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DISTRUST: THE RHETORIC AND REALITY OF MEANS−TESTING

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In 1998, bankruptcy filings in the United States topped 1.4 million. For the 12−month period ending September 30, 1998, the number of bankruptcies filed increased 5.1% from the same 12−month period in 1997, for a total of 1,436,964. [1] According to the Administrative Office of the United States Courts, personal filings continue to drive the increase. [2] Personal bankruptcies, which accounted for 96.7% of all filings, increased by 5.8% during this period, for a total of 1,389,839 filings. [3] During this period, 996,905 petitions, or 71.7% of the total, were filed under chapter 7 of the Bankruptcy Code. [4] Another 392,053 petitions, or 28.2% of the total, were filed under chapter 13 of the Bankruptcy Code. [5] The numbers are staggering. During 1997, one out of every hundred households in the United States filed for relief under the Bankruptcy Code. [6] Disturbingly, many of these filings may fairly be characterized as an abuse of the bankruptcy process. [7] The exact percentage, however, is a matter of heated debate.

The rhetoric of consumer bankruptcy reform centers primarily on the advantages and disadvantages of means−testing. [8] In theory, means−testing is designed to prevent debtors who are able to repay some of their debt from filing a chapter 7 petition, which would discharge those debts, and instead forces those debtors into a chapter 13 case, under which some debt repayment is achieved. [9] Each camp parades its list of horribles regarding the applicability of means−testing before any audience that will listen, and, as a result, Congress has taken notice. [10] Both the Senate and House have overwhelmingly passed significantly different versions of means−tests without joint presentment to the President. [11] The issue is already before the Congress in 1999. [12]

Those who scorn the massive increase in bankruptcy filings believe the increase is a direct result of lax moral standards and a culture of tolerance. [13] In addition, many critics regard as being no better than thieves, debtors who have the ability to repay their debts but who instead choose to avoid their obligations through bankruptcy. [14] Many critics argue that these abusive debtors are unnecessarily imposing a $400 bankruptcy tax on American families. [15] The 1990's mantra of these groups is "means−testing."

Those in opposition to means−testing, such as a majority of the National Bankruptcy Review Commission ("NBRC"), consumer groups, and a score of influential academics, reject means−testing as being mean spirited and ill−conceived. [16] They argue that imposing additional costs on debtors to comply with a vague and incoherent means−testing formula is an unnecessary burden, one shouldered largely by honest debtors in legitimate pursuit of bankruptcy relief. [17] Furthermore, those in opposition view means−testing as a move by the credit card industry to persuade Congress to dissuade prospective debtors and their attorneys from entering the bankruptcy system at all. [18]

As one observes the debate unfolding, an impression unmistakably emerges: one−eyed prophets largely inhabit the realm of debate. These one−eyed prophets see only what they want to see, throwing up curtains of rhetoric to hide unwelcome facts. That said, both sides do set forth some valid arguments, but the rhetoric masks a deeper reality. Shadow debate centers on means−testing. Reality casts light on a more fundamental divide. That divide is not directed at the conduct of the parties in the bankruptcy process but at the activity within the institution of bankruptcy itself and at its actors – the bankruptcy judges. [19] The two camps disagree on how bankruptcy judges should preside over consumer bankruptcy cases. Many of those advocating

means−testing also seek to restrict a bankruptcy judge's discretion in deciding who may seek relief under the Bankruptcy Code, in part, by utilizing strict means−testing. [20] Many of those opposed to means−testing are concerned that the proposals disconnect judges from issues of true abuse by removing the bench's discretion to tackle the infinite variety one finds in consumer bankruptcy cases. [21]

Part I of the essay begins with an introduction to the present means−testing provision in the Bankruptcy Code and then explores both the Senate and House versions of means−testing proposed during the 105th Congress. From the language of the provisions and the report on the debates, what emerges is less a disagreement on means−testing and more a fundamental schism over the role of the bankruptcy judge as gatekeeper in the bankruptcy process. In Part I, I avoid the issue of whether heightened means−testing is warranted. Rather, I assume that some form of means−testing will pass Congress. My concern is with what that model might look like. Part II analyzes the distinction between the use of rules and standards as tools to limit judicial discretion. [22] I argue that the choice between the rules approach and the standards approach turns on a strong right−wrong distinction and how much trust a super−authority (e.g., Congress) has in a decision−maker (e.g., a bankruptcy judge). Part III contains my observations and suggestions on both the process and substance of means−testing as it plays out in the bigger picture of the proper role of bankruptcy judges as gatekeepers in the bankruptcy process. I suggest that the Senate version of means−testing is a standard−based approach to abuse, leaving considerable discretion in the hands of the bankruptcy judge to tailor potential remedies to the circumstances at hand. I further contend that the House version is a rules−based approach to abuse and leaves little discretion with the bankruptcy judge. I opt for a model of means−testing similar to the Senate version. The Senate version leaves the tools to do the job in the hands of the decision−maker, albeit subject to clearer guidance as to what may constitute abuse.

I. Means−Testing Proposals

A. Substantial Abuse under Section 707(b)

As Professor Jean Braucher forcefully notes:

> Means−testing of chapter 7 is not a new idea. The Commission on the Bankruptcy Laws of the United States, established by Congress in 1970, considered it and then wrote: "The Commission has concluded that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system." [23]

Professor Braucher continues by demonstrating that with the 1984 amendments to the Bankruptcy Reform Act of 1978, [24] Congress implemented a form of means−testing in section 707(b). [25] Section 707(b) provides that:

> The court on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter [chapter 7] whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. [26]

According to the legislative history, section 707(b) strikes a balance between two competing interests. [27]

> It preserves the fundamental concept embodied in our bankruptcy laws that debtors who cannot meet debts as they become due should be able to relinquish non−exempt property in exchange for a fresh start. At the same time, however, it upholds creditors' interests in obtaining repayment where such repayment would not be a burden. [28]

These policies could support either the Senate or House version of means−testing legislation presently pending. Why, then, is section 707(b) perceived by so many, including many in Congress, as being a dismal failure? Why has the section not operated effectively as a gatekeeper and deterrent to debtor abuse of chapter

7? Here, again, the answer depends on whom you ask.

George Wallace has put forth one of the better arguments as to why section 707(b) has failed. [29] Wallace argues that bankruptcy judges ignore the section. "There are over 300 bankruptcy judges out there, and, in most of their courts, section 707(b) is simply a dead letter." [30] "Judges' values, which become important in determining how much expenses are appropriate for a debtor, vary widely across the spectrum of judges." [31] "The objective standards, of course, are necessary in order to produce some uniformity in the system. We need something that is both a bright−line test and something that provides sufficient flexibility for the hard cases." [32] In effect, Wallace is asserting the classic attack on standards. As perceived by Wallace, a standard, like section 707(b), vests too much discretion in bankruptcy judges, who, in turn, are shirking their responsibility.

Case law under section 707(b) may support Wallace's argument. [33] Like many operative terms in the Bankruptcy Code, "substantial abuse" is not defined. [34] Moreover, the Office of the United States Trustee, the office charged with the enforcement of section 707(b), has failed to establish uniform guidelines on what may constitute a "substantial abuse." [35] In response to the ambiguity of the phrase, both the Eighth and Ninth Circuits have held that whether a debtor has the ability to repay his or her debts through funding a chapter 13 plan is the single most important factor in determining whether a substantial abuse exists. [36] In fact, both circuits have embraced a *per se* rule to this effect.

In grappling with the standard, most other courts have employed several rhetorical tools to assess factors relevant to the inquiry, including balancing techniques, sifting through the facts peculiar to the case, and weighing the policies and values at play in the bankruptcy process. [37] These courts have rejected the focus on the ability of a debtor to fund a chapter 13 plan, observing that a debtor's ability to repay his or her debts or to fund a chapter 13 plan is but one factor to consider and may, by itself, be insufficient grounds for finding abuse. [38] Rather, these courts embrace a totality−of−circumstances test to assess whether a chapter 7 filing is permitted under section 707(b). [39] Many of the reported cases, however, are hard to square with a meaningful means−testing mechanism. [40] One can sympathize with the frustration of a creditor who sees its debtor file a chapter 7 petition, even though the debtor could pay between 42% and 75% of the total owed (depending upon the length of the plan), and then sees the court reject a section 707(b) motion because the debtor appears to be a decent person. [41]

Wallace also argues in favor of pending means−testing provisions because section 707(b) does not currently permit a party in interest to challenge substantial abuse by the debtor. At present, only the court and the United States trustee can bring a substantial abuse challenge. [42] According to Wallace, United States trustees in most jurisdictions have "refused [to take] any effective action whatsoever." [43] Panel trustees have faired no better in the enforcement of section 707(b). According to Lawrence Friedman, an officer of the National Association of Bankruptcy Trustees, it is not cost−effective for panel trustees to ferret out and challenge substantial abuse cases. [44] Professor Braucher counters, arguing that section 707(b) is not used much because few debtors actually abuse the bankruptcy system. [45] My review of the empirical studies on the frequency of the use of section 707(b) suggests that the data are inconclusive.

B. Means−Testing under the Senate Version

Responding to the perceived ineffectiveness of section 707(b), the Senate considered a means−testing provision in Senate Bill 1301. [46] Of particular relevance was section 102 of S. 1301, [47] which sought to impose a heightened means−testing mark. [48] Under present law, section 707(b) permits a court to dismiss a consumer case if granting chapter 7 relief to the debtor would constitute a "substantial abuse" of chapter 7. [49] The Senate's means−testing component of section 102 employed the existing framework of section 707(b), but modified it in several key respects.

First, the Senate proposal would have changed the ground for relief from "substantial abuse" to "abuse." [50] Like "substantial abuse," "abuse" would have been left undefined in the statute, thus leaving courts with a similarly vague standard with which to struggle. But, unlike its predecessor, the Senate version includes three

guidelines a court must consider in assessing whether a debtor has abused relief under chapter 7. [51] These guidelines are:

> (1) Whether a debtor was able to pay at least 20% of unsecured, non−priority claims through a chapter 13 plan under section 1325(b)(1);
>
> (2) Whether a debtor filed the bankruptcy case in bad faith; and
>
> (3) Whether a debtor attempted to negotiate in good faith a non−bankruptcy payment alternative, and whether the creditors were unreasonable in response to the debtor's efforts. [52]

Not surprisingly, these factors resemble several of the factors some courts presently employ under section 707(b). [53] Under the Senate version, however, these factors become explicit directives from the super−authority to the decision−maker, clearly expressing the super−authority's intent. These factors also reject the line of cases that discounted the importance of a debtor's ability to repay his or her debts under the present section 707(b) rubric for determining abuse. [54]

Second, the Senate proposal would permit any party in interest [55] to move for dismissal or conversion to a chapter 13 case for debtor abuse. [56] Standing to move, however, is tempered by the requirement that the right of a party in interest be conditioned on a debtor's income level. [57] Where a debtor's household is four or less, a party in interest may not move under proposed section 707(b) unless "the debtor and the debtor's spouse combined, as of the date of the order for relief, have current monthly total income equal to or less than the national median household monthly income calculated on a monthly basis for a household of equal size." [58] Additional adjustments are made for each member of the household in excess of four. [59]

Third, the Senate version would delete the current presumption in section 707(b), favoring the debtor's election of substantive relief. [60] What effect this change will have is unclear.

Fourth, the Senate version constructs a mechanism to address creditor abuse under section 707(b). [61] One fear articulated by opponents of Senate Bill 1301 is that it would permit creditors to file motions in order to gain leverage in the reaffirmation of their debt. [62] In addition to rule 9011 of the Federal Rules of Bankruptcy Procedure and 18 U.S.C. § 152, the Senate version seeks to address this concern by providing for sanctions against creditors who abuse this right. [63] Additionally, a court would have the power to impose sanctions against the debtor's attorney in certain circumstances for abuse of the bankruptcy process. [64]

C. Means−Testing under the House Version

The House has introduced a version of means−testing that differs significantly from the Senate version and present section 707(b). [65] The House version is a classic rules approach to the issue of debtor abuse. Under H.R. 3150, a court is required to assess the substantial repayment capacity of the debtor by undertaking a three−part test in an effort to steer debtors from chapter 7 to chapter 13. [66] First, a court employs the "median income test." Next, the court applies the "projected monthly net income test." Finally, the court applies the "20% of unsecured debt test." A description of these tests follows below.

Under the "median income test," a court must ascertain the average monthly gross income of the debtor for the six months prior to the filing of the bankruptcy petition. [67] After the debtor's "current monthly total income" is identified, the court must compare this amount to the national median income for a family of comparable size. [68] For a family of four, the most recent median annual income was $51,518. [69] Under the House proposal, the debtor's current monthly total income must be at least equal to the median annual income for the relevant family size. [70] If not, a debtor's choice of substantive relief under the Bankruptcy Code is not disturbed by H.R. 3150. [71] In other words, if a debtor's current monthly total income does not exceed the national median income, then the House version of means−testing does not apply. [72] If a debtor's current monthly total income meets or exceeds this threshold limit, then a court employs the "projected monthly net income test." [73]

Under the second stage, the projected monthly net income test, a court must determine whether the debtor's projected monthly income exceeds a surplus of $50 per month after living expenses (as allowed by the Internal Revenue Service's collection standards), [74] secured debt payments, and priority debt payments are deducted from the debtor's current monthly total income. [75]

Under the final test, the 20% of unsecured debt test, a court must determine whether the debtor's projected monthly net income is sufficient to allow the debtor to pay at least 20% of non−priority unsecured debt over five years pursuant to a chapter 13 plan. [76] If this final test is met, a presumption arises in favor of dismissing the debtor's chapter 7 case and converting it to a chapter 13 case. [77] A debtor may rebut this presumption by submitting a verified statement, executed by the debtor and the debtor's attorney, that demonstrates extraordinary circumstances. [78]

Thus, H.R. 3150 constructs a very different form of means−testing than that found in the present section 707(b) and S. 1301. The House version constructs an algorithm purposefully designed to limit judicial discretion on the issue of consumer debtor abuse. In contrast, S. 1301 employs standards and guidelines to channel the decision−maker's discretion. Before I turn to a more critical analysis of the Senate and House models, it is necessary to provide an introduction to the traditional debate regarding decision−maker discretion.

II. Rules and Standards as Limits on Judicial Discretion

Professor Kathleen Sullivan has skillfully attended to the differences inherent between the two techniques used in legal theory to constrain judicial discretion – rules and standards. [79] Rules and standards are tools for channeling the discretion of a decision−maker. [80] According to Professor Sullivan, rules require a decision−maker to classify and label. [81] Rules are perceived as outcome determinative. [82] The entire conflict in litigation is to determine which rule controls. "Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial standards of the claimed right against the government's justification for the infringement." [83] In contrast, standards require a decision−maker to weigh competing rights and interests. [84] Standards are not perceived as outcome determinative, "but [the outcome] depends on the relative strength of a multitude of factors." [85]

Thus, the debate between rules and standards may provide insight into the more pressing debate about means−testing in bankruptcy. [86] Much of the debate ultimately turns on how much discretion the superior authority wishes to grant to the decision−maker on the bankruptcy frontline. [87] The superior authority can attempt to limit the discretion of a decision−maker by fixing or requiring rules. Rules promote consistency, predictability, and judicial restraint in decision making. [88] Rules are designed to confine a decision−maker to the role of sifting through the facts of a case, a task generally devoid of subjective value choices. [89] Rules also provide fair notice of what is expected of parties in interest. [90]

In contrast, standards are generally perceived as indeterminate. [91] They are contextual determinations that, according to Professor Sullivan, embody the "pragmatic spirit of the common law judges." [92] Standards allow and encourage wide−ranging discretion (legal, political, and otherwise) on the part of a decision−maker to decide concrete cases. Standards are arguably fairer than rules because they promote substantive justice and equality. [93] Since a standard−like approach is not committed to a fixed protocol, the decision−maker is free to minimize the risk of error from the over− and under−inclusiveness endemic in a rule. Endowing a decision−maker with wide−ranging discretion, however, injects another type of error into the decision making process; namely, error from bias and incompetence. [94] Additionally, standards may provide less notice of what is expected of parties in interest. [95]

The rules/standards debate further masks a deeper schism in the law. Like language, the law is a system of thought and of communication. [96] Rules communicate outcomes to judges, litigants and society in a clear manner. [97] Rules, however, do not advance a debate over issues, nor do they allow the law to grow through new cases and observations. [98] A rule is perceived as the death of thought. On the other hand, standards further the law's system of thought by exposing judges, litigants, and society to the rationale of outcomes. [99]

Yet, while standards further the debate over issues and allow the law to develop through new cases, the technique often fails as a good communicator of outcomes. [100]

In other contexts, I have offered a perspective on the debate that is closely related to that offered by Sullivan. [101] I have asserted that the choice between rules or standards turns on different conceptions of the system of law – communication or thought – held by a superior authority or decision−maker. [102] Thus, Sullivan's perspective on the debate is the consequence of the classification of the systems of law and not its purpose. [103] According to my view, legal classification relies on a scale of discretion conventionally identified by reference to rules and standards. The degree of discretion employed turns on how much we know and want to know about a case, the need for debate, the need for fair notice, general principles of efficiency and, ultimately, the degree of trust the super authority has in the decision−maker. These notions are in a state of contradiction. [104] In Part III of this essay, I apply these general principles to the debate concerning means−testing and the implicit choices we make in adopting and advancing one version of means−testing over another.

III. Observations

Before considering the Senate and House versions of means−testing through the lens of the rules/standards debate, I would like to say a few things about the underlying assumption of means−testing. That assumption is that a "legally significant" [105] number of debtors who chose relief under chapter 7 have the income to repay a significant portion of their debts. Of the available studies, some have concluded that debtor abuse is substantial, while others have concluded that it is virtually non−existent. [106] A number of studies show various levels of debtor abuse, ranging from substantial to almost nonexistent. [107] The National Bankruptcy Review Commission ("NBRC") reviewed many of these studies and rejected means−testing. [108] The NBRC concluded that substantial debtor abuse of chapter 7 does not exist. [109] A number of influential commentators on, and participants in, the consumer bankruptcy process support this conclusion. [110] Nevertheless, several studies suggest that many debtors who seek relief under chapter 7 could have paid a significant portion of their debts through a chapter 13 plan. [111] Influential commentators on and participants in the consumer bankruptcy process also support this conclusion. [112]

Recently, the results of a study conducted by Professors Marianne B. Culhane and Michaela M. White, which was funded by the American Bankruptcy Institute ("ABI"), were announced at the ABI's 1998 Winter Meeting. [113] The ABI announced the finding that it appears very little abuse of the bankruptcy process takes place. [114] These findings did not surprise many of those working in the bankruptcy trenches. [115] The study reported that 97% of chapter 7 debtors in the sample had insufficient income with which to repay even 20% of their unsecured debts over five years. [116] Nonetheless, the study did find that three percent of those individuals who filed under chapter 7 of the Bankruptcy Code did have sufficient repayment capacity to be barred from chapter 7 under the means−testing proposal embodied in H.R. 3150. [117] Three percent of those individuals that filed for relief under chapter 7 in 1997−98 amount to almost 30,000 filers who would be impacted by H.R. 3150. [118] The study also found that these impacted filers had the apparent ability to repay, on average, 70% of their unsecured non−priority debts, assuming their living expenses and debts did not change relative to their income. [119] Furthermore, the median gross income of impacted filers was over 2.5 times that of chapter 7 filers not impacted by H.R. 3150, and was 22% higher than the national median income for all families. [120] Additionally, the median unsecured debt of impacted filers was substantially higher than that of chapter 7 filers unaffected by H.R. 3150's means−testing provisions. These findings were based on a random sample of over 1,000 chapter 7 cases filed in 1995. [121]

Based on the statistical reports alone, it appears that proponents of means−testing have not made out a clear case of substantial debtor abuse. That is not to say, however, that legally significant abuse does not take place. Section 707(b), at least in some districts, presently ensnares some debtors for substantial abuse. [122] The ABI study suggests that about 30,000 chapter 7 filers may be able to repay as much as 70% of their debts. [123] Thus, there is some percentage of individual chapter 7 debtors that have sufficient income to pay a significant portion of their debts. [124] My point is not to make out the case for heightened means−testing; my task is less ambitious. Unfortunately, the winds are such that the question for Congress is not whether there is *statistically*

significant [125] evidence of debtor abuse of chapter 7 relief to support heightened means−testing. Instead, the question is whether there is *politically significant* [126] evidence of debtor abuse to justify heightened means−testing. The fact is that three to ten percent of individual chapter 7 filers abusing the system may be relatively small, but it is politically significant. [127] The debate in the 105th Congress demonstrated this point. [128] Moreover, the fact that some debtors have abused the system may have an impact on how other debtors approach their role in the bankruptcy process. [129] This is not unlike the argument made in the context of another voluntary, self−reporting system – the federal personal income tax system. [130] Finally, a society may take a stand on the moral issues associated with the failure to repay one's debts when one possesses the ability to do so. [131] In this light, heightened means−testing provides information to members of society as to what is expected of them. It is a symbolic, but no less a real signal of acceptable social norms. This essay assumes that means−testing, whether we like it or not, is on the horizon, and concerns itself with what model of means−testing is more appropriate for the bankruptcy system. [132]

Means−testing in H.R. 3150 follows the form of a rule with a standard−like exception. Means−testing in S. 1301 follows the form of a standard with rule−like exceptions. Recall that rules allow small patches of discretion for a decision−maker. [133] In contrast, standards allow large patches of discretion. [134] Generally, the choice between rules and standards should turn on how much a super−authority and a decision−maker know about a problem and not what political or judicial agenda it seeks to further. Where one knows more about a problem, rules may be used. Rules will tend to establish more precision in a continuous system. [135] Rules promote uniformity. [136] Rules limit variation in local legal cultures. [137] Uniformity, however, is not expense−free. Adherence to a strict protocol forces a decision−maker to round off cases. Thus, rules increase the error rate in that they tend to be over and under inclusive. [138] Under the House version some debtors, for example those with high exempt asset values but low current incomes, will go unfettered by heightened means−testing. [139] Their choice of substantive relief would remain undisturbed. In contrast other debtors, for example those with unusual family, financial, or medical circumstances, may be forced from chapter 7 to chapter 13 or denied relief entirely. To be sure, H.R. 3150 does provide a standard−like exception for exceptional circumstances, but that may be too thin a wedge upon which to rely. [140]

Standards are more appropriate where one knows less about a problem. Standards require the court to identify and analyze the competing rights and interests and weigh them in some fashion. [141] This is typically accomplished explicitly in a court's written decision. "Candor and demystification are independent goods." [142] Spelling out the reasons for a decision fosters debate. Debate leads to both negative and positive feedback. [143] This new data may then be used by a court or by Congress to refine its future decisions to reach mostly right ones. Standards are not only continuous, but also adaptive. [144] There are enormous variations among families in this country. A form of means−testing like S. 1301 "supplies desirable flexibility to the courts." [145] Standards also decentralize power and authority, leaving tools in the hands of those that need them the most – the bankruptcy judges. [146]

Some have argued that too much discretion leads to disparate results. [147] This is the bane of standards like S. 1301. Experience, however, suggests that the quality of uniformity is greatly overstated and selectively voiced. [148] Uniformity restricts creativity. [149] In this country, bankruptcy is a work in progress, an organic system that boldly steps in when other systems (including support systems) fail. [150] Its strength is in its adaptability to ever−changing conditions. [151] In bankruptcy, non−uniformity is not a curse; it is a blessing of the first order.

What passes for lack of uniformity is really something very different. To his credit, Wallace has made the point explicit. He stated:

> But too much judicial discretion gives non−uniform results, and that's not fair either. Since 1984, the provision in the Code, § 707(b), which has allowed judges to control this problem, has not been used. It is entirely discretionary. If the judges had been trying hard to make that provision work, if the U.S. Trustee's Office had been pushing for enforcement, we would not be here today. Judges haven't taken the initiative that they should have shown, for example, to enforce the Sears case – where they have on their own motion audited cases in order to find

out whether reaffirmation agreements were being filed improperly. [152]

Congress is moving to enact heightened means−testing because of the perception that bankruptcy judges are not doing their job. [153] As a body of decision−makers, they are asleep at the wheel. [154] Advocates of H.R. 3150 and other rule−like models of reform are convinced that bankruptcy judges have become too timid in applying section 707(b). [155] Congress does not trust bankruptcy judges to implement the intent of Congress regarding debtor abuse. [156] This debate is no different from when Congress lost trust in the ability of federal district court judges to effectuate the intent of Congress in imposing criminal sentences. [157] In that case, Congress answered with sentencing guidelines that removed virtually all discretion from judges. [158] In the bankruptcy context, Congress is likely to address its distrust of judges with H.R. 3150, or a version thereof, that will seeks to remove most of a judge's discretion. [159]

A metaphysical assumption implicit in the traditional rules/standards debate is that a correct resolution to a given dispute exists and a superior authority has already decided it. [160] Because the debate frames the relationship in terms of accurate communication between a superior authority and decision−maker, implicit in the debate is a belief that the legal universe is completely filled. [161] Courts, the decision−makers, cannot be trusted, and so the superior authority, the legislature, searches for an equilibrium between, on the one hand, over− and under−inclusiveness and, on the other, the risk that judges will sneak in their own ethical preferences in lieu of the intent of the superior authority. [162] Under this view, law is a brooding omnipresence in the sky. There is always a right answer.

A corollary of the view that law is a brooding omnipresence in the sky is the strong theme that underlies the advance of rules over standards, and vice−versa; that is, the mistrust inherent in the relationship between a superior authority and a decision−maker. "If the legislature trusted judges to execute its intent, rules would only be a nuisance and a waste of time. No law would be needed if judges could be completely trusted, just as infinite law would be needed if judges were completely untrustworthy." [163]

The post−modern super authority and decision−maker knows that the legal universe is not filled. [164] There *is* no pre−linguistic reality. Reality is linguistic. Traditional analysis distinguishes the use of rules and standards on the basis of a strong right−wrong distinction. Rules get it "wrong" because words betray the speaker's intent. Standards permit "wrong" results because a judge does not or will not commune with the pre−linguistic reality of the superior authority, which has already figured out who should win every contest. But post−modern philosophy suggests that a speaker never fills the universe with omnipresence. [165] This denial implies that any given qualitative concept contains things that are thought to be excluded. Every qualitative concept covertly contains its opposite. Every concept is in a state of contradiction. Furthermore, what any qualitative judgment must admit, whether expressly or covertly, is anti−quality. The opposite of the asserted quality is negativity, or quantity. Thus, qualitative judgments fail; they let in negativity, universality, quantity, and degree. [166]

A standard−like model of means−testing recognizes that determinations of abuse are textual determinations that depend on numerous facts and circumstances, including the demeanor and credibility of the debtor. [167] Congress cannot adequately make that call. Experience shows the decision−maker has to be there to decide. [168] To be sure, Congress could embrace an approach like H.R. 3150 that squeezes discretion from the bankruptcy judge. But such an approach is a crude approximation of what goes on before the bankruptcy judge. Spend a week witnessing the trial of debtors and creditors that pass before the bankruptcy court. Debtors and creditors are not always of the same ilk. Experience strongly suggests, dare I say, demands that any model of means−testing must decentralize power to allow those with the responsibility to decide to possess the authority to decide. [169] A rules approach to means−testing removes authority from the bankruptcy judge, replacing that authority with crude approximations created by Congress of who is or is not eligible for relief without ever having to look the participants in the face. [170] A standards approach, on the other hand, vests in the bankruptcy judge the authority to hear the actual facts of the case before deciding on debtor eligibility for chapter 7 relief. [171] This type of an approach recognizes that participants in the bankruptcy process have an intrinsic value as human beings and members of society; that they are entitled to be treated with dignity by the government (especially before they are denied access to an important right like chapter 7

relief); that they should be given a meaningful opportunity to present their case before a bankruptcy judge; and that they are entitled to be treated as an individual and not as some member of a class that a super authority has identified as unworthy of chapter 7 relief without even considering their individual circumstances. [172]

Conclusion

Aside from the ideological and political firestorms, means−testing poses fundamental questions about the proper relationship of the bankruptcy courts to Congress. Congress has clearly demonstrated a distrust of bankruptcy judges in implementing its intent under section 707(b). In response, Congress is considering two very different versions of means−testing. The House version removes discretion from bankruptcy judges, disconnecting them from the authority but not the responsibility to decide these matters. The Senate version vests discretion in bankruptcy judges, tempering that discretion with clear directives in certain recognizable cases that Congress has identified as clearly abusive. A bankruptcy judge has both the responsibility and the authority to decide hard cases. A standard−like model of means−testing has the benefits of adaptability and substantive fairness. Such a model decentralizes power, vesting it in the only participant in the bankruptcy process who can wield that power to promote substantive fairness – the bankruptcy judge. With that power, however, comes a responsibility to ferret out of abuse cases when they arise. As Justice Frankfurter eloquently observed some fifty years ago, "A timid judge, like a biased judge, is intrinsically a lawless judge." [173]

FOOTNOTES:

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[1] *See* American Bankruptcy Institute, *Bankruptcies Break Another Record During 12−Month Period Ending September 30* (released Nov. 23, 1998) <http://www.abiworld.org/release/98thirdquarterfilings.html> [hereinafter *Bankruptcies Break Another Record*] (providing statistical increase in bankruptcies filed in 1998); *see also Overall Filings Up at Midyear, But Business Filings Drop Again*, Bankr. Strategist, Sept. 1998, at 1 (noting increase in bankruptcies filed in second quarter of 1998 as compared to 12 month period in 1997).Back To Text

[2] *See Reports from Winter Meeting*, Am. Bankr. Inst. J., Feb. 1997, at 18, 18 (noting statistics from United States Court's Administrative Office showing continued increase in consumer debtor bankruptcy filings); *see also* Tamara Ogier & Jack F. Williams, Bankruptcy Crimes and Bankruptcy Practice, 6 Am. Bankr. Inst. L. Rev. 317, 318 (1998) (observing dramatic increase in bankruptcy filings during last 20 years); Danielle Svetcov, *Snap Judgments*, Bus. L. Today, May−June 1997, at 6 (asserting that consumer bankruptcy filings hit all−time high in 1996).Back To Text

[3] *See* Bankruptcies Break Another Record, supra note 1 (detailing statistics and recognizing increase in 1998 in number of bankruptcies filed); *see also* Carlos J. Cuevas, *The Consumer Credit Industry, The Consumer Bankruptcy System, Bankruptcy Code Section 707(b), and* Justice: A Critical Analysis of the Consumer Bankruptcy System, 103 Com. L.J. 359, 359 (1998) (stating that majority of bankruptcy cases filed are consumer bankruptcies); Charles A. Doctor, *Impact of Credit Card Use on Consumer Bankruptcies*, Am. Bankr. Inst. J., Feb. 1998, at 1, 42 (discussing surge in consumer bankruptcy filings).Back To Text

[4] *See* Bankruptcies Break Another Record, supra note 1 (providing statistical information regarding amount of personal bankruptcies filed and percentage of increase).Back To Text

[5] *See* id. (noting statistical increase in chapter 13 filings); *see also* Bruce L. Dixon, Consumer Bankruptcy Filings in the U.S. and Arkansas: Growth Rates and Possible Causes, 1998 Ark. L. Notes 13, 15 (observing rapid increase in chapter 13 filings).Back To Text

[6] *See* Sherri L. Rotert, Bankruptcy Law, 75 Denv. U. L. Rev. 731, 731 (1998) (stating that in 1997, one out of every 100 American families filed bankruptcy petition);.*Testimony of the American Bankruptcy Institute on*

Consumer Debt, Delinquencies and Personal Bankruptcies: Hearing Before the Committee on Banking and Financial Services of the U.S. House of Representatives (Sept. 12, 1996) (statement of Ford Elsaesser, Esq., Vice−President of the American Bankruptcy Institute) (visited Apr. 1, 1999) <http://www.abiworld.org/legis/testimony/12sep96.html> [hereinafter *Testimony of Ford Elsaesser, Esq.*] (conveying in common terms effect of increased number of consumer bankruptcy filings). Back To Text

[7] *See* Hon. Leif M. Clark, *The Responsible Borrower Protection Bankruptcy Act: A Not−So Responsible Effort at* Protecting Borrowers, 28 U. Mem. L. Rev. 741, 751 (1998) (stating consumer bankruptcy filings are increasingly abusive of bankruptcy process); Mary Jo Heston, The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions, 6 Am. Bankr. Inst. L. Rev. 359, 359 (1998) (stating bankruptcy fraud affects integrity of bankruptcy system); Hon. Stephen A. Stripp, An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time, 23 Seton Hall L. Rev. 1329, 1337−38 (1993) (noting multitude of areas impacted by abuse of bankruptcy system).Back To Text

[8] *See* H. Gray Burks, IV, *Rethinking the Eradication of Cram Down – Changing "Cram Down" to "Cram Up"* Norton Bankr. L. Adviser, Dec. 1998, at 10, 13 (discussing disadvantages of means−testing); Elizabeth Warren, A Principled Approach to Consumer Bankruptcy, 71 Am. Bankr. L.J. 487, 503−04 (1997) [hereinafter Warren I] (recognizing debate concerning advantages and disadvantages of means−testing in bankruptcy); *see also* Bruce Moyer, *FBA Calls for Action on ALJ Pay, Delay on Bankruptcy Reform*, Fed. Law., Oct. 1998, at 7 (noting problems with means−testing, and urging Congress to delay reform until empirical data can be collected).Back To Text

[9] *See* Michael Higgins, *Putting Back the Bite,* A.B.A. J., June 1998, at 74, 75 (providing rationale behind means−testing); Elizabeth Warren, The Bankruptcy Crisis, 73 Ind. L.J. 1079, 1094−95 (1998) [hereinafter Warren II] (recognizing means−testing as mechanism for deterring debtors able to repay creditors under chapter 13 from filing multiple bankruptcies to stay foreclosure actions).Back To Text

[10] *See* Higgins, supra note 9, at 75 (discussing recommendations and growing debate on means−testing); Larry Prince & Robert A. Faucher, *Ethical Issues Facing Idaho Bankruptcy Practitioners*, 34 Idaho L. Rev. 309, 325 (1998) (noting that "means−testing" undoubtedly will be debated by Congress); *see also* James L. Baillie, *Bankruptcy Under Scrutiny*, Bus. L. Today, Jan.−Feb. 1998, at 24, 25 (discussing recommendations proposed to Congress regarding means−testing).Back To Text

[11] *See Picking Up the Pieces on Bankruptcy Reform,* Am. Bankr. Inst. J., Dec.−Jan. 1999, at 1, 41 [hereinafter *Picking Up the Pieces*] (comparing formulaic approach of House with case−by−case analysis backed by Senate); Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f):* One Step Forward and One Step Back, 70 U. Colo. L. Rev. 1, 72 (1999) (noting House's formulaic approach in comparison to Senate's case−by−case analysis, thus reserving more discretion for bankruptcy judges); *see also Bankruptcy Bill Moves Forward*, NAAG Bankr. Bull., May 1998, at 1, 2 (stating that Senate's bill relies on stronger version of § 707(b) test, while House focuses on formula−based approach).Back To Text

[12] Senator Charles E. Grassley (R−Iowa) has made this point clear. *See Bankruptcy Reform Bill Dies at End of Session*, Am. Bankr. Inst. J., Nov. 1998, at 1, 1 (noting existence of difference between House and Senate approach to means−testing); *see also* Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means−Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a* Starting Point, 6 Am. Bankr. Inst. L. Rev. 1, 1 (1998) [hereinafter Braucher I] (recognizing Congress' interest in applying uniform approach to consumer debtors under means−testing); Burks, supra note 8, at 13 (stating Congress' return to bankruptcy reform issues in 1999); Hon. Leif M. Clark, *Dodging a Bullet*, Am. Bankr. Inst. J., Nov. 1998, at 28, 28 (recognizing Congress' return to issues related to means−test in bankruptcy for 1999).Back To Text

[13] *See* Testimony of Ford Elsaesser, Esq., supra note 6, at 4 ("Unlike a generation ago, there is no shame in debt any more; the stigma associated with bankruptcy has largely disappeared."). Reform is about "telling the people who are out there paying their bills that they're doing the right thing.'" Higgins, supra note 9, at 75. *See*

also Braucher I, supra note 12, at 3 (stating that many file chapter 7 bankruptcies who in fact have ability to repay some debt); Heston, supra note 7, at 358 (noting lax bankruptcy standards result in abusive filings); Michael C. Petersen, Note, Prebankruptcy Planning with ERISA – Qualified Pension Plans and Individual Retirement Accounts After Patterson v. Shumate, 29 Willamette L. Rev. 893, 893 (1993) (noting bankruptcy increase resulting from social acceptance of process).Back To Text

[14] *See* Nicole L. Ripken, Recent Decisions: The United States Court of Appeals for the Fourth Circuit, 57 Md. L. Rev. 1114, 1117 (1998) (noting eighth and ninth circuits have ruled it is *per se* abuse of bankruptcy process for debtor possessing ability to repay debt to file under chapter 7); Robert B. Vandiver, Jr., Note, *Bankruptcy—A Review of Recent Court Decisions Applying Section 707(b) of the* Bankruptcy Code to Chapter 7 Proceedings, 22 Mem. St. U. L. Rev. 549, 549 (1992) (discussing how some debtors file chapter 7 instead of chapter 13 in order to have all debts discharged); *see also* supra notes 8−9 and accompanying text (stating that means−testing is designed to prevent debtors from filing under chapter 7 in situations when they would be able to repay their debts under chapter 13).Back To Text

[15] *See* John Weistart, *Fanning the Flames of Class Division*, Wash. Times, Dec. 18, 1998, at A21; *see also* Amy K. Bock, Comment, How to Restore the Airline Industry to Its Full Upright Position: An Analysis of the National Commission to Ensure a Strong, Competitive Airline Industry Report, 59 J. Air. L. & Com. 663, 685 (1994) (recognizing effect of bankruptcy process on general public); Andrew M. Campbell, Annotation, Exception From Discharge of Taxes Under Section 523(a)(1) of the Bankruptcy Code, 145 A.L.R. Fed. 1, 8 (1998) (noting debtors file successive bankruptcies to avoid paying federal taxes); Petersen, supra note 13, at 893 (observing that personal bankruptcies in 1992 cost private sector consumer creditors approximately $10 billion and that much of this cost was passed onto general public).Back To Text

[16] "A hard−line means−test says, 'in effect, we don't care about things that happen in the normal vicissitudes of life; pay the damn bank.' It's really that mean spirited." Higgins, supra note 9, at 3 (statement by Jeffrey L. Solomon, Chair of the Committee of the ABA General Practice, Solo and Small Firm Section). "It's a mistake to demonize the many American families who have turned to bankruptcy for a fresh start. The vast majority of debtors are honest, hard−working people." *Resolved: The Time has Come for Means−Testing Consumer Bankruptcy*, Am. Bankr. Inst. J., Apr. 1998, at 1, 44 [hereinafter *Resolved*] (quoting Gary Klein of National Consumer Law Center). *See generally* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 81, 89−91, 235 (1997) [hereinafter Commission Report] (setting forth National Bankruptcy Review Commission's consumer bankruptcy discussion and rejection of means−testing).Back To Text

[17] *See* Cuevas, supra note 3, at 359 (discussing how means−testing may deprive honest debtors of opportunity to obtain discharge under chapter 7); Higgins, supra note 9, at 74 (stating that consumer groups describe means−testing as "nightmarishly complex," and note it punishes honest debtors hampered by unemployment or medical catastrophe); Warren II, *supra* note 9, at 503 (describing means−testing as "vague" and "sketchy").Back To Text

[18] *See* H.R. 2500, 105th Cong. §§ 101−02 (1998) (noting means−testing impedes access to chapter 7); Ellen Drought, Note, *Navigating Scylla and Charybdis: In re Briese, Gambling and Credit Card Debt Dischargeability*, 1997 Wisc. L. Rev. 1323, 1351 (stating that means−testing forces debtors into chapter 13 rather than allowing them to file under chapter 7).Back To Text

[19] One additional point needs to be made here. Those that oppose means−testing may, in my opinion, do so not because of the merits of the issue, but because of the concern that consumer bankruptcy reform may not end there. As the saying goes, once the camel's nose is in the tent, so the rest follows on. The consumer package before Congress includes many other provisions that are essentially designed to dissuade consumer bankruptcy filings. Those that oppose means−testing, then, see this issue as one among many. In this regard, I have a difficult time concluding that some of these other proposed bankruptcy provisions in H.R. 3150 square with the time−honored values embodied in the Code. See Picking Up the Pieces, supra note 11, at 48 (recognizing that means−testing removes judicial discretion); Resolved, supra note 16, at 44 (discussing increase in monitoring of cases and need for more judges as reasons bankruptcy discharge has never been

means−tested); Warren II, *supra* note 9, at 505−06 (discussing effect of means−testing on courts and bankruptcy judges).Back To Text

[20] *See* Picking Up the Pieces, supra note 11, at 48 (comparing formula−driven approach to means−testing with judicial discretion approach in determining who may be precluded from filing under chapter 13); Ponoroff, supra note 11, at 72 & n.22 (recognizing that implementation of means−testing reserves more discretion for bankruptcy judges); Drought, *supra* note 18, at 1352 (discussing tension between means−testing and role of judges in moving debtors from chapter 7 to chapter 13).Back To Text

[21] *See* Braucher I, supra note 12, at 10 (noting additional costs and burden means−testing places on judges and public); *Testimony of Honorable Edith H. Jones*, Fifth Circuit U.S. Circuit of Appeals Judge and National Bankruptcy Review Commissioner, Before the House Judiciary Subcommittee on Commercial and Administrative Laws, March 10, 1998, 52 Consumer Fin. L.Q. Rep. 176, 177 (1998) [hereinafter *Testimony of Jones*] (noting increased cost and burden means−testing puts on judiciary); Warren I, supra note 8, at 506 (stating that means−testing determinations would leave judges with less time to review abuse cases).Back To Text

[22] *See generally* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 56−94 (1992) [hereinafter Sullivan I] (discussing constitutional issues arising out of using rules and standards to limit judicial discretion).Back To Text

[23] Braucher I, supra note 12, at 3; *see also* 1973 Report of the Commission of the Bankruptcy Laws of the United States, pt. I, at 159 (concluding that forced contributions from future income are unlikely to succeed).Back To Text

[24] *See* Bankruptcy Reform Act of 1984, Pub. L. No. 98−353, §§ 312, 475, 98 Stat. 355, 381 (1984) (amending Bankruptcy Reform Act of 1978).Back To Text

[25] *See* 11 U.S.C. § 707(b) (1994); *see also* Braucher I, supra note 12, at 3−4 (observing that form of means−testing exists in § 707(b)); Wayne R. Wells et al., *The Implementation of Bankruptcy Code Section 707(b): The* Law and the Reality, 39 Clev. St. L. Rev. 15, 19, 23−24 (1991) (observing that, pursuant to § 707(b), bankruptcy judges as well as U.S. Trustees have authority to raise substantial abuse challenges).Back To Text

[26] 11 U.S.C. § 707(b).Back To Text

[27] *See* H.R. Conf. Rep. No. 99−958, at 5−7 (1986) (noting § 707(b) tries to balance competing interests of creditor and debtor); In re Grant, 51 B.R. 385, 390 (Bankr. N.D. Ohio 1985) (observing that legislative history of § 707(b) indicates it was intended to balance interests of creditor and debtor).Back To Text

[28] 4 Bankr. Serv. L. Ed. § 37:136, at 88 (1993).Back To Text

[29] *See* Resolved, supra note 16, at 45−46 .Back To Text

[30] *Id*. at 45.Back To Text

[31] Id.Back To Text

[32] *Id*. at 46.Back To Text

[33] *See* Zolg v. Kelly (In re Kelly), 841 F.2d 908, 917 (9th Cir. 1988) (asserting that § 707(b) specifically creates presumption in favor of granting debtor relief); In re Martin, 107 B.R. 247, 248 (Bankr. D. Ark. 1989) (stating that dismissal pursuant to § 707(b) is within discretion of bankruptcy judge).Back To Text

[34] *See* Green v. Staples (In re Green), 934 F.2d 568, 570−71 (4th Cir. 1991) (noting that Congress did not define term "substantial abuse" or provide committee report with guidance); In re Balaja, 190 B.R. 335, 337 (Bankr. N.D. Ill. 1996) (stating that no definition of "substantial abuse" exists in Bankruptcy Code); Heller v. Foulston (In re Heller), 160 B.R. 655, 657 (Bankr. D. Kan. 1993) (observing Congress declined to define "substantial abuse").Back To Text

[35] *See* Cuevas, supra note 3, at 365 (stating that U.S. Trustee lacks uniform national guidelines); Wells, *supra* note 25, at 24 (stating that U.S. Trustees do not have strict guidelines for defining "substantial abuse").Back To Text

[36] *See* In re Walton, 866 F.2d 981, 984 (8th Cir. 1989) (providing that most courts interpreting "substantial abuse" consider debtor's ability to pay debts with potential future income); Kelly, 841 F.2d at 914 (finding that "debtor's ability to pay his debts when due, as determined by his ability to fund a chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a 'substantial abuse'").Back To Text

[37] *See, e.g.*, In re Farrell, 150 B.R. 116, 119 (Bankr. D.N.J. 1992) (looking at multitude of factors to decide case); In re Butts, 148 B.R. 878, 880 (Bankr. N.D. Ind. 1992) (concluding that case cannot be resolved solely by examining debtor's ability to repay).Back To Text

[38] *See, e.g.*, Farrell, 150 B.R. at 119 (stating that "it would be clearly improper" to determine "substantial abuse" solely based upon debtor's ability to repay his debts); Butts, 148 B.R. at 880 (concluding that substantial abuse determination does not proceed by "a bright−line test" solely based upon debtor's ability to repay).Back To Text

[39] *See* Green, 934 F.2d at 572−73 (preferring totality of circumstances to *per se* rule); In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (adopting modified totality of circumstances test). In In re Carlton, 211 B.R. 468, 477−78 (Bankr. W.D.N.Y. 1997), Judge Ninfo articulated the totality of circumstances test:

On a case−by−case basis, the Court will first determine whether the debtor has an "Ability to Pay". For this Court, this equates to the ability to pay: (1) all priority and unsecured debt in a Chapter 13 case under a plan of from one to five years in duration, or over a reasonable period of time in a Chapter 11 case, while properly providing for any secured debt; (2) all priority debt and a significant percentage of unsecured debt through such a Chapter 13 or 11 plan; or (3) a significant dollar amount, irrespective of percentage, to unsecured creditors through such a Chapter 13 or Chapter 11 plan. In making this determination, if necessary, the Court will scrutinize the record to determine whether the debtor's proposed family expense budget is excessive or extravagant, and whether the debtor's statement of income and expenses is representative of the Debtor's true financial condition.

If after this analysis the Court determines that the debtor has an "Ability to Pay", it will then utilize a totality of the circumstances test to determine whether any factors exist which may mitigate against the debtor's "Ability to Pay", or constitute aggravating factors to show a debtor's bad faith or dishonesty, or that the debtor is truly not needy. The factors which the Court will consider are any and all relevant factors brought to its attention by the parties in a particular case, as well as the following non−exclusive list of factors, which the Court believes will likely be an expanding list if additional substantial abuse motions are brought before it for decision:

(1) Whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment;

(2) Whether the debtor incurred cash advances and made consumer purchases far in excess of his ability to pay;

(3) Whether the petition was filed in good faith;

(4) Whether the debtor exhibited good faith and candor in filing his schedules and other documents;

(5) Whether the debtor has engaged in "eve of bankruptcy purchases";

(6) Whether the debtor was forced into Chapter 7 by unforeseen or catastrophic events;

(7) Whether the debtor's disposable income permits the liquidation of his consumer debts with relative ease;

(8) Whether the debtor enjoys a stable source of future income;

(9) Whether the debtor is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code;

(10) Whether there are state remedies with the potential to ease the debtor's financial predicament;

(11) Whether there is relief obtainable through private negotiation, and to what degree;

(12) Whether the debtor's expenses can be reduced significantly without depriving him of adequate food, clothing, shelter, and other necessities;

(13) Whether the debtor has significant retirement funds which could be voluntarily devoted in whole or in part to the payment of creditors;

(14) Whether the debtor is eligible for relief under Chapter 11 of the Bankruptcy Code; and

(15) Whether there is no other choice available to the debtor for working out his financial problems other than Chapter 7, and whether the debtor has explored or attempted other alternatives.

Id. at 478 (citations omitted).Back To Text

[40] For a listing of these cases, see 4 Bankr. Serv. L. Ed. §§ 37:203 to 37:205 (listing cases employing means−testing analysis). For cases where courts granted relief under § 707(b), see United States Trustee v. Duncan (In re Duncan), 201 B.R. 889, 902 (Bankr. W.D. Pa. 1996) (granting Trustee's motion to dismiss for substantial abuse); In re Mastromarino, 197 B.R. 171, 180 (Bankr. D. Me. 1996) (granting motion to dismiss); In re Dominguez, 166 B.R. 66, 69 (Bankr. E.D.N.C. 1994) (dismissing case based on totality of circumstances test); In re Traub, 140 B.R. 286, 286−87 (Bankr. D.N.M. 1992) (considering witness testimony, counsel arguments, case law, exhibits and memoranda of law submitted by parties, court granted § 707(b) motion); In re Gyurci, 95 B.R. 639, 644 (Bankr. D. Minn. 1989) (concluding that totality of circumstances demonstrates substantial abuse by debtor); In re Kress, 57 B.R. 874, 878 (Bankr. D.N.D. 1985) (dismissing chapter 7 petition based on totality of debtor's circumstances).Back To Text

[41] *See, e.g.*, Butts, 148 B.R. at 880. The court in *Butts* stated that a § 707(b) motion "turns upon the extent to which the court is able to find within itself the compassion needed to allow the debtor to proceed." Id.Back To Text

[42] *See* 11 U.S.C. § 707(b) (1994) (allowing U.S. Trustee or court, by its own motion, to dismiss case for substantial abuse); In re Young, 92 B.R. 782, 784 (Bankr. N.D. Ill. 1988) (noting that § 707(b) by its terms cannot be invoked by party in interest); Resolved, supra note 16, at 45 (stating that § 707(b) motion to dismiss can only be made by court or U.S. Trustee).Back To Text

[43] *See* Resolved, supra note 16, at 45 (stating that § 707(b) has not been enforced partially because U.S. Trustees refuse to raise it).Back To Text

[44] *See* In re Fitzgerald, 155 B.R. 711, 713 & n.1 (Bankr. W.D. Tex. 1993) (stating most trustees would not bring motions alleging substantial abuse because no "economic incentive" exists to do so); Higgins, supra note

9, at 76 (stating that pursuing particular case can take 20−50 hours and that is not cost effective for trustees who earn $60 in no−asset bankruptcies and $6,000 in cases where they liquidate $50,000 in assets); *see also* Michael D. Bruckman, *The Thickening Fog of "Substantial Abuse": Can 707(a) Help Clear the Air?*, 2 Am. Bankr. Inst. L. Rev. 193, 202 (1994) (stating traditionally trustees have been reluctant to allege substantial abuse due to lack of monetary gain).Back To Text

[45] *See* Braucher I, supra note 12, at 3−4 & n.15 (stating there are few challenges for abuse because few debtors abuse chapter 7); Warren I, supra note 8, at 493 (indicating there is no data showing that bankruptcy system is infected with rampant abuse); *see also* Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 Am. Bankr. L.J. 501, 536−37 (1993) [hereinafter Braucher II] (stating that lack of challenges for abuse is attributed to lack of actual abuse by chapter 7 debtors).Back To Text

[46] *See* S. 1301, 105th Cong. § 102 (1997).;*see also* Michelle J. White, *Why it Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a* Proposal for Change, 65 U. Chi. L. Rev. 685, 688 (1998) (noting that § 707(b) has been ineffective because courts have refused to dismiss petitions based solely on debtor's ability to pay and § 707(b) itself calls for presumption in favor of granting requests for debtor relief).Back To Text

[47] S. 1301 at § 102.Back To Text

[48] *See* id. at § 102(a)(2)(A) (forcing courts to consider whether debtor has ability to pay portion of unsecured claims before granting debtor's requested relief); *see also* Braucher I, *supra* note 12, at 2 (stating that § 102 would amend § 707(b) and include means−testing provision that would prevent debtor from filing chapter 7 unless debtor's income is less than 75% of national median or debtor does not have enough income to pay all secured debts and 20% of unsecured debts in five year plan); Hon. Eugene R. Wedoff, *Senate Bill Would Make Major Changes in Code*, Am. Bankr. Inst. J., July−Aug. 1998, at 1, 6 (stating that chapter 7 cases would be subject to dismissal, under Senate proposal, if debtors could pay 20% of their unsecured claims in chapter 13).Back To Text

[49] *See* Jennie D. Latta, "*What You Don't Know May Hurt You" –* Time Limits Under the Bankruptcy Code and Rules, 28 U. Mem. L. Rev. 911, 927 & n.84 (1998) (noting that dismissal of chapter 7 filing is appropriate if it would lead to substantial abuse of chapter 7); Juliet M. Moringiello, *Distinguishing Hogs from* Pigs: A Proposal for a Preference Approach to Pre−Bankruptcy Planning, 6 Am. Bankr. Inst. L. Rev. 103, 107 & n.31 (1998) (stating judges may dismiss chapter 7 petition if discharge would result in substantial abuse); White, supra note 46, at 688 & n.14 (stating that § 707(b) allows judges to dismiss chapter 7 filings if discharge would amount to substantial abuse of chapter 7); supra note 40 (discussing cases where 707(b) motion was granted).Back To Text

[50] *See* S. 1301 at § 102; *see also* Gary Klein, *Means Tested Bankruptcy: What Would it Mean?*, 28 U. Mem. L. Rev. 711, 732 (1998) [hereinafter Klein I] (stating that proposed legislation would change standard from "substantial abuse" to "abuse"); *Summary: Major Effects of the Consumer Bankruptcy Provisions of Amended S.1301*, Am. Bankr. Inst. J., June 1998, at 6, 13 [hereinafter *Summary*] (noting that § 102 of Senate Bill 1301 would change grounds for relief from "substantial abuse" to "abuse").Back To Text

[51] *See* S. 1301 at § 102(a)(2)(B)(ii) (listing several factors bankruptcy courts must consider when deciding whether granting relief would be abuse of chapter 7); *see also* Braucher I, *supra* note 12, at 10 (stating that under proposed amendment to § 707(b) judicial consideration of abuse will be based on three factors); *Summary*, *supra* note 50, at 6 (noting that § 102 has given courts factors to consider in making determinations of abuse).Back To Text

[52] S. 1301 at § 102(a)(2)(B)(ii). The Senate version of means−testing does not make it clear whether the three identified concerns are strict rules or just guidelines. My own impression is that they appear to be more in the nature of rules; that is, if the rule is met, the case is either dismissed or converted. I would prefer this result to be presumptive rather than irrebuttable.Back To Text

[53] *See* United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1111 (9th Cir. 1998) (allowing discharge of debt under chapter 7 where debtor made good faith effort to repay loan); Stuart v. Koch (In re Koch), 109 F.3d 1285, 1286 (8th Cir. 1997) (noting that primary factor to be considered in determining whether chapter 7 proceeding should be dismissed is debtor's ability to fund chapter 13 plan for benefit of unsecured creditors as required by § 1325(b)(1)); Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829, 832 (8th Cir. 1994) (stating that bad faith constitutes cause for dismissing chapter 7 petition).Back To Text

[54] Some courts view the debtor's "ability to repay" as a dispositive factor in determining abuse while other courts do not place such emphasis on "ability to repay" and ultimately discount its importance in the determination of chapter 7 abuse. *Compare* Koch, 109 F.3d at 1288 (stating that debtor's ability to repay creditors alone warrants dismissal of chapter 7 petition for abuse), *and* Zolg v. Kelly (In re Kelly), 841 F.2d 908, 915 (9th Cir. 1988) (finding that debtor who is able to pay debts supports conclusion of substantial abuse), *with* First U.S.A. v. Lamanna (In re Lamanna), 153 F.3d 1, 5 (1st Cir. 1998) (stating that court need not find abuse where debtor has ability to repay debtors), *and* In re Krohn, 886 F.2d 123, 126−27 (6th Cir. 1989) (noting that ability to repay debts is but one factor to consider in determining abuse).Back To Text

[55] *See* 11 U.S.C. § 1109(b) (1994) (defining party in interest).Back To Text

[56] *See* S. 1301 at § 102(a)(2)(B)(i) (stating that any party in interest may move for dismissal); Braucher I, supra note 12, at 2 & n.9 (stating that under S. 1301, § 707(b) would be amended to give any party in interest power to move for dismissal of petition on basis of chapter 7 abuse); Summary, supra note 50, at 6 (stating that current limitations on standing would be removed under § 102 and in its place "any party in interest" would be allowed to move for dismissal).Back To Text

[57] *See* S. 1301 at § 102 (a)(5) (stating that party in interest may not bring motion under § 102 if debtor's income is equal to or less than national median household income); Summary, supra note 50, at 6 (noting that parties in interest may bring motions to dismiss where debtor's family income exceeds national median); Wedoff, supra note 48, at 6 (discussing how motions to dismiss can be brought by parties in interest where debtor's income exceeds national median).Back To Text

[58] S. 1301 at § 102 (a)(5).Back To Text

[59] *See* id. (explaining that for households of more than four or more individuals, median income will be that of four individuals plus $583 for each additional member); Ed Flynn & Gordon Bermant, *Measuring Means−Testing: It's All in the Words*, Am. Bankr. Inst. J., Sept. 1998, at 1, 30−31 (stating Senate proposal allows linear progression of limits for families of greater than four). Flynn and Bermant have written an informative piece on the differences in language employed by the Senate and House versions. They also note that in the Senate version, the term "national median household income" is not defined. Moreover, the term "household" is not defined in the Bill. *See* id. at 30−31.Back To Text

[60] *See* S. 1301 at § 102 (a)(2)(B)(i)(I) (noting that at request of party in interest, debtor's chapter 7 petition can be converted into chapter 13); Summary, supra note 50, at 6 (noting that proposal would remove current presumption in favor of debtor's choice of relief).Back To Text

[61] *See* S. 1301 at § 102 (a)(4) (stating that bankruptcy court shall award debtor all reasonable costs in contesting motion brought by party in interest if court finds that party in interest was not justified in bringing motion, or party in interest brought motion solely as coercive tactic); Braucher I, supra note 12, at 24 & n.60 (acknowledging that § 1301 specifically awards debtor's attorney fees in event that court fails to grant motion to dismiss and motion is found to be unjustified or coercive); Summary, supra note 50, at 6 (describing how debtors can be awarded damages, costs and fees at discretion of court for successful claim objections and successful defenses of objections to discharge).Back To Text

[62] *See* Gary Klein, Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors, 5 Am. Bankr. Inst. L. Rev. 293, 305 (1997) [hereinafter Klein II]

(asserting that creditors have significant economic leverage based on their ability to litigate); Klein I, supra note 50, at 734 (noting that allowing creditors to file motions suggesting abuse raises concern of creditors filing numerous motions in order to obtain leverage).Back To Text

[63] *See* 18 U.S.C. § 152 (setting forth bankruptcy crimes that may lead to criminal liability to creditor); Tamara Ogier & Jack F. Williams, Bankruptcy Crimes and Bankruptcy Practice, 6 Am. Bankr. Inst. L. Rev. 317, 318−19 (1998) (listing actions that have lead to criminal liability or sanctions for bankruptcy creditors); supra note 61 and accompanying text (discussing creditor abuse of bankruptcy court's awarding of damages to debtor).Back To Text

[64] *See* Fed. R. Bankr. P. 9011(b) & (c); *see also* In re Knepper, 154 B.R. 75, 79 (Bankr. N.D. Ind. 1993) (stating that seventh circuit has upheld bankruptcy court's authority to impose sanctions against either party's attorney); In re Endrex Instruments, Inc., 111 B.R. 939, 943 (Bankr. D. Colo. 1990) (stating court has authority to impose sanctions "under Bankruptcy Rule 9011, 28 U.S.C. § 1927 and pursuant to the courts inherent power").Back To Text

[65] *See* Picking Up the Pieces, supra note 11, at 48 (debating House version of means−testing and determining whether it is beneficial to bankruptcy system); *see also* Flynn & Bermant, supra note 59, at 29−30 (stating House version of means−testing is based on "national family median income" while Senate version is based on "national median household income").Back To Text

[66] *See* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998) (attempting, where possible, to put consumer debtors into chapter 13 instead of chapter 7 by applying three part test); Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means−Testing*, 1999 BYU L. Rev. (forthcoming 1999) (explaining purpose of H.R. 3150 is to place consumer debtors into chapter 13 proceeding).Back To Text

[67] *See* H.R. 3150 at § 101(1)(a)(4) (explaining monthly total income means debtor's average monthly income for six months prior to filing bankruptcy petition); *see also* Flynn & Bermant, supra note 59 and accompanying text (discussing median income test).Back To Text

[68] *See* Flynn & Bermant, *supra* note 59, at 30 (explaining language of H.R. 3150 creates test that calculates difference between debtor's monthly income and national median income).Back To Text

[69] *See Median Income for Four Person Families by State* (visited Apr. 1, 1999) <http://www.census.gov/hhes/income/4person.html> (posting national median income as of 1996, including break up of average by state on Census Bureau's website). *See also* Hon. Leif M. Clark, *Needs−Based Bankruptcy – On What is the "Need" Based?*, Am. Bankr. Inst. J., Apr. 1998, at 40, 40 (noting that median income of family of four was $51,518 as of 1996).Back To Text

[70] *See* Flynn & Bermant, *supra* note 59, at 30 (explaining that debtor with present total income greater or equal to national median family income for family of equivalent size is considered to have income available to pay creditors).Back To Text

[71] *See* Jones & Zywicki, *supra* note 66, at 8 (stating that means−testing applies to families whose income exceeds national median).Back To Text

[72] *See id.* at 9 (noting that H.R. 3150 does not affect debtors who are poor since their median income does not exceed national median).Back To Text

[73] *See* Carol Ann Brideau, *A.B.I. Forum: Debate Over Necessity for 'Needs Based' Bankruptcy System Continued at A.B.I. Forum*, Bankr. L. Daily (BNA), at D−2 (Feb. 20 1998) (stating where debtor income is greater than threshold limits, "the debtor would be subjected to a needs−based test under which he would be required to file a repayment plan under chapter 13").Back To Text

[74] *See IRS Collection Financial Standards* (visited Apr. 1, 1999) <http://www.irs.gov/prod/ind_info/coll_stds/index.html> (listing breakdown of various categories determining whether debtor's monthly income exceeds amount necessary for monthly net income test). *See generally* Clark, *supra* note 69, at 40 (directing reader to IRS website to view collection standards implemented by IRS to determine whether debtor meets mandatory $50 minimum).Back To Text

[75] *See* Jones & Zywicki, *supra* note 66, at 8 (noting deduction from total income for priority debt payments).Back To Text

[76] *See* Brideau, *supra* note 73, at 4 (explaining debtor is required to file chapter 13 plan if 20% of unsecured debt test is satisfied).Back To Text

[77] *See* id.Back To Text

[78] *See* H.R. 3150, 105th Cong. § 101 (1998) ("The Court . . . shall determine whether such extraordinary circumstances exist and shall establish the amount of the additional expense allowance, if any. The burden of proving such extraordinary circumstances shall be on the debtor."); Henry E. Hildebrand, III, *The Hidden Costs of Bankruptcy Reform*, Am. Bankr. Inst. J., Apr. 1998, at 16, 16 (stating if debtor could show court extraordinary circumstance, debtor could qualify for chapter 7); Jeffery A. Logan, Comment, The Troubled State of Chapter 13 Bankruptcy and Proposals for Reform, 51 SMU L. Rev. 1569, 1595 (1998) (noting in order to rebut presumption that debtor is eligible for chapter 7, debtor must show extraordinary circumstances).Back To Text

[79] *See* Kathleen M. Sullivan, Post−Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L. Rev. 293, 293 (1992) [hereinafter Sullivan II] (contrasting two judicial techniques of categorization and balancing).Back To Text

[80] The use of balancing tests is one of five rhetorical techniques used by courts. *See* Jeffery Blum et al., Comment, *Cases that Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 Harv. C.R−C.L. L. Rev. 713, 715 (1980) (noting that five techniques include standards tests, evasion of precedent, viewing facts as dichotomies, privatization of governmental disputes, and idiosyncratic rule extension). The authors of the Comment recognize that all five techniques allow a court to manipulate legal doctrine in accordance with the court's own biases while paying lip−service to objectivity and fidelity to past precedents. *See* id. at 715, 727.Back To Text

[81] *See* Sullivan II, supra note 79, at 293 (explaining significance of classifying and labeling as form of categorization).Back To Text

[82] *See* id. (noting under categorization method rules are outcome determinative).Back To Text

[83] Id.Back To Text

[84] *See* id. at 293−94 (describing role of judge applying standards technique as taking competing rights and interests and weighing them on scale against one another).Back To Text

[85] Id. at 294.Back To Text

[86] The role and significance of rules and standards has captured the attention of scholars across many disciplines in the law. *See, e.g.*, Mark Kelman, A Guide To Critical Legal Studies 15−63 (1987) (summarizing development and general contours of Critical Legal Studies according to which legal rules are bad predictors of outcome because (1) rules, by their nature, produce unintended consequences in some cases and (2) rules are always in conflict with at least someone's extralegal values); Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule−Based Decision making in Law and in Life 104 & n.35 (1991) (developing theory of ruled−based decision−making, described as "a form of decision−making characterized

by its reliance on entrenched but potentially under−and over−inclusive generalizations"); Louis Kaplow, Rules and Standards: An Economic Analysis, 42 Duke L.J. 557, 557 (1992) (discussing extent to which legal commands should be put forth as rules or standards); Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 814 (1989) (arguing "Rule of Law" should not be thrown out, but only modified); Carol M. Rose, *Crystals and Mud in* Property Law, 40 Stan. L. Rev. 577, 592−93 (1988) (discussing theoretical distinction between rules and standards); Paul M. Shupack, *Rules and Standards in* Kennedy's Form and Substance, 6 Cardozo L. Rev. 947, 966 (1985) (discussing various criticisms and possible applications of rules and standards); Sullivan I, *supra* note 22, at 25 (discussing whether to cast legal directives in more discretionary form).Back To Text

[87] *See* Ponoroff, *supra* note 11, at 72 (discussing proposed Senate bill allowing more discretion to bankruptcy judge); *see also* Dolores J. Baird, Bankruptcy's Uncontested Axioms, 108 Yale L.J. 573, 579 (1998) (noting that goals of bankruptcy require judge to have broad discretion); Barry L. Johnson, *Discretion and the Rule of Law in* Federal Sentencing Guidelines: Developing Departure Jurisprudence in the Wake of Koon v. United States, 58 Ohio St. L.J. 1697, 1697 (1998) (discussing extremely broad sentencing discretion given to federal judges).Back To Text

[88] *See* Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 400 (1985) (stating rules are effective when values such as certainty and uniformity are prized); Sullivan I, *supra* note 22, at 62, 65 (explaining that rules insure certainty, thus enhancing judicial productivity while discussing Justice Scalia's support for implementation of general rules because, among other reasons, they promote consistency).Back To Text

[89] *See* Duncan Kennedy, *Form and Substance in* Private Law Adjudication, 89 Harv. L. Rev. 1685, 1770 (1976) ("[R]ules are defined as directives whose predicates are always facts and never values."). *But see* Patricia A. Cullen, *Does Anybody Know the Rules in Federal Divorce Court?:* A Case for Revision of Bankruptcy Code Section 523, 46 Rutgers L. Rev. 427, 459 (1993) (discussing subjective test applied by judge in divorce settlement, in face of seemingly confining rules, under § 523(a)(5) of Bankruptcy Code).Back To Text

[90] *See* Fed. R. Bankr. P. 6007 (providing judge designate that parties in interest are to be notified of effect of any motion or action); *see also* supra notes 86−89.Back To Text

[91] *See* Kaplow, supra note 86, at 568−85 (noting standards may imperfectly reflect law); Schlag, supra note 88, at 385 (suggesting standards fail to delineate permissible and impermissible conduct); Sullivan I, *supra* note 22, at 58 (defining "standard" as legal directive that forces decision−maker to apply background on case by case basis).Back To Text

[92] Sullivan I, *supra* note 22, at 27. *See also* Sullivan II, *supra* note 79, at 294 (noting Supreme Court's movement away from excessively discretionary standards).Back To Text

[93] *See* Kennedy, supra note 89, at 1737−51, 1753−56 (comparing and contrasting equality of rules and standards in judicial process). *But see* Schlag, supra note 88, at 417 (discussing promotion of judicial equality in use of rules rather than standards); Sullivan I, *supra* note 22, at 66 (explaining arguments that standards promote fairness and equality).Back To Text

[94] *See* Schauer, *supra* note 86, at 149−55 (explaining role of bias in distinction between rules and standards); Sullivan I, *supra* note 22, at 58−59 & n.236 (discussing inherent risk of incompetence or bias in use of standards); *see also* Schlag, supra note 88, at 387 (noting lack of reliability of decisions based on standards).Back To Text

[95] *See* Schlag, supra note 88, at 387 (explaining minimization of misunderstanding through use of rules and additionally citing example of freedom of speech standards that fail to give advance notice of what constitutes protected speech).Back To Text

[96] *See generally* Noam Chomsky, Language and Mind (1972) (exploring intersection of linguistics, philosophy, and psychology). I, of course, do not mean that the law is only a system of thought and communication, but that these systems are of more interest to me in this context. *See generally* United States Fidelity & Guaranty Trust Co. v. Guenther, 281 U.S. 34, 37 (1930) (defining law as body of rules prescribed by controlling authority and having binding legal force); Dauer's Estate v. Zabel, 156 N.W.2d 34, 37 (Mich. Ct. App. 1968) (defining law of state to be composed of statutory and constitutional enactment and rulings of courts).Back To Text

[97] In a nutshell, this is the jurisprudence of Justice Scalia. *See generally,* Antonin Scalia, *The Rule of Law as a* Law of Rule, 56 U. Chi. L. Rev. 1175, 1178 (1989) (discussing dichotomy between "general rule of law" and "personal discretion to do justice"); Eric J. Segall, Justice Scalia, Critical Legal Studies, and the Rule of Law, 62 Geo. Wash. L. Rev. 991, 999−1014 (1994) (analyzing Scalia's methodology); Sullivan I, supra note 22, at 38 (discussing judicial methodology used by Scalia).Back To Text

[98] *See* Kaplow, supra note 86, at 576 (discussing courts tendency to blindly apply rules in form of precedent rather than engage in appropriate inquiry); Schlag, supra note 88, at 388 (noting rules restrict communication and understanding); Sullivan I, supra note 22, at 58 (stating unlike standards, rules are inflexible and do not adapt to changed circumstances).Back To Text

[99] *See* Schlag, supra note 88, at 388 (stating standards clearly delineate formal requirements to ensure open communication between all parties, thereby meeting parties expectations); Sullivan I, supra note 22, at 67 (discussing visible judicial weighing process inherent in standards); *see also* Kaplow, supra note 86, at 591 (discussing examples where standard would be more effective than rule for litigants).Back To Text

[100] *See* Schlag, supra note 88, at 388 (stating proliferation of communicative means makes communication uncertain and parties cannot gauge consequences of miscommunication); Sullivan I, supra note 22, at 62 (stating rules produce uncertainty, thereby chilling socially unproductive behavior); *see also* Kaplow, supra note 86, at 591 (stating in some situations applying simple rule is more effective than complex standard).Back To Text

[101] *See* Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a* Fuzzy System, 15 Cardozo L. Rev. 1403, 1406 (1994) [hereinafter Williams I] (proposing "fuzzy" model for definition of fraudulent transfers because binary logic of law falls short when describing vagueness in real world); Jack F. Williams, *Process and Protection: A Return to a* Fuzzy Model of Pretrial Detention, 79 Minn. L. Rev. 325, 365−69 (1994) [hereinafter Williams II] (asserting "fuzzy" logic provides better way for decision−maker to identify and resolve legal issues posed by pre−trial detention because "fuzzy" logic recognizes that rules as well as standards are elements of balancing which turns on degrees of judicial discretion). The discussion in this essay on rules/standards is an abbreviated excerpt of these two articles.Back To Text

[102] As Professor Sullivan has observed, classifications may be driven by politics and by conceptions of the judicial role. *See* Sullivan I, *supra* note 22, at 92. According to the political perspective, contextual political considerations are generally the only explanation for a particular classification technique. *See* Schauer, *supra* note 86, at 230. After discounting the political claim, Sullivan suggests that perhaps the choice among classification techniques may turn on a decision−maker's conceptions of the judicial role. *See* Sullivan I, *supra* note 22, at 95, 112. Sullivan shows that Justice Scalia favors rules at the "interpretive and operative" levels, while Justices Kennedy, O'Connor and Souter favor standards. *See id*. at 113.Back To Text

[103] *See* Sullivan I, *supra* note 22, at 58−60 (defining rules and standards and discussing arguments for both).Back To Text

[104] *See* Kaplow, supra note 86, at 592 (discussing examples and contradictory outcomes that result when applying standards and rules); Schlag, supra note 88, at 383−390 (explaining contradiction of standards and rules in areas of deterrence, delegation and communication); Sullivan I, *supra* note 22, at 62−67 (discussing

contradictory arguments between rules and standards in constitutional context).Back To Text

[105] Courts' and commentators' use of the term "significance" can often be confusing. *Statistical* significance has a precise meaning. It means that an observed difference cannot be attributed to chance alone, that something besides random error is afoot. *See* David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Reference Manual on Scientific Methods 380 (1994). Significant differences may or may not be *practically or legally significant*. *See* id. at 380−81. *Practical or legal* significance is generally of substantive importance in the law. It is generally understood to mean that the magnitude of the effect of interest is "sufficiently important substantively for the court to be concerned." Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* Reference Manual on Scientific Methods 429 (1994). However, results that are statistically significant may not be practically significant because with large samples even small differences (that we would not think much of) may be significant. *See* id. at 429−30.Back To Text

[106] *See* Irving A. Breitowicz, *New Developments in* Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of Substantial Abuse, 5 J.L. & Com. 1, 1 (1984) (discussing need to dismiss chapter 7 cases due to substantial abuse of bankruptcy system); Robert V. Vandiver, Jr., Note, *Bankruptcy – A Review of Recent Court Decisions Applying Section 707(b) of the* Bankruptcy Code to Chapter 7 Proceedings, 22 Mem. St. U. L. Rev. 549, 549 (1992) (discussing effect of substantial chapter 7 abuse on cost of consumer credit). *But see* Henry J. Sommer, Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit, 27 Hofstra L. Rev. 33, 55 (1998) (noting that it is easy credit and not substantial abuse that causes bankruptcy filings); Logan, supra note 78, at 1600 (1998) (noting that increased number of consumer bankruptcy filings is caused by creditors who continue to "dig deeper into the risk pool for borrowers"). Back To Text

[107] *See The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 39 (1997) (discussing rise in consumer bankruptcy filings); Warren II, *supra* note 9, at 1084 (discussing conflicting data regarding consumer abuse of bankruptcy process); *see also* Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard to Get Tougher Laws*, Wall St. J., June 17, 1998, at A1 (noting government−appointed commission divided over whether there is abuse of bankruptcy system).Back To Text

[108] *See generally* Commission Report, supra note 16, at 81, 89−91, 235 (finding no need for means−testing).Back To Text

[109] *See* id. at 90−91.Back To Text

[110] *See* Teresa A. Sullivan et al., As We Forgive Our Debtors 33 (1989) (supporting similar conclusion with that of NBRC); Braucher I, *supra* note 12, at 3 (stating that few debtors attempt to abuse chapter 7); Braucher II, *supra* note 45, at 536−37 (suggesting that debtors who file under chapter 7 do not abuse bankruptcy process); Warren I, supra note 8, at 492 (stating that data does not show that bankruptcy system is rife with abuse); Warren II, *supra* note 9, at 1098 (concluding that available data does not support finding that there is rampant abuse of bankruptcy process); *see also* Clark, supra note 69, at 41 (concluding that information used by Congress to analyze bankruptcy abuse grew out of assumptions that appear inaccurate).Back To Text

[111] *See generally* John M. Barron & Michael E. Staten, *Personal Bankruptcy: A Report on Petitioners' Ability−to−Pay* (prepared by Credit Research Center, Georgetown School of Business, Georgetown University) (Oct. 1997) (analyzing debtor petitions and supporting implementation of means testing); Tom Neubig & Fritz Scheuren, *Chapter 7 Bankruptcy Petitioners' Ability to Repay: Additional Evidence from Bankruptcy Petition Files* (prepared by Policy Economics and Qualitative Analysis Group, Ernst & Young LLP) (Feb. 1998) (on file with author) (finding overuse of chapter 7 in four major U.S. cities); WEFA Group Resource Planning Service, *The Financial Costs of Personal Bankruptcy* (Feb. 1998) (on file with author) (proposing implementation of means−testing under H.R. 3150).Back To Text

[112] *See* Jones & Zywicki, supra note 66 (discussing several studies that supported implementation of means−testing); *see also* Lynn M. LoPucki, Common Sense Consumer Bankruptcy, 71 Am. Bankr. L.J. 461,

468 (1997) (suggesting that bankruptcy law contains disincentives to dissuade dishonest debtors from abusing system); supra note 111 (citing some studies that Jones and Zywicki discussed). *See generally* Braucher I, *supra* note 12, at 13 (stating bankruptcy law also gives debtor opportunity to repay in chapter 13); Sommer, supra note 106, at 44 (stating that study showed 25% of chapter 7 debtors could pay 30% of their debts if forced into chapter 13);Back To Text

[113] *See* Marianne B. Culhane & Michaela M. White, *Means−Testing for Chapter 7 Debtors: Repayment Capacity Untapped?*, (Dec. 1998) (visited Apr. 1, 1999) <http://www.abiworld.org/research/creightonstudy.html> (applying means−testing to sample of chapter 7 debtors).Back To Text

[114] *See* id. (finding only 3% of sample chapter 7 filers had capacity to repay debts).Back To Text

[115] *See* Clark, *supra* note 69, at 41 (noting that information did not match up with Judge Clark's "experience on the bench with actual cases"); *see also* Braucher II, supra note 45, at 536−37 (noting that lawyers and chapter 7 trustees rarely saw substantial abuse challenges and attributed this lack of abuse to fact that chapter 7 debtors do not have excess income to fund chapter 13 plans).Back To Text

[116] *See* Culhane & White, supra note 113 (applying H.R. 3150 means−testing to sample).Back To Text

[117] *See* id.Back To Text

[118] In 1997−98 there were 996,905 personal chapter 7 bankruptcy petitions filed. Three percent of that number is 29,907; ten percent is 99,690 personal chapter 7 bankruptcy petitions. *See Non−business Bankruptcy Filings by Chapter 1990−1998* (visited Apr. 1, 1999) <http://www.abiworld.org/stats/newstatsfront.html> (providing quarterly breakdown of filings).Back To Text

[119] *See* Culhane & White, supra note 113.Back To Text

[120] *See* id.Back To Text

[121] *See* id. (stating that sample was originally drawn for wholly different purpose).Back To Text

[122] *See* 11 U.S.C. § 707(b) (1994) (describing how court on its own can dismiss case filed by debtor if it finds that granting relief would be substantial abuse of this chapter); First USA v. Lamanna (In re Lamanna), 153 F.3d 1, 4−5 (1st Cir. 1998) (finding dismissal of debtor's chapter 7 petition justified because debtor had ability to repay debt); In re Stewart, 204 B.R. 780, 781−83 (Bankr. N.D. Okla. 1997) (concluding that dismissal of debtor's case is proper if granting relief would result in substantial abuse).Back To Text

[123] *See* Culhane & White, supra note 113 (stating three percent of sample had sufficient repayment capacity to be barred from chapter 7); *see also* supra note 118 (providing total number of chapter 7 filings in 1997).Back To Text

[124] *See* Jones & Zywicki, supra note 66, at 17.Back To Text

[125] *See* supra notes 106−119 (evaluating different statistical surveys on bankruptcy abuse).Back To Text

[126] *See* supra notes 46−48 (comparing Senate and House versions of means−testing).Back To Text

[127] *See* Culhane & White, supra note 113 (stating H.R. 3150 and its new modifications have impacted filings).Back To Text

[128] *See* supra Section I (comparing and contrasting Senate and House means−testing proposals and why such proposals may or may not be necessary).Back To Text

[129] *See* Warren I, *supra* note 8, at 493−94 ([I]t is important to recognize that public confidence is undermined when any debtor can deliberately refuse to pay rent and find a federal court to delay eviction"). *But see* Teresa A. Sullivan et al., Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981−1991, 68 Am. Bankr. L.J. 121, 140 (1994) (concluding that abuse of bankruptcy system has not led to increased filings or abuse by other debtors); Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)*, 75 Iowa L. Rev. 733, 741−42 (1990) (finding that reported abuse of bankruptcy loophole, in reality, was occurring in less than one percent of all cases).Back To Text

[130] *See* Walter T. Henderson, Jr., *Criminal Liability Under the Internal Revenue Code: A Proposal to Make the "Voluntary" Compliance System a Little Less "Voluntary,"* 140 U. Pa. L. Rev. 1429, 1431−32 (1992) (discussing implications of tax evasion by individuals on perception of tax system by public).Back To Text

[131] *See* In re Vianese, 192 B.R. 61, 72 (Bankr. N.D.N.Y 1996) (asserting that "'it is morally and legally unconscionable that a person should be able to extinguish his obligations without first making reasonable effort to fulfill them'" (quoting In re Hudson, 56 B.R. 415, 419 (Bankr. N.D. Ohio 1985)). *But see* In re Attanasio, 218 B.R. 180, 219 (Bankr. N.D. Ala. 1998) (opining that it is not morally or legally unconscionable that person should be able to discharge obligations without first making reasonable effort to fulfill them).Back To Text

[132] I would like to briefly address the argument that means−testing as proposed in the Congress would increase the administrative costs of bankruptcy. Most assert this argument without any or little empirical evidence. Those that oppose the argument also marshal little empirical evidence. It has been my experience that administrative costs are generally understated at the onset of a program. However, Judge Leif Clark has been engaging in some "arm−chair" means−testing without, it appears, too much difficulty. *See* Clark, *supra* note 69, at 40−41. References to a couple of websites and some changes to Schedules I and J get one pretty close to the marks set by the stricter House version. *See* id.Back To Text

[133] *See* Bart Kosko, Fuzzy Thinking: The New Science of Fuzzy Logic XVI 167, 178−80 (1993) (discussing how judges weigh all principles involved when deciding cases).Back To Text

[134] *See id.* at 167; *see also* Williams I, *supra* note 101, at 1458−9 (explaining why standards create large rule patches).Back To Text

[135] *See* Kosko, *supra* note 133, at 167 (discussing distinction between rules and standards as tools to limit discretion and provide uniformity); supra Section II.Back To Text

[136] *See* Kosko, *supra* note 133, at 167 (stating that rules promote predictability and consistency).Back To Text

[137] *See* id. (finding that rules limit decision−maker from using subjective value choices).Back To Text

[138] *See* supra Section II (finding that rules do not advance debate over issues); *see also* Sullivan I, *supra* note 22, at 58 (regarding inflexibility of rules).Back To Text

[139] Specifically, H.R. 3150 does not incorporate debtor's assets in its three part test; therefore, a debtor with numerous and valuable assets but with a low monthly income would not be affected by H.R. 3150. *See generally* discussion supra Section I.C. (discussing effect of having "projected monthly income test" and "national median income").Back To Text

[140] *See* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 101 (1998) (providing that projected monthly net income may be further reduced by "personalized" category of expenses resulting from "extraordinary circumstances" established by debtor).Back To Text

[141] *See* Sullivan II, supra note 79, at 295 and accompanying text (discussing "balancing" approach like standards as compared with "categorical" approach similar to "rules").Back To Text

[142] Id. at 309.Back To Text

[143] *See* id.Back To Text

[144] *See* id. at 295 (describing positive attributes of "balancing" approach like standards); *see also* Richard H. Fallon, Jr., Foreword: Implementing The Constitution, 11 Harv. L. Rev. 56, 81 (1997) (discussing debate between rules approach and standards approach in law making). *See generally* Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Constitutional Balancing Tests, 81 Iowa L. Rev. 261, 300−01 (1995) (analyzing standards versus rules approach to constitutional law).Back To Text

[145] *See* Testimony of Jones, supra note 21, at 179 (discussing desirable aspects of means−testing program).Back To Text

[146] *See* supra note 142 and accompanying text.Back To Text

[147] *See Resolved, supra* note 16, at 46 (noting that objective standard necessary to produce system uniformity would balance bright−line test with some flexibility).*Back To Text*

[148] *See, e.g.*, John L. Gedid, U.C.C. Methodology: Taking a Realistic Look at the Code, 29 Wm. & Mary L. Rev. 341 (1988) (observing that even when rules are set forth in code, such as UCC, non−uniformity is common); Girardeau A. Spann, Simple Justice, 73 Geo. L.J. 1041, 1078 (1985) (noting that despite rules designed to facilitate and require uniformity, nonuniformity dominates).Back To Text

[149] *See* Karen A. Jordan, The Complete Preemption Dilemma: A Legal Process Perspective, 31 Wake Forest L. Rev. 927, 937 (1996) (opining that constraints on creativity promotes uniformity).Back To Text

[150] *See* Granfinancier, S.A. v. Nordberg, 492 U.S. 33, 88−89 (1989) (White, J., dissenting) (stating that bankruptcy laws have "striking capacity" to "meet new considerations as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day" (quoting Continental Ill. Nat'l Bank v. Chicago, R.I. & P.R. Co., 294 U.S. 648, 671 (1935)).Back To Text

[151] *See* id.; *see also* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating bankruptcy system can adapt to future scenarios); Thomas E. Plank, The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 544 (1996) (discussing tools at Congress' disposal to allow Bankruptcy law to adapt to new conditions).Back To Text

[152] Picking Up the Pieces, supra note 11, at 48 (statement by Wallace) (addressing how judges have not taken enough initiative under § 707(b)).Back To Text

[153] *See* Jones & Zywicki, supra note 66, at 176 (stating how common bankruptcy is today); *see also* Richard E. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(b):* An Evolving Philosophy of Debtor Need, 52 Consumer Fin. L.Q. Rep. 261, 284 (1998) (stating that § 707(b) created chaos, which has been handled poorly by courts).Back To Text

[154] *See* Stacey Kleiner Humphries & Robert L.R. Munden, Painting a Self−Potrait: A Look at the Composition and Style of the Bankruptcy Bench, 14 Bankr. Dev. J. 73, 77−78 (1997) (discussing bankruptcy judges dual decision making roles); supra note 153.Back To Text

[155] *See* Picking Up the Pieces, supra note 11, at 48 (statement by Wallace) (stating failure of judges to utilize § 707(b)); *see also* Jones & Zywicki, supra note 66, at 176 (stating that H.R. 3150 will make bankruptcy last option rather than first).Back To Text

[156] *See* Coulson, supra note 153, at 284 (stating that H.R. 3150 is Congress' reply to rise in number of consumer bankruptcy filings).Back To Text

[157] *See* Elizabeth Parsons, Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines, 29 Val. U. L. Rev. 417, 420 (1994) (stating Sentencing Reform Act was intended to eradicate dishonesty in sentencing); Robert Eldridge Underhill, Sentence Entrapment: A Casualty of the War on Crime, 1994 Ann. Surv. Am. L. 165, 181 (discussing how sentence reform was aimed at achieving honesty and uniformity); Ronald F. Wright, *Complexity and Distrust in* Sentencing Guidelines, 25 U.C. Davis L. Rev. 617, 618 (1992) (discussing Sentencing Commission's distrust of judges).Back To Text

[158] *See* Donald W. Dowd, The Sentencing Controversy: Punishment and Policy in the War Against Drugs, 40 Vill. L. Rev. 301, 313−314 (1995) (stating that judges' discretion has been severely limited); Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 281 & n.367 (1993) (stating that under guidelines, judge has little room to maneuver); Wright, supra note 157, at 618 (stating federal guidelines go into great detail).Back To Text

[159] *See* Coulson, supra note 153, at 285 (stating that H.R. 3150 is clear and objective and takes judge out of lifestyle decisions); *see also* Jones & Zywicki, supra note 66, at 176 (stating that H.R. 3150 should limit bankruptcy filings).Back To Text

[160] Professor Frederick Schauer forcefully depicts a model of rules that turn on a strong right/wrong distinction. *See* Schauer, supra note 86, at 135, 149−55.Back To Text

[161] *See* Arthur J. Jacobson, Hegel's Legal Plenum, 10 Cardozo L. Rev. 877, 880−83 (1989) (discussing concept of legal plenum).Back To Text

[162] Schauer acknowledges a foundation of mistrust between the superior authority and the decision−maker. *See* Schauer, *supra* note 86, at 158−62.Back To Text

[163] David G. Carslon, Contradiction and Critical Legal Studies, 10 Cardozo L. Rev. 1833, 1839 (1989) (discussing legislatures' trust of judges).Back To Text

[164] *See* Williams II, *supra* note 101, at 1457 (stating that super authority understands that legal universe is not yet full).Back To Text

[165] *See* Carlson, supra note 163, at 1838−39.Back To Text

[166] *See Picking Up the Pieces*, *supra* note 11, at 48 (statement by Wallace) (explaining that need for standardization is result of judges' failure to enforce § 707(b)); *Resolved*, *supra* note 16, at 45 (stating judges allow personal values to affect decisions).Back To Text

[167] *See* David L. Balser, *Section 707(b) of the Bankruptcy Code: A Roadmap with a* Proposed Standard for Defining Substantial Abuse, 19 U. Mich. J.L. Reform 1011, 1022−23 (1986) (stating process would require close review of each petition).Back To Text

[168] *See* id. at 1022 (noting Congress, by precluding creditor in chapter 7 from substantial abuse challenge, impliedly approves of judges ability to weed out potential abusers).Back To Text

[169] *See Resolved*, *supra* note 16, at 44 (statement of Gary Klein) (stating that strict means−testing approach would compel judges to force individuals into chapter 13 five year plans and this will lead to increased bankruptcy litigation and longer period of time for monitoring cases).Back To Text

[170] *See Picking Up the Pieces*, *supra* note 11, at 48 (statement of Mary Rouleau) (noting that means−test would take discretion away from judges and would create unfair results).Back To Text

[171] *See Resolved*, *supra* note 16, at 46 (statement of George Wallace) (arguing that standards are necessary because they provide sufficient flexibility in hard cases).Back To Text

[172] *See* Larry E. Prince & Robert A. Faucher, Ethical Issues Facing Idaho Bankruptcy Practitioners, 34 Idaho L. Rev. 309, 344 (1998) (describing percentage−based test of H.R. 3150); Brady C. Williamson & Ralph Vosskamp, Bankruptcy: The Need for Balance, 18 Miss. C. L. Rev. 285, 286 (1998) (stating that these proposals would eliminate the choice between chapter 7 liquidation and chapter 13 payment plan and explaining how this has become integral part of American bankruptcy system).Back To Text

[173] Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring) (noting that judges' easy alternative is leaving case for jury determination).Back To Text