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Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform

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by

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Change is in the air in the bankruptcy system. An omnibus bankruptcy bill has substantially amended titles 11 and 28 of the United States Code,[1] and the professionals involved with bankruptcy are working hard to prepare for the quickly approaching effective date.[2] They are writing and revising books, developing new rules of procedure and forms, updating and expanding case software, starting or re-tooling credit counseling and financial education programs, and holding workshops and conferences around the country. All of this activity suggests that something big is happening.

But will bankruptcy really be so different a year from now, two years from now, five years from now? And how will these changes affect people who are candidates for personal bankruptcy? I argue in this Article that one must look beyond the statutory revisions to answer these questions.[3]

Legal and sociological research suggests that the bill's impact will be filtered through the influences of day-to-day actors in the bankruptcy sys-

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[1] *See* S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [hereinafter BAPCPA], Pub. L. No. 109-8, 119 Stat. 23 (2005). [Most future references will be to the codified provision, i.e. 11 U.S.C. § ___ (2005).] This bill as enrolled has fifteen titles and over two hundred sections, many of which make multiple changes to title 11, title 28, and other parts of the United States Code. *Id.*

[2] Most of the bill is effective on October 17, 2005, 180 days after President Bush signed the legislation. *See* S. 256, 109th Cong. § 1501 (2005). Certain portions have a different effective date. *See* S. 256 §§ 324, 325(d), 434(b), 601(c), 603(e), 1001(a)(2), 1003(c), 1223(e), 1234(b), 1301(b)(2), 1302(c)(2), 1303(b)(2), 1304(b)(2), 1305(b)(2), 1306(b)(2), 1404(b), 1406, 1501(b).

[3] *See, e.g.*, Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 Nw. U. L. Rev. 1498, 1549 (1996) [hereinafter *Law in Lawyers' Heads*].

tem.[4] As in the past, this filtering may mute or magnify certain statutory changes and may produce variation around the country.[5] Assessments of the impact of formal law changes are incomplete without taking this filtering into account.

Notwithstanding this filtering, it is reasonable to predict that the changes will make bankruptcy more complicated and expensive for bankruptcy filers to some extent.[6] Even so, the real life impact of the changes is unclear. Researchers know little about filers *after* bankruptcy or about how their recovery compares with that of insolvent individuals who avoid bankruptcy.[7] If studies were to find that many filers confront serious financial trouble again two or three years after bankruptcy, then they might call into question the effectiveness of bankruptcy. Similarly, if studies were to find that non-filers with similar profiles recover equally well through non-bankruptcy means, then statutory changes that make bankruptcy more difficult may not be as consequential as they seem. Ultimately, therefore, it is difficult to characterize the impact of these changes on financially distressed individuals without knowing more about the effectiveness of bankruptcy in an absolute and comparative sense.[8]

Part I offers an overview of the statutory changes. Part II explores how the day-to-day influences of the bankruptcy system might affect the statutory changes. Part III describes the limits of research on personal bankruptcy filers and explains how this affects predictions of the impact of reform.

I. STATUTORY BANKRUPTCY REFORM

After almost eight years of intermittent consideration, the omnibus bankruptcy bill officially has become part of the formal law.[9] As the biggest set of statutory amendments to bankruptcy law in a generation, the bill has added hundreds of provisions, exceptions, qualifications, and requirements to the Bankruptcy Code and other portions of the United States Code along with a

[4] *See infra* text associated with notes 45-80. For a list of "system players," see Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 520-521 (2004). R

[5] *See infra* text associated with notes 45-80. R

[6] *See generally* Melissa B. Jacoby, *Generosity Versus Accessibility: Bankruptcy, Consumer Credit, and Health Care Finance in the US*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 297-298 (JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY, WILLIAM WHITFORD, EDS. 2003). *See also* Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L. J. 81, 108 (2002) (noting how costs and complex bureaucracy affect use of bankruptcy in other countries).

[7] *See generally infra* text associated with notes 92, 94, and 105. R

[8] *See infra* text associated with notes 82-113. R

[9] Prior bills containing some iteration of the ultimate changes include S. 1301, 105th Cong. (1997); H.R. 2500, 105th Cong. (1997); H.R. 3150, 105th Cong. (1998); H.R. 833, 106th Cong. (1999); H.R. 333, 107th Cong. (2001); and H.R. 975, 108th Cong. (2003). For a history, see, e.g., Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1095-1106 (2004).

host of uncodified duties and pronouncements.[10] Many, although not all, of the provisions are relevant to personal bankruptcy.[11]

Most of the attention has been showered on a provision requiring that chapter 7 cases be screened solely on the basis of ability to repay debts.[12] At least in some locations, this new statutory means test – presumably designed to encourage more chapter 13 repayment plans or to deter filings altogether – may be less important than many other changes. First, although chapter 13 filings are about 30% of personal bankruptcy filings overall, much higher proportions of debtors in some districts already are choosing chapter 13 over chapter 7.[13] Second, although the means test imposes paperwork requirements on nearly all individual chapter 7 bankruptcy filers with primarily consumer debts, most filers have too little income for their cases to be the subject of motions to dismiss or convert on the basis of the means test.[14] Third, at least in some districts, trustees already have been screening chapter 7 cases for ability to pay and other factors. In recent years, the Executive Office for United States Trustees has required that trustees screen chapter 7 cases for ability to pay.[15] Even before the EOUST took this step, an empirical study

[10] *See* BAPCPA, *supra* note 1. The other significant pieces of bankruptcy legislation since 1978 were enacted in 1984 and 1994, *see* Pub. L. No. 98-353, 98 Stat. 333 (1984); Pub. L. No. 103-394, 108 Stat. 4107 (1994), although many other pieces of legislation have amended the Bankruptcy Code. For a list of such bills through 1994, see Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801, 864 n.161 (1994) [hereinafter *Local Legal Culture*]. R

[11] Many Bankruptcy Code provisions have grown in length considerably due to the omnibus bill. *See, e.g.*, 11 U.S.C. § 362 (2005) (automatic stay); *id.* § 521 (debtor's duties); *id.* § 523 (exceptions to discharge); *id.* § 524 (discharge and reaffirmation agreements); *id.* § 704 (trustee duties); *id.* § 707 (dismissal or conversion). In addition, the bill added many new provisions, some of which are pertinent to personal bankruptcy. *See, e.g.*, *id.* § 111 (credit counseling and financial management regulation); *id.* § 112 (disclosure of name of minor children); *id.* §§ 526-528 (debt relief agencies); *id.* § 1115 (property of estate in case of individual chapter 11 debtor); *id.* § 1308 (tax returns).

[12] *See* Jacoby, *supra* note 9, at 1127 n.176. *See also* sources cited in note 42. R

[13] *See, e.g.*, Gordon Bermant & Ed Flynn, *Stability and Change in Chapter 13 Activity (1990-1999)*, AM. BANKR. INST. J., Nov. 2000, at 20; Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, AM. BANKR. INST. J., July/Aug. 2000, at 22.

[14] *See, e.g.*, Ed Flynn & Gordon Bermant, *Pre-planning Limits Means Test Impact*, *Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, AM. BANKR. INST. J., Feb. 2000, at 22 (reporting that under 16% of their nationally representative sample had incomes above state median). For the income-related safe harbor, see 11 U.S.C. § 707(b)(7) (2005). All individual chapter 7 filers with primarily consumer debts must complete some paperwork under section 707(b)(2)(C) unless they are disabled veterans who meet the requirements of section 707(b)(2)(D). *See id.* § 707(b)(2).

[15] *See, e.g.*, United States Department of Justice, Executive Office for United States Trustees, Handbook for United States Trustees, 6-11 – 6-13 (2002, includes technical amendments effective January 1, 2005), *available at* http://www.usdoj.gov/ust/library/chapter07/forms/Ch7hb0702-2005.pdf; United States Department of Justice, U.S. Trustee Program, Annual Report of Significant Accomplishments 7-8 (2001) (on file with author); Antonia G. Darling & Mark A. Redmiles, *The Civil Enforcement Initiative: A Review of the First Ten Months and a Look at the Next Stage*, AM. BANKR. INST. J., Sept. 2002, *available at* http://www.usdoj.gov/ust/press/articles/abi_092002.htm (reporting that "an increasing number of offices are now reviewing all Chapter 7 petitions for substantial abuse and other indicia of problems. This

found that all United States trustee office respondents reported some method of screening chapter 7 cases, with 30% screening exclusively on the basis of ability to pay and the rest considering a variety of factors.[16] The possibility that cases already were being screened is consistent with studies estimating that a statutory means test applied to today's filers would not produce a lot of presumptively abusive cases.[17] Fourth, debtors who otherwise might have presumptively abusive cases can alter the outcome of the means test by incurring more secured debt or making charitable contributions, leaving the United States trustee or creditors to seek dismissal of their cases on generic grounds similar to those that existed under prior formal law.[18]

Of course, the means test consumes only a tiny fraction of the long omnibus bill and of the revisions to the Code. Those who have refrained from studying the bill until final passage are likely to be surprised by the range and apparent magnitude of changes that they find. At least in theory, provisions that directly alter the cost of a bankruptcy filing could have a more significant impact in engineering debtors' choices. Although revisions to the Judicial Code permit courts to waive filing and related fees for the lowest-income chapter 7 filers,[19] other revisions significantly raise the basic filing fee for chapter 7 from $155 to $220 while they lower the basic chapter 13 fee from $155 to $150.[20] The revised Bankruptcy Code permits providers of mandatory credit counseling and financial education courses to charge bank-

has resulted in more debtors converting their cases to Chapter 13 and more dismissals of Chapter 7 cases, either by the court or by debtors who voluntarily dismiss their cases when the U.S. Trustee scrutinizes their income and expenses."); Lawrence Friedman, Director, *Executive Office for United States Trustees, A New Approach to Accountability in the Bankruptcy System*, AM. BANKR. INST. J., June 2002, *available at* http://www.usdoj.gov/ust/press/articles/abi_062002.htm ("all of our offices are reviewing Chapter 7 petitions for evidence of fraud and abuse").

[16]*See* Wayne R. Wells, Janell M. Kurtz, & Robert J. Calhoun, *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 CLEV. ST. L. REV. 15, 43 (1991).

[17]*See* sources cited *infra* notes 84-85. R

[18]*See* 11 U.S.C. § 707(b)(1) (2005) (prohibiting courts from taking into account charitable contributions when determining whether case is abusive under any portion of section 707(b)); *id.* § 707(b)(2)(iii) (permitting deduction for secured debt payments owed within sixty months following the date of the petition for purpose of presumed abuse determination); *id.* § 707(b)(3) (providing grounds that court shall consider under section 707(b)(1), including totality of circumstances).

[19]*See* 28 U.S.C. § 1930(f) (2005) (permitting court to waive chapter 7 filing fee, and additional fees, if the court finds that the individual has income less than 150% of the "official poverty line" and is unable to pay the fee in installments). *See generally* Ed Flynn & Gordon Bermant, *The Impact of the Coming Fee-waiver Provision*, AM. BANKR. INST. J., July/Aug. 2001 (using sample of no-asset chapter 7 cases filed between 1998 and 2000, finding that "29.7 percent of individual chapter 7 debtors have incomes that are less than 150 percent of the applicable poverty line").

[20]*See* 28 U.S.C. § 1930(a) (2005). *See also* Memorandum from Glen K. Palman, Chief, Bankruptcy Court Administration Division, Administrative Office of the United States Courts to Clerks, United States Bankruptcy Courts regarding Clarification of Effective Date of Statutory Fee Increases and Reallocation of Fees for Bankruptcy Cases to October 17, 2005 (May 13, 2005) (on file with author) (providing fee schedule to reflect changes in omnibus bankruptcy bill and supplemental appropriations bill). The debtor must pay other fees in addition to the filing fee. *See id.*; 28 U.S.C. § 1930(b)-(d) (2000).

ruptcy filers a "reasonable fee."[21] In addition, the revisions to the Bankruptcy Code may lead debtors' lawyers to raise their own fees considerably, assuming they continue to represent debtors at all.[22]

The revised Bankruptcy Code also offers less debt relief across the board, even to chapter 7 filers who do not have presumptively abusive cases under the means test and to chapter 13 filers who manage to complete repayment plans. The revisions to the Code make a broader range of debts presumptively or absolutely non-dischargeable, including for-profit student loans, credit card debts, credit card cash advances, and property settlements not in the nature of support.[23] Debtors who finish chapter 13 repayment plans no longer will have earned a substantially broader "superdischarge" than chapter 7 debtors.[24] Discharges are available less frequently for all personal filers.[25]

The formal rules for keeping property subject to security interests also have changed. According to the revised Bankruptcy Code, lien avoidance is

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[21] An individual's eligibility for bankruptcy is conditioned on receipt of a nonprofit credit counseling briefing within 180 days before filing. *See* 11 U.S.C. § 109(h) (2005). The requirement does not apply if the United States trustee or bankruptcy administrator determines that available services are inadequate, *id.* §§ 109(h)(2)) & 111, if a debtor satisfies the requirements for a temporary exemption, *id.* § 109(h)(3), or if a debtor satisfies the requirement for one of the "status" exceptions. *Id.* § 109(h)(4) (rendering eligibility requirement inapplicable if the debtor is on active military duty in a military combat zone or is unable to complete the requirements because she fits statutory definition of incapacity or disability). The service providing the briefing may charge a reasonable fee but must provide the briefing "without regard to ability to pay the fee." *Id.* § 111(c)(1)(B). Completion of a financial management course is a condition of a chapter 7 and chapter 13 discharge, subject to exceptions similar to those for credit counseling. *Id.* § 727(a)(11); *id.* § 1328(g); *id.* § 111. For a discussion of the implications of these provisions, see *infra* text associated with notes 70-80. R

[22] *See, e.g.*, 11 U.S.C. § 101(12A) (2005) (defining debt relief agency to include lawyers); *id.* § 526-528 (regulating debt relief agencies and their communications with clients and imposing sanctions); *id.* § 707(b)(4)(B) (lawyer sanctions); *id.* § 707(b)(4)(C) (importing Rule 11 requirements); *id.* § 707(b)(4)(D) (providing that "signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."). *See generally* Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 441-442 (2002); Catherine E. Vance, *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition of Sanctions Against Debtors' Counsel*, 106 COM. L. J. 241 (2001); M. Clarkson McDow, *The Bankruptcy Reform Act of 2001 and its Impact on Consumer Lawyers*, S.C. LAWYER, July/Aug. 2001, at 32; Hon. A. Thomas Small & Hon. Eugene R. Wedoff, *A Proposal for More Effective Bankruptcy Reform*, at 5 *available at* http://www.abiworld.org/pdfs/LegisProposal256.pdf (noting that requiring attorneys to investigate schedule accuracy, when debtors already have obligation to provide complete and accurate disclosure raises costs of legal representation and interferes with attorney-client relationship).

[23] *See, e.g.*, 11 U.S.C. § 523(a)(2)(C) (2005) (presumptive fraud of credit card debts and cash advances); *id.* § 523(a)(8)(B) (for-profit student loans); *id.* § 523(a)(14)(A) (debts incurred to pay state or local taxes); *id.* § 523(a)(14)(B) (fines or penalties imposed under Federal election law); *id.* § 523(a)(15) (property settlements nondischargeable without affirmative defense or balancing test); *id.* § 523(a)(18) (loans to pension plans). *See generally* Hon. William Houston Brown, *Taking Exception to a Debtor's Discharge: The 2005 Bankruptcy Act Makes it Easier*, 79 AM. BANKR. L. J. 419 (2005).

[24] *See* 11 U.S.C. § 1328(a) (2005) (limited discharge after chapter 13 plan completion).

[25] *See id.* § 727(a)(8) (extending time between receipt of discharges to eight years); *id.* § 1328(f) (new restrictions on granting discharge in chapter 13 based on receipt of discharge in prior case).

available for only a limited list of household items,[26] the price to redeem property has increased,[27] non-consensual "ride-through" for personal property is prohibited,[28] and new procedures for reaffirmation agreements are in place.[29] The revised Code also appears to increase the price of keeping property in chapter 13 in numerous respects.[30]

Other revisions increase protection of debtors' assets but only to the extent they hold their wealth in particular forms. For example, the revised Bankruptcy Code insulates qualified retirement and educational funds from the reach of creditors.[31] And, for the small handful of filers with major assets, the revised Code preserves the use of generous state law property exemptions in many instances.[32]

Finally, the revisions to the Bankruptcy Code alter the substance and procedure throughout the cases of individual bankruptcy filers. The matters affected by these changes include document production,[33] personal property

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[26]*See id.* § 522(f)(4) (exclusive list of what constitutes "household goods" for purposes of lien avoidance).

[27]*See id.* § 506(a)(2) (imposing standard of replacement value, without deductions for costs of sale or marketing, for personal property subject to security interest for debtor in chapters 7 or 13). *See also id.* § 722 (clarifying that debt must be paid in full at time of redemption).

[28]*See id.* § 521(a)(6) (setting forth exclusive list of options for property subject to security interests and consequences of failing to act on intention); *id.* § 365(h) (providing automatic stay-related implications for failure to file statement of intention or to act on statement of intention).

[29]*See id.* §§ 524(k) - (m).

[30]Most significantly, several revisions to the Bankruptcy Code further limit the ability of a chapter 13 plan to modify undersecured claims over the objection of the lender. Modification refers to the ability to limit the secured claim to the value of the collateral and to pay 100% of that claim, and to treat the remainder of the debt as unsecured and entitled to a pro rata share of the debtor's disposable income. *See generally* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 900, 920-924 (1997). The revised Code disallows modification of purchase money obligations secured by cars if the debt was incurred within 910 days prior to the bankruptcy filing, and disallows modification of obligations secured by "any other thing of value" if the debt was incurred within one year before the bankruptcy filing. *See* 11 U.S.C. § 1325(a) (2005). The revised Code also clarifies that debts secured by mobile homes and incidental property fall within the general prohibition of modifying debts secured by a debtor's principal residence. *See id.* § 101(13A) (defining "debtor's principal residence"); *id.* § 101(27B) (defining incidental property). For the general prohibition on modifying loans secured by the debtor's principal residence, see TABB, at 920-924. For secured loans still subject to modification in chapter 13, the revised Code dictates the use of the replacement value standard, without deductions for the costs of sale or marketing. *See* 11 U.S.C. § 506(a)(2) (2005). *Compare* Associates Commercial Corp. v. Rash, 520 U.S. 953, 965 n.6 (1997) (providing that replacement value was standard, but "creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning").

[31]*See, e.g.*, 11 U.S.C. § 522(b)(3)(C) (2005) (retirement savings exemption for debtors in opt-out states); *id.* § 522(d)(12) (new provision for debtors using federal exemptions), *id.* § 522(n) (limitation for IRAs); *id.* § 541(b)(5) (exclusion from property of estate for qualified education accounts). The bill furthers this insulation of retirement assets by protecting a debtor's ability to repay a loan to her pension plan. *See id.* § 362(b)(19) (exception to automatic stay for withholding of wages for pension loan repayment), § 523(a)(18) (exception to discharge for debt to pension plan).

[32]*See id.* § 522(o)-(q) (imposing limitations in the delineated circumstances).

[33]*See id.* § 521(a) – (j).

leases,[34] residential leases,[35] chapter 13 "adequate protection" payments,[36] disposable income calculations,[37] the entry of discharges in chapter 13,[38] the maintenance of the automatic stay in a second (or third) bankruptcy case,[39] and significant aspects of chapter 11.[40]

While the omnibus bill producing these changes was pending in Congress, supporters and others offered various assessments of the impact of these changes. Academics and bankruptcy professionals critical of the bill regularly predicted a major, and usually negative, impact on the personal bankruptcy system and the filers themselves.[41] Presumably believing that the chapter 7 means test was the key change, Congressional supporters sometimes stated that the bill would not alter bankruptcy other than for a small number of high-income filers.[42] Other supporters pronounced that the revisions would

[34] *See id.* § 362(h); *id.* § 521(d).

[35] *See id.* § 362(b)(22)-(23); *id.* § 362(l) -(m).

[36] *See id.* § 1326(a)(C).

[37] *See id.* § 1325(b)(2)-(3).

[38] *See id.* § 1328(h) (requiring hearing on whether section 522(q) is implicated). The rules of construction of the Bankruptcy Code suggest that the hearing may not be required if notice is properly provided. *See* 11 U.S.C. § 102(1) (2000) (explaining meaning of notice and hearing).

[39] *See* 11 U.S.C. § 362(c) - (d) (2005) (limited automatic stay for repeat filings).

[40] *See, e.g., id.* § 1115 (new provision making all postpetition earnings property of the estate); *id.* § 1123(a)(8) (new condition of confirmation involving payment of all future earnings); *id.* § 1129(a)(15) (new condition of confirmation linked to satisfaction of chapter 13 requirements).

[41] *See, e.g.*, Jean Braucher, *Middle Class Knowledge*, 21 EMORY BANKR. DEV. J. 193, 197 (2004) (reviewing ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003)) (explaining that "legislation would burden all would-be filers, leaving more debtors to continue to be hounded by debt collectors into paying small amounts of what they owe."); Braucher, *Means Testing Consumer Bankruptcy, supra* note 22, at 430, 433 R (legislation "would burden even the worst off, while leaving some inequities and potential abuse in place, and risk bringing the system to its knees with new, often pointless paperwork" and that her "examination of the provisions of the proposed legislation will focus on demonstrating that they are complex and confusing and would burden even those debtors most in need of a fresh start, without catching all abuse . . ."); Walter W. Miller, Jr., *The Proposed "Bankruptcy Abuse Prevention and Consumer Protection Act of 2002*," 22 ANN. REV. BANKING & FIN. L. 301, 308 (2003) (explaining that bill would exclude "uninformed, and genuinely needy" from bankruptcy protection and describing bill as "harmful to consumers"); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?* 18 BANKR. DEV. J. 1, 5-6 (2001) ("Bankruptcy reform in its current form is draconian for those financially vulnerable 'fragile middle class' debtors who have been the most in need of bankruptcy relief"); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L. J. 361 (2003); Jean Braucher & Charles W. Mooney, Jr., *Means Measurement Rather Than Means Testing: Using the Tax System to Collect from Can-Pay Consumer Debtors after Bankruptcy*, AM. BANKR. INST. J., Feb. 2003, at 6 ("the predictable effect would be to drive up fees of lawyers and document-preparers. Some of the worst-off debtors would be unable to afford a bankruptcy discharge"). *See generally* Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301, 303-304 (2004) (noting academics' general opposition to the bill even though they accepted prevailing conceptions of abuse). *But see* Todd J. Zwyicki, *An Economic Analysis of Consumer Bankruptcy*, George Mason Working Paper (2005) (arguing that generous bankruptcy laws impose economic and noneconomic costs and that bankruptcy laws must strike proper balance).

[42] *See, e.g.*, 151 CONG. REC. S2054 (daily ed. Mar. 4, 2005) (statement of Sen. Sessions) ("But on the question of, What about the changes? How does it impact a person who would go and file in bankruptcy?

bring a big shift in bankruptcy, or at least a big cost savings for non-bankrupt American families.[43] The Executive Office For United States Trustees' website reports that enactment of the bill "opens a new era in the history of bankruptcy law and practice."[44]

Most, although not all, of these positions could find some support in the Code revisions. Yet, the extent to which these various predictions actually come to fruition depends on many factors, discussed in Part II.

II. STATUTORY BANKRUPTCY REFORM AND REAL PEOPLE: THE DAY-TO-DAY SYSTEM ACTORS

> Local legal culture is not just dust in the national legal machine. In fact, it may be a significant element of the legal landscape. Failure to account for it causes policy debates as well as legal reforms to fall wide of their marks.[45]
>
> Thus, it is never the case that the legal system of any country is uniform, unified, and able to cover the whole country

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We know that 80 percent of the people who file for bankruptcy make below median income. That means under the provisions of this bill, no fundamental changes will occur."); 151 CONG. REC. H2066 (daily ed. Apr. 14, 2005) (statement of Rep. Jim Moran) ("It is estimated that only a small minority of those already filing for bankruptcy would be affected, perhaps as little as 7 percent. Contrary to some reports, families and individuals facing difficult economic circumstances, people who may have lost their job or family breadwinner or have been devastated by a severe medical condition, will be given a chance to clear their debts and receive a fresh start under this bankruptcy reform legislation."); Press Release, Representative Ed Royce, House Passes Bankruptcy Reform Bill (Mar. 19, 2005) *available at* http://www.royce.house.gov/News/DocumentSingle.aspx?DocumentID=2604 ("This reform protects the rights of those who truly need and deserve a fresh start as determined by legal standard. Those who fall below the median threshold, as well as those with extraordinary circumstances like medical expenses, will not be subject to any change from current law."); News Release, Opening Statements of Sen. Chuck Grassley at the Bankruptcy Reform Hearing, Feb. 10, 2005, *available at* http://grassley.senate.gov/index.cfm?FuseAction=pressReleases.Detail&PressRelease_id=4878&Month=2&Year=2005 ("The fact is S. 256 doesn't harm bankrupts with large medical debts.").

[43] *See, e.g.*, 151 CONG. REC. H2047-48 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner) ("This legislation represents the most comprehensive reforms of the bankruptcy system in more than 25 years. . . This bill will help stop fraudulent, abusive, and opportunistic bankruptcy claims by closing various loopholes and incentives that have produced steadily cascading claims."); 151 CONG. REC. H1980 (daily ed. Apr. 14, 2005) (statement of Rep. Dreier) ("On average, passage of this legislation will save a family of four $400 a year, and $400 a year is a very important amount of money for an awful lot of people in this country, and that is the price that they are paying because of the abuse that we have seen of our bankruptcy law that has been going on for years and years and years.").

[44] Executive Office For United States Trustees, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *available at* http://www.usdoj.gov/ust/bapcpa/index.htm (reporting on new law).

[45] Sullivan, Warren & Westbrook, *Local Legal Culture*, *supra* note 10, at 865. *See also* Teresa A. R
Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Culture*, 20 J. CONSUMER POL'Y 223, 225 (1997) ("these data suggest that, while formal law is an important determinant of the U.S. bankruptcy system, local legal cultures have developed that create different bankruptcy systems among the districts").

> like a smooth coat of paint.[46]
> Complex written law can produce a determinate system, but cannot control what it will be.[47]

Informed by a variety of bankruptcy and non-bankruptcy studies, many academics share the belief that the bankruptcy system is not simply imposed on judges, trustees, lawyers, and other repeat players; instead, these parties make the system what it is today.[48] Bankruptcy may be especially susceptible to shaping by the day-to-day actors because the vast majority of cases yield no formal litigation, let alone appeals.[49] Whether one prefers a precise model of local legal culture or a more generalized recognition of the role of real people, this inevitable shaping and filtering complicate statute-centered assessments of the future of bankruptcy. Indeed, as is discussed later in this section, the latest revisions may invite system players to shape the system much more than Congress anticipated.

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[46]Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 67 (1996).

[47]LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1549. R

[48]*See, e.g.*, Rafael Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 EMORY BANKR. DEV. J. 351, 352-53 (2004) ("Law and society scholars attribute some of the disparity between the formal laws and the laws in actions [sic.], as well as the substantial local variations in the implementation of the laws, to the influence of legal culture. . . . Researchers sometimes use legal culture to explain apparent disparities between formal laws and the actual implementation of the laws on the ground."); LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1508 ("The examples I present here are only a small sample from a large R body of empirical studies showing deviation of the law in action from the law on the books. I refrain from presenting more only because the existence of substantial deviations is not in dispute."); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 1003 (2004) (explaining that "most bankruptcy lawyers and bankruptcy judges use, apply, argue, and shape bankruptcy law primarily as actors 'on the ground.' It is in the bankruptcy courts, and within negotiations in the courts' shadows, where bankruptcy law is made and shaped by a particular legal culture. Bankruptcy law in a given bankruptcy court also is a function of the attitudes of bankruptcy judges, who have substantial control over the fate of a case."); David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 56 (2004) (explaining that use of chapter 13 has been determined more by local legal culture than by other factors); Trujillo, *supra* note 4, at 509-515; Jay R Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 26-27 (1998).

[49]For example, in the year ending September 30, 2003, parties filed fewer than 100,000 adversary proceedings in bankruptcy cases – and even this was a significant increase compared to prior years— notwithstanding a total bankruptcy caseload of over 1.5 million. *See* Judicial Business of the Federal Courts, The Third Branch, Mar. 2004, *available at* http://www.uscourts.gov/ttb/mar04ttb/substantial/ ("For the year ending September 30, filings of adversary proceedings jumped 31 percent in 2003 to 96,809, the highest number reported in 20 years."). In fiscal year 2004, parties filed fewer than 3,000 bankruptcy appeals with the United States district courts, again notwithstanding the overall filing statistics. *See* United States District Court, Civil Cases Filed By Nature of Suit, tbl. 2.2, *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf In the five circuits that have Bankruptcy Appellate Panels, parties filed around 1,000 appeals annually in 2003 and 2004. *See* Judicial Business of the United States Courts 2004, 122 tbl. B-10, *available at* http://www.uscourts.gov/judbus2004/contents.html. *See generally* Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. EMPIRICAL LEGAL ST. 913 (2004).

Well before Congress started considering the omnibus bankruptcy bill, researchers were observing significant local variation in and deviations from formal bankruptcy law.[50] For example, a researcher reported that chapter 13 plans in one city in the early 1980s lasted for seven, eight or nine years even though the Bankruptcy Code said then (and now) that courts may not approve plans for longer than five.[51] Several researchers have found judges and trustees who impose on chapter 13 plans an unsecured debt repayment requirement – 10% in some places, 100% in others – that appears to be entirely extra-statutory.[52] Examples of existing deviations of this nature could fill this entire journal symposium.

Congress did not outlaw local culture when it passed the 2005 omnibus bankruptcy bill. Even with its hundreds of amendments, the bill changed neither the overarching structure of the system nor the fundamental roles of the day-to-day actors, although it adds a few actors to the mix, such as credit counselors and financial management course providers. Two implications flow from this. First, in the absence of very explicit resolution, existing variations and deviations of the nature noted above likely will persist.[53]

Second, the revisions themselves may look quite different once filtered through the influences of the day-to-day actors. In some instances, financial constraints may dictate a different result than that anticipated by the revisions. For example, the Bankruptcy Code revisions change the way that chapter 13 plans deal with car loans.[54] Under former law, a plan could be confirmed over a car lender's objection if the debtor promised to pay 100% of the value of the car with interest and to pay a pro rata share of any remainder

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[50] *See, e.g., supra* sources cited in note 48. R

[51] *See* Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L. J. 17, 44 (1989-1990). The statutory reference to the length of plans at the time of Girth's study was 11 U.S.C. § 1322(c) (1988). *See* Girth, at 44 n.175. The reference is now 11 U.S.C. § 1322(d), and also has been changed to enable five year plans without showing cause for above-median income debtors. *See* 11 U.S.C. § 1322(d) (2005).

[52] *See, e.g.*, Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices – A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 166 n.3, 174, 178 (1997) [hereinafter *Counseling Consumer Debtors*]; Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L. J. 501, 532-534 (1993) [hereinafter *Lawyers and Consumer Bankruptcy*] (study of lawyers and consumer bankruptcy in four cities, including incentives to promise high repayment in chapter 13); LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1506-1507; Sullivan, Warren & Westbrook, *Local Legal Culture*, *supra* note 10, at 817 ("How much the debtors repay is subject to wide R variation. From the start, debtors vary greatly in how much they promise to pay, and courts vary in what levels of promised repayment they will approve. At times one hundred percent payment is promised, and at other times, unsecured creditors are promised no payment at all."); *id.* at 832, fig. 5, 833 (showing variation in chapter 13 repayment promises by district); 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, 410-412 (1994); Report of the National Bankruptcy Review Commission 267-268 (1997) [hereinafter Commission Report].

[53] *See* LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1515-1516. R

[54] *See* sources cited *supra* note 30. R

out of disposable income.[55] The revised Code no longer supports this approach for purchase money car loans securing debts incurred within 910 days prior to the bankruptcy filing.[56] If a chapter 13 filer wishes to keep the car over the lender's objection, the filer must pay the debt in full, plus interest, regardless of the worth of the car.[57]

Perhaps those who sought these changes assumed debtors will pay whatever it takes to keep their cars. Maybe they will be right. But maybe chapter 13 filers will propose to surrender their cars in chapter 13,[58] or simply allow lenders to repossess and liquidate their collateral because they can neither get a plan confirmed nor complete it.[59] Lenders may not want to deal with all of these used cars. If that is the case, lenders and debtors may make deals resembling the old formal law of chapter 13: the debtor will retain the car and pay something less than the full value over time with interest. If this happens, chapter 13 will not be the same as before—the statutory change has reduced debtors' leverage—but it will not be as different as the revised statutory language suggests.

Similarly, the revised Bankruptcy Code requires that chapter 13 filers make adequate protection payments directly to secured creditors but provide detailed evidence of these payments to the trustee so they can deduct these amounts from later plan distributions.[60] When put into practice, this could present accounting difficulties and confusion that hampers payments to the very creditors the provision was designed to assist. At least in some districts, secured creditors may decide they are better off if adequate protection payments are funneled through the trustee's office. Demanding direct receipt, as the revised Code entitles them to do, may or may not be in creditors' best interest, and their best interest probably will dictate whether substantive and procedural changes in the Code produce big changes in real life.

In other circumstances, the revisions to Bankruptcy Code may not be sufficiently absolute to overcome deep-seated beliefs among the day-to-day players. For example, the statute restricts application of the automatic stay to repeat filers.[61] Under this provision, if a debtor files a second case within

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[55] *See* 11 U.S.C. § 1325(a)(5)(B) (2000); TABB, *supra* note 30, at 922. For the method of determining the appropriate interest rate in this situation, see Till v. SCS Credit Corp., 541 U.S. 465 (2004). R

[56] *See* 11 U.S.C. § 1325(a) (2005) (providing exception to general approach to valuation of secured claims). The language was added to the very end of subsection (a), after clause (9).

[57] *See id.*

[58] Surrender of the property without the consent of a lender is a method of obtaining confirmation of a chapter 13 plan. *See id.* § 1325(a)(5)(C).

[59] *See* Melissa B. Jacoby, *Collecting Debts from the Ill and Injured; The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 258 n.129 (2001) (citing chapter 13 trustee survey available on Internet at that time).

[60] *See* 11 U.S.C. § 1326(a)(1)(C) (2005).

[61] *See id.* § 362(c)(3). This supplements an existing, and rather weak, statutory restriction on eligibility for subsequent chapter 13 filings in a narrow set of cases, *id.* § 109(g), although courts had devised other

one year of the time a prior case was pending, the automatic stay goes into effect for only thirty days.[62] A party in interest can ask the court to extend the automatic stay, but must prove that the filing is in good faith, which in some cases requires overcoming a contrary presumption with clear and convincing evidence.[63] The circumstances that produce this presumption include routine occurrences, such as missing a deadline or a payment in a prior case.[64] Although the provision's application is not limited to chapter 13, these details suggest that its intended effect probably is geared toward that chapter.[65]

At first blush, these revisions appear to deter repeat filings for at least a year; overcoming this presumption looks difficult and debtors with inflexible jobs may find it difficult to attend such hearings.[66] However, in some locations, the belief in second (and third) chances in chapter 13 is probably quite strong, especially if system actors think that chapter 13 promotes values like repayment and fulfilling commitments.[67] These beliefs presumably are what motivate courts and trustees to impose the extra-statutory unsecured debt repayment requirements mentioned earlier,[68] and to permit cases to go on for much longer than the statutory limit.[69] Unless a secured creditor is convinced that debtors have no chance of success and is willing to spend money to enforce the provision rigorously, local beliefs about the utility of chapter 13 probably will shape whether the new rules on repeat filings have a deterrent effect or whether they serve as a slight hindrance to business as usual.

In other instances, the drafters wrote revisions to the statute that are destined for variable application on rather significant matters. For example, as noted earlier, the revised Code requires a credit counseling briefing as a

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methods of dealing with abusive repeat filings. *See, e.g.*, Susan L. DeJarnatt, *Once is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L. J. 455, 467-468 (1999).

[62] *See* 11 U.S.C. § 362(c)(3)(A) (2005). A third case within the year produces no automatic stay at all, subject to the debtor successfully requesting that a stay be imposed. *See id.* § 362(c)(4). The bill contains a separate exception to the automatic stay to protect secured creditors from filings that repeatedly are designed only to prevent foreclosure with no intent to cure the default on the loan. *See id.* § 362(d)(4).

[63] *See id.* § 362(c)(3)(B), (C).

[64] *See id.*

[65] For data on chapter 13 repeat filings, see, e.g., sources cited *infra* note 110. R

[66] With the belief that the changes would be potent deterrents, some commentators who believe repeat filings generally are legitimate have expressed concern about these provisions. *See, e.g.*, DeJarnatt, *supra* note 61, at 467-468. On the other hand, deterrence of repeat filings would seem like a positive development to those who believe that the system over-uses dismissal with the expectation of a subsequent, that troubled repayment plans should be modified rather than dismissed, or that some districts' high chapter 13 counts are inflated by the same families filing multiple times. *See, e.g.*, Commission Report, *supra* note 52, at 276-279. R R

[67] Courts routinely dismiss chapter 13 cases for a variety of reasons, including failure to comply with administrative requirements or the incurrence of new debt, with the anticipation that the debtor will file another petition in the near future. *See, e.g.*, Commission Report, *supra* note 52, at 276- 279. R

[68] *See supra* text associated with note 52. R

[69] *See supra* text associated with note 51. R

condition of bankruptcy eligibility and completion of a financial management course as a condition of discharge, both of which may impose an unspecified "reasonable fee" on debtors.[70] Providers are not supposed to refuse services based on debtors' inability to pay this fee, but they face no impediment to charging and billing the debtors once they have provided the services.[71] These eligibility and discharge requirements do not apply at all if the United States trustee for that district determines services are insufficient.[72] The United States trustees are expected to regulate these providers amidst a huge array of other new responsibilities.[73] Credit counselors need to be nonprofit to be on the approved list for bankruptcy,[74] but providers of financial management courses do not.[75]

Whether or not sound policy justifications explain these details, they make the impact of these two new requirements quite uncertain and dependent on how the day-to-day actors put them into place. The willingness of private nonprofit credit counselors to provide these services at all may depend on how many of their clients file for bankruptcy and discharge the counseling fee.[76] If offering these services to potential bankruptcy filers becomes undesirable, counselors may abandon the enterprise or charge an impossibly high fee to deter usage. United States trustees may have little choice but to declare services insufficient in certain districts, which, according to the statute, makes the eligibility requirement ineffective.[77] On the other hand, debtor's lawyers may decide to become nonprofit credit counselors, offer inexpensive briefing services over the Internet or telephone, and ensure pay-

[70] *See* sources cited *supra* note 21. R

[71] *See* 11 U.S.C. § 111(c)(2)(B) (2005); *id.* § 111(d)(1)(E).

[72] *See id.* § 109(h)(2)(A) (making briefing requirement inapplicable to debtors who reside in a district for which a U.S. Trustee or bankruptcy administrator determines that approved providers "are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies"); *id.* § 727(a)(11) (providing similar exception for financial management course requirement); *id.* § 1328(g)(2) (providing similar exception).

[73] *See, e.g.*, Executive Office For United States Trustees, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *available at* http://www.usdoj.gov/ust/bapcpa/index.htm (summarizing certain new duties of United States trustees); Martha Davis, *Beyond The Bankruptcy Bill; Transparency in the Bankruptcy System*, AM. BANKR. INST. J., Apr. 2001, *available at* http://www.usdoj.gov/ust/press/articles/articles.htm (listing other data collection obligations, many of which will be undertaken by United States trustees).

[74] All references in new section 111 to budget and counseling agencies include the term "nonprofit" *See* 11 U.S.C. § 111(a)-(g) (2005). *See also id.* § 109(h) (also referring to "nonprofit").

[75] Unlike the references to credit counseling, the financial management course references do not include the term "nonprofit." *See id.* § 111(d); *id.* § 727(a)(11); *id.* § 1328(g). Of course, nonprofit status by itself offers few assurances. *See, e.g.*, Christopher Conkey, *Family Finance: Deterrent to Bankruptcy: Counseling: Congress's Overhaul of Code Would Require Sessions Before and After a Filing*, WALL ST. J., Apr. 6, 2005, at D2 ("The mandate for counseling comes amid a wave of scandals within the rapidly growing, largely nonprofit debt-services industry.").

[76] *See generally* 11 U.S.C. § 524(a) (2000) (delineating scope of discharge).

[77] *See* 11 U.S.C. § 109(h)(2) (2005).

ment before the case is filed through collaborating with their former debtor counsel colleagues. In this instance, the provision will be nominally operative, but may not have the tempering effect on the bankruptcy decision that Congress intended.

The personal financial management course requirement has some different details that also are susceptible to variable implementation. Congress could have imposed better controls on the consequences had it first instituted its intended pilot program.[78] The drafters apparently chose otherwise and have implemented the nationwide requirement concurrent with the pilot program.[79] The statute sets the stage for financial management courses to be more lucrative than credit counseling because, as noted above, the providers of financial management courses do not need to have nonprofit status, and they also are less likely to face a discharge of their fees, which are incurred after the filing of the case.[80] This may produce a range of financial management courses in various locations, with a range of associated fees that debtors must pay to emerge from bankruptcy with a discharge.

Like a package dropped from the top of a tall building, a statutory package dropped from Congress onto the bankruptcy system is unlikely to land intact. Even as bankruptcy professionals and judges work to implement the statutory changes faithfully and literally, the nature of legal systems and the details of these particular statutory changes practically dictate variable and divergent application. Whether the omnibus bankruptcy bill results in a ripple or a revolution for the personal bankruptcy system will depend on how the Bankruptcy Code revisions are filtered through the influences of the day-to-day actors trying to make the system work.

III. STATUTORY BANKRUPTCY REFORM AND REAL PEOPLE: PERSONAL BANKRUPTCY CANDIDATES

Perceptions of bankruptcy filers and perceptions of the omnibus bill often are linked. Those who believe filers have modest means and legitimate circumstances tend to doubt the desirability of the statutory revisions.[81] The

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[78]Section 105 of S. 256 implements a six-district, 18-month pilot program for financial management courses under the guidance of the Director of the Executive Office for United States trustees. *See* BAPCPA, *supra* note 1, § 105. *See generally* Jonathan Fox, Suzanne Bartholomae, & Jinjook Lee, *Building the Case for Financial Education*, 39 J. CONS. AFF. 195, 199 (2005) ("The common challenge facing organizations offering financial education is the need to show that their programs make a difference."); *id.* at 208 ("Currently, financial education programs often omit evaluation as a component of their program design."). R

[79]*See* BAPCPA, *supra* note 1, § 106. R

[80]*See generally* 11 U.S.C. § 524(a) (2000) (delineating scope of discharge).

[81]*See, e.g.*, Charles J. Tabb, *Of Contractarians and Bankruptcy Reform: A Skeptical View*, 12 AM. BANKR. INST. L. REV. 259, 262 (2004) (arguing that the case for means testing and other restrictions have not been made, partly due to modest profiles of existing filers). By contrast, those who believe that the legislation will have a positive effect tend to believe that the profiles do not explain the filing trends and

existing studies of bankruptcy filers do call into question the need for major restrictions in bankruptcy relief. Yet, it is possible to believe that filers have modest means and legitimate circumstances but to reserve judgment on whether the legislation will have a negative impact. The reason for reserving judgment is that the effectiveness of bankruptcy currently does not enjoy a wealth of empirical support.[82]

Whether intentionally or accidentally, proponents of means testing and related proposals have narrowed the empirical research agenda involving personal bankruptcy filers.[83] They repeatedly have emphasized that some chapter 7 filers could repay their debts if required to do so and have commissioned various studies to support this assertion.[84] Academic and government researchers have, in turn, invested time, energy, and available financial resources in evaluating the methodology of these "can they pay" studies and in producing and analyzing other datasets focused on the circumstances of bankruptcy filers.[85] The ongoing scramble to respond to repeated allegations of

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prefer to use other criteria in judging the utility of the reforms. *See, e.g.*, Zywicki, *supra* note 41 (arguing that commonly cited circumstances leading to bankruptcy cannot explain filing trends). R

[82]Systematic empirical research on how the bankruptcy system works has made great strides but the studies still are too few and far between. *Compare* Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2124 (2003) [hereinafter *Empirical Research*] ("Bankruptcy is a field in which there has been a relatively substantial amount of empirical work, especially in the last twenty years.") *with* Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161 (2002) [hereinafter *Politics of Research Access*] (arguing that there have been too few studies of bankruptcy, that court system hinders magnitude and content of research, and that Sullivan, Warren, and Westbrook "have completely dominated the field during [the last twenty years], producing what I estimate to be more than ninety percent of the work"). *See generally* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195 (1987) (noting limits of reliance on episodic studies).

[83]*See* Westbrook, *Empirical Research, supra* note 82, at 2136 ("The agenda for empirical research in consumer bankruptcy over the last twenty years has been largely set by the opponents of the allegedly pro-debtor structure created by the 1978 Bankruptcy Code."); *id.* at 2140 (making similar assertion).

[84]*See, e.g.*, Credit Research Center, Krannert Graduate School of Management, Purdue University, Consumer Bankruptcy Study (1982); Tom Neubig et al., Ernst & Young, LLP, Chapter 7 Bankruptcy Petitioners' Ability to Repay: Additional Evidence from Bankruptcy Petition Files (Feb. 1998); WEFA Group Planning Servs., The Financial Costs of Personal Bankruptcy (Feb. 1998); John M. Barron & Michael E. Staten, Credit Research Center, Georgetown Sch. of Bus., Personal Bankruptcy: A Report on Petitioners' Ability To Pay (1997).

[85]*See, e.g.*, Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091 (1983); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087 (1984), TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS; BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989) [hereinafter AS WE FORGIVE OUR DEBTORS]. *See also* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999) [hereinafter *Test Drive*] (concluding that 3.6% of the sample debtors would have presumptively abusive cases under earlier proposed means test legislation, but explaining why this estimate was quite optimistic); U.S. Gen. Accounting Office, Personal Bankruptcy: The Credit Research Center Report on Debtors' Ability to Pay, GAO/GGD-98-47 (Feb. 1998); U.S.

chapter 7 debtors' ability to pay has left little resources for other projects, especially given the difficulties involved in collecting data relating to the bankruptcy system.[86]

The "can they pay" focus of the research has resulted in significant developments in our understanding of bankruptcy filers' situations at the time of filing.[87] Sullivan, Warren, Westbrook and other collaborators have found personal bankruptcy filers with very low incomes, significant indebtedness, and seemingly legitimate problems that fueled their financial distress.[88] Other studies offer less information about the debtors' circumstances, but reveal similar information about their financial profiles.[89] The findings of these studies make some lawmakers' characterizations of bankruptcy filers seem incongruous.[90]

Gen. Accounting Office, Personal Bankruptcy: The Credit Research Center and Ernst & Young Reports on Debtors' Ability to Pay, GAO/T-GGD-98-79 (March 12, 1998); U.S. Gen. Accounting Office, Personal Bankruptcy Analysis of Four Reports on Chapter 7 Debtors' Ability to Pay, GAO/GGD-99-103 (June 1999); Congressional Budget Office, Personal Bankruptcy: A Literature Review 23-30 (Sept. 2000); Gordon Bermant & Ed Flynn, *Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, AM. BANKR. INST. J., Jan. 1999, at 8.

[86] *See infra* sources cited in note 111. R

[87] Indeed, Sullivan, Warren and Westbrook may never have gotten together had they not felt the need to respond to and critique the methodology of a "can they pay" study. *See* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L. J. 121, 122 n.5 (1994) [hereinafter *Consumer Debtors Ten Years Later*].

[88] *See, e.g., id.*, at 129 -130, 134-139 (reporting on 1981 and 1991 income, assets, and debt-income ratios); Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L. J. 115, 124-125 (2003) (reporting on 2001 data). The research also explores the types of problems debtors reported when they filed. *See generally* AS WE FORGIVE OUR DEBTORS, *supra* note 85; TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS; AMERICANS IN DEBT (2000); ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE 81 (2003) (reporting that 87% of 2001 sample reported medical problems, job problems, or family breakup, or some combination of the three).

[89] For example, having studied the petitions and schedules of a nationally representative sample of personal bankruptcy filers in the late 1990s and early 2000s, Bermant and Flynn have found debtors of very modest incomes, significant indebtedness, and limited ability to repay. *See, e.g.*, Ed Flynn & Gordon Bermant, *How Fresh is the Fresh Start?*, AM. BANKR. INST. J., Jan. 2001, at 20; Ed Flynn & Gordon Bermant, *Pre-planning Limits Means Test Impact*, *Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, AM. BANKR. INST. J., Feb. 2000, at 22; Ed Flynn & Gordon Bermant, *Demographics of Chapter 7 Debtors*, AM. BANKR. INST. J., Sept. 1999, at 24. Culhane & White's sample of debtors also was a modest and burdened group. *See, e.g,.* Marianne B. Culhane & Michaela M. White, *Debt After Discharge, An Empirical Study of Reaffirmation*, 73 AM. BANKR. L. J. 709, 762 (1999) [hereinafter *Debt After Discharge*]; Culhane & White, *Test Drive*, supra note 85. R

[90] *See, e.g.*, News Release, Opening Statement of Sen. Chuck Grassley at the Bankruptcy Reform Hearing, Feb. 10, 2005, *available at* http://grassley.senate.gov/index.cfm?FuseAction=pressReleases.Detail&PressRelease_id=4878&Month=2&Year=2005 ("When I started working on this issue, it was considered a scandal that bankruptcies might reach 1.4 million. Guess what? In 2004, there were 1.6 million. Congress has wasted time and we still have a bankruptcy crisis on our hands. . . . Most people think it should be more difficult for people to file for bankruptcy. Americans have had enough; they are

The observation that personal bankruptcy filers are legitimate users of the system is responsive to some important policy questions but not others. First, it does not directly speak to the question of whether bankruptcy maximizes social welfare generally.[91] Second, and more the focus of this discussion, it does not directly speak to the question of whether bankruptcy helps the people who actually file in the long term.[92]

Evaluating whether bankruptcy helps filers in the long term has a comparative component. If bankruptcy filers are a subset of financially distressed households in the working and middle classes, as some researchers believe, then many individuals with similar profiles to bankruptcy filers are dealing with their problems through other methods.[93] Although economic analyses have considered the effect of legal changes on the aggregate filing rate, it remains unclear why some financially distressed people file and others do not, and what happens to the latter group.[94] Some researchers have argued that other laws, whether in a current or modified form, could perform a similar function to bankruptcy and might be effective for individuals with certain kinds of problems.[95] If this were true, the revisions to the Bankruptcy Code would be less consequential. Even researchers who seem to believe that filers are honest and in need of help have expressed the concern that some debtors' lawyers may be too quick to put their clients into bankruptcy rather than

tired of paying for high rollers who game the current system and its loopholes to get out of paying their fair share. . . . Our current system allows wealthy people to continue to abuse the system at the expense of everyone else. People with good incomes can run up massive debts and then use bankruptcy to get out of honoring them.").

[91] *See, e.g.*, Kartik Athreya & Nicole B. Simpson, *Personal Bankruptcy or Public Insurance*? 3 (Fed. Reserve Bank of Richmond Working Paper No. 03-14, 2003) (considering the impact of permissive bankruptcy laws on moral hazard). For a review of this literature, see Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. (forthcoming 2005).

[92] *See, e.g.*, Mark L. Power, Tahira K. Hira and Roger P. Murphy, *Personal Bankruptcy, A Risk Management Technique: Policy Implications*, 2 RISK MANAGEMENT & INS. REV. 81, 81-82 (1998-99).

[93] *See, e.g.*, WARREN & TYAGI, *supra* note 88 (discussing financial vulnerability of middle class generally); Lawrence M. Ausubel & Amanda Dawsey, *Informal Bankruptcy* (Working Paper Feb. 2002) (studying bankrupt families omits half or more of households in financial collapse). *See also* Scott Fay, Erik Hurst, & Michelle J. White, *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706, 712 tbl. 2 (2002) (from economic analysis of data from Panel Survey of Income Dynamics, reporting that "[o]verall, a much larger proportion of households has an incentive to file for bankruptcy than actually files each year."). R

[94] *See, e.g.*, Tashira K. Hira & Kyle L. Kostelecky, *Pilot Study of Consumer Debtors Provides New Insights – What Influences Debtors' Attitudes?*, AM BANKR. INST. J., Apr. 1995, at 1 ("A review of bankruptcy literature shows that no studies have been carried out on the decision making process debtors undertake when determining whether to file for bankruptcy."); Susan Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L. J. 675, 751, n.248 (1991) (noting lack of data on consumers who do not file for bankruptcy, making it difficult to assess how debtor-creditor system is working overall).

[95] *See, e.g.*, Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 140-143 (2004) (discussing changes in state collection law as superior substitute for bankruptcy); Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L. J. 855, 888-889 (2003) (arguing that lawyers may be doing debtors a disservice by sending them into bankruptcy system if another approach would suffice).

attempting to negotiate with creditors and exploring alternatives.[96]

Because filers' financial problems do not exist in a vacuum, it is especially important for both researchers and lawyers to compare bankruptcy with alternatives.[97] Consider, for example, filers who have medical-related financial distress.[98] In a recent study, chronic medical conditions were reported by more than half of the debtors who indicated that a medical issue was a "significant reason" for their bankruptcies.[99] In addition to the possibility of continued high personal liability for direct medical costs,[100] the chronic conditions they face may produce repeated income interruption and diminish the inability to save sufficiently for retirement and future emergencies.[101] The tools of bankruptcy can offer short term financial help but have obvious limits here.[102] On its face, bankruptcy seems inferior to other possible social insurance approaches for debtors with health problems that have long-term financial implications.

Comparative analyses should not overlook the wide array of bankruptcy's costs. Although the basic economic measurements of financial benefit and cost sometimes are stated to be the value of debt discharged and assets forfeited,[103] one also should consider issues such as a large outlay for an attorney's fee and related access fees, an increase in the cost of credit, the possibility that parties such as medical providers and insurers will discriminate against them, and the sense of failure associated with a bankruptcy filing.[104]

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[96] *See, e.g.*, Braucher, *Counseling Consumer Debtors, supra* note 52, at 172-173, 179 (noting that bankruptcy may not be right approach for debtors even if they have debts they cannot pay, and that lawyers should attempt more negotiation with creditors before filing bankruptcy cases for clients); Kovac, *supra* note 94, at 678. *See generally* David S. Kennedy, R. Spencer Clift III, & Shauna Fuller Veach, *Professionalism in the Legal Profession; The Bankruptcy Attorney as a True Professional*, 33 U. MEM. L. REV. 1, 17-21 (2002). R R

[97] *See, e.g.*, Feibelman, *supra* note 91. R

[98] *See generally* Melissa B. Jacoby, Teresa A. Sullivan, & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 408-409 (2001)

[99] *See* David U. Himmelstein, Elizabeth Warren, Steffie Woolhandler, & Deborah Thorne, *Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF. WEB EXCLUSIVE W5-63 (2005).

[100] *See, e.g., id.* at W5-70 (reporting average out of pocket cost of nearly $12,000 among those who participated in the medical-specific component of the first telephone survey in Phase III of the Consumer Bankruptcy Project, with much higher averages among certain subsets of patients).

[101] *See, e.g.*, Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior; An Expanded Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. (forthcoming 2006). *See also* Jacoby, Sullivan & Warren, *supra* note 98, at 408-409 (reporting high correlation between job problem and medical problem). *See generally* SULLIVAN, WARREN, AND WESTBROOK, THE FRAGILE MIDDLE CLASS, *supra* note 88, at 160 (discussing income effects of illness and injury). R R

[102] *See* Jacoby & Warren, *supra* note 101. R

[103] *See* Fay, Hurst & White, *supra* note 93, at 707. R

[104] *See generally* Feibelman, *supra* note 91; Tahira K. Hira, *Causes and Effects of Consumer Bankruptcies: a Cross-Cultural Comparison*, 16 J. CONSUMER STUD. & HOME ECON. 229, 229 (1992) [hereinafter *Cross-Cultural Comparison*] ("Bankruptcy has both personal and societal costs. Personal costs may include R

The effectiveness of bankruptcy has an absolute component as well. Indeed, it is difficult to embark on comparative questions without having a sense of how individuals fare after bankruptcy.[105] A forthcoming study by Professors Katherine Porter and Deborah Thorne evaluates in-depth post-bankruptcy interviews from the 2001 Consumer Bankruptcy Project, and has the potential to make a substantial contribution to the literature on these questions.[106] In the meantime, existing studies using more limited court data or debtor interviews present mixed results. Some have reported that debtors tend to have improved financial conditions right after bankruptcy, although the method of measurement of financial condition varies.[107] By contrast, fo-

stress and depression, employment harassment, difficulty in morally accepting bankruptcy, loss of assets, social disapproval, court costs and legal fees."); Kovac, *supra* note 94, at 679, 681, 756; Ausubel and Dawsey, *supra* note 93.

[105]*See, e.g.*, Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net; Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1070 (2004); Hira, *Cross-Cultural Comparison, supra* note 104, at 230 ("few studies have focused on exploring the impact of bankruptcy on debtors' social and economic situations"); Power, Hira, & Murphy, *supra* note 95, at 82-83 ("A review of bankruptcy literature shows that none of the studies have reported the long-term personal and financial consequences of filing bankruptcy"); Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy*," 21 U.C.L.A. L. REV. 403 (1973) (noting limited information on rehabilitative consequences of personal bankruptcy); Westbrook, *Empirical Research*, *supra* note 82, at 2147 ("We know very little about consumer bankrupts after they leave the bankruptcy court, except that they rarely file again. We also know that nowadays they are offered credit again quite quickly, often on an unsecured basis. Indeed, some bankruptcy attorneys have reported receiving applications from credit-card companies asking that they be passed along to their bankrupt clients. But the rest is silence."); Marianne B. Culhane & Michaela White, Debtors After Discharge: Fresh Start or Still Deep in Debt?, 2-4 (June 29, 2001) (unpublished manuscript on file with author) (noting that most bankruptcy research has been focused on the front end and stating that "[k]nowledge of the immediate and long-term post-discharge financial picture of debtors is essential in order to design efficient and humane bankruptcy systems addressing the worldwide problem of consumer overindebtedness"). *See also* Larry H. Filer II & Jonathan Fisher, *The Consumption Effects Associated With Personal Bankruptcy*, 71 S. ECON. J. 837 (2005) ("Surprisingly little work has been done on the direct benefits to filing for bankruptcy. This is in contrast with the growing literature on the costs of bankruptcy.").

[106]For a description of the Consumer Bankruptcy Project, see Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1008-9 (2002).

[107]Bermant and Flynn found most debtors in their sample of no-asset chapter 7 cases closed in 2000 had a small positive net worth after discharge. Ed Flynn & Gordon Bermant, *How Fresh is the Fresh Start?*, *supra* note 89. In a small study, Hira found that most debtors reported an improved financial situation immediately after bankruptcy. *See* Hira, *Cross-Cultural Comparison, supra* note 104, at 238 (67% reporting they were better off financially, n.108). Hira and Kostelecky conducted a small pilot study involving post-bankruptcy contact, but did not report the debtors' postbankruptcy experiences in detail. *See* Tahira K. Hira & Kyle L. Kostelecky, *Methods of Data Collection from Debtors in Bankruptcy After Discharge: A Pilot Study*, J. FAMILY ECON. & RESOURCE MGMT. BIENNIAL 101 (1995). VISA U.S.A. has interviewed debtors after bankruptcy about their life after bankruptcy, but has limited its publicly available results. *See, e.g.*, Visa U.S.A., Executive Summary, Bankruptcy Qualitative Research, April 1997, available at http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/Bankruptcy_Qualitative_Research.htm; Rafael Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL'Y 205, 235 n. 173 (2003) (citing VISA U.S.A. INC., 2000 Life After Bankruptcy Study (2000)).

cusing on debtors who had reaffirmed debts, Culhane and White uncovered a grim picture of this subset of chapter 7 filers:

> The debtor-by-debtor results were as dismal as the district aggregates. Fully 52% of the reaffirming debtors had either zero income or a monthly deficit after reaffirmation payments, and for 16% of the reaffirming debtors, the monthly deficit exceeded $500. . . . Fewer than half of the reaffirming debtors had any income remaining after expenses and reaffirmation payments, and only a third had more than $100 per month left. . . . . More than one in five (22%) signed reaffirmations totaling more than 40% of annual income.[108]

The level of indebtedness also may remain high for the many debtors who drop out of chapter 13 repayment plans prior to completing them.[109] Some data suggest that a notable number of people in bankruptcy file more than one time—probably without having received a discharge the first time—which may signal, among other things, a lack of effectiveness or responsiveness of bankruptcy to their problems.[110]

[108]Culhane & White, *Debt After Discharge*, *supra* note 89, at 762. *See also* Kovac, supra note 94 (surveying debtors after bankruptcy); Power, Hira & Murphy, *supra* note 105, at 96-99 (conducting longitudinal case study of one individual debtor, who was unsatisfied with how bankruptcy affected him); Marc Rudow, *A Statistical Analysis of Debtor Status in Chapter 7 Petitions in the Western District of North Carolina*, DISCLOSURE STATEMENT (North Carolina Bar Association), Oct. 2004, at 3, 5 (finding on basis of analysis of chapter 7 filers in Western North Carolina that "only 17 percent of debtors are able to live within their means after filing. The vast majority of debtors are spending or need to spend more than they earn . . . it still looks like many debtors have fallen short of putting their financial affairs in order and will continue to incur debt in excess of their ability to pay."). R R

[109]*See, e.g.*, Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 564, 571 (2001) (reporting plan completion rates, five years after cases were filed , ranging from 18.2% and 54.1%). For cites to other published studies of chapter 13 plan completion rates, see Melissa B. Jacoby, *Collecting Debts from the Ill and Injured; The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 243-44 (2001). For the circumstances under which debtors can receive a discharge without completing the plan, see, e.g., 11 U.S.C. § 1328(b) (2005) (hardship discharge); 11 U.S.C. § 1307(a) (2000) (providing right to convert to chapter 7).

[110]*See, e.g.*, Commission Report, *supra* note 52, at 276 (compiling statistics); Hira, *Cross-cultural Comparison, supra* note 104, at 230 (11% repeat filers in small sample); Jean M. Lown & Barbara R. Rowe, *A Profile of Consumer Bankruptcy Petitioners*, 5 J. L. & FAM. STUD. 113, 125-126 (2003) (studying sample of 1997 cases in Utah, and finding "more than 20% of the Chapter 13 cases reported a previous bankruptcy filing (only those within the previous six years were recorded), and almost 90% failed to complete their plans"); Kathleen March and Jennifer Hildebrand, *Is Bankruptcy a Solution or a Way of Life: When Are Multiple Bankruptcies Permitted, When Are Multiple Bankruptcies Prohibited?*, 25 CAL. BANKR. J. 104, 110 (1999) (asserting that "[i]n the Central District of California a significant percentage of Chapter 13 debtors file more than one Chapter 13 cases [sic.]"). Repeat filings were on the radar screen even before the Bankruptcy Reform Act of 1978. *See* DAVID T. STANLEY AND MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 59 (1971) (finding 22% repeat filing rate among chapter XIII filers, and noting that this likely understated repeat filings because it excluded previous filings in other states). However, because of some data limitations, we currently do not have as much information on chapter 13 repeat R

Although the results will come too late to inform current predictions, passage of the omnibus bill may promote study of the effectiveness of bankruptcy in the long run. First, revisions to Title 28 of the United States Code require that courts and trustees change their data collection and reporting practices in ways that may facilitate a wider range of research projects for lower cost.[111] These changes will not lead seamlessly to a better understanding of bankruptcy. Some issues are inherently hard (and expensive) to evaluate even with better access to case file information.[112] Also, the data collection provisions are far from perfect, and have the potential to produce misleading impressions of how the system is working.[113] Nonetheless, due to these changes, the court system now has a statutory obligation to collect financial information about bankruptcy cases.

In addition, passage of the omnibus bill may diminish the heavy research emphasis on chapter 7 access and ability to pay, at least in the short term. Presumably, the proponents of bankruptcy reform will move onto other challenges. If debates are not framed in terms of ability to pay, researchers may find themselves freer to explore a wider range of empirical projects.

As noted, this slight spark of promise for later generations of research does not help with the current dilemma, namely the assessment of the revised Code's effects on candidates for personal bankruptcy. The existing research on personal bankruptcy filers may call into question the need for restrictions

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filings as we should. *See, e.g.*, LoPucki, *Politics of Research Access*, *supra* note 82, at 2169; Commission Report, *supra* note 52, at 106 (attributing lack of good information on repeat filings to lack of national database).

[111] The bill adds provisions to title 28 that impose new obligations on both the court system and on the Attorney General that will promote the collection and analysis of important information about the bankruptcy system. *See* 28 U.S.C. §§ 159, 589b (2005). In the past, the court system's method for storing records has not facilitated analysis. Commission Report, *supra* note 52, at 921-939. This has increased the expense and difficulty of studying even the most basic questions about how the system works. LoPucki, *Politics of Research Access*, *supra* note 82, at 2171 ("By offering selective access to data, the courts have controlled legal scholars' research agendas, encouraging research that focused on the social and economic implications of litigation and discouraging research that focused on the actions of judges and the impact of those actions on both litigants and the public."). Other kinds of studies, such as the effects of aggregate bankruptcy filings on credit supply, are not affected by these limitations. For a description and review of some studies exploring this issue, see Congressional Budget Office, *supra* note 85, at 31-37. The alternative available datasets, such as the chapter 13 trustees' recordkeeping systems, were designed for accounting and not research purposes and thus would require considerable tweaking to facilitate in-depth longitudinal analysis. Braucher, *Empirical Study of Debtor Education*, *supra* note 109, at 590-591.

[112] *See* sources cited *supra* note 84. Culhane and White have explained that "[q]ualitative studies estimating life enrichment and financial rehabilitation are difficult because former bankrupts are often difficult to locate and reluctant to answer questions about their past and present lives." Marianne B. Culhane & Michaela White, Fresh Start or Still Deep in Debt, supra note 105, at 2-4. *See also* Westbrook, *Empirical Research*, *supra* note 82, at 2147 (noting difficulties of studying filers after bankruptcy).

[113] *See, e.g.*, 28 U.S.C. § 159 (c)(3)(C) (2005) (requiring that the aggregate amount of debt discharged be calculated by subtracting categories of "predominantly nondischargeable" debt from "all scheduled debt and obligations"). If interpreted literally, this calculation has the potential to produce an erroneous calculation of discharged debts in bankruptcy.

in bankruptcy law, but does not predict the outcome of implementing those restrictions.

CONCLUSION

The revisions to the Bankruptcy Code preserve the structure of the former system but embellish and alter the details to a great extent. The provisions are complex, difficult to decipher, and a challenge to implement. This challenge in the short term, however, does not signify the impact of the statutory revisions in the long term.

This Article has explored the role of the day-to-day system players in shaping the actual impact of statutory revisions. I recently noted in this journal the practical impossibility of Congress's intent to exclude bankruptcy experts from system reform.[114] This Article reaffirms that position not at all as a sign of rebellion against the revisions to the statute, but as a description of law-making that researchers have observed time and time again. The drafting and the details of the omnibus bill may amplify the importance of these other factors. Once the statutory changes are filtered through other influences, the impact of the revisions is likely to vary in substance and magnitude, both geographically and as compared with a literal reading of the revised Code. With the correct inquiries and tools, researchers probably could predict the variations and deviations with reasonable certainty.[115] The key is to recognize that factors other than the statute matter greatly in determining whether the omnibus bankruptcy bill brings about major or minor changes.

However the bankruptcy system processes Congress's statutory changes, real live human beings will continue to face serious financial trouble, often precipitated by events out of their control. Depending on how the details play out, bankruptcy will be less beneficial to filers by at least a little, and maybe a lot. This Article has highlighted the difficulties of assessing the impact of this change. Reserving judgment about the impact of the bill should not be perceived as inconsistent with concerns about the well-being of these individuals and families. The implications of statutory bankruptcy reform simply remain murky without better information about the effectiveness of bankruptcy.

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[114] *See* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L. J. 221 (2004).

[115] *See, e.g.*, LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1503, 1555. R