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LOCAL LEGAL CULTURE AND THE FEAR OF ABUSE

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This article combines the results of empirical research into consumer bankruptcy in the United States and Europe with a description of emerging trends in European bankruptcy law. Its argument can be oversimply stated for the busy reader as follows:

a) there is a phenomenon known as Local Legal Culture that produces a coherent and persistent variation in the application of laws; [1]

b) consumer bankruptcy in the United States presents a powerful and long−standing example of Local Legal Culture;

c) the existence of Local Legal Culture in United States bankruptcy laws is dependent upon the existence of broad discretion deliberately inserted into the statutory scheme;

d) broad discretion is primarily the result of a fear of abuse of the right to discharge from debt;

e) as a right to a discharge begins to emerge in the reform of European consumer bankruptcy laws, it provokes a strong fear of its abuse;

f) the European fear of abuse in turn results in broad discretion in these new European schemes, which in turn fosters a Local Legal Culture;

g) the European experience tends to support the notion that Local Legal Culture is consequent upon broad discretion in bankruptcy laws which is consequent upon a fear of abuse;

h) that experience also suggests that these phenomena are powerfully connected, so that it seems unlikely that any contemporary society will be successful in substantially narrowing the discretion in consumer bankruptcy laws and the consequent power of Local Legal Culture.

As noted, the foregoing is an oversimplified summary, but reflects the central themes. If this paper proves to have any value, it will lie in stimulating discussion by referring the reader to a very interesting series of papers about consumer bankruptcy that many will not have read [2] and by laying out briefly, but baldly, the arguments summarized above. These arguments may have some immediacy in light of the recommendations of the National Bankruptcy Review Commission concerning consumer bankruptcy [3] and the political debate arising from those recommendations.

I must begin by noting in text that anything I know about the data in the United States I owe to my co−investigators, Dr. Teresa Sullivan of The University of Texas at Austin, and Professor Elizabeth Warren of the Harvard Law School. On the other hand, they have no share of the blame for the arguments that follow.

It is equally important to acknowledge that the data and doctrine that are described hereafter derive from a very interesting and important mini−symposium held at the University of Glasgow in the Summer of 1997. [4] The papers presented are published in the Journal of Consumer Policy, a journal published in Europe and not found in every law library in North America. The participants in the discussion at Glasgow found it so stimulating they adjourned to another room for two more hours of interchange to discuss differing consumer bankruptcy laws and cultures in a number of countries. The papers themselves should be read by anyone seriously interested in consumer bankruptcy.

I. LOCAL LEGAL CULTURE

The analysis I offer begins with the first identification of a phenomenon called "Local Legal Culture" in United States bankruptcy law in a paper published by three of us in 1994. [5] In that article, it was defined as "systematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime." [6] It is important to emphasize that the phenomenon is not mere inconsistency in the application of a uniform law. The thesis is that there are coherent and predictable inconsistencies or variations from one locality to another, that these variations persist over long periods of time despite major shifts in formal law and economic conditions, and that the origin of these variations is a culture governing the behavior of actors in the bankruptcy system in each locality. [7]

Our paper supported this thesis by reference to data gathered in our empirical studies and data published by the Administrative Office of the Courts. These data showed marked differences among judicial districts in the per capita rates of filing for bankruptcy in each district [8] and in the percentages of debtors choosing chapter 7 versus chapter 13 proceedings. [9] Sharp variations in both regards were found between districts within the same state, making it highly unlikely that variations in state laws (exemptions, garnishment, and the like) would have much explanatory power. [10] The paper argued that there were also no obvious economic or demographic variables that would explain the differences. [11]

Our paper emphasized that the differences described were persistent over more than twenty years. [12] The two decades of data covered a period in which there had been enormous economic changes in the United States and from region to region within the country. [13] There also had been important changes in consumer protection laws at both the federal and state level, including laws regulating garnishment and security interests in consumer goods, and a sweeping reform of the bankruptcy laws in the form of the Bankruptcy Code of 1978. [14] These changes did have an impact on the data in various ways, but the persistence and direction of variation in the variables we discussed changed very little. We argued that under these circumstances the most plausible explanation for the variations was Local Legal Culture. [15]

A number of other articles published before and since contain data and analysis supporting the existence of this phenomenon in the American bankruptcy system. [16] William Whitford's analysis of the results of chapter 13 cases in various judicial districts is a striking example. In that paper, for example, Whitford reports dramatic differences among districts in the percentages of payment promised in chapter 13 plans. [17]

My co−authors and I are among the researchers who have suggested that lawyers are the central transmitters of Local Legal Culture because of the uniquely powerful position they enjoy vis à vis their clients in a highly technical area such as bankruptcy. [18] For example, Professor Braucher explains how lawyers' interests affect debtor choices and how lawyers influence those choices. [19] Her work built on that of Professor Neustadter, who was the first in the field to note how the lawyer's view of bankruptcy substantially influenced a debtor's decisions. [20]

II. DISCRETION AS A FUNCTION OF FEAR OF ABUSE

The research just described focused on discretion or choice as the pre−requisite for the existence of Local Legal Culture in the bankruptcy field, but did not explore to any great extent the reason for the existence of so

much discretion built into the Bankruptcy Code. I want to go farther and suggest that it is the fear of debtor abuse that is largely responsible for this discretion. While no one factor is entirely explanatory, it seems clear to me that a major reason for that discretion is the policymakers' fear of abuse of bankruptcy. For the most part, abuse of bankruptcy in this context means abuse of the right to a discharge.

Even though the discharge is limited to the "honest debtor," [21] and a number of debts are barred from discharge for various policy reasons distinct from dishonesty, [22] there is a widespread fear that the right to discharge will tempt too many debtors to abandon their burdens of debt too readily. [23] Much of the debtor choice built into the Code is related to that concern. The addition of substantial abuse dismissal to the Code, along with the requirement that chapter 7 debtors list their incomes and expenses, was motivated in large part by a fear of abuse. [24] Reaffirmations are often defended as a matter of debtor benefit, but the motivation for section 524(c) clearly includes a desire to increase creditor returns. [25] It goes without saying that chapter 13, and its very discretionary disposable income requirement, [26] are a direct reflection of Congressional concern about abuse of the discharge. [27] If there were any doubt about the relationship of these provisions to fear of abuse, the discourse surrounding current proposals to require chapter 13 plans of those who "can pay" makes it clear that these provisions flow from a concern that even many "honest" debtors will abuse the chapter 7 discharge unless pushed and pulled to some form of repayment. [28] On that basis, I think it is a fair statement to say that much of the discretion in the current Code as to consumer bankruptcy is a function of a fear of debtor abuse of the discharge.

The evidence strongly suggests that the "choices" given to debtors are often exercised in fact by creditors, [29] lawyers, [30] by judges through lawyers, [31] and by judges through debtors. [32] The average consumer debtor, faced with an extraordinarily complex statute at a moment of financial and personal crisis, will be guided by lawyers and pressures exerted through lawyers. For example, if such a debtor "chooses" to try a chapter 13 plan, it will often be because the lawyer strongly encouraged that result and the lawyer's encouragement will often arise from a belief system rooted in many years of Local Legal Culture. Because the choices given to debtors arise from the fear of abuse, and Local Legal Culture is empowered by these choices, it follows that the power of Local Legal Culture arises in substantial part from this fear. Local Legal Culture does not necessarily focus on preventing abuse−it varies greatly from place to place in that regard. But it is empowered by the discretion that arises from fear of abuse. Recent developments in Europe support this hypothesis.

III. EUROPEAN DEVELOPMENTS

Professor Niemi−Kiesiläinen's article summarizes the remarkable developments in European bankruptcy law in the last decade or so. [33] Until then, few other countries in the world had a substantial right to discharge from debt. [34] Even in common−law jurisdictions one usually found only conditional discharges dependent upon making payment on debts. [35] Most continental countries−and most countries elsewhere in the world−had no possibility of discharge and many had no provision at all for consumer bankruptcy. [36]

Professor Niemi−Kiesiläinen links the dramatic change in European laws to the deregulation of the credit industry, [37] a development parallel to the virtual abolition of usury laws in the United States in the early eighties. [38] Thereafter followed a great rise in household indebtedness and then a deep recession−events which combined to generate pressure for consumer relief. New laws were adopted in Denmark, Finland, Norway, Sweden, France, Germany, and the United Kingdom. [39] These laws generally introduced the possibility of discharge into their legal systems for the first time. Other countries, notably the Netherlands and Belgium, are actively considering similar reforms.

The leading European figure in the consumer bankruptcy field has been Professor Nick Huls. [40] He has described the different approaches that Europeans have taken in partially−and warily−adopting the American notion of a discharge from debt. In particular, there is a requirement in these laws that at least some payment be made. [41] It is evident that in adopting the discharge, European policymakers have been very concerned about the risk that it might be abused and have included substantial discretionary elements to protect against abuse. There is now some evidence that these discretionary elements are beginning to produce a Local Legal Culture in consumer bankruptcy.

This phenomenon is revealed in the only paper I have seen that reports empirical data on point. The paper, written by Professor Graver of the University of Oslo, reports on the new Norwegian law and includes an analysis of the cases decided under that law in various parts of Norway. [42]

Professor Graver's description offers many fascinating points for the interested reader, to whom I recommend it. For example, the Norwegian law, like some of the other recent legislation in Europe, requires that the debtor's bankruptcy be "permanent in nature," [43] which apparently means the court must find that the debtor could never pay off all the debts with any future income within plausible reach of that debtor.

But the most important points for the present discussion are two discretionary features of the law. The first is an additional requirement that can be imposed as a condition to discharge: that the discharge under the circumstances of the particular debtor is not "morally offensive." [44] The statute gives the courts the right to refuse a discharge to a debtor otherwise legally entitled to one if it would be morally offensive to grant it. [45] What is even more striking is that research has shown that this reason is used not only by judges but also by certain court officials who act as gatekeepers, empowered to accept or reject the debtor's bankruptcy filing. [46]

The second discretionary feature is determination of the required duration of a debtor's proposed plan of payment. [47] The law provides that five years is the normal period for a payment plan, but permits deviation in special circumstances. [48] Some courts have required plans to extend for as long as ten years. [49]

It appears clear that both these discretionary elements were included in the law because of the legislators' fear that the new discharge provisions might be abused. The legislators stated explicitly that the new law must not "negatively influence the moral obligation to pay . . . ." [50]

The central point for the present discussion is that Norwegian researchers have shown that the second discretionary element, length of plan, is subject to very substantial local variation. [51] In 1994, 83% of the time the Oslo court accepted a proposal for a payment plan limited to five years, while 82% of the time the court in Bergen refused a five−year plan. [52] In both regions, if the debtor was invited to extend the plan, but refused, the discharge was denied. [53] Discharges were denied in 40% of the cases in Bergen and in only 8% of the cases in Oslo. [54]

The Norwegian law is too new to permit a finding of Local Legal Culture, which requires demonstration of a persistence in variation over a substantial period of time in the face of changes in plausibly relevant variables like economic conditions and legal rules. Nonetheless, the variations reported are striking. They are exactly the sorts of variations shown in the United States in the research done by ourselves and others. Their direct tie to "moral" concerns about abuse of discharge supports the thesis that fear of abuse and consequent statutory discretion has much to do with the empowerment of Local Legal Culture.

That we would find the same apprehensions, the same remedies, and the same apparent effects in a country with a quite different legal culture strongly suggests the power of the fear of abuse and the consistency of its consequences. The evidence is especially powerful because Norway is a far smaller and more homogeneous country than the United States. One might have thought local differences would be less sharp. Further research over the next several years in the various countries that have adopted these new laws could yield a rich harvest of new evidence and perhaps unexpected variations. We may end with a hypothesis transcending bankruptcy law, the Localizing Effects of Mixed Emotions.

IV. CONCLUSION

The fear of abuse in our own country seems difficult to overcome and is continually fanned by the credit industry for its own purposes. [55] The European experience reinforces the conviction that fear of abuse is likely to maintain the powerful influence of Local Legal Culture in our bankruptcy system for many years to come.

FOOTNOTES:

[*] Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. I greatly appreciate the research assistance on this paper I received from David Johnson, '98.Back To Text

[1] Although the present discussion is limited to bankruptcy, Local Legal Culture is a phenomenon in various legal fields. *See, e.g.*, Herbert Kritzer, Frances Zemans & Lawrence Marshall, *Controlling Litigation and Local Legal Culture, Disputes Processing Research Program*, Working Paper 11−1 (1992) [hereinafter *Rule 11 Study*] (on file with author); Thomas W. Church Jr., *Examining Local Legal Culture*, 1985 Am. B. Found. Res. J. 449 [hereinafter Church 1985]; Thomas W. Church Jr., *Who Sets the Pace of Litigation in Urban Trial Courts?*, 65 Judicature 76 (1981); Thomas Church, Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978).Back To Text

[2] *See generally* Symposium, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and North America*, 20 J. Consumer Pol'y 133 (Special Issue 1997). Although my focus in this paper is on the developments in Europe, the conference included outstanding papers by William Whitford concerning the narrowing of the discharge in the United States and by Professor Jacob Ziegel concerning important developments and ongoing debates about consumer bankruptcy in Canada. *See, e.g.*, William C. Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. Consumer Pol'y 179 (Special Issue 1997); Jacob S. Ziegel, *Canadian Perspectives on the Challenges of Consumer Bankruptcies*, 20 J. Consumer Pol'y 199 (Special Issue 1997).Back To Text

[3] *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 96−301 (1997) [hereinafter Commission Report].Back To Text

[4] I am grateful to Professors Johanna Niemi−Kiesiläinen, Nick Huls and William Whitford for the invitation to my co−authors and me to submit a paper, giving me an opportunity to participate in this conference.Back To Text

[5] *See generally* 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 (1994) [hereinafter *Local Legal*]. Our contribution to the Glasgow conference drew heavily on our Harvard Law and Policy paper, but added substantial new data from our second consumer study. *See generally* Teresa A. 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 (Special Issue 1997). That new data will be reported more fully in The Fragile Middle Class (forthcoming 1998). Back To Text

[6] *Local Legal*, *supra* note 5, at 804 n.15.Back To Text

[7] *See id.* at 857−58. Back To Text

[8] *See id*. at 817−22 (demonstrating that bankruptcy filings by individual debtors differ according to specific geographic region).Back To Text

[9] *See id.* at 822−30 (illustrating variations in debtor choice between chapter 7 and chapter 13 petitions according to geographic region within United States).Back To Text

[10] *See id*. at 821, 828−29 (indicating data proved differences between districts within states as well as among states).Back To Text

[11] *See Local Legal*, *supra* note 5, at 833−38 (discussing three "plausible" explanations for differences in debtor choices as "(i) systematic variations among the economic circumstances of debtors in different localities; (ii) influential people with differing convictions in each locality; or (iii) different cultures in each locality" while realizing that these explanations cannot be confirmed as actual explanations and attributing differences in debtor choices to phenomenon known as local legal culture).Back To Text

[12] *See id.* at 806, 839 (stating data indicated differences which "continue over a twenty−year" period in judicial districts throughout United States).Back To Text

[13] *See id.* at 806 (assembling of data by authors portrayed "persistent variations" of debtors in various geographic regions of country).Back To Text

[14] *See id.* at 864 (noting Bankruptcy Reform Act of 1978 was first major revision in fifty years).Back To Text

[15] *See id.* at 838−39 (concluding that best explanation of reported data is "local legal culture").Back To Text

[16] *See, e.g.*, 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, 406−412 (1994) [hereinafter Whitford] (attributing changes in consumer bankruptcy to local legal culture, including attorney's influence on debtors' choices for filing); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 503 (1993) (stating that one goal of study was to research "influence of 'local legal' culture on chapter choice"); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 Buff. L. Rev. 177, 239 (1986) (explaining difficulty lawyer encounters in trying to apply certain solutions to client's bankruptcy needs).Back To Text

[17] *See* Whitford, *supra* note 16, at 410−12 (documenting and explaining variation in average proposed payouts in chapter 13 in different states).Back To Text

[18] *See Local Legal*, *supra* note 5, at 848 (opining that bankruptcy attorneys have been successful "in developing and dominating a local legal culture" primarily because bankruptcy is very technical area of law in which few attorneys specialize).Back To Text

[19] *See* Braucher, *supra* note 16, at 503 (addressing problem of strong influence of lawyer's own financial and social concerns upon debtor and her choices).Back To Text

[20] *See* Neustadter, *supra* note 16, at 178−79 (noting data showed lawyers acting in certain manner due to social system and effects of those actions on debtor client).Back To Text

[21] *See* 11 U.S.C. § 523(a)(2) (1994), which states in part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt−
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> . . . .
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by−
>
> (A) false pretenses, a false representation, or actual fraud . . .

see also 11 U.S.C. § 727(a)(2), which states in part:

> (a) The court shall grant the debtor a discharge, unless−
>
> . . . .
>
> > (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be

transferred, removed, destroyed, mutilated, or concealed.Back To Text

[22] *See, e.g.*, 11 U.S.C. § 523(a)(5), (6), (9), which state in part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . .
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . ;
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> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;
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> . . . .
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> . . . .
>
> (9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug or another substance.Back To Text

[23] *See, e.g.*, Credit Res. Ctr., Krannert Graduate Sch. of Mgmt., Purdue Univ., Consumer Bankruptcy Study (1982) [hereinafter Purdue Study].Back To Text

[24] *See* S. Rep. No. 98−95, at 53−54 (1983).Back To Text

[25] *See id.* at 11−13.Back To Text

[26] *See* 11 U.S.C. § 1325(b)(2) stating:

> [D]isposal income means income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor; and if the debtor is engaged in business, . . . for the continuation, preservation, and operation of such business.Back To Text

[27] *See, e.g.*, Commission Report, *supra* note 3, at 89−91 (discussing possible legislation involving "means test" requiring debtor−by−debtor scrutiny before permitting debtor to file chapter 7 petition).Back To Text

[28] *See* Hon. Edith H. Jones and Comm'r James I. Shepard, *Recommendations For Reform of Consumer Bankruptcy Law By Four Dissenting Commissioners: Uniform Federal Exemptions−Critique of Framework Proposal*, Commission Report, *supra* note 3, ch. 5, Individual Consumer Views 28 [hereinafter *Dissent*] (observing that some income−earning debtors with ability to pay some or all debt inappropriately seek chapter 7 relief).Back To Text

[29] *See, e.g., In re* Long, 3 B.R. 656, 656 (Bankr. E.D. Va. 1980) (indicating that creditors might extract reaffirmations by pressuring debtors).Back To Text

[30] *See, e.g.*, Braucher, *supra* note 16, at 550−51 (stating that lawyers have financial incentive to use chapter 13 over chapter 7 because on average chapter 13 cases are more lucrative); Neustadter, *supra* note 16, at 230−31 (indicating that both client and lawyer may expect lawyer to gather information to produce final product rather than describing to client variety of services he could provide). *Back To Text*

[31] *See, e.g.*, *Local Legal*, *supra* note 5, at 843−45 (describing techniques by which judges can "influence the attorney's recommendations").Back To Text

[32] Judges influence those choices in various ways. One important instance is dismissal of a chapter 7 case for substantial abuse in light of the debtor's ability to file a chapter 13 case and pay some part of the debts. *See, e.g.*, United States Trustee v. Harris, 960 F.2d 74, 75 (8th Cir. 1992) (finding that ability of debtor to pay substantial portion of unsecured debt under chapter 13 is sufficient ground to dismiss chapter 7 petition for substantial abuse); *In re* Walton, 866 F.2d 981, 982 (8th Cir. 1989) (dismissing chapter 7 filing where debtor could have supported chapter 13 plan); Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 914 (9th Cir. 1988) (holding debtor's ability to pay debts under chapter 13 plan is primary factor in determining whether granting relief would be substantial abuse).Back To Text

[33] *See generally* Johanna Niemi−Kiesiläinen, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA*, 20 J. Consumer Pol'y 133 (1997) (Special Issue) [hereinafter *Changing Directions*].Back To Text

[34] *See id.* at 133 (explaining that European bankruptcy law for individuals was practically nonexistent until this decade).Back To Text

[35] *See, e.g.*, Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo−American Bankruptcy Proceedings*, 131 Pa. L. Rev. 69, 84 (1982) (England) (indicating English bankruptcy law permits discharge to be granted on condition that bankrupt consents to pay debts with future earnings); Ziegel, *supra* note 2, at 209−11 (Canada) (explaining that under Canadian law bankrupt may choose statutory consolidation of debts which does not include any discharge of debt or choose to make proposal to creditors which contemplates some discharge).Back To Text

[36] *See Changing Directions*, *supra* note 33, at 133 (observing that before 1990's only United Kingdom and Denmark had consumer bankruptcy laws); Johanna Niemi−Kiesiläinen, *The Debtor's Day in Court*: *Observations of the Danish Debt Arrangement Procedure*, (unpublished paper, 21 July 1992, copy on file with author) [hereinafter *Danish Debt*].Back To Text

[37] *See Changing Directions*, *supra* note 33, at 134 (explaining European legislation prompted by debt crisis as result of deregulation of credit which led to increase in household indebtedness).Back To Text

[38] *See generally* Diane Ellis, Div. of Ins., FDIC, The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge−offs, and the Personal Bankruptcy Rate, (1998). Back To Text

[39] *See generally id*. Back To Text

[40] *See generally* Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. Consumer Pol'y 125 (1994) (discussing problems and possibilities of introduction of American "fresh start" doctrine in European economies); Nick Huls, *Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution*, 20 J. Consumer Pol'y 143 (1997) (Special Issue) [hereinafter *Overindebtedness*] (exploring possible use of professional and independent debt counselors in dealing with consumer debt). Back To Text

[41] *See Overindebtedness*, *supra* note 40, at 147 (stating debtor must place part of future income at disposal of his creditors for maximum of four years); *see also Danish Debt*, *supra* note 36, at 1. Back To Text

[42] *See generally* Hans Peter Graver, *Consumer Bankruptcy: A Right or a Privilege? The Role of the Courts in Establishing Moral Standards of Economic Conduct*, 20 J. Consumer Pol'y 161 (1997) (Special Issue) (finding that Norwegian law gives discretion to court in consumer bankruptcy proceedings and as result cases are treated differently in different jurisdictions).Back To Text

[43] *See id.* at 165 (observing that according to Norwegian Consumer Bankruptcy Act of 1992 debtors must be permanently incapable of paying debts to be accorded discharge).Back To Text

[44] *See id.* at 166 (comparing this standard to our "substantial abuse" standard under 11 U.S.C. § 707(b) where Norwegian model may be even more vague). Also, "[t]he expressed intent behind this escape clause is to exclude debtors who speculate in the possibility of achieving a discharge, who are suspected of hiding assets from creditors, or who are uncooperative under the bankruptcy proceedings." *Id.* at 171. Back To Text

[45] *See id*.Back To Text

[46] *See* Graver, *supra* note 42, at 167.Back To Text

[47] *See id.* at 168 (indicating that section 5.2 of Norwegian Consumer Bankruptcy Act of 1992 states that length of payment plan is five years, but leaves discretion to court). Back To Text

[48] *See id.Back To Text*

[49] *See id.* at 169 (indicating that from November 1994−1996 12% of payment plans were set to 7 years or longer and longest was 10 years).Back To Text

[50] *See id.* at 164 (quoting Report from Parliamentary Committee, 1991−1992, p.3).Back To Text

[51] *See* Graver, *supra* note 42, at 168 (explaining research has shown considerable variation in length of payment plan from jurisdiction to jurisdiction).Back To Text

[52] *See id.* at 169 (noting that Bergen courts accepted five year plan in only 18% of cases).Back To Text

[53] *See id. Back To Text*

[54] *See id.Back To Text*

[55] This anxiety about abuse is fed by a constant stream of industry−inspired studies. These studies are like cockroaches. Each one scurries through the debates for a while until some sober, methodical analyst publishes a devastating critique. Following the "squish," another study appears and scurries. *See*, *e.g.*, John M. Barron and Michael E. Staten, *Personal Bankruptcy: A Report on Petitioner's Ability−to−Pay* (Oct. 6, 1997), criticized in U.S. General Accounting Office, Personal Bankruptcy, *The Credit Research Center Report on Debtors' Ability to Pay*, GAO/GGD−98−47 (February 1998); letter from Kim Kowalweski, Chief, *Financial & General Macroeconomic Analysis Unit, Congressional Budget Office*, to Brady C. Williamson, National Bankruptcy Review Commission Chair (October 6, 1997). The appearance of these withering criticisms was followed almost instantly by a new report by a national accounting firm relying on the same flawed methodologies. *See* Policy Economics and Quantitative Analysis Group, Ernst and Young, LLP, *Chapter 7 Bankruptcy Petitioner's Ability to Repay: Additional Evidence from Bankruptcy Petition Files* (February 1998). For a historical example, see Purdue Study, *supra* note 23, criticized in Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wisc. L. Rev. 1091.Back To Text