments come with a surprising number of administrative challenges. Often, the appointments are scheduled without consulting the welfare recipient,²⁹⁴ who, by legal requirement, is juggling work responsibilities and child care arrangements.²⁹⁵ In some cases, the recipient never receives any notice of the meeting.²⁹⁶ In the 1990s, New York City developed an antifraud program that required a meeting at one location that served welfare applicants from the entire city, no matter how far away they lived.²⁹⁷

Although welfare represents the most extreme point on this spectrum, even more politically popular programs present procedural barriers. Applicants for Department of Veterans Affairs (VA) disability benefits must complete a complex, twenty-three page application²⁹⁸ and satisfy high documentation requirements.²⁹⁹

290. Gustafson, *supra* note 75, at 674.

291. *Id.* at 645-46.

292. *Id.* at 674 n.144.

293. Kennedy, *supra* note 289, at 242-43.

294. Super, *supra* note 114, at 1111.

295. Jeffrey, *supra* note 120, at 146-47.

296. *Id.* at 153.

297. *Id.* at 146.

298. Berenson, *supra* note 287, at 118.

299. As one veterans' attorney advised in an article for lawyers considering entering the field:

Be prepared to lose some claims because you can never locate enough

Researchers have found the system to be confusing to veterans, lacking in clear rules, and steeped in bureaucratic redundancies.³⁰⁰ Numerous studies have been devoted to determining how best to improve the claims process, but progress is not apparent. As recently as 2007, a 562-page report by the Veterans' Disability Benefits Commission characterized the claims process as "extremely complex and often not understood by veterans, some of the veterans service representatives, and by many VA employees."³⁰¹

Perhaps the biggest process factor that prevents veterans from obtaining benefits is time. The VA is notoriously slow. According to the Agency's own 2008 materials, it took an average of 1215 days, or nearly three years, for a case to make its way through one intermediate, appellate step.³⁰² As of 2009, the entire process took a typical veteran six to seven years,³⁰³ an extremely long time for someone seeking benefits because a disability left her unable to support herself fully.

Supplemental Security Income (SSI), the disability program for people with limited work histories, faces a similar problem. Although the act of filing a claim may be relatively easy—in several states,³⁰⁴ more than half of the claims are filed by telephone³⁰⁵—ensuring its quality is more difficult. Budget cuts have forced the SSA to reduce the amount of assistance available to applicants, and

documentation. You may have to look your client in the eye and tell your client that you absolutely believe that the events the client told you about occurred. But you will never be able to substantiate the claim to VA's satisfaction and that VA will never award your client any benefits.

David Ackerly, *Special Considerations When Representing Military Veteran Clients*, 43 CLEARINGHOUSE REV. 249, 253 (2009).

300. VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 325 (2007), available at <http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>.

301. *Id.* at 329.

302. 2008 BD. OF VETERANS' APPEALS ANN. REPORT 19 [hereinafter BVA CHAIRMAN REPORT], available at <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>.

303. Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom To Hire an Attorney*, 19 FED. CIR. B.J. 433, 439 (2009).

304. SSI is a federal program, but state agencies that contract with the SSA make the initial disability determinations. See Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES 115, 144 (Michael W. Dowdle ed., 2006).

305. SOC. SEC. ADVISORY BD., CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE 25 (2001) [hereinafter DISABILITY WHITE PAPER], available at <http://www.ssab.gov/publications/disability/disabilitywhitepap.pdf>.

many claimants do not understand the criteria used to decide their claims.³⁰⁶ A high-quality initial application is particularly important because SSI applicants face three levels of internal administrative appeals and an average wait of more than two-and-a-half years³⁰⁷ before they are eligible to pursue their claims in court.³⁰⁸ This process has been described as “complex, multilayered, torpid, and increasingly adversarial.”³⁰⁹

In contrast, as discussed in Part II, pre-2005 Chapter 7 bankruptcy appears to have been more useable than any of these three programs. Bankruptcy did, however, add significant new procedural hurdles with BAPCPA, which have had a negative impact on the system’s functioning.³¹⁰ This is a serious issue and needs to be addressed. But the example of the U.S. administrative programs does not recommend them as a satisfactory alternative in this regard. All three of the programs provide equal, if not greater, opportunity for procedural disenfranchisement.

Two additional positive procedural features of consumer bankruptcy highlight the ways in which the system is relatively successful. The first is decision-making time. In contrast to the years that disability and veteran claimants must wait for a determination, a typical Chapter 7 case takes only a few months from filing to discharge.³¹¹ This short timeframe is particularly noteworthy because speed should be one of the selling points for an administrative system. Administrative bankruptcy proponents have argued that, without the delays engendered by cumbersome judicial machinery,

306. *Id.* at 6.

307. *Id.* at 7 chart 7.

308. Mashaw, *supra* note 304, at 140; see *Bowen v. City of N.Y.*, 476 U.S. 467, 470-74 (1986).

309. Jerry L. Mashaw, *Disability: Why Does the Search for Good Programs Continue?*, in *SOCIAL SECURITY IN THE 21ST CENTURY* 105, 117 (Eric R. Kingson & James H. Schulz eds., 1997).

310. See *supra* Part II.B.

311. Data from 2007 CBP. The difference in case processing times could also relate to attorney incentives. Disability and veterans’ benefits attorneys are frequently paid based on a percentage of the back benefits that are eventually awarded, giving them incentives to slow down the process. *DISABILITY WHITE PAPER*, *supra* note 305, at 20-21; *VETERANS’ CLAIMS ADJUDICATION COMM’N, VETERANS’ CLAIMS ADJUDICATION COMMISSION REPORT 117-18* (1996), available at https://www.1888932-2946.ws/vetscommission/e-documentmanager/gallery/Documents/Reference_Materials/VCACReport_1.pdf. Bankruptcy lawyers, on the other hand, are paid with a flat fee, which incentivizes them to handle cases quickly. *GAO DOLLAR COSTS REPORT*, *supra* note 147, at 21.

case processing times could theoretically be reduced to weeks or days.³¹² But the experience of other U.S. administrative programs suggests that, in practice, this would be unlikely to occur.³¹³

The second positive feature is the way consumer bankruptcy respects its beneficiaries' time. As early as the 1960s, some courts were not requiring debtors to attend Chapter 13 examinations in order to save them an "unnecessary loss of working time."³¹⁴ Similarly, most modern bankruptcy courts have abandoned any discharge hearing and are sending the relevant documents by mail "on the theory that requiring a struggling debtor to lose a day's pay to attend a discharge ceremony is wasteful."³¹⁵ This process stands in stark contrast to the welfare approach, in which missing one of the many required face-to-face meetings is a significant factor in the denial and termination of benefits.³¹⁶ Since at least 1996, welfare programs have been explicitly work based, and many recipients are single mothers with childcare concerns, but the system consistently manifests disrespect for its beneficiaries' working time.³¹⁷

2. *Unmet Legal Needs*

A second negative characteristic shared by administrative beneficiary programs is a significant unmet need for lawyers. In the welfare context, the situation is particularly dire. It is extremely difficult for claimants to obtain legal representation on welfare matters. Their main source of counsel is legal aid organizations, but even before the budget cuts and federally imposed restrictions of the 1990s,³¹⁸ welfare cases represented a small percentage of these offices' caseloads.³¹⁹ By 2001, only 2.6 percent of legal aid cases were

312. See, e.g., Mann, *supra* note 229, at 244.

313. See *supra* notes 287-309 and accompanying text; *supra* Part III.B.

314. STANLEY & GIRTH, *supra* note 119, at 95.

315. WARREN & WESTBROOK, *supra* note 54, at 229.

316. See *supra* notes 294-97 and accompanying text.

317. See Super, *supra* note 114, at 1111.

318. In the mid-1990s, Congress substantially reduced the Legal Services Corporation's budget and imposed restrictions on the type of cases that its grantees could bring. See *id.* at 1094. Many of the restrictions were procedural, such as a ban on class actions, but Congress imposed substantive restrictions on welfare litigation, some of which were later disallowed by the Supreme Court. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

319. In 1983, for example, 5.4 percent of Legal Services cases dealt with welfare matters and 2.6 percent were related to food stamps. Super, *supra* note 114, at 1094-95.

welfare related, with an additional 1.1 percent dealing with food stamps.³²⁰ Lawyers may be crucial in these cases. As discussed above, welfare beneficiaries have a high risk of procedural disenfranchisement.³²¹ Studies have found that a claimant with representation has a good chance of reversing a negative outcome, but that these individual decisions rarely change agency practices.³²² Unrepresented claimants suffering from the same problem are left with no remedy.

This lack of representation is especially problematic because of the recent trend of involving the criminal justice system in welfare cases. The scope of criminally prosecutable welfare fraud has been broadened to include matters such as failing to report an increase in income.³²³ Any statements made to this effect—or any form document signed to this effect—in an administrative hearing may be used against a welfare recipient in a later criminal prosecution for welfare fraud and, due to collateral estoppel, will not be subject to challenge.³²⁴ The bankruptcy system is similarly sensitive to fraud, but practices like this are unheard of there.

The need for lawyers in the VA disability system is noteworthy for contrasting reasons. Unlike the welfare system, the veterans' benefits process was specifically designed to be user friendly. The VA is charged with a "duty to assist" veterans in developing their cases,³²⁵ even though the agency is also deciding the claims. The evidentiary standard is "as likely as not," which is lower than the preponderance of evidence standard used in typical civil cases.³²⁶ In addition, veterans' services organizations (VSOs) such as the Foreign Legion and Veterans of Foreign Wars have long-standing programs that provide free lay advocates for VA applicants.³²⁷ If any group of claimants would be able to succeed without counsel, veterans should be that group.

320. *Id.*

321. See *supra* notes 95-97, 102-04, 114-20 and accompanying text.

322. See Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 868 (1990).

323. See, e.g., CAL. WELF. & INST. CODE § 10980(a) (West 2010).

324. Gustafson, *supra* note 75, at 710 n.308.

325. See 38 U.S.C. § 5103A(a)(1) (2006).

326. See *id.* § 5107(b).

327. Berenson, *supra* note 287, at 121.

Even with these advantages, however, VA claimants have significant unmet legal needs. Veterans suffer a high error rate at the initial level, where very few of them are represented due to a ban on paid representation.³²⁸ For example, a U.S. district court recently found that as many as 44 percent of claims certified for appeal may contain avoidable mistakes.³²⁹ When veterans appeal their cases, representation makes a major difference in the outcome. In 2009, 49 percent of pro se veterans had their appeals denied at the intermediate appellate level, which was true of only 30 percent of claimants with lawyers and 31 to 43 percent with lay representation through VSOs.³³⁰

Efforts have been made to increase the availability of lawyers for appeals, but they have fallen short. In 1991, Congress reallocated a portion of the budget of the U.S. Court of Appeals for Veterans Claims (CAVC) to funding programs that would provide legal representation for veterans—at the request of the court itself.³³¹ In 2006, Congress recognized that there was still a major problem and repealed the Civil War-era cap of \$10 on the fees lawyers may charge for appeals within the administrative system,³³² although fees are still prohibited at the initial stage.³³³ It even went so far as to allow contingency fees, although at a lower level than those typically charged in private cases.³³⁴ Nevertheless, 70 percent of

328. Lawyers are prohibited from charging for representation unless the claim has proceeded beyond the initial determination, thus limiting the number of veterans who have counsel at this stage. See 38 U.S.C. § 5904(c)(1).

329. Berenson, *supra* note 287, at 122 (citing *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1075 (N.D. Cal. 2008)).

330. BVA CHAIRMAN REPORT, *supra* note 302, at 23. The VSO Paralyzed Veterans of America had a denial rate of only 23.8 percent, although the organization's name suggests that its clients may be disproportionately disabled. *Id.* Lay representatives from VSOs tended to have the highest rates of allowed claims, whereas lawyers had the highest number of remands. *Id.* This data is from fiscal year 2008. *Id.*

331. See NAT'L VETERANS LEGAL SERVS. PROGRAM, NVLSP LEGAL PRO BONO OPPORTUNITIES (2010) [hereinafter NVLSP PRO BONO], <http://www.nvlsp.org/ProBonoWork/>.

332. See 38 U.S.C. § 5904(c)(1).

333. See *id.*

334. Attorneys may charge a maximum of 33.3 percent of any award. Berenson, *supra* note 287, at 133-34. They are further incentivized to charge no more than 20 percent because the VA will pay the fees directly to the lawyer if the contingency is at or below that rate. *Id.* As with SSI beneficiaries, many claimants will have accrued a backlog of benefits by the time all appeals are resolved, so attorneys using contingency fees may receive meaningful compensation. *Id.* at 133. However, many contend that these caps are too low given the time, risk, and outlay required to bring these appeals. *Id.* at 134.

veterans do not have attorneys at the time that they exit the administrative appeals system and seek relief at the CAVC.³³⁵ And despite a wealth of programs intended to bridge that gap, 19 percent of veterans still lack attorneys by the time their appeals conclude.³³⁶

Like the VA, the SSA has a duty to develop both sides of the case in making disability determinations.³³⁷ And even at the third level of administrative appeal, regulations require that the process be conducted in an “informal, nonadversary manner.”³³⁸ Despite these features, claimants report difficulty in navigating the process without representation.³³⁹ Indeed, the system is structured so that claimants must undergo two rounds of decision making in which they are more likely than not to be denied before they reach the level of appeal in which they are more likely to prevail.³⁴⁰ This appellate process has resulted in an impression among the beneficiary population that the early denials are designed to reduce the number of meritorious claims by weeding out claimants who do not have the wherewithal to last through multiple levels of appeals.³⁴¹

335. See NVLSP PRO BONO, *supra* note 331.

336. Berenson, *supra* note 287, at 114-15.

337. Dubin, *supra* note 287, at 1302.

338. 20 C.F.R. § 416.1400(b) (2010).

339. See, e.g., MSWorld.org, Questions About USA Social Security Benefits, <http://www.msworld.org/forum/forumdisplay.php?f=19> (last visited Mar. 14, 2011).

340. In FY 2000, SSA granted 38 percent of claims at the initial level, 16 percent of claims at the first level of reconsideration, and 62 percent of claims at the second level of administrative appeal. DISABILITY WHITE PAPER, *supra* note 305, at 8 chart 8. There are a number of possible explanations for the increased generosity at this second level of appeal. First, this level of appeal is primarily hearing-based, whereas the first reconsideration is primarily record-based. Compare 20 C.F.R. § 416.1453(a) (second level), *with id.* § 416.1420 (first level). Second, the decision makers at this second level are Administrative Law Judges (ALJs), who operate independently of certain SSA restrictions, see *Butz v. Economou*, 438 U.S. 478, 513-14 (1978) (discussing federal ALJ independence from agencies), and are, as I argue below, better qualified than the initial reviewers. Third, more claimants obtain counsel or lay representation for this stage of proceedings. See DISABILITY WHITE PAPER, *supra* note 305, at 9, 18. Fourth, it is also possible that those with weaker cases are not pursuing multiple levels of reconsideration. Of the approximately 1,232,824 claims that were denied at the initial determination in FY 2000, only 433,584 (approximately 35 percent) were appealed this far. *Id.* at 8 chart 8. I have doubts about how much this last factor contributes, however. It seems equally as likely that the most disabled among the initially-denied claimants would have the lowest ability to appeal. This would cause the population of claimants who reached the ALJ level to be skewed in the other direction. The figures in this footnote include determinations for the Disability Insurance (DI) program, for individuals with substantial pre-disability work history, and for SSI. *Id.*

341. Indeed, this was the understanding of the system that I gained from years of working

By the second level of appeal, nearly 60 percent of claimants have obtained counsel and another 13 to 14 percent have lay representation.³⁴²

The consumer bankruptcy pro se rate looks quite low by comparison. The percentage of debtors representing themselves in Chapter 7 has risen to approximately 3.6 percent in the wake of BAPCPA,³⁴³ and as the negative outcomes these debtors experience demonstrate, this is too many. But it is still much lower than the 40 percent of disability applicants or the 70 percent of VA claimants who pass the initial determination and reach two levels of appeal without counsel.³⁴⁴ This is partly by design. These programs are supposed to operate in an informal, nonadversarial manner.³⁴⁵ But, as the discussion below suggests, this model has not been a success.

3. Low-Quality Decision Makers Making Low-Quality Decisions

In addition to procedural barriers and unmet legal needs, these administrative programs share a tendency to use lower-quality decision makers who generate a problematic number of poor decisions. Over the past several decades, each program has undergone a systematic deprofessionalization of its frontline decision makers, the officials who make the first determination about a claimant's case. In all three systems, these shifts correlated with an increasingly rule-bound process that decreased decision-maker discretion. The results are generally considered ineffective.

For welfare programs, the evolution has been from social workers to "eligibility technicians."³⁴⁶ In welfare's early decades, caseworkers operated under a "social work model" that emphasized a paternalistic interest in helping low-income families.³⁴⁷ Although the system

in an unrelated capacity with many individuals who received SSI. It was not corrected until I researched the matter myself.

342. These figures are from the mid-1990s. Dubin, *supra* note 287, at 1294 n.29.

343. See *supra* note 149 and accompanying text.

344. See *supra* notes 335, 342 and accompanying text. I have not been able to obtain exact numbers for welfare claimants, but the LSC data discussed by Super, *supra* note 114, at 1093-95, suggest that the number of welfare claimants with representation is very low.

345. See *supra* note 287 and accompanying text.

346. Simon, *supra* note 114, at 1215.

347. *Id.* at 1214 n.45; see also David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 819 (2004).

never achieved its goal of staffing entire offices with social workers, social work ideals infused welfare programs. These ideals exerted an upward pressure on caseworker education and training, which frontline workers needed to make the particularized, moralistic judgments with which they were charged.³⁴⁸ When the bureaucratic model of welfare emerged in the 1960s and 1970s, caseworker qualifications plummeted. Managing welfare cases changed from a professional job with relatively high educational requirements to a dead-end, clerical position.³⁴⁹ In the words of one welfare official, the goal was to replace people who thought like social workers with people who thought like bank tellers.³⁵⁰ This trend was mirrored in the higher levels of welfare administration, where social workers were replaced by people with managerial backgrounds.³⁵¹

The degree of ineffectiveness that resulted—at least from a claimant point of view³⁵²—approaches the legendary.³⁵³ Welfare programs have achieved a dramatic drop in caseloads since the federal reform in 1996, in part because of substantive eligibility changes, but also in large part by discouraging applications and denying substantively eligible claims on procedural grounds.³⁵⁴ For example, between the early 1990s and 1999, the *percentage* of eligible families receiving benefits decreased from 85 to 52 percent, despite changes in eligibility requirements that reduced the *number* of qualifying families.³⁵⁵

A similar transition has taken place in the SSA's disability programs. There, the initial disability determinations that vocational specialists with masters degrees used to make are now made by low-level employees who frequently have no more than high school diplomas.³⁵⁶ Because these frontline workers are technically

348. Simon, *supra* note 114, at 1214-15.

349. *Id.* at 1215-16.

350. *Id.* at 1216.

351. *Id.*

352. This ineffectiveness with respect to claimants may be accomplishing other program goals, an issue discussed in Part I.C.

353. See Jeffrey, *supra* note 120, at 153.

354. See, e.g., Super, *supra* note 347, at 824-25.

355. *Id.* at 824 (citing Sheila R. Zedlewski, *Left Behind or Staying Away? Eligible Parents Who Remain off TANF 1* (Urban Inst., Assessing the New Federalism Series No. B-51, 2002), http://www.urban.org/UploadedPDF/310571_B51.pdf).

356. DISABILITY WHITE PAPER, *supra* note 305, at 9; Mashaw, *supra* note 304, at 144-45.

state employees,³⁵⁷ there is tremendous variation in their qualifications and salaries, with the most generous states paying 2.5 times more than the stingiest.³⁵⁸ Due to budgetary pressures and state civil service rules, the trend has been toward the lower end of this scale.³⁵⁹ These constraints may also prevent the hiring of necessary experts.³⁶⁰ The poor working environment correlates with high attrition rates among frontline employees.³⁶¹

These factors have resulted in poor decisional outcomes, as measured in several ways. First, there is a high degree of state-by-state variation.³⁶² For example, a GAO study tested 10 state disability offices on 221 hypothetical claims and found that they reached the same result in just 48 of them.³⁶³ Second, when denials reach judicial and judicial-like decision makers, most of them are reversed or remanded. Administrative Law Judges (ALJs) overturn 59 percent of denials at the second internal level of appeal.³⁶⁴ Two appellate levels later, federal courts reverse or remand another 54 percent of cases.³⁶⁵ Perhaps most tellingly, more than half of appli-

357. See Mashaw, *supra* note 304, at 144.

358. DISABILITY WHITE PAPER, *supra* note 305, at 16-17.

359. Mashaw, *supra* note 304, at 145.

360. DISABILITY WHITE PAPER, *supra* note 305, at 7.

361. As of 2000, 10 states had an annual attrition rate of more than 20 percent. *Id.* at 26.

362. Consumer bankruptcy suffers from similar state-by-state variation in chapter usage, with some regions having much higher rates of Chapter 13 cases and others having higher rates of Chapter 7 cases. See Gordon Bermant & Ed Flynn, *Bankruptcy by the Numbers—Measuring Performance in Chapter 13: Comparisons Across States*, http://www.justice.gov/ust/eo/public_affairs/articles/docs/abi082000ch13.pdf. But this problem is not an inherent feature of judicial consumer bankruptcy and could be solved with chapter-choice reform, which could occur in either a judicial or an administrative system.

363. Mashaw, *supra* note 304, at 147; see also DISABILITY WHITE PAPER, *supra* note 305, at 3. To be fair to the SSA, valid reasons for some geographic differences exist. Disability claims are subject to review by “a highly decentralized judicial system.” Susan Haire & Stefanie Lindquist, *An Agency and 12 Courts: Social Security Disability Cases in the U.S. Courts of Appeals*, 80 JUDICATURE 230, 236 (1997). Different appellate circuits issue profoundly different statutory interpretations, and the SSA is expected to abide by them all. See *id.* at 233-36.

364. DISABILITY WHITE PAPER, *supra* note 305, at 8 chart 8. As discussed in note 340, this data point alone does not mean that the initial determinations are inaccurate, but it does contribute to the larger picture painted by figures in this paragraph.

365. DISABILITY WHITE PAPER, *supra* note 305, at 8 chart 8. Six percent are reversed, whereas 48 percent are remanded. *Id.* Of the 48 percent remanded, approximately 60 percent are reversed by the decision maker below. *Id.*

cants who are denied disability status never return to substantial productivity.³⁶⁶

In the VA, the change in decision-maker qualifications was actually the result of an effort to improve decision quality. Through the late 1980s, the initial administrative decision was made by a three-person panel, with one member representing each of three specialties: legal, medical, and occupational.³⁶⁷ A separate three-member panel consisting of two lawyers and one doctor then decided the first internal appeal.³⁶⁸ The goal was for the professional judgment of the decision makers to render unnecessary the development of a detailed medical claim.³⁶⁹

This process came under attack as the system became subject to judicial review.³⁷⁰ Until 1988, VA benefits decisions could not be appealed to court.³⁷¹ But when Congress responded to pressure to create a system of judicial review, one of the earliest decisions issued by the newly established Court of Appeals for Veterans Claims forbade the VA from allowing its decision makers to substitute their professional judgment for the development of a reviewable legal record.³⁷² This prohibition resulted in a VA decision to cease hiring physicians as adjudicators.³⁷³ Although these changes brought the decision-making process in better accordance with the rule of law, they also introduced substantial delays and resulted in a body of less-qualified frontline decision makers.³⁷⁴ Currently, more than one quarter do not have college degrees.³⁷⁵

The quality of the VA's benefits determinations has been a matter of concern for some time. In the academic literature, commentators frequently use colorful language to describe the inadequacy of the process. One describes it as "a carousel consisting of remand,

366. Mashaw, *supra* note 309, at 117 (citing data from 1994).

367. James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 412 (2009).

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at 412-13 (citing *Colvin v. Derwinski*, 1 Vet. App. 171 (1991)).

373. *Id.* at 413.

374. *See id.* at 422-23.

375. *See* DANIEL HARRIS, CNA CORP., FINDINGS FROM RATERS AND VSOs SURVEYS 13 (2007), available at https://www.1888932-2946.ws/vetscommission/e-documentmanager/gallery/Documents/2007_July/CNA_Raters&NVSO-Survey_FinalReport.pdf.

mishandling, rehearing, remand, and so on.”³⁷⁶ Another states, “In terms of making timely and accurate compensation determinations, the VA sets low standards and consistently fails to meet them.”³⁷⁷

One measure of the problem is the rate of reversals upon appeal. In 2008, the VA’s internal Board of Veterans’ Appeals (BVA) affirmed only 38.1 percent of the initial decisions made by regional offices.³⁷⁸ It reversed 22.4 percent of the decisions and remanded another 37.2 percent.³⁷⁹ The remand figure is particularly problematic because remands are frequently the result of basic failures, such as the lack of a medical examination or violation of notice procedures.³⁸⁰ Furthermore, 75 percent of remanded cases later return to the BVA for another round of appeals.³⁸¹ The problem continues at the next level, where over the past decade, among cases decided on nonprocedural grounds, the U.S. Court of Appeals for Veterans Claims has affirmed, even in part, only approximately 30 percent of BVA decisions.³⁸² Regardless of which decision maker is reaching the best determination, the number of appeals and remands a veteran must undergo is troubling.

When viewed through the lens of the American administrative safety net, the consumer bankruptcy system looks quite functional. In contrast with the administrative programs, the frontline bankruptcy decision maker is a federal judge.³⁸³ The administrative programs’ less prestigious frontline decision makers would be a positive, cost-saving feature if the “eligibility technicians”³⁸⁴ and “raters”³⁸⁵ were reducing the need for judicial review, but that is not the case. Instead of an efficient administrative system that

376. James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed To Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 229 (2001). Interestingly, O’Reilly’s proposal is “to merge [the VA disability system] with the better-functioning federal disability benefits appeal systems already in place for [SSA] disability claimants.” *Id.* at 224.

377. Wright, *supra* note 303, at 439.

378. BVA CHAIRMAN REPORT, *supra* note 302, at 22.

379. *Id.*

380. *Id.* at 5.

381. *Id.*

382. Berenson, *supra* note 287, at 113. For reference, the analogous rate for U.S. Courts of Appeals was 75 percent in 2007. *Id.*

383. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978, Part Five: Inside the White House*, 82 AM. BANKR. L.J. 175, 194 (2008).

384. See *supra* note 346 and accompanying text.

385. HARRIS, *supra* note 375, at 2.

effectively manages the easy cases and leaves the expensive judicial apparatus free to focus on ones in which its skills are needed, these programs tend toward messy bureaucracies with the same expensive judicial system imposed on top.

Even when compared with the ALJs who decide internal administrative appeals, bankruptcy judges come out ahead. With 14-year terms, salaries set at 92 percent of those for Article III district court judges, and a retirement plan that some think is better than its Article III equivalent, bankruptcy judgeships are sought by the elite of the legal profession.³⁸⁶ This is also one place where consumer bankruptcy's continued association with its corporate counterpart is helpful, as many bankruptcy judges come from the top tiers of business bankruptcy law.³⁸⁷ The job's elite nature in and of itself also sends a signal of respect to consumer bankruptcy filers.

Bankruptcy judges' position outside a federal bureaucracy gives them the independence necessary to make decisions in accordance with their legal judgment.³⁸⁸ In a contrasting example, the ALJs in the SSA have fought a long-running battle to avoid a review designed to insure that their decisions meet the SSA's cost objectives.³⁸⁹ In 2000, the ALJs went so far as to unionize in response to this tension.³⁹⁰

Bankruptcy's high-quality decision makers have helped create a consumer bankruptcy system that works relatively well from the debtor perspective. Chapter 7 has a much higher "allowance" rate—the percentage of claimants who receive the legal benefit for which they are applying—than the administrative benefits programs.³⁹¹ Debtors are not entangled in multiple layers of appeals

386. Mund, *supra* note 383, at 180, 196-97. A strong critic of the consumer bankruptcy system, Fifth Circuit Judge Edith Jones echoes this high praise for bankruptcy judges. See BABETTE CECCOTTI, EDITH H. JONES & JAMES I. SHEPARD, NAT'L BANKR. REVIEW COMM'N, DISSENT FROM RECOMMENDATION TO MAKE BANKRUPTCY JUDGES ARTICLE III JUDGES (1997), <http://govinfo.library.unt.edu/nbrcreport/24commvi03.html> ("The quality of candidates applying for and being selected to bankruptcy judgeships has been very high.")

387. Mund, *supra* note 383, at 196.

388. *Id.*

389. DISABILITY WHITE PAPER, *supra* note 305, at 18.

390. *Id.*

391. *See supra* tbl.3a.

the way that administrative claimants are,³⁹² and total processing times are significantly shorter.³⁹³

Paradoxically, this judicial system has mastered the administrative component of case processing much more effectively than the administrative programs. It has done so by creating what is, in essence, a judicial-administrative hybrid within the court system. One commentator refers to this as “an administrative system that happens to take place in a court.”³⁹⁴ Trustees and clerks’ offices manage most of the work presented by the flood of LILA cases that, from an efficiency perspective, expensive decision makers like judges should not be handling.³⁹⁵ As a former, longtime member of the Federal Judicial Center staff explained, “In a well-run bankruptcy courthouse, a good deal of the repetitive work is handled by the competent clerk and clerk’s staff, so that the judge can concentrate on the more interesting work of asset 7’s, 11’s, contested matters and adversary proceedings.”³⁹⁶

There are at least two possible explanations for why judicial consumer bankruptcy appears to function like an effective administrative system. One possibility is that there is little to “decide” in LILA consumer bankruptcy case. A debtor does not need to demonstrate technical insolvency, and the main eligibility requirement for Chapter 7—the means test—applies to a small percentage of the consumer bankruptcy population.³⁹⁷

This feature, however, distinguishes bankruptcy from only social security disability and veterans’ benefits, not from welfare. Welfare eligibility, too, is based on a lack of income. Its requirements are primarily aimed at eliminating applicants who have other sources of funds.³⁹⁸ Currently, welfare programs also engage in more intrusive screening, conducting home searches and fingerprinting and disallowing individuals with criminal records or histories of drug use.³⁹⁹ But these restrictions are not related to its core function the

392. See *supra* Part IV.A.1-2.

393. See *supra* notes 311-12 and accompanying text.

394. Telephone Interview with Henry Sommer, *supra* note 176.

395. Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 454-55 (1997).

396. E-mail from Gordon Bermant, Fed. Judicial Ctr., to Angela Littwin, Assistant Professor of Law, Univ. of Tex. School of Law (Aug. 6, 2010, 20:49 CST) (on file with author).

397. See *supra* notes 50-51 and accompanying text.

398. See *supra* notes 289-93 and accompanying text.

399. See Gustafson, *supra* note 75, at 672, 675, 706-08.

way that an inability to work is related to a disability determination or injury during military service is related to veterans' benefits. Rather, they are part of a strategy of bureaucratic disenfranchisement, and there is nothing inherent in bankruptcy to prevent it from taking a similar approach.

Another possible reason for judicial consumer bankruptcy's administrative efficiency is the role of judges. Even though they spend little time on each LILA case, judges may serve as an important backstop, preventing the staff that does interact with debtors from slowing down the process or putting up road blocks. As the influential welfare commentator Michael Lipsky argued in his classic article *Bureaucratic Disenfranchisement*, without countervailing pressures, "bureaucrats may have plenty of reasons and opportunities to develop policy in ways that withdraw resources from constituents, and may be inclined to be receptive to policy initiatives that direct them to do so."⁴⁰⁰ Invested judges may have stopped a process like this before it could begin.

Judges exert significant influence over how well the bankruptcy process runs. Unlike in the benefits systems, the officials and employees who manage the bankruptcy cases are directly accountable to the judges. Bankruptcy judges appoint their own clerks and hold the ultimate supervisory authority over them.⁴⁰¹ The one exception to judicial control is trustees, who represent the unsecured creditors' interests in bankruptcy.⁴⁰² In addition to other functions, Chapter 7 trustees play a major administrative role, and they are appointed by the U.S. Trustee (UST) rather than by judges.⁴⁰³ Some have argued that many Chapter 7 trustees have tended toward disenfranchisement, especially when the UST was relatively politicized during the interval between the implementation of BAPCPA and the election of a Democratic Congress in 2006.⁴⁰⁴ Because Chapter 7 trustees are paid by the case, and a small

400. Lipsky, *supra* note 92, at 22.

401. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and The Passage of the Bankruptcy Act of 1978, Part Four: The Separate Clerk's Office*, 81 AM. BANKR. L.J. 515, 536 (2007).

402. See 11 U.S.C. § 701 (2006).

403. *Id.* §§ 701(a), 702(d). Section 701(a) provides for the U.S. Trustee's appointment of an interim trustee. Because there are very few creditor's committees in individual bankruptcies, this appointment then becomes permanent by default under § 702(d).

404. Telephone Interview with Henry Sommer, *supra* note 176.

number of asset-bearing cases generate most of their income, it is in their interest to help create the kind of system the UST finds desirable.⁴⁰⁵

On the other hand, engaging in a practice of bureaucratic disenfranchisement is time consuming and therefore expensive for an official who is paid by the case. In most LILA cases, it would not be worthwhile for a trustee to spend time challenging the debtor's paperwork. In addition, trustees do not act in isolation. Consumer bankruptcy lawyers handle much of bankruptcy's administrative function, and they are directly accountable to the debtors. And in comparison to administrative agency systems in which judges are often not available until the third or fourth level of appeal, consumer bankruptcy attorneys have relatively effective access to judges when they see a need to challenge a trustee's decision.⁴⁰⁶ This may provide a counterweight against any trustee who might otherwise use bureaucratic disenfranchisement.

But if bankruptcy judges have the power to make the system function well, one important question remains: why, generally speaking, do they seem to prefer a system that works? After all, they also have the ability to make the system function poorly. BAPCPA certainly handed them the tools to make consumer bankruptcy much more technically difficult for the debtor,⁴⁰⁷ but by and large, they have not done so. Is there something inherently different about bankruptcy that enabled it to develop a core of officials who appear to have little interest in procedural disenfranchisement? Or is it a result of consumer bankruptcy's current structure? The remainder of this Part considers these questions.

B. Bankruptcy's Distinguishing Characteristics: Would They Be Enough?

At this point, the bankruptcy-oriented reader is no doubt thinking about the features that distinguish consumer bankruptcy from poverty programs, of which there are several. The issue, however, is not whether there are differences between these programs, but

405. National Association of Bankruptcy Trustees, Bankruptcy FAQ, <http://www.nabt.com/faq.cfm#Q11> (last visited Mar. 14, 2011).

406. See *supra* notes 376-83 and accompanying text.

407. See *supra* notes 1-11 and accompanying text.

rather how salient they are likely to be in the policy arena. The question becomes whether these differences would be enough to overcome the moral anxiety about redistribution. The fear of abuse must be overcome not only in the mind of the reader, but more importantly, in the minds of the policymakers who shape our bankruptcy system.

The most significant difference between consumer bankruptcy and the administrative benefits programs is that, to the extent that redistribution takes place in bankruptcy, it is mostly from private parties rather than from public funds. This is important because it means that ordinary citizens, who may be struggling but not seeking assistance, are not subsidizing the legal benefit. This reduces much of the sting of the moral anxiety surrounding redistribution. Its importance may be seen in the credit industry's large investment in convincing the public that it is, in fact, subsidizing consumer bankruptcy.⁴⁰⁸ A major argument made by creditor interests in their recent campaign to tighten the bankruptcy laws was that all consumers paid for bankruptcy in the form of higher interest and reduced credit access.⁴⁰⁹ They even attempted to quantify this cost as a \$400 "bankruptcy tax."⁴¹⁰

In many ways, this argument has won the day, although the precise impact of the credit industry's campaigns is not clear. For example, during the recent recession, one of the major arguments voiced against allowing mortgage modification has been that it is unfair to homeowners who did not borrow as much during the housing boom—despite evidence that all homeowners may be affected when foreclosure, the alternative to modification, occurs.⁴¹¹

This argument may have additional importance in practice that is not apparent from the policy debates. The fact that the government is not paying for the benefit at issue means that bankruptcy officials are free from the substantive cost-cutting pressures that benefits administrators face. Unlike an administrative bureaucrat, a bankruptcy judge granting a discharge does not report to, work with, or receive auditing by the officials who pay for the discharge.

408. See Warren, *supra* note 67, at 77-78.

409. See *id.* at 83.

410. *Id.*

411. See, e.g., John D. Geanakoplos & Susan P. Koniak, *Matters of Principal*, N.Y. TIMES, Mar. 5, 2009, at A31.

On the other hand, the fact that the redistribution is from private actors, rather than the government, also works against consumer bankruptcy. It means that there is always a well-financed group with a strong interest in making the system less generous. Moreover, in an administrative system, even though the debtors would largely be pro se, the other side would likely have counsel in matters with actual money at stake.⁴¹²

A related difference between bankruptcy and benefits programs is that, in bankruptcy, real redistribution often does not take place. Much of the forgiven debt would have remained unpaid even without bankruptcy.⁴¹³ A \$400 bankruptcy discharge is worth less than a \$400 welfare check because creditors were unlikely to see full repayment even without bankruptcy. And though changes in technology and secondary markets have increased the value of bankruptcy debt,⁴¹⁴ it is still worth far less than 100 cents on the dollar.

The main limit of this distinction is that it does not seem to penetrate policy debates very well. It has been obscured by credit-industry-financed research arguing that these debts are, in fact, collectible,⁴¹⁵ and perhaps more importantly, it is something that the credit industry and its supporters have simply not been willing to believe, regardless of evidence to the contrary.⁴¹⁶

A third distinction is that consumer bankruptcy filers are sociologically middle class, whereas public benefits claimants are living in poverty. Although most debtors have very low incomes at

412. Theoretically, this could be resolved by removing all foreclosures and other asset-bearing cases from the administrative system. However, the decimation of the current bankruptcy bar that would follow the establishment of such a system would limit the availability of low-cost consumer attorneys in these cases as well. *See infra* Part IV.C.

413. *See, e.g.*, Richard Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 127 (2004).

414. *See* Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 714-16 (2008).

415. For example, Visa and MasterCard funded the notorious Credit Research Center report claiming that "about 25 percent of Chapter 7 debtors could have repaid at least 30 percent of their nonhousing debts over a 5-year repayment plan, after accounting for monthly expenses and housing payments." Jensen, *supra* note 2, at 520-21. The validity of the study's conclusions has been a matter of much controversy. *See generally* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of Creditors' Data*, 1983 WIS. L. REV. 1091.

416. *See, e.g.*, Howard, *supra* note 91, at 448.

the time of filing,⁴¹⁷ they are middle class in terms of education, occupational prestige, and education level.⁴¹⁸ But welfare commentators have argued the same proposition about their program's beneficiaries and the working class.⁴¹⁹ Yet research showing that recipients tend to cycle between welfare and traditional working-class jobs has not dislodged the "culture of poverty" school of thought that dominates policy circles.⁴²⁰ In addition, the very force with which this middle-class argument has been made suggests that its advocates are concerned that consumer bankruptcy filers are vulnerable to being grouped with the chronic poor and possibly to being treated like them.

In many ways, the ultimate question posed by this Article—what are the underlying factors that make a redistributive program successful?—is not objectively answerable. There is no way to control for enough factors to conduct a study that would tell us, for example, whether decision-maker qualifications or sociological class status is more important. As a general matter, it seems fairly clear that the moral fears that invariably accompany redistribution seem to have done less damage in consumer bankruptcy than elsewhere. This could be because of bankruptcy features unrelated to program design, such as middle-class beneficiaries and private redistribution. But if there is a real possibility that the system's structure, particularly its use of lawyers and judges, has played a protective role, we must be very careful when considering proposals to abandon it. The following Section addresses specific features of a judicial system that may have helped separate bankruptcy from welfare.

C. The Benefits of Professionals

The most significant difference between judicial consumer bankruptcy and its administrative counterpart is role of the lawyers and judges who manage the system. There seems to be little question that moving to an administrative system would end the

417. See Lawless et al., *supra* note 3, at 356-61.

418. See SULLIVAN ET AL., *supra* note 57, at 27-33.

419. See, e.g., Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1933 (2000).

420. See, e.g., *id.*; Law, *supra* note 82, at 475-79; Patricia Cohen, "Culture of Poverty," *Long an Academic Slur, Makes a Comeback*, N.Y. TIMES, Oct. 18, 2010, at A1.

consumer bankruptcy bar as we know it. This is what occurred when England changed systems in 1883.⁴²¹ Stanley and Girth acknowledged this in their detailed administrative blueprint back in 1971.⁴²² The consumer bankruptcy bar has certainly lobbied as though this were the case whenever administrative bankruptcy has been on the table.⁴²³ Indeed, eliminating the need for consumer lawyers is a major selling point for administrative bankruptcy: it would arguably reduce both the need to save up for a bankruptcy lawyer and the risks of filing pro se. Although a reduction in lawyers may thus appear to increase consumer access in the short term, there are several ways in which consumer lawyers contribute to the long-term workability of the system.

At the most basic level, lawyers help the system run smoothly. They file accurate petitions.⁴²⁴ They manage a large portion of the administrative work in each case. They enable consumers to avoid the inaccurate information about bankruptcy that abounds in do-it-yourself books and on the Internet.⁴²⁵ They serve a diagnostic purpose, informing consumers which problems can be solved by bankruptcy and which cannot. And the data analyzed in Part II show that, in the wake of BAPCPA, they are crucial for clearing the many new procedural hurdles that the legislation introduced. But

421. SKEEL, *supra* note 60, at 93.

422. STANLEY & GIRTH, *supra* note 119, at 216 (“Attorneys for debtors would certainly lose some business, but in most instances bankruptcy work is only a small part of their practice.”).

423. See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 84 (1997); see also SKEEL, *supra* note 60, at 92 (“In short, the legislative evidence is too anecdotal to ‘prove’ that bankruptcy lawyers deserve much of the credit (or blame) for thwarting the reforms, but the evidence surely is suggestive.”).

424. See *supra* Part IV.A.2.

425. For a sampling of inaccurate advice, see Mansi Aggarwal, *Personal Bankruptcy Advice Guide 101*, EZINE ARTICLES, Jul. 20, 2006, <http://ezinearticles.com/?Personal-Bankruptcy-Advice-Guide-101&id=240041> (stating that after discharge, “the bankrupt person can avail limited credit only as the legal system and his financial statement will not allow him to enjoy credits beyond a certain limit”); Mike Hinshaw, *Be Wary of Products Promising To Reveal ‘Bankruptcy Secrets’* (July 26, 2010), <http://www.bankruptcycorner.com/bankruptcy-news/2010/07/be-wary-of-products-promising-to-reveal-bankruptcy-secrets/> (“With a Straight Bankruptcy or Chapter 7 bankruptcy the judge in bankruptcy court bangs his gavel and all your debts instantly vanish—once and for all.... Under the Chapter 13 bankruptcy all your debts remain. You’re forced to repay each and every one right down to the last penny!”); *Declaring Personal Bankruptcy*, <http://www.declaringpersonalbankruptcy.net/> (last visited Mar. 14, 2011) (“The thing to remember out here is that your income should be higher than the median of the state. If it is lower then, you do not qualify for the Chapter 7 personal bankruptcies. If it is higher, then you will probably do so even if the rules have changed.”).

even before 2005, when the outcomes between pro se and represented consumers were not statistically distinguishable, they may have played a prophylactic role. It is possible that the low pre-2005 pro se rate helped judges and court personnel give each such case the attention it needed.

1. Lawyers as Consumer Advocates

Consumer bankruptcy lawyers are responsible for much of the financial consumer protection enforcement that takes place. This type of litigation is notoriously cost ineffective. The potential awards are small, often lower than the cost of representation itself.⁴²⁶ Thus, if a consumer right requires litigation, it will not typically be enforceable.⁴²⁷ In addition, consumer litigation requires consumers who are aware of their legal rights.⁴²⁸

The current model of consumer bankruptcy representation addresses these problems. Bankruptcy provides consumers with a benefit important enough to enable lawyers to charge fees that are high from a debtor perspective. It occurs with enough frequency to allow lawyers to make a living off these fees, even though they are low by standards of the profession. This combination has resulted in the development of the high-volume practice, characterized by cost-saving measures such as flat-fee representation and heavy use of paralegals. Interestingly, though these features have been criticized in the bankruptcy context, they are being urged as “best practice” innovations in the general pro se literature,⁴²⁹ and they have helped produce a consumer system with a remarkably low pro se rate. As Professor Jean Braucher wrote nearly two decades ago:

426. See William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 397 (1994).

427. Braucher, *supra* note 10, at 413 n.28; see also Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 32-36 (1997). Professor Stuart Macaulay found that nonbankruptcy lawyers rarely take consumer cases in his groundbreaking study. Stuart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 129 (1979).

428. See Macaulay, *supra* note 427, at 120-21.

429. See, e.g., JEANNE CHARN & RICHARD ZORZA, BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVS. PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS 22-23, 32-33 (2005); see also John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21.

From the perspective of consumer law in general, 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.⁴³⁰

Although bankruptcy attorneys typically charge on a flat-fee basis, this representation often includes collateral matters for which consumers would not otherwise be able to obtain representation.⁴³¹ This stands in contrast to the situation in Canada, where the main consumer bankruptcy professionals are accountant-trained trustees.⁴³² There, the trustees feel so constrained by their role that they typically do not help debtors even with basic matters, such as stopping collections harassment.⁴³³

A recent article by Professor Katherine Porter provides a useful case study of how bankruptcy lawyers may play an important role in consumer protection. In *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, Professor Porter found that mortgage claims in bankruptcy cases were riddled with errors and missing documentation.⁴³⁴ Although she did not collect data in state courts, she hypothesized that the situation would be even worse there, in part because significantly fewer debtors would have representation.⁴³⁵ One of her most interesting proposed solutions involved educating bankruptcy trustees about this issue and informing consumer bankruptcy attorneys about the fee-generating causes of action these errors may provide.⁴³⁶ Her research attracted substantial publicity,⁴³⁷ and she was able to conduct some of the outreach she

430. Braucher, *supra* note 113, at 525-26.

431. Whitford, *supra* note 426, at 402.

432. Iain Ramsay, *Market Imperatives, Professional Discretion, and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399 (2000).

433. *Id.* at 449; *see also id.* at 419 (“Most trustees would indicate to consumers their rights in relation to collection practices but only a minority seemed interested in actively providing a consumer with material on how to address harassment.”).

434. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 121 (2008).

435. *Id.* at 124.

436. *Id.* at 177-78.

437. *See* Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures*, N.Y. TIMES, Nov. 6, 2007, at A1.

proposed.⁴³⁸ Anecdotally, these efforts appear to have been successful. A number of reports suggest that banks are starting to lose cases when they cannot produce basic mortgage documents.⁴³⁹ Porter also advocated for more systemic reform,⁴⁴⁰ and ultimately, the Bankruptcy Rules Committee has proposed new rules to improve the process.⁴⁴¹ None of this would have been possible without an existing bar that could move quickly on newly available consumer protection claims. Moreover, researchers would have much greater difficulty in identifying problems like this to study if astute lawyers and judges were not noticing them in their work every day.

2. *A Paid Bar*

Beyond the importance of lawyers in general, there are benefits to having a paid bar rather than relying on pro bono and legal aid lawyers. Representatives of stigmatized populations share some of that stigma with their clients and are easy targets for policymakers seeking to reduce program use. Both bankruptcy and welfare lawyers have been the subject of recent congressional attacks,⁴⁴² but those attacks have been much less successful in the bankruptcy arena. Because bankruptcy lawyers are privately funded, Congress could act only indirectly through changes to the Bankruptcy Code. As discussed in Part II, the resulting amendments did raise legal fees and probably contributed to an increasing pro se problem, but these results pale in comparison with the damage sustained by legal services practices in the 1990s.⁴⁴³ Because the federal government funds legal services programs through the Legal Services Corporation, Congress was able to impose direct restrictions. These included bans on class actions,⁴⁴⁴ prohibitions on receiving remuner-

438. *Id.*

439. See, e.g., Gretchen Morgenson, *Flawed Paperwork Aggravates a Foreclosure Crisis*, N.Y. TIMES, Oct. 4, 2010, at A1.

440. See *supra* note 273 and accompanying text.

441. See FED. R. BANKR. P. (with 2009 amendments), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK-Rules.pdf>.

442. See Mann, *supra* note 11, at 394 (“Indeed, some observers view much of the Act as laying an elaborate trap for those who make a living out of representing consumer bankrupts.”); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 533 (2000).

443. See Super, *supra* note 114, at 1094.

444. *Id.*

ation through fee-shifting statutes,⁴⁴⁵ and subject-matter limitations in welfare cases.⁴⁴⁶ These changes reduced already struggling welfare practices to almost nothing.⁴⁴⁷

In addition, consumer bankruptcy practices are financially self-sustaining. When demand increases—for example, during recessions—lawyers can expand their practices to meet it. This contrasts with legal aid organizations, which have more difficulty raising funds when the economy is tight, even though their caseloads also increase during hard times.⁴⁴⁸ Similarly, consumer bankruptcy lawyers do not have to spend resources on fundraising and recruiting pro bono assistance the way free legal programs do. That time and money may instead be spent on advertising, which though criticized by some,⁴⁴⁹ can improve consumer awareness,⁴⁵⁰ an important issue in areas of law where rights are underutilized.⁴⁵¹

3. *Lawyers as Lobbyists*

A paid consumer bar creates a permanent consumer-debtor interest group. Consumer bankruptcy filers are a textbook case of an interest that cannot organize effectively. They are a diffuse, stigmatized group of which nobody expects to become a member.⁴⁵²

445. *Id.* (citing 45 C.F.R. § 1617.3 (2004), *repealed by* 45 C.F.R. § 1642 (2010)).

446. *Velazquez*, 531 U.S. at 533.

447. *See* Super, *supra* note 114, at 1094.

448. *See, e.g.*, William Glaberson, *Courts Seek More Lawyers To Help the Poor*, N.Y. TIMES, Jan. 7, 2010, at A26.

449. Mann, *supra* note 11, at 394 n.91 (citing Senator Grassley's criticisms of bankruptcy lawyers).

450. Braucher, *supra* note 113, at 545.

451. In the welfare context, a high percentage of families who are eligible for food stamps do not apply for them. Gustafson, *supra* note 75, at 678 n.159 (citing KAREN E. CUNNINGHAM ET AL., MATHEMATICA POLICY RESEARCH, INC., REACHING THOSE IN NEED: STATE FOOD STAMP PARTICIPATION RATES IN 2006, at 5 (2008)). For bankruptcy, see Michelle White, *Why Don't More Households File for Bankruptcy?* 14 J.L. ECON. & ORG. 205, 206 (1998) (calculating that 15 percent or more of U.S. households would benefit from bankruptcy, but only 1 percent file annually).

452. *See, e.g.*, Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509, 523 (2003) ("Individual debtors would logically be against the Reform Legislation or its prior versions; however, there are millions of debtors with interests so diverse that they are not an effective lobbying force. Organizing such a group, coupled with the stigma often attached to debtors, is riddled with collective action problems."); Posner, *supra* note 423, at 47 ("[D]ebtors, considered as the class of people who are potential beneficiaries of bankruptcy law, do not

It is their lawyers who have a long-term, personal stake in maintaining a consumer-friendly system.⁴⁵³ Consumer bankruptcy lawyers make an ideal interest group because they are “a relatively small number of people with similar interests and a lot at stake,” who therefore, according to public choice theory, “will have more of an incentive to organize into politically effective interest groups.”⁴⁵⁴

There is a strong argument that lawyers account for much of the debtor friendliness that characterizes U.S. consumer bankruptcy law. There is little dispute that lawyers have had a major impact on the shape of the system. Professor David Skeel provides perhaps the strongest form of the argument. In his history *Debt's Dominion*, he argues that the bankruptcy bar is responsible for the very existence of a permanent consumer bankruptcy regime.⁴⁵⁵ More generally, he also states that “no other group has had nearly so pervasive an impact on bankruptcy law as the bankruptcy bar.”⁴⁵⁶ Many commentators agree that lawyers have played a formidable role.⁴⁵⁷ They argue that an important reason why lawyers have been so successful in bankruptcy is that it is perceived as a technical area of law.⁴⁵⁸ Complex subjects often require policymakers to defer to experts with a better understanding of the issues. A perception of complexity also

compose an organized and politically influential group.”).

453. Consumer advocates and academics have also played an important role here, but their livelihoods are not dependent on a generous bankruptcy regime. See SKEEL, *supra* note 60, at 192-94, 203.

454. Posner, *supra* note 423, at 59.

455. SKEEL, *supra* note 60, at 44-47. Skeel argues that the emergence of the individual-debtor bankruptcy bar as an effective lobbying force is what prevented the Bankruptcy Act of 1898 from being repealed within a few years, as had been the case with all of its predecessors. *Id.* at 45. According to this account, Republican political control for much of the first decade of the twentieth century prevented its immediate repeal, and by the time Democrats gained power, the law had been in place long enough for the bankruptcy bar to emerge to preserve it.

456. David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 498 (1998).

457. Iain D.C. Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales*, 7 THEORETICAL INQUIRIES L. 625, 627 (2006). For a purely financial account of lawyers' motives in this respect, see Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2087 (2003) (reviewing SKEEL, *supra* note 60). For a more textured account, see Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986*, 74 AM. BANKR. L.J. 35, 74 (2000).

458. Iain Ramsay, *Comparative Consumer Bankruptcy*, 2007 U. ILL. L. REV. 241, 264.

provides them with cover, allowing them to defer to interest groups without the general electorate, or even other politicians, noticing.⁴⁵⁹ It enables statutory changes to appear “merely” technical in nature and fly “underneath the wider horizon of political debate.”⁴⁶⁰

The role that consumer bankruptcy lawyers have played in shaping legislation is often portrayed in a negative light. These activities have been viewed as obstructionist⁴⁶¹ and as exclusively motivated by financial gain.⁴⁶² Professor Skeel takes an intermediate approach, arguing that the bar’s influence has led to a number of inefficiencies but that they should not be overstated.⁴⁶³

But for those who favor a strong consumer bankruptcy regime with an accessible discharge, lawyers’ efforts may have had a positive impact. As Professor Skeel states, “The obvious explanation for bankruptcy’s pro-debtor bias is the bankruptcy bar.”⁴⁶⁴ Professor Iain Ramsay supports this argument, stating that “if the U.S. consumer bankruptcy system is unique, it is partly because of the central role of lawyers in consumer bankruptcy administration and policy.”⁴⁶⁵ Professor Ramsay adds a comparative perspective to this picture, arguing more broadly that the type of interest groups prominent in the legislative arena will heavily influence the law’s ultimate pro-creditor or pro-debtor orientation.⁴⁶⁶

This account also partially explains consumer bankruptcy’s recent turn in the pro-creditor direction by tying it to a decline in the influence of consumer lawyers. One major factor behind the first

459. Carruthers & Halliday, *supra* note 457, at 74.

460. *Id.*; *see also* Ramsay, *supra* note 457, at 640.

461. *See, e.g.*, Susan Block-Lieb, *The Politics of Privatizing Business Bankruptcy Law*, 74 AM. BANKR. L.J. 77, 88 (2000) (“Public choice theorists often view lawyers as obstructionist forces who oppose important changes to the legal status quo in order to protect against encroachments upon their livelihood.”).

462. Zywicki, *supra* note 457, at 2022 (“Bankruptcy lawyers have clear goals—to increase the number of bankruptcies filed and the expense of each.”)

463. Skeel, *supra* note 456, at 518, 520-21.

464. *Id.* at 518.

465. Ramsay, *supra* note 458, at 270.

466. Iain Ramsay, *Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada*, 53 U. TORONTO L.J. 379, 423 (2003) (“[A]n interest group analysis is central to understanding the specific institutional features of consumer bankruptcy law in a country and the reasons for which a regime might ultimately be described as creditor- or debtor-friendly.”). In a separate article, Ramsay discusses the comparable role that Canadian bankruptcy trustees have played there. Ramsay, *supra* note 458, at 271.

contraction of the consumer bankruptcy regime in more than a century was the politicization of the debate, which, in turn, reduced the comparative importance of legal experts, including debtor lawyers.⁴⁶⁷

Between the passage of the modern Code in 1978 and BAPCPA in 2005, consumer bankruptcy became highly politicized, shedding its image as a neutral, technical subject.⁴⁶⁸ One major reason for this change was the emergence of the consumer credit industry as a lobbying force.⁴⁶⁹ This development was driven by several factors, the most important being the ever-increasing number of consumer bankruptcy filings.⁴⁷⁰ The skyrocketing bankruptcy rate gave consumer credit issuers a larger stake in each change in the bankruptcy laws.⁴⁷¹ Simultaneously, innovations in data processing further increased their interest by making each dollar of about-to-be-discharged debt more valuable.⁴⁷²

The debates leading up to BAPCPA also mobilized the consumer bankruptcy bar. This group's main professional organization, the National Association of Consumer Bankruptcy Attorneys (NACBA), was formed in 1992 when it became clear that Congress was going to reexamine the bankruptcy statute.⁴⁷³ As Professor Elizabeth Warren described it, "The political story of bankruptcy in the 1990s is how these two groups—bankruptcy professionals and interest groups—compete for dominance in shaping congressional directives on bankruptcy."⁴⁷⁴ The professionals lost, and the result was BAPCPA.

BAPCPA, however, has been far from a total loss for consumer debtors. Just last year, bankruptcy filings returned to their pre-

467. See, e.g., Carruthers & Halliday, *supra* note 457, at 75.

468. See *id.*

469. Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 193 (1999). Professor Skeel argues that two other factors were behind the change in tone: the 1994 change in congressional control and the newly emerging divisiveness within the academic bankruptcy community over the role of law and economics scholarship. SKEEL, *supra* note 60, at 199-202.

470. SKEEL, *supra* note 60, at 200, 202; Warren, *supra* note 469, at 203.

471. SKEEL, *supra* note 60, at 202.

472. See Haneman, *supra* note 414, at 714-16.

473. Telephone Interview with Maureen Thompson, Legislation Dir., NACBA (Dec. 13, 2010).

474. Warren, *supra* note 469, at 190.

BAPCPA levels,⁴⁷⁵ and as discussed in Part II, the vast majority of those who do file still receive their discharge. This is partly because there has never been a large population of “can-pay” consumer bankruptcy filers for the new means test to screen.⁴⁷⁶

It is also due to the fact that the consumer bankruptcy bar did not resign in defeat after BAPCPA’s passage. In what must be an irony to BAPCPA’s drafters, the law’s passage caused the organizing efforts of the consumer bankruptcy bar to gain momentum. NACBA’s membership has more than doubled since 2005, increasing from 2000 members then to 5000 by the end of 2010.⁴⁷⁷ One effect of this mobilization was that, once BAPCPA was passed, NACBA was in a position to offer training on the new law in an organized and integrated manner.⁴⁷⁸ Its legal education program became a factor in the consumer bankruptcy bar’s relatively smooth transition to practicing under the complex new statute.⁴⁷⁹ BAPCPA’s relatively limited disentanglement effects are also due to the broader response of the bench and bar to the new law, which is discussed in the next Section.

4. Professionalism and Effectiveness

Consumer bankruptcy’s location in the judicial branch has enabled the development of a corps of professionals with a commitment to a workable system. In addition to consumer lawyers, this community includes judges and corporate bankruptcy attorneys. These professionals were particularly important in implementing BAPCPA in a way that mitigated the effects of the statute’s attempts at bureaucratic disentanglement.

A key example of the professionals’ influence in limiting bureaucratic disentanglement was their role in drafting the Bankruptcy Rules. After BAPCPA’s passage in April 2005, there were only six months to prepare for its implementation. The Bankruptcy Rules

475. See Lawless, *supra* note 37.

476. See Lawless et al., *supra* note 3, at 351.

477. Telephone Interview with Maureen Thompson, *supra* note 473; Nat’l Assn. of Consumer Bankr. Attorneys, About Us, <http://www.NACBA.org/AboutUs.aspx> (last visited Mar. 14, 2011).

478. Telephone Interview with Maureen Thompson, *supra* note 473.

479. *Id.*

Committee—which included debtor and creditor attorneys from consumer and corporate practices as well as academics, judges, and officials from the U.S. Trustee Program⁴⁸⁰—was tasked with drafting an immense number of rules and forms.

Of particular importance was the implementation of the means test.⁴⁸¹ One very plausible reading of § 707(b) would have required all debtors to complete and provide documentation for the expenses calculation in the means test,⁴⁸² even though, logically, this would be unnecessary for debtors with incomes at or below their state’s median. Debtors with incomes below this threshold cannot be challenged on their expenses,⁴⁸³ so requiring that they list and document them would have created a procedural burden with no substantive relevance. This paperwork is particularly technical and time consuming, and this reading of § 707(b) would have increased it in nearly 90 percent of Chapter 7 cases.⁴⁸⁴ It could have had a large impact on legal prices and pro se failure, with no improvement in the substantive effectiveness of the means test.

But the Rules Committee maintained a professionalized orientation that focused on how to keep the consumer bankruptcy system manageable, and it ultimately decided to not require below-median debtors to complete this paperwork.⁴⁸⁵ That decision in and of itself probably prevented bankruptcy from procedurally disentiing a large number of its substantively eligible beneficiaries.

This culture of professionalism has benefitted consumer debtors in several other ways as well. One advantage of keeping consumer bankruptcy in the judicial system is that it has allowed consumer

480. See, e.g., Meeting Minutes of the Advisory Committee on Bankruptcy Rules, Meeting of August 3-5, 2005, Washington, D.C., <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/BK08-2005-min.pdf>.

481. 11 U.S.C. § 707(b) (2006).

482. Section 707(b)(2)(C) states that “the debtor shall include a statement of ... the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.” 11 U.S.C. § 707(b)(2)(C). This suggests that all debtors would need to provide precise numbers for the expense portion of the means test, which is described in subparagraph (A)(ii) (incorporated by reference in subparagraph (A)(i)).

483. *Id.* § 707(b)(7).

484. In the 2007 CBP’s Chapter 7 sample, 88.8 percent of debtors had incomes at or below their state’s median. Only 7.8 percent had incomes above this threshold. Another 3.3 percent failed to check either box on their bankruptcy petitions.

485. Bankruptcy Form 22A (Chapter 7), Part III, line 15 (instructing below-median debtors: “do not complete Parts IV, V, VI or VII”).

and corporate bankruptcy to develop in parallel. Many academics write in both areas, and the field's two major journals—the *American Bankruptcy Law Journal* and the *American Bankruptcy Institute Journal*—cover both topics.

Although practitioners in these areas constitute two distinct bars, there is some sense of practicing in the same field, which has several positive spillover effects. The sense of joint enterprise enhances the prestige of consumer bankruptcy, as corporate bankruptcy lawyers are among the most successful in the profession. This prestige is important in countering the seedy reputation that has plagued consumer bankruptcy and that could otherwise deter qualified people from entering the field.⁴⁸⁶

More basically, consumer and corporate bankruptcy share the same statute. Many Code provisions apply to both contexts, which may serve to check a potential slide into bureaucratic disenfranchisement on the consumer side. BAPCPA's drafters appear to have been aware that the statute's combined application exerts an upward pressure on consumer debtors' rights. In key areas, BAPCPA carefully carved out consumer exceptions to provisions that have long applied to both contexts.⁴⁸⁷

Corporate practitioners have taken a proprietary interest in consumer matters. This is important when Congress is considering bankruptcy legislation,⁴⁸⁸ although this was more effective in the 1970s than in the politicized environment in which BAPCPA was debated.⁴⁸⁹ Corporate bankruptcy lawyers also played a large role in the Rules Committee work discussed above.⁴⁹⁰

Judges have been a key in maintaining the connection between the two halves of the field. The fact that the actors at the top of the bankruptcy hierarchy have a foot in the consumer and corporate worlds further enhances the link between them.⁴⁹¹ A number of

486. SKEEL, *supra* note 60, at 192 (stating that following the enactment of the Bankruptcy Reform Act of 1978 "increasing visibility of corporate bankruptcy ... has had a positive ripple effect on the status of the consumer bankruptcy bar").

487. *See, e.g.*, 11 U.S.C. § 506(a)(2) (2006), which was amended by BAPCPA to require different measures for valuing collateral that apply only when the debtor is an individual.

488. Warren, *supra* note 469, at 191.

489. *Id.* at 201-02.

490. *See supra* notes 480-85 and accompanying text.

491. For example, a significant number of corporate lawyers attend the annual meeting of the National Conference of Bankruptcy Judges, yet the meeting continues to offer panels on

judges also embody this relationship through their biographies. Many come from the corporate arena, but the job itself consists of mostly consumer adjudication.

This brings us to the question posed at the end of Part IV.A.3: why do bankruptcy judges as a group seem to favor a functional consumer system when this is not true of decision makers in many other redistributive programs? Although judges played a reduced role in the legislative debates leading to BAPCPA,⁴⁹² they were highly influential in earlier decades,⁴⁹³ and they were important players within the Rules Committee.⁴⁹⁴ Part of the answer must be their role in the system. Unlike lawyers, their financial well-being is not directly tied to the usability of consumer bankruptcy.⁴⁹⁵ But their prestige and job satisfaction are closely aligned with the system's success, and the visibility of the job means that they are publicly identified with consumer bankruptcy's accomplishments and failures. In addition, the functionality of the system is self-perpetuating. Professionals who care about these issues are likely to see a well-run consumer bankruptcy system as a forum where they can play a positive role and are therefore more likely to seek bankruptcy judgeships in the first place.

The relationship with corporate bankruptcy also probably affects the way judges view consumer debtors. Working with corporate bankruptcy—in which insolvency is treated in a matter-of-fact manner rather than as a moral issue—makes it more likely that judges will apply a similar lens to consumer insolvency. In corporate bankruptcies, judges are dealing with some of the most sophisticated lawyers in the profession, and this promotes a culture in which litigants are generally treated with respect. In addition, bankruptcy judges' mixed caseloads lower their risk for burnout when compared to analogous adjudicators who hear only poverty-related cases.

consumer topics.

492. Warren, *supra* note 469, at 201 (noting that many judges became reluctant to participate in the legislative debates as bankruptcy became more politicized).

493. See SKEEL, *supra* note 60, at 194; Mund, *supra* note 383, at 196-97.

494. See *supra* note 480.

495. With 14-year terms, they are less likely to be affected by a contraction in bankruptcy filings. In addition, because of the prestige of bankruptcy judgeships and because many of them come from corporate bankruptcy backgrounds, they have a variety of options upon leaving the bench.

Some combination of these factors has left consumer bankruptcy with a body of decision makers who are unlikely to let the system slide into the type of dysfunction that plagues our administrative state.

CONCLUSION: SOME THOUGHTS ON REFORM

If how a legal system treats its pro se claimants is an important indicator of its overall accessibility, post-BAPCPA consumer bankruptcy is on middle ground. It has fallen from its earlier grace, especially with respect to Chapter 7. But when viewed through the lens of other redistributive programs, it is still surprisingly successful. The reasons for this may have less to do with specific statutory provisions than with the fact that the professionals who run the system want it to be effective.

The larger point is that we cannot design a consumer bankruptcy system based on only what would be most efficient on a conceptual level. Consumer bankruptcy will always be haunted by moral anxiety and a fear of abuse, and thus will always be vulnerable to strategies of bureaucratic disentanglement. These considerations mean we must also consider how to retain professionals who are likely to act in good faith and how to give them enough power to protect the integrity of the system.

Pre-BAPCPA Chapter 7 achieved this balance. On one hand, it was simple enough that its judicial machinery did not overwhelm its efficient administration. On the other hand, a strong bench and active debtor bar prevented its slide into the administrative morass that has plagued other social welfare programs. Of the 463 Chapter 7 debtors studied by the 2001 CBP, all but three received a discharge, and none of those three filed pro se.⁴⁹⁶ And this was a system that processed more than a million cases per year. For those for whom the specter of abuse is very real, these figures were alarming and were indeed what led to the system's change. But for those who take seriously the empirical data that has time and again portrayed the crushing financial distress experienced by the overwhelming majority of consumer bankruptcy filers, the pre-BAPCPA system was a remarkable success. It remains a worthwhile bench-

496. *See supra* tbl.3a.

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mark as we move forward with strategizing about where consumer bankruptcy should go from here.