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## **Race and Bankruptcy**

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The three articles attached are:

1. *Local Legal Culture from R2D2 to Big Data*, 96 Tex. L. Rev. 1353 (2018),  
by Robert M. Lawless and Angela Littwin.
2. *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 Am. Bankr. L.J. 623 (2017), by Dov Cohen, Robert M. Lawless, and Faith Shin.
3. *Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys*, 20 Am. Bankr. Inst. L. Rev. 611 (2012), by Jean Braucher, Dov Cohen, and Robert M. Lawless.

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## Local Legal Culture from R2D2 to Big Data

Robert M. Lawless\* & Angela Littwin\*\*

### I. Introduction

If you ask Teresa Sullivan, Elizabeth Warren, or Jay Westbrook about the early years of their groundbreaking Consumer Bankruptcy Project (CBP), they eventually will tell you about R2D2, their mobile photocopier. They carted R2D2 across the country to copy the bankruptcy court records that formed the backbone of their examination of the lives of consumer bankruptcy filers. Courthouses charged twenty-five cents per page for photocopies, so it was cheaper to bring R2D2, although they had to purchase a separate airplane ticket for “him.” Journeying to courthouses across the country resulted in several anecdotes, such as the time R2D2 “made a break for it” on Grand Avenue in Chicago by sliding out of the back of the station wagon rented for the purpose of transporting the machine or when they had to lug R2D2 up three flights of stairs in Danville, Illinois.<sup>1</sup> In 1981, gathering data on consumer bankruptcy filers in three states took a tremendous amount of time and effort.

Once they had the data, analyzing it posed another hurdle. At the time of the first study, Westbrook had just obtained his first Apple II Plus, which was an order of magnitude slower than even today’s cell phones. To analyze their data, they used the campus’ mainframe. They could access it by telephone but had to hire a graduate student who knew how to operate it.

Fast-forwarding to today, we obtained a database with over 12.5 million records on every U.S. bankruptcy case that was pending sometime during the government fiscal years 2012–2016. We added Census Bureau data to estimate demographic and other characteristics by matching debtor zip codes to those in the Census database. We analyzed these data and obtained our results within weeks of formulating our analysis plan. We did this all without having to raise money or leave our offices.<sup>2</sup> Our world of ready data

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1. Telephone Interview with Professor Jay Lawrence Westbrook, Benno C. Schmidt Chair of Business Law, Univ. of Tex. Sch. of Law (Jan. 20, 2018).

2. That said, we both believe in the value of researchers leaving their offices to interact with the systems they are studying and to generate their own data. Lawless is a coprincipal investigator on the current CBP, which gathers court-record data and surveys consumer bankruptcy filers on an ongoing basis. *See, e.g.*, Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne,

availability and computers to analyze them compares to photocopier R2D2 about the same as the world of science-fiction R2D2 compares to the U.S. Space Shuttle program (a contemporary of photocopier R2D2).

We do not use the term “groundbreaking” lightly when describing the early CBP. Sullivan, Warren, and Westbrook changed the nature of the consumer bankruptcy field. They shattered myths such as the idea that debtors were marginalized workers rather than part of the middle class.<sup>3</sup> They developed the dominant framework of why consumers file for bankruptcy, as reported by the debtors themselves: job loss, medical problems, and divorce.<sup>4</sup> They were the first research team to discover that fewer than half of chapter 13 cases receive a discharge.<sup>5</sup> Most importantly, Sullivan, Warren, and Westbrook created the norm of empirical research in the field, making it unacceptable to write about consumer bankruptcy without engaging in real-world analysis.

One key contribution of Sullivan, Warren, and Westbrook was putting “local legal culture” on the scholarly map. Along with Professor Jean Braucher, who was writing contemporaneously,<sup>6</sup> the CBP researchers realized that debtors experienced a theoretically federal and theoretically uniform consumer bankruptcy law very differently based on where they lived.<sup>7</sup>

In some areas of the country, such as Alaska, Connecticut, and Indiana,<sup>8</sup> the overwhelming majority of debtors were filing under chapter 7 of the

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“No Money Down” *Bankruptcy*, 90 S. CAL. L. REV. 1055, 1071 (2017) (analyzing data from the 2007 and 2013–2015 CBP). Littwin has collected qualitative and quantitative data for analysis in recent years. See, e.g., Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 189 (2016) (reporting data from fifty-three interviews with consumer bankruptcy attorneys); Angela Littwin with Adrienne Adams & McKenzie Javorka, *The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence*, VIOLENCE AGAINST WOMEN (forthcoming 2020). We are both nonetheless glad that we did not have to carry a copy machine up three flights of stairs.

3. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 238–52 (2000).

4. *Id.* at 73–74.

5. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 17, 217 (1989) (reporting that only one-third of chapter 13 debtors in their database completed their bankruptcy plans).

6. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 503 (1993).

7. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 810–11 (1994). The Bankruptcy Code also incorporates some elements of state law, most notably state exemption law. 11 U.S.C. § 522(b) (2012). But the researchers found a wide variety of practices within states, which suggested that state law could not be driving regional differences. Sullivan et al., *supra* note 7, at 828–29; Braucher, *supra* note 6, at 515–16.

8. Sullivan et al., *supra* note 7, at 825 tbl.3.

Bankruptcy Code<sup>9</sup>—the quicker and cheaper consumer chapter that provides the majority of bankruptcy debtors the relief they need. Under chapter 7, debtors liquidate all of their nonexempt property and receive a discharge of most unsecured debts.<sup>10</sup> The liquidation requirement has little bite because very few chapter 7 filers have unencumbered, nonexempt assets that a bankruptcy trustee can sell to pay creditors.<sup>11</sup> Most chapter 7 debtors receive their discharge within a few months.<sup>12</sup>

In other areas of the country, such as Alabama and the Western District of Tennessee, most debtors were filing under chapter 13,<sup>13</sup> which requires debtors to pay all of their disposable income over a period of three to five years.<sup>14</sup> Chapter 13 does provide tools for some consumers trying to save their homes<sup>15</sup> and a broader discharge than chapter 7 (although Congress has narrowed this discharge since the time of the original CBP research).<sup>16</sup> Still, the differences in chapter 7 and chapter 13 were highly improbable sources for the huge variation in chapter choice bankruptcy scholars observed around the country.

Although the Bankruptcy Code leaves the decision of which chapter to use mostly in the debtor's hands,<sup>17</sup> the scholars argued that the results of this

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9. 11 U.S.C. §§ 701–27 (2012).

10. *Id.* §§ 523, 727.

11. Dalíé Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009); LOIS R. LOPICA, AM. BANKR. INST. NAT'L CONFERENCE OF BANKR. JUDGES, THE CONSUMER BANKRUPTCY CREDITOR DISTRIBUTION STUDY 6, 44–45 (2013).

12. Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 175, 175 (Katherine Porter ed., 2012); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEXAS L. REV. 103, 116 (2011).

13. Sullivan et al., *supra* note 7, at 825–26 tbl.3. Consumers may also file under chapter 11, but only a tiny percentage of consumer debtors use this option. See ADMIN. OFFICE OF THE U.S. COURTS, CASELOAD STATISTICS DATA TABLES, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [https://perma.cc/4AN2-2LMN] (showing statistically that a minimal number of nonbusiness filings fall under chapter 11 while the majority fall under chapter 7 and chapter 13).

14. 11 U.S.C. § 1325(b)(4) (2012).

15. *Id.* § 1322(b)(5), (c).

16. *Id.* § 1328(a)(2) (incorporating some but not all of the nondischargeability provisions in § 523(a)).

17. In 2005, Congress added the means test to prevent high-income debtors from filing under chapter 7. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h), 119 Stat. 23, 33–34 (2005). The change appears to have had little effect on the ratio of chapter 7 to chapter 13 filings. Chrystin Ondersma, *Are Debtors Rational Actors? An Experiment*, 13 LEWIS & CLARK L. REV. 279, 295–303 (2009).

choice and other choices<sup>18</sup> were, in fact, driven by local legal culture. As Professor Westbrook explained:

The evidence strongly suggests that the “choices” given to debtors are often exercised in fact by creditors, lawyers, by judges through lawyers, and by judges through debtors. The average consumer debtor, faced with an extraordinarily complex statute at a moment of financial and personal crisis, will be guided by lawyers and pressures exerted through lawyers.<sup>19</sup>

Sullivan, Warren, and Westbrook identified local legal culture as “systematic and persistent variations in local legal practices” that arose because of “perceptions and expectations shared by many practitioners and officials in a particular locality.”<sup>20</sup> Persistence over time was a key feature of their conceptualization, and their foundational article on the topic examined local culture features that persisted across 1970, 1980, and 1990.<sup>21</sup> Braucher similarly defined local legal culture as the “context created by” a locality’s “administrative practices of judges and trustees, and prevailing professional attitudes,”<sup>22</sup> although she did not emphasize persistence. The CBP researchers and Braucher each used qualitative data to develop portraits of the complex interactions among judges, trustees, and debtor attorneys that shaped local legal culture.<sup>23</sup>

Authors working with the databases from the CBP since that time have produced findings on local legal culture, but the focus has shifted to race. Specifically, beginning with the 1991 CBP, researchers documented a disturbing trend. Black debtors, and sometimes Latino debtors, were overrepresented in chapter 13, the chapter that takes more time,<sup>24</sup> costs more money,<sup>25</sup> and has a significantly lower discharge rate.<sup>26</sup> These patterns

18. Bankruptcy chapter is not the only debtor choice guided by local legal culture. Sullivan, Warren, and Westbrook also studied filing rates and proposed payments to creditors in chapter 13 plans. Sullivan et al., *supra* note 7, at 811. Braucher additionally studied repayment rates in chapter 13 cases. Braucher, *supra* note 6, at 530–34. We focus on chapter choice in this Article for two reasons. First, once a debtor decides to file for bankruptcy, the choice of chapter influences—and frequently determines the outcome of—the other choices in the case. Second, most of the recent research on local legal culture has focused on chapter choice because of the disturbing racial trends associated with that decision. See *infra* subpart II(B).

19. Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 30 (1998).

20. Sullivan et al., *supra* note 7, at 804.

21. See generally Sullivan et al., *supra* note 7.

22. Braucher, *supra* note 6, at 503.

23. See *infra* subpart II(A).

24. See *supra* Part I.

25. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 58 fig.4, 69 fig.7 (2012).

26. SULLIVAN ET AL., *supra* note 5, at 222; Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV.

remained even when controlling for income, homeownership, and a variety of other factors associated with chapter 13.<sup>27</sup> Research from the 2007 CBP additionally controlled for judicial district and found that the correlations between chapter 13 and black debtors remained significant.<sup>28</sup> An article based on the 2007 and 2013–2015 CBPs found that judicial districts with high chapter 13 rates significantly correlated with the overrepresentation of black debtors in chapter 13—and that the effect of judicial district became more pronounced once researchers controlled for debtor financial variables associated with chapter 13.<sup>29</sup>

The current study adds to this recent work with new methods. Using a public database collected by the Administrative Office of the U.S. Courts, we analyzed chapter choice in consumer bankruptcies filed from fiscal years 2012–2016.<sup>30</sup> We developed three sets of factors expected to influence chapter choice in a consumer bankruptcy case: (1) case characteristics, particularly features of the debtor's economic situation that make chapter 7 or 13 more appropriate; (2) a debtor's geographic community based on demographics of her zip code; and (3) judicial district. We analyzed both geographic community and legal district to shed light on an ambiguity in the scholarship of local legal culture—what does “local” mean? Is it the debtor's neighborhood or the debtor's legal neighborhood that counts?

Our results support and extend the prior research. Race, once again, matters. More specifically, race, case characteristics, and judicial district are the only variables that matter. We find that case characteristics are significantly associated with each bankruptcy chapter in the expected ways. For example, real property correlates with chapter 13, almost certainly because of the tools chapter 13 provides for saving debtors' homes.<sup>31</sup> Unsecured debt correlates with chapter 7, which provides a more effective mechanism for discharging it.<sup>32</sup> At the community level, the most interesting point is what we do not find. Although most of the community variables we tested are statistically significant when the regression includes only case and community variables, once we add judicial district to the regression, the only variable that retains its statistical significance is race, specifically the percentage of the debtor's zip code that is black. The disappearance of significance for most of the community variables once we add district fixed effects suggests that the “work” of local legal culture is being done at the legal level rather than at the community level. Finally, most judicial districts in the United States are statistically significant at a very high level. The

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1031, 1042 (2017).

27. See *infra* Part II.

28. Cohen & Lawless, *supra* note 12, at 185.

29. Foohey et al., *supra* note 2, at 1088.

30. See *infra* subpart III(A).

31. See 11 U.S.C. § 1322(b)(5) (2012) (providing an option to cure a mortgage in default).

32. Foohey et al., *supra* note 2, at 1093 tbl.5.

pattern we find among judicial district chapter 13 rates both confirms and complicates the conventional wisdom of chapter 13 as a southern phenomenon.

This Article makes several contributions. First, we use observational data on the universe of bankruptcy filers. All of the recent CBPs are surveys of a national random sample, which means that participation in them is voluntary. Thus, researchers using the CBP data could never rule out nonresponse bias, the possibility that study participants somehow differed from debtors who chose not to participate.<sup>33</sup> Second, although the prior research, especially that of the early CBP and Braucher, leaves little doubt that local legal culture exists, the phrase contains ambiguities. This study considers competing definitions of “local” and thus provides quantitative evidence suggesting that legal boundaries may be more relevant than geographic ones. Third, our finding that race is the only community-level variable that retains significance when we add judicial districts to the regression provokes more questions than it addresses. This unsettling result, combined with the importance of judicial districts, suggests directions for future research. Legal professionals and their attitudes need further examination. A return to the qualitative methods of Braucher and the early CBP may be a particularly fruitful line of inquiry.

The rest of this Article proceeds as follows. Part II is a literature review. Part III provides our methodology, results, and interpretation of findings. Part IV concludes with more directions for future research.

## II. Literature Review

### A. *What Is Local Legal Culture? Definitions and Origins in the Literature*

The first study to probe local legal culture, although it did not use the term, was Stanley and Girth's seminal Brookings Institution study. They found wide variation in chapter XIII rates—the predecessor to chapter 13—among the seven districts they studied.<sup>34</sup> Chapter XIII cases ranged from 76% of all filings in the Northern District of Alabama to 52% in Maine to 11% or fewer in four districts.<sup>35</sup> Their “unit of locality” was district, but they did not study any districts within the same state,<sup>36</sup> limiting their ability to identify judicial district or state as the level of locality for the effect.

Sullivan, Warren, and Westbrook began to fill this gap by examining

33. Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 423–24 (2012).

34. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 74–75 (Brookings Inst. ed., 1971).

35. *Id.* at 74.

36. *See id.* at 41–42 (studying districts of Northern Ohio, Northern Alabama, Maine, Northern Illinois, Oregon, Western Texas, Southern California, and Southern New York).

the variation between judicial districts within the same state, using survey and court-record data from ten judicial districts studied in the CBP. They argued that because bankruptcy is federal law and incorporates some state law, variations between districts within a state that persist over time must be due to local culture.<sup>37</sup> Their examination of chapter choice found tremendous variation between states as well as judicial districts within states. For example, 20% of the filings in the Southern District of Alabama were chapter 13 cases compared to 66% in the Middle District of Alabama.<sup>38</sup> Moreover, the authors found statistically significant persistence in the district rates over time.<sup>39</sup>

Sullivan, Warren, and Westbrook argued that the complex and numerous decisions that went into a bankruptcy case made the consumer bankruptcy system particularly susceptible to the development of local legal cultures.<sup>40</sup> They also argued that influential individuals in a legal community changed over time and thus were an unlikely source for their findings about patterns that had held up over twenty years.<sup>41</sup>

Braucher studied four bankruptcy divisions<sup>42</sup> from two pairs of cities that shared a federal judicial district.<sup>43</sup> The two pairs of cities were in two parts of the country—Ohio and Texas—that had distinct chapter 13 rates.<sup>44</sup> Braucher demonstrated the existence of local legal culture through in-depth qualitative interviews with legal professionals.<sup>45</sup> She showed how judges and especially trustees shaped local legal culture by imposing requirements not in the Bankruptcy Code and incentivizing attorneys to use chapter 7 or chapter 13.<sup>46</sup> She also analyzed the complex interactions among the incentives of attorneys and their clients that led to the use of one bankruptcy chapter or another.<sup>47</sup>

Taken together, the Sullivan, Warren, and Westbrook and Braucher studies left little doubt that many local legal cultures existed in the

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37. Sullivan et al., *supra* note 7, at 812.

38. *Id.* at 828.

39. *Id.* at 829–30 (basing this finding on data from the Administrative Office of the U.S. Courts covering 1970, 1980, and 1990).

40. *Id.* at 836–39.

41. *Id.* at 839.

42. A division is a subunit within a judicial district. See, e.g., 28 U.S.C. § 124 (2000) (dividing the Northern District of Texas into seven divisions).

43. Braucher, *supra* note 6, at 515.

44. *Id.*

45. *Id.* at 512–13.

46. See, e.g., *id.* at 546–47 (finding that, while consumer attorneys earned higher fees for chapter 13 cases than chapter 7s in all four divisions, the divisions with higher chapter 13 rates featured larger differences in the amount by which the attorney fees for a chapter 13 exceeded those for a chapter 7 case).

47. *Id.* at 562–63.

bankruptcy system. Using different research methods, two sets of scholars had come to the same fundamental conclusions about the existence and nature of the local legal cultures. The idea was on the scholarly map, and many scholars both replicated and expanded their findings.

Using data from the Administrative Office of the U.S. Courts (AO), Whitford showed wide variation in chapter 13 rates among judicial districts in 1990, 1992, and 1993.<sup>48</sup> Whitford later updated these findings using 1993, 2002, 2009, and 2010 data, suggesting that the percentage of chapter 13 cases in each district had remained relatively consistent across these four years.<sup>49</sup> Bermant, Flynn, and Bakewell drilled down to divisions as the unit of locality. They used 2001 AO data to demonstrate that state chapter 13 rates masked variations among districts and that district chapter 13 rates masked variation among divisions.<sup>50</sup> Norberg and Schreiber Compo found widespread disparities in chapter 13 rates among seven judicial districts in the South and mid-Atlantic regions and that the high-chapter 13 districts tended to have fewer chapter 13 debtors with mortgages than the other districts, suggesting that debtors without mortgages were filing under chapter 13 in the former districts due to local legal culture.<sup>51</sup> Ondersma replicated Sullivan, Warren, and Westbrook's analysis of the persistence of local legal culture with an expanded dataset that included data on exemption laws, poverty and unemployment rates, and foreclosure rates, none of which could explain the variation of chapter 13 choice across localities.<sup>52</sup>

#### B. *Race and Ethnicity*

The concept of "local legal culture" was at the same time both pathbreaking and incomplete. As one of this Article's authors put it:

"Local" is a problem because it is generally taken to mean areas defined by political boundaries . . . rather than boundaries that are psychologically meaningful to people. "Legal" is a problem because the cultural values we discuss may be a product of broad community sentiment, rather than ones unique to the local legal community. "Culture" is a problem because . . . we have no measures of the attitudes, values, and beliefs of professionals in the legal system. On

48. William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 411–14 (1994).

49. William C. Whitford, *Small Ball*, 90 TEXAS L. REV. SEE ALSO 9 app. A (2011).

50. Gordon Bermant, Ed Flynn & Karen Bakewell, *Bankruptcy by the Numbers: Thoughts on the "Local Legal Culture"*, AM. BANKR. INST. J., Feb. 2002, at 24, 24.

51. Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 436–37 (2007).

52. Ondersma, *supra* note 17, at 303–05.

the other hand, the advantage of the present definition is that it fits with a common conception of the term that many people have—local legal culture is what the people in a local legal community “do”; it is their practices that define them.<sup>53</sup>

Thus, scholars needed to and did start to unpack the constituent parts of what made for a “culture” that was both “local” and “legal.” The most widely known of these efforts have focused on racial and ethnic differences in who files chapter 13. In her original study, Braucher noted that Ohio standing trustees were concerned that black debtors were overrepresented in chapter 13, with one stating that black debtors were possibly “being taken advantage of.”<sup>54</sup>

The earliest efforts appeared either as byproducts of research with other goals or based on nonrandom samples that limited statistical inference. In a paper about the rise of filings after the 1978 implementation of the Bankruptcy Code, White found that the percentage of African-American debtors in a county’s population was associated with a statistically significant increase in the proportion of chapter 13 cases.<sup>55</sup> Interestingly, she found no statistically significant relationship between African-Americans and chapter 7 filings, but the proportion of Spanish-speaking debtors in a county was significantly negatively associated with chapter 7 filings.<sup>56</sup>

Using data from the 1991 CBP, Chapman found that although African-Americans appeared to be overrepresented in consumer bankruptcy, they were not overrepresented in chapter 7, which implied that they were overrepresented in chapter 13.<sup>57</sup> Specifically, his data analysis found that non-Hispanic whites were statistically significantly more likely to file under chapter 7 than other racial and ethnic groups.<sup>58</sup> Chapman found that this effect was uniform in all but one of the studied districts that yielded data appropriate for his analysis.<sup>59</sup> Van Loo used data from the 2001 CBP to find 61.8% of black debtors used chapter 13 compared to 29.4% of Hispanic and 20.5% of white debtors.<sup>60</sup> After controlling for the influence of income, education, and employment, he found that only 19.8% of blacks and 19.4% of Hispanics in chapter 13 obtained a discharge compared to 28.3% of non-

53. Cohen & Lawless, *supra* note 12, at 180.

54. Braucher, *supra* note 6, at 559–60.

55. Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 48 (1987).

56. *Id.* at 47.

57. Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 387 n.226 (2002).

58. *Id.*

59. *Id.*

60. Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 234 (2009).

Hispanic whites.<sup>61</sup> Van Loo attributed the lower discharge rates to more aggressive uses of motions to dismiss in the chapter 13s of black debtors as compared to debtors of other races.<sup>62</sup> Although doing more extensive data analysis than the previous articles, the Chapman and Van Loo studies relied on earlier iterations of the CBP that were not national random samples, limiting the statistical inferences that could be drawn.

Using CBP data from 2007 that was collected from a national random sample, Braucher, Cohen, and Lawless found that blacks were disproportionately likely to file under chapter 13.<sup>63</sup> This effect held even when controlling for twenty variables that theoretically should determine a filing under chapter 13 including: home ownership, pending foreclosure, legal representation, monthly income, asset levels, total debt, priority debt, the percentage of debt that was secured or credit card debt, and demographic variables such as marital status and education. The study also developed a control variable that effectively isolated the effects of geography from those of race, and yet race was still a statistically significant determinant in chapter choice.<sup>64</sup> Even after controlling for the variables that should determine chapter choice, blacks were roughly twice as likely to file chapter 13 as debtors of other races. The authors also found that blacks did not receive more favorable treatment in chapter 13 and were indeed slightly more likely to have their cases dismissed. In articles for a symposium discussing this paper, Doherty<sup>65</sup> and Eisenberg<sup>66</sup> reanalyzed the authors' data and confirmed their findings.

The same Braucher, Cohen, and Lawless paper also included an experimental vignette that asked consumer bankruptcy attorneys to select a bankruptcy chapter for a hypothetical couple with a mix of financial characteristics that could suggest chapter 7 or 13.<sup>67</sup> The only variations were the race of the couple (white, black, no race identified) and the couple's expressed chapter preference (chapter 7, chapter 13, no preference).<sup>68</sup> Attorneys who thought they were counseling a black couple were about twice

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61. *Id.*

62. *Id.* at 237. He was not able to analyze Hispanic debtors because the sample of those receiving a discharge was too small. He limited this analysis to discharged debtors because almost all of the debtors with dismissed cases were subject to motions to dismiss. *Id.* at n.28.

63. Braucher et al., *supra* note 33, at 400–04.

64. *Id.* at 403; see also Cohen & Lawless, *supra* note 12, at 186–87 (reporting an earlier version of the study).

65. Joseph W. Doherty, *One Client, Different Races: Estimating Racial Disparity in Chapter Choice Using Matched Pairs of Debtors*, 20 AM. BANKR. INST. L. REV. 651, 678 (2012).

66. Theodore Eisenberg, *The CBP Race Study: A Pathbreaking Civil Justice Study and Its Sensitivity to Debtor Income, Prior Bankruptcy, and Foreclosure*, 20 AM. BANKR. INST. L. REV. 683, 700 (2012).

67. Braucher et al., *supra* note 33, at 405.

68. *Id.* at 406–07.

as likely to recommend chapter 13 as attorneys who thought they were counseling a white couple.<sup>69</sup> Attorneys were less likely to say that a black couple who wanted chapter 7 were persons of “good values” or were “competent” but had directly the opposite reaction to a white couple who wanted chapter 7.<sup>70</sup>

Greene, Patel, and Porter found that the debtor’s race had a major impact on chapter 13 plan completion.<sup>71</sup> Using data from the 2007 CBP, they found black debtors were 17% less likely to receive a discharge than their non-black counterparts when controlling for all the other statistically significant variables in the study.<sup>72</sup> The authors concluded: “More than amount of debt, prior bankruptcies, trying to save a home from foreclosure, or having a job—all features that are imbedded in chapter 13 of the Bankruptcy Code—race matters.”<sup>73</sup>

Using a sample from Cook County, Illinois, Morrison and Uettwiller found many of the same racial pathologies that other researchers have documented.<sup>74</sup> But they provided a new possible explanation for the high chapter 13 rates and poor chapter 13 outcomes among black debtors—parking tickets and related government fines, which are dischargeable in chapter 13 but not chapter 7.<sup>75</sup> Blacks were overrepresented among bankrupt debtors with more than \$500 in fines, the group of filers that had the highest termination rates. Within this group, blacks and debtors of other races had similar chances of having their cases terminated.<sup>76</sup> Moreover, when the authors excluded the “fines” group from the population of bankruptcy filers, blacks remained disproportionately represented but at smaller rates.<sup>77</sup> Morrison and Uettwiller suggest that government fines may be driving the chapter 13 racial disparities in Cook County because African-Americans appear to be particularly vulnerable to receiving these fines, and debtors

69. *Id.* at 411–12.

70. *Id.* at 413–15.

71. Greene et al., *supra* note 26, at 1086. Race appeared to be the second most important factor. Slightly edging out race, the variable with the largest impact (a 19% difference) was amount of unsecured debt. *Id.* The greater the amount of non-priority unsecured debt, the more likely the debtor was to receive a discharge. *Id.* at 1051. The authors argue that debtors with high levels of unsecured debt have increased incentives to complete their plans. *Id.* at 1089.

72. *Id.* at 1060, 1086.

73. *Id.* at 1086.

74. Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. INSTITUTIONAL & THEORETICAL ECON. 174, 176 (2017).

75. See 11 U.S.C. § 523(a)(7) (2012) (prohibiting discharge of government fines); *id.* § 1328(a)(2) (incorporating several nondischargeability provisions from § 523(a) into the chapter 13 discharge but excluding § 523(a)(7)). In addition, bankruptcy’s automatic stay prevents creditor collection activity while a debtor is in bankruptcy and lasts for the duration of a chapter 13 case. *Id.* §§ 362(a), 1301.

76. Morrison & Uettwiller, *supra* note 74, at 187 fig.1.

77. *Id.* at 185 tbl.4, 186.

within the “fines” group have low incomes that make it challenging to complete chapter 13 plans.<sup>78</sup>

Foohey, Lawless, Porter, and Thorne have found blacks disproportionately represented among so-called “no money down” chapter 13s, where the entire attorney’s fee is funded through the chapter 13 plan. Indeed, the largest determinants of a no-money-down chapter 13 are the judicial district where the case is filed and the race of the debtor. Using data from the 2007 and 2013–2015 CBPs, they found that the financial characteristics of debtors filing no-money-down chapter 13 cases resembled those of chapter 7 debtors more than those of debtors filing “traditional chapter 13s.”<sup>79</sup> They tied these findings to local legal culture by demonstrating that, when controlling for other relevant factors, the higher the chapter 13 rate in a district, the higher the use of no-money-down plans and the higher the racial difference in chapter use.<sup>80</sup> In fact, much of the racial disparity in chapter use in high-chapter 13 districts may be accounted for by no-money-down cases.

In an article for *ProPublica*, Kiel and Fresques used AO data supplemented by demographic data via zip codes to find that nationally the odds of filing under chapter 13 were twice as high for debtors living in a mostly black area.<sup>81</sup> Compared to black debtors who filed under chapter 7, the black chapter 13 debtors had less income, fewer assets, lower secured debts, and dramatically lower unsecured debts.<sup>82</sup> The authors did an in-depth study on two districts with especially troubling disparities—the Northern District of Illinois and the Western District of Tennessee.<sup>83</sup> In both districts, Kiel and Fresques found that a handful of law firms accounted for a significant number of all chapter 13 filings, and, at least in Tennessee, the practice “nearly always” was to file with no money down. Like Morrison and Uettwiller, Kiel and Fresques found many black debtors were filing under chapter 13 to avoid suspension of their driver’s licenses.<sup>84</sup>

Most recently, Cohen, Lawless, and Shin replicated the 2007 CBP findings about racial disparities in chapter use with 2013–2015 data from the current CBP.<sup>85</sup> Further, the authors surveyed a national random sample of

78. *Id.* at 194.

79. Foohey et al., *supra* note 2, at 1077–80.

80. *Id.* at 1089 fig.4. It is important to note that, even in low-chapter 13 districts, African-Americans are approximately 10% less likely to file chapter 7 as debtors of other races in the presence of controls. *Id.*

81. Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, PROPUBLICA (Sept. 27, 2017), <https://projects.propublica.org/graphics/bankruptcy-data-analysis> [<https://perma.cc/KK6C-K75X>].

82. *Id.*

83. *Id.*

84. *Id.*

85. Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider*

consumer bankruptcy attorneys and found that their beliefs about the percentage of African-Americans and whites who filed under chapter 13 was exactly reversed from the real-world percentages.<sup>86</sup> On average, attorneys believed that whites were more than twice as likely to file under chapter 13 as African-Americans when in fact the opposite is true.<sup>87</sup>

### III. Data and Analysis

#### A. Methodology

Our theory conceptualizes the chapter choice decision as being the result of three different dynamics: (1) the individual debtor's circumstances; (2) the community from where the debtor comes; and (3) the legal norms and rules of the debtor's judicial district. The first idea captures traditional explanations for chapter choice, such as the idea that homeowners will be more likely to file chapter 13 because it offers greater protections to homeowners than chapter 7. Because these determinants are individual to the debtor, they would not represent a "local culture." The second idea is that certain communities may offer financially distressed debtors fewer options or constrain debtors' bankruptcy choices. Given the previous findings, the racial composition of a community may be a particularly important factor. The third idea is that the legal professionals—lawyers, trustees, and judges—implement formal rules or have informal norms that direct bankruptcy debtors to a particular chapter choice.

Our data came from the Integrated Database assembled by the AO and made available through the Federal Judicial Center.<sup>88</sup> Specifically, we used the "Bankruptcy Snapshot 5-year File" for the governmental fiscal years 2012–2016.<sup>89</sup> This file contains all bankruptcy cases filed, pending, or terminated at any point from October 1, 2011 to September 30, 2017; although, we only used cases filed on January 1, 2012, and after. The database contains (1) much of the information found in the bankruptcy petition—such as chapter choice, legal representation, method of paying filing fees, debtor's zip code, case status (pending/dismissed)—and (2) the information found in the summary of schedules on asset, debt, income, and expense levels.<sup>90</sup>

It is possible for a case to appear more than once in the database if it is

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*Perceptions of Race and Bankruptcy*, 91 AM. BANKR. L.J. 623, 630–32 (2017).

86. *Id.* at 638. The authors surveyed these attorneys before publishing the results of their original work on race and chapter 13 in *Less Forgiven: Race and Chapter 13 Bankruptcy*. Cohen & Lawless, *supra* note 12, at 175.

87. Cohen et al., *supra* note 85, at 638.

88. *Integrated Database*, FED. JUDICIAL CTR., <https://www.fjc.gov/research/idb> [<https://perma.cc/ZSF6-PR4S>].

89. *IDB Bankruptcy 2008–Present*, FED. JUDICIAL CTR., <https://www.fjc.gov/research/idb> [<https://perma.cc/88VF-VV4W>].

90. *Id.*

pending for more than one year. The full database contains 12,502,973 records of 6,675,597 unique bankruptcy cases. Because we are interested in the filing decision for chapter 7 and chapter 13, we used the case record from the year of filing. We further eliminated (1) cases filed outside the fifty states and the District of Columbia; (2) records representing a reopened case; (3) cases where the debtor's bankruptcy petition identified the debts as predominately business in nature; (4) cases filed by nonindividuals; and (5) cases filed by persons who were not U.S. residents. Our final database had 4,343,794 unique bankruptcy cases filed from fiscal year 2012–2016.

We then downloaded zip-code level data using the U.S. Census Bureau's American FactFinder website.<sup>91</sup> The American Community Survey (ACS)<sup>92</sup> provided data on population by race, Hispanic/Latino origin, owner- vs. renter-occupied housing units, and income. We used ACS five-year estimates for the years 2012–2016, exactly overlapping with our bankruptcy data.

The U.S. Census Bureau's County Business Patterns<sup>93</sup> series provided zip-code level data on consumer-lending storefronts as a measure of constrained financial advice and lending within a community. We used the 2014 data from this series because that year is the midpoint of our bankruptcy database. Consistent with Bhutta,<sup>94</sup> we downloaded the count of establishments identified in two North American Industry Classification System (NAICS) codes:<sup>95</sup>

- 522390 Other Activities Related to Credit Intermediation: This code provides information on services such as "Check cashing services, Money order issuance services, Loan servicing, Travelers' check issuance services, Money transmission services, Payday lending services."
- 522291 Consumer Lending: This code provides information on "establishments primarily engaged in making unsecured cash loans to consumers. *Illustrative Examples:* Finance companies (i.e., unsecured cash loans), Personal credit institutions (i.e., unsecured cash loans), Loan companies (i.e., consumer, personal, student, small), Student loan companies."

91. *American FactFinder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov> [<https://perma.cc/6VAN-WRLW>].

92. *American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/> [<https://perma.cc/WEV6-9D4D>].

93. *County Business Patterns*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/cbp.html> [<https://perma.cc/GSKQ-XEUD>].

94. Neil Bhutta, *Payday Loans and Consumer Financial Health*, J. BANKING & FIN., Oct. 2014, at 230, 235.

95. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2017), <https://www.census.gov/eos/www/naics/> [<https://perma.cc/99S2-W2NQ>].

For a shorthand reference, we call the sum of these counts “fringe lending,” although the term is overinclusive. We used the zip-code level population counts from the ACS to construct a measure of fringe lending storefronts per 1,000 residents in the zip code.

We merged the zip-code level data from the U.S. Census with the bankruptcy database using the zip code for the first debtor listed in the bankruptcy petition. This method has two complications. First, the ACS uses zip-code tabulation areas (ZCTAs), which in most instances are identical to the corresponding zip code, but ZCTAs can sometimes diverge from exact contiguity with a zip code depending on where census tract boundaries fall. Second, in 2.9% of the joint cases, the second debtor listed a zip code different from the first debtor. As a robustness check, we reran our regressions omitting these cases, and the results did not change.

#### *B. Results*

To test our theories, we constructed a series of regressions on the determinants of the bankruptcy chapter choice between chapter 7 and chapter 13. Because the outcome is a binary variable, we ran a logistic regression, and for ease of interpretation we report odds ratios. The odds ratio can be interpreted as the effect of the variable on the probability of filing chapter 13. Table 1 reports the regression results with an expanded table of the odds ratios for the fixed effects of each judicial district appearing in the Appendix.

The first regression captures case characteristics. The second regression adds zip-code level data as our measure of the debtor’s community. The final regression then adds fixed effects for each judicial district. Our measures are not perfectly mutually exclusive. For example, the racial composition of a neighborhood tells us something both about the probability of the debtor’s race and perhaps the socioeconomic status of the neighborhood.

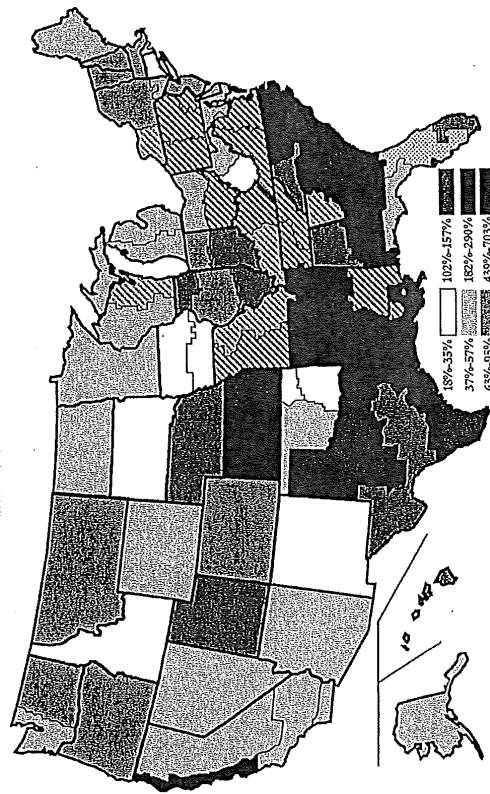
Finally, we created a map (Figure 1) grouping the judicial districts into six clusters based on the final regression. The map reports the odds ratio and thus can be interpreted as the probability of observing a chapter 13 filing in each district as compared to the median district, the Middle District of Florida, after controlling for the variables in the regression. The map provides a visual overview of the wide variation in chapter 13 use across the country and within many states as well as the regional clustering of many of the high-chapter 13 districts.

Table 1. Logistic Regression on Probability of Filing Chapter 13, Odds Ratios

	(1)	(2)	(3)
<i><u>Case Characteristics</u></i>			
Real Property (ln)	1.02*	1.03*	1.03*
Personal Property (ln)	1.01	1.03	1.05*
Secured Debts (ln)	1.10*	1.09*	1.08*
Priority Debts (ln)	1.11*	1.11*	1.10*
Unsecured Debts (ln)	0.58*	0.59*	0.60*
Income (ln)	1.72*	1.78*	1.88*
Filing Fee (Reference Category: Installments Completed)			
Installments in Progress	2.05*	1.95*	1.76*
Full at Filing	0.47*	0.53*	0.55*
Fee Not Paid	0.31	0.33	0.31
Waived (IFP)	0.002*	0.002*	0.002*
Prior Bankruptcy	5.20*	4.81*	4.68*
Joint Filing	0.87*	0.95	0.95
Pro Se Filer	0.21*	0.26*	0.37*
Filing Year (Reference Category: 2012)			
2013	1.03*	1.02	1.01
2014	1.13*	1.10*	1.10*
2015	1.22*	1.18*	1.18*
2016	1.24*	1.20*	1.21*
<i><u>Zip-Code Characteristics</u></i>			
Black Percent in Zip Code		5.00*	3.06*
Latino Percent in Zip Code		1.01	1.09
Mean Income (\$1,000s)		0.99*	1.00
Mean Income Squared (\$1,000s)		1.00*	1.00
"Fringe Lending" (per 1,000)		2.29*	1.05
Renter-occupied Property Percent		0.40*	0.96
<i><u>Judicial District Fixed Effects</u></i>			Yes

NOTES: The table reports odds ratios for the probability of filing a chapter 13 out of a database composed of all chapter 7 and chapter 13 cases filed from FY 2012 to 2016. Standard errors are clustered at the judicial district level in all three regressions. For the case characteristic and zip-code characteristic variables, an asterisk indicates statistical significance where  $p < .05$ . Full results for the district fixed effects are presented in the Appendix.

Figure 1. Judicial District Fixed Effects from Regression, Probability of Filing Chapter 13 vs. Chapter 7  
Relative to Median Judicial District



NOTES: The map shows the odds ratios from the judicial district fixed effects from Regression (3) in Table 1. Using the odds ratios, the map shows the judicial district's fixed effect on the probability of a bankruptcy debtor choosing chapter 13 as compared to the median judicial district, which is the Middle District of Florida where 29.9% of the cases are chapter 13s. As the probabilities come from the Regression (3), they represent the probabilities after controlling for the case characteristic variables and zip-code characteristic variables of the debtor. Judicial districts with striped fill did not differ from the Middle District of Florida at a statistically significant level ( $p < .0006$ , using a Bonferroni adjustment).

### C. Discussion

The most striking finding is that, at the zip-code level, the only variable that matters consistently is the zip code's racial composition. At the case level, the characteristics that one would expect to drive chapter 13 filings are in fact associated with chapter 13 cases. Chapter 13 is more likely with higher amounts of real property, secured debts, priority debts, unsecured debts, and income, as well as paying the filing fee in installments, prior bankruptcy, and retaining an attorney. Higher amounts of real property, secured debt, and priority debt are likely to make chapter 13 attractive to debtors because that chapter provides tools for managing real estate and those debts.<sup>96</sup> A higher income increases a debtor's ability to propose and complete a feasible chapter 13 plan.<sup>97</sup> Chapter 13 is associated with debtors paying legal fees in installments,<sup>98</sup> so the chapter's correlation with debtors paying filing fees in installments is not surprising. Prior bankruptcy is strongly associated with chapter 13, partly because debtors face longer waiting periods after an earlier discharge to file again under chapter 7 than under chapter 13.<sup>99</sup> In addition, chapter 13 debtors who drop out prior to discharge because they cannot afford the payments often try again later.<sup>100</sup> Finally, given the greater complexity of chapter 13 and the dismal track record of pro se filers in confirming chapter 13 plans,<sup>101</sup> it makes sense that being represented is positively associated with filing chapter 13.

But once we move to the zip-code level, the logical connection between chapter 13 and factors associated with it becomes more complex. We tested

96. See 11 U.S.C. § 1322(a)(2) (2012) (stating that, unless the creditor consents, all priority debts must be paid in full, although without interest); *id.* § 1322(b)(5) (providing an option to cure mortgage in default).

97. Although the requirement that debtors pay all of their disposable income in chapter 13 would appear to lessen the relevance of income level to plan success, a debtor's income also must be high enough to pay the required thresholds of secured and priority debt. *Id.* § 1325(b); see *id.* § 506(a)(2) (valuing collateral on secured debts); *id.* § 1322(a)(2) (requiring full payment of priority debts, although without interest); *id.* § 1322(b)(2) (prohibiting modification of mortgages on primary residences); *id.* § 1325(a)(5) (prohibiting modification of many secured debts in personal property). In addition, some districts require a certain percentage payment to the general unsecured creditors beyond the disposable-income requirement. Morrison & Uetwiller, *supra* note 74, at 189.

98. Foohey et al., *supra* note 2, at 1074.

99. Compare 11 U.S.C. § 727(a)(8) (2012) (listing an eight-year waiting period if prior discharge was in a chapter 7 case), and *id.* § 727(a)(9) (prescribing a six-year waiting period if prior discharge was in a chapter 12 or chapter 13 case), with *id.* § 1328(f) (requiring a two-year waiting period if prior discharge was in a chapter 13 case and a four-year waiting period if discharge was obtained via any other bankruptcy chapter).

100. Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 252 (2015).

101. See Angela Littwin, *The Do-It-Yourself Mirage: Complexity in the Bankruptcy System*, in BROKE: HOW DEBT BANKRUPTCY THE MIDDLE CLASS 157, 160 tbl.9 (Katherine Porter ed., 2012) (finding that represented debtors were approximately 45 times more likely to confirm chapter 13 plans than their pro se counterparts when controlling for demographic and bankruptcy variables).

zip-code income, Latino percentage of the zip code, black percentage of the zip code, fringe lending, and percentage of zip-code housing that is rental units. The fringe-lending variable examines the effects of living in lower-quality neighborhoods. Because we used racial percentages in zip codes as a proxy for race, we needed to consider the possibility that black neighborhoods were associated with chapter 13 rather than black debtors. African-Americans tend to live in poorer-quality neighborhoods due to decades of housing discrimination during and after the Jim Crow Era.<sup>102</sup> Zip-code percentage of housing that is rented was another proxy for neighborhood quality, but this variable's inclusion also reflects our thinking that homeowners are more likely to file under chapter 13. At the zip-code level, both of these variables were significant. Fringe lending was positively associated with chapter 13. When interpreting that result, it is important to note that most zip codes have zero or one fringe lender per thousand residents, with more than half of zip codes having no fringe lenders. So the odds ratio of 2.21 means that the difference between having zero and one fringe lender per thousand people in a zip code is a 221% increase in the likelihood of a debtor in that zip code filing under chapter 13. Percentage of property in a zip code that was renter-occupied is negatively correlated with chapter 13, supporting the classic association of chapter 13 with homeowners. Income was negatively correlated with chapter 13, which is surprising because it was positively correlated with chapter 13 at the case level. Reconciling the findings suggests that, all else equal, an increase in an individual debtor's income is an indicator of chapter 13, while a decrease in zip-code income is an indicator of chapter 13. The latter result supports Kiel and Fresques' counterintuitive finding that, in high-chapter 13 districts, lower incomes were associated with chapter 13.<sup>103</sup>

The only variable that was not significant at the zip-code level was Latino percentage. On one hand, this result is surprising. Like African-Americans, Latinos experience lending discrimination,<sup>104</sup> so we might expect them to be steered into chapter 13 the way that black debtors appear to be.<sup>105</sup> And the analyses of data from early CBPs identified Latino as well as black disparities in chapter use<sup>106</sup> and case outcomes.<sup>107</sup> In addition, Puerto Rico

102. MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 141–42 (2017).

103. Kiel & Fresques, *supra* note 81.

104. Ethan Cohen-Cole, *Credit Card Redlining*, 93 REV. ECON. & STAT. 700, 700 (2011); Simon Firestone, *Race, Ethnicity, and Credit Card Marketing*, 46 J. MONEY, CREDIT & BANKING 1205, 1206 (2014).

105. Braucher et al., *supra* note 33, at 417–18.

106. Chapman, *supra* note 57, at 387 n.226.

107. Van Loo, *supra* note 60, at 234.

has a long-standing history as a high-chapter 13 district,<sup>108</sup> which may result from some of the same implicit racial associations found with respect to blacks in the attorney-vignette study.<sup>109</sup> On the other hand, neither of the two most recent CBP studies found a Latino effect,<sup>110</sup> and this study's lack of Latino findings supports those results.

More interesting than the significance of income, fringe lending, and rental housing at the zip-code level is the fact that none of these variables retain their significance once we control for judicial district by adding fixed effects in the third regression. Our database contained the universe of over 4.3 million bankruptcy filings in the study period. Although we are cautious to interpret from a null result, we believe our finding suggests that the geographic pattern of chapter use is being determined by legal boundaries rather than neighborhood boundaries.

The one variable that remains significant even when controlling for district fixed effects is the black percentage in a zip code. It is positively correlated with the chapter 13 rate, and the effect is strong. The difference between a debtor living in a zip code that is 0% black and 100% black is a 306% increase in likelihood of that debtor filing under chapter 13.<sup>111</sup> Of course, we cannot rule out the possibility that debtors of other races living in predominantly black zip codes also have high odds of filing under chapter 13. There could be unobserved characteristics of black neighborhoods that are associated with chapter 13. Our attempts to control for neighborhood quality provide some evidence that neighborhoods are not the issue but cannot fully address this concern.

Prior studies also give us more confidence that our racial finding is hardly spurious. The 1991, 2001, 2007, and current iterations of the CBP all found racial disparities in chapter use,<sup>112</sup> and this study provides important support for these findings. However, all of these CBPs were surveys and are thus subject to the critique of nonresponse bias.<sup>113</sup> A major contribution of this study is to provide support for the racial disparities found by the CBP using data that did not require voluntary participation by respondents.

While the most important characteristic of the results of adding the district fixed effects is the effect that the addition has on other variables, the distribution of chapter 13 filings among judicial districts also sheds light on

108. Bermant et al., *supra* note 50, at 24; Whitford, *supra* note 48, at 406–07.

109. Braucher et al., *supra* note 33, at 415–16.

110. *Id.* at 400; Foohey et al., *supra* note 2, at 1081.

111. We also ran the same regressions with a binary variable for whether the zip code was majority black. We get a similar result: a 170% increase in the probability of filing under chapter 13 for persons living in majority-black districts.

112. Braucher et al., *supra* note 33, at 404; Chapman, *supra* note 57, at 389; Foohey et al., *supra* note 2, at 1086; Van Loo, *supra* note 60, at 234.

113. Braucher et al., *supra* note 33, at 423–24.

the relationship between chapter 13 and the South. The South has been viewed as the chapter 13 belt since at least 2002.<sup>114</sup> As Figure 1 shows, our results support this finding in interesting ways. First, the South appears to be committed to chapter 13. With the exception of Kansas, all of the states that have a majority of districts in the top two chapter 13 clusters were part of the Confederacy during the U.S. Civil War.<sup>115</sup> Conversely, Florida is the only former Confederate state that does not have a majority of districts with greater-than-median chapter 13 filing rates, although several Southern districts have chapter 13 rates that are not significantly different from that of the reference, median district, the Middle District of Florida. On the other hand, there are several high-chapter 13 districts in other parts of the country, such as the Northern District of California, the District of Kansas, and the District of Utah. However, most of the non-Southern states with high chapter 13 rates have districts that fall in the third-highest cluster, meaning that their chapter 13 percentages are 102% to 157% greater than the reference district. And none of these states have any districts in the highest cluster, with chapter 13 rates that are 439% to 703% greater than those in the Middle District of Florida.

This map also sheds interesting light on Sullivan, Warren, and Westbrook's original findings. The 1981 CBP covered three states: Illinois, Pennsylvania, and Texas.<sup>116</sup> Illinois and Pennsylvania have turned out to be two of the non-Southern states that contain above-median chapter 13 districts. This may have made it more difficult to notice the concentration of the chapter 13 belt in the South until relatively recently.

#### IV. Conclusion

Our research builds on and extends prior studies. We confirmed CBP findings on race and chapter choice with a non-survey database. Specifically, we found that race and judicial district appear to be the key factors in chapter choice beyond the economic profile of a bankruptcy case. We began to address the question of whether the "local" in "local legal culture" is shaped by legal geography or general geography. Our findings suggest that legal boundaries are playing a more important role.

This study also points to directions for future research. We obtained one finding on the meaning of "local" in "local legal culture." Additional research would make the relationship between "local" and "legal" clearer. For

114. See Bermant et al., *supra* note 50, at 24 (noting an "intensive chapter 13 practice runs in a broad band across the South and includes Puerto Rico").

115. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. See, e.g., G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 482, 495 (2011).

116. Sullivan et al., *supra* note 7, at 834 n.105.

example, it could examine places where zip codes span more than one judicial district to see if the changes in chapter 13 rate are occurring at the zip-code or district boundaries. Already, our finding on the meaning of “local” suggests the need to explore the roles of professionals more deeply. One possibility is to examine law-firm patterns in districts with varying chapter 13 rates. Kiel and Fresques’s study of Tennessee suggests that law-firm concentration may be playing a role in the relationship between race and chapter 13.<sup>117</sup> Finally, this study points in the direction of returning to the methods of Sullivan, Warren, and Westbrook and Braucher’s original scholarship on local legal culture by supplementing big data with in-depth qualitative research with judges, lawyers, trustees, and other bankruptcy actors.

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117. Kiel & Fresques, *supra* note 81.

## Appendix

Table 2. Judicial District Level Fixed Effects from Logistic Regression  
(Reference District = Middle District of Florida, median district)

<i>DC Circuit</i>	<i>Odds Ratio</i>	<i>Sixth Circuit (continued)</i>	<i>Odds Ratio</i>
District of Columbia	0.21*	Michigan, Eastern	0.53*
<i>First Circuit</i>		Michigan, Western	0.49*
Maine	0.48*	Ohio, Northern	0.45*
Massachusetts	0.63*	Ohio, Southern	1.02
New Hampshire	0.69*	Tennessee, Eastern	1.40
Rhode Island	0.35*	Tennessee, Middle	1.22
<i>Second Circuit</i>		Tennessee, Western	2.87*
Connecticut	0.24*	<i>Seventh Circuit</i>	
New York, Eastern	0.18*	Illinois, Central	0.63*
New York, Northern	0.63*	Illinois, Northern	1.35*
New York, Southern	0.52*	Illinois, Southern	1.32*
New York, Western	0.91	Indiana, Northern	0.83*
Vermont	0.68*	Indiana, Southern	1.21*
<i>Third Circuit</i>		Wisconsin, Eastern	0.92
Delaware	0.75*	Wisconsin, Western	0.47*
New Jersey	0.70*	<i>Eighth Circuit</i>	
Pennsylvania, Eastern	1.13	Arkansas, Eastern	2.01*
Pennsylvania, Middle	1.10	Arkansas, Western	1.84*
Pennsylvania, Western	1.13	Iowa, Northern	0.21*
<i>Fourth Circuit</i>		Iowa, Southern	0.33*
Maryland	0.37*	Minnesota	0.53*
North Carolina, Eastern	4.39*	Missouri, Eastern	0.83
North Carolina, Middle	2.36*	Missouri, Western	1.05
North Carolina, Western	1.41*	Nebraska	1.35*
South Carolina	2.38*	North Dakota	0.44*
Virginia, Eastern	1.17	South Dakota	0.32*
Virginia, Western	1.04	<i>Ninth Circuit</i>	
West Virginia, Northern	0.42*	Alaska	0.53*
West Virginia, Southern	0.32*	Arizona	0.46*
<i>Fifth Circuit</i>		California, Central	0.44*
Louisiana, Eastern	1.94*	California, Eastern	0.43*
Louisiana, Middle	1.16	California, Northern	2.01*
Louisiana, Western	7.01*	California, Southern	0.46*
Mississippi, Northern	2.07*	Hawaii	1.16*
Mississippi, Southern	1.23	Idaho	0.23*
Texas, Eastern	1.92*	Montana	0.67*
Texas, Northern	2.47*	Nevada	0.49*
Texas, Southern	2.44*	Oregon	0.70*
Texas, Western	1.57*	Washington, Eastern	0.81*
<i>Sixth Circuit</i>		Washington, Western	0.50*
Kentucky, Eastern	1.10		
Kentucky, Western	0.95		

<i><u>Tenth Circuit</u></i>		<i><u>Eleventh Circuit</u></i>	
Colorado	0.71*	Alabama, Middle	5.86*
Kansas	1.82*	Alabama, Northern	1.43*
New Mexico	0.22*	Alabama, Southern	4.85*
Oklahoma, Eastern	0.25*	Florida, Northern	0.44*
Oklahoma, Northern	0.30*	Florida, Middle	<i>omitted</i>
Oklahoma, Western	0.57*	Florida, Southern	1.40*
Utah	1.34*	Georgia, Middle	2.90*
Wyoming	0.42*	Georgia, Northern	0.92
		Georgia, Southern	4.53*

NOTES: Odds ratios are reported for each judicial district's fixed effect on the probability of filing chapter 13 as compared to the median district, the Middle District of Florida. Standard errors are clustered at the judicial district level in the regressions. The table is an expansion of Regression (3) from Table 1. For the district-fixed effects, an asterisk indicates statistical significant where  $p < .0006$ , using a Bonferroni adjustment from the standard statistical significance threshold of  $p < .05$  for the 90 districts.

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## \*623 OPPOSITE OF CORRECT: INVERTED INSIDER PERCEPTIONS OF RACE AND BANKRUPTCY

### ABSTRACT

*Previous data collected during the 2007 meltdown of the subprime mortgage market showed that African Americans were approximately twice as likely to file chapter 13 bankruptcy than persons of other races, a significant policy issue given the generally less generous rules in chapter 13. We first update and replicate these findings with new data collected during 2013-2014 as the housing market recovered. Results of the original study were not specific to the subprime crisis as the new data showed the same 2:1 racial disparity as the older data, suggesting that this disparity may be a relatively enduring part of the U.S. bankruptcy system.*

*To see if insiders were aware of this disparity, we sent surveys to a national random sample of consumer bankruptcy attorneys. They seemed to believe there was a racial disparity in bankruptcy, but they had the disparity exactly backwards. A majority (about 60%) believed that whites were twice as likely to file chapter 13 when it is actually African Americans who are twice as likely to do so. We also report on a convenience sample of respondents from Amazon Mechanical Turk. These respondents have little or no knowledge of the U.S. bankruptcy system but likely hold common American stereotypes about which groups tend to be responsible or irresponsible. Their responses were largely similar to those of bankruptcy professionals. Overall, Mechanical Turk respondents were slightly more accurate than bankruptcy professionals. The likely reason is that Mechanical Turk respondents stuck more closely to the national base rate.*

*Across studies, it seems that those inside the bankruptcy system have little knowledge of the racial disparities that exist within it. Instead, they rely on \*624 common American stereotypes about who are responsible or irresponsible citizens.*

### I. INTRODUCTION

Previous work conducted during the 2007 subprime mortgage crisis found that African-American bankruptcy debtors are approximately twice as likely to file chapter 13 than their white counterparts.<sup>1</sup> The disparity remains even after controlling for a variety of legal, financial, and demographic factors that should determine bankruptcy chapter choice,<sup>2</sup> a finding we replicate later in this paper with data from 2013-14 as the housing market recovered. A vignette study in the previous work sent to consumer bankruptcy attorneys, where the hypothetical clients differed only on race and chapter preference, found that attorneys were plausibly an important part of creating this effect, by steering African Americans toward the more disadvantageous chapter 13.<sup>3</sup> Our previous work thus suggests that the professionals working in the bankruptcy system may contribute to the racial disparity in chapter choice.

However, are professionals working in a legal system aware of inequities within that system? We accept as natural that people within a system will have different explanations for *why* inequities occur. For example, prosecutors and defense

attorneys may have different opinions on why African Americans are more likely to end up in jail than their white counterparts are. Employment discrimination plaintiff and defense lawyers may have different views about why women are less likely to be in upper management. However, we commonly assume that all participants within a system know that African Americans are overrepresented in prison cells and women are underrepresented in the corner office. If the facts on the ground are plain enough, we assume people will notice them.

In the present paper, however, we show that this is not necessarily the case. Practicing attorneys fail to notice the 2:1 racial disparity in chapter choice between African Americans and whites. Moreover, they in fact believe that the 2:1 disparity runs in the *opposite* direction. That is, although \*625 African Americans are twice as likely as whites to file under a bankruptcy chapter that generally requires them to pay back at least some of their debts, attorneys believe that it is whites who are twice as likely as African Americans to do so.

We argue that the actual racial disparity is not noticed and perceptions are in fact flipped because the beliefs of bankruptcy professionals are driven not by their actual experience but by common American stereotypes about which groups comprise the most responsible citizens. The stereotypes are so common that laypeople outside the system--who know nothing about the bankruptcy courts-- have much the same (mistaken) expectations as bankruptcy insiders do. In fact, to the extent that laypeople end up simply using the base rates and ignoring the stereotypes, their predictions become more accurate than those of insiders. The stereotypes and expectations are so powerful that they will not only cause those inside the system to miss a gaping racial disparity, they flip beliefs and cause even insiders to see the world as the opposite of what it is.

Because chapter 7 and chapter 13 debtors have very different experiences in bankruptcy, the disparity matters. The mean attorney's fee in a chapter 7 is currently around \$1,200 as compared to \$3,200 for a chapter 13.<sup>4</sup> Although chapter 7 debtors tend to have lower incomes than chapter 13 debtors, the attorney's fee is less than 50% of the typical chapter 7 debtor's monthly income as compared to an entire month's income for the typical chapter 13 debtor.<sup>5</sup> When it comes to distributions to creditors, more than 90% of all debtors who file chapter 7 have no assets to turn over to the bankruptcy trustee.<sup>6</sup> In our previous work, the chapter 13 debtors proposed plans paying an average of 28% of their unsecured debt.<sup>7</sup> Nearly every chapter 7 debtor receives a bankruptcy discharge as compared to half of chapter 13 debtors.<sup>8</sup> Chapter 13, however, can certainly be advantageous for some debtors--those with valuable assets to lose if they filed chapter 7, those with substantial mortgage arrearages, or perhaps those needing the somewhat broader discharge available in chapter 13. But, the typical debtor who can file chapter 7 generally will be better off in chapter 7. There is no obvious reason to think chapter choice should break along racial lines, especially after controlling for demographic, legal, and economic factors that might legitimately make one chapter better than the other.

\*626 This paper continues as follows. Part II discusses the long-running and well-known divergence in local practices surrounding chapter 13 and discusses the academic literature that has studied chapter 13 usage. In Part II, we also use new data to replicate our previous research showing a racial disparity in chapter 13 usage. These data suggest that the 2:1 racial disparity is a relatively enduring part of the U.S. bankruptcy system, as these new data collected during the housing recovery matched quite well with the earlier data collected during the meltdown. Part III discusses the psychological research that motivates our study of whether insiders recognize this disparity and then provides its methodology. Part IV discusses our results. Part V concludes with a discussion of our thoughts on what our results tell us about the racial disparity in bankruptcy chapter choice and the ability of those within the system to even perceive disparity.

## II. DIFFERENCES IN BANKRUPTCY CHAPTER CHOICE IN THE COURTS AND THE ACADEMIC JOURNALS

### A. THE MANY CULTURES OF BANKRUPTCY PRACTICE

Although based on a congressional power to pass "uniform Laws on the subject of Bankruptcies throughout the United States,"<sup>9</sup> the bankruptcy system is anything but uniform. One of the starkest differences is the percentage of bankruptcies filed as chapter 13 cases in different locales. Figure 1 shows the variation broken down by federal judicial district from 2013-2014. Over this time, the Western District of Louisiana had the highest percentage with 79.6% of all bankruptcies being filed as chapter 13 cases, a rate that was fourteen times as great as the 5.7% of bankruptcies filed as chapter 13 cases in the Northern District of Iowa.

Figure 1: Variations in chapter 13 usage by federal judicial district, 2013 - 2014

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The variation in chapter 13 rates is long-running and long-known. Stanley & Girth's Brookings Institution study, intended as a comprehensive statistical portrait of the bankruptcy system in the 1960s, noted the strong regional differences in chapter choice.<sup>10</sup> At a time when the national rate was 17%, Stanley & Girth observed chapter XIII rates varying from 4% to 76% in the seven judicial districts they studied. In trying to explain the regional disparities they found, Stanley & Girth attributed the differences to attitudes by local legal professionals--both lawyers and judges. They quoted one attorney saying chapter XIII was "morally correct," but they cited instances in other districts where judges and lawyers opposed chapter \*627 XIII on principle as a bad deal for debtors.<sup>11</sup>

After the passage of the current bankruptcy law in 1978, several studies examined how the decision to file chapter 13 is made. As part of a sociological study on attorney-client interaction more generally, Neustadter sat in on consumer debtors consulting with lawyers on the decision to file bankruptcy and concluded that the decision-making process on chapter choice was decidedly attorney-centered.<sup>12</sup> Braucher explored local variations in a theoretically uniform federal bankruptcy system through a series of interviews with \*628 bankruptcy attorneys in Texas and Ohio. The differences in chapter choice were a major focus of her work. Summarizing her findings, Braucher wrote:

In a large, far-flung, locally administered system such as consumer bankruptcy it is inevitable that there will be local variation in practice and attitudes. But the current state of consumer bankruptcy is very far from the constitutional ideal of uniformity, and takes the form of a network of fiefdoms with significantly different customs .... Some lawyers use counseling to try to show most debtors that they could and should pay under chapter 13. Others influence debtors to use chapter 7 by emphasizing the debtors' lack of disposable income after realistic budgeting and the absence of material rewards for making repayment. While some debtors surely make their choices with some degree of autonomy, a substantial portion of them end up in one chapter or the other primarily because of the views of their lawyers.<sup>13</sup>

As Braucher was doing her work, Sullivan, Warren & Westbrook were exploring variations in the bankruptcy system, including chapter choice, using data from the 1981 and 1991 versions of the Consumer Bankruptcy Project ("CBP").<sup>14</sup> With data from bankruptcy court records, they found that debtors' economic situation only partially explained differences in chapter choice. They hypothesized that local legal culture as well as social and demographic factors played a substantial role in affecting chapter choice.<sup>15</sup> Attorneys, judges, and other actors such as bankruptcy trustees perpetuated a local legal culture that either made chapter 13 relatively commonplace or relatively unusual.<sup>16</sup>

\*629 Thus, the first generation of scholarship documented the differences in chapter 13 filing rates and offered "local legal culture" as the explanation for why these differences occurred, but this scholarship did not explore what that "culture" might be. There were a few observations of possible racial disparity in chapter choice, but these mentions were anecdotal in nature, observed in passing in a paper focused on other matters, or not based on nationally representative

samples.<sup>17</sup> In recent work, we examined racial disparity in chapter 13 use--as well as the role attorneys might be playing in it--through two national random samples, one of consumer bankruptcy debtors (taken from the 2007 CBP) and one of consumer bankruptcy attorneys.<sup>18</sup>

The first national random sample came from the 2007 version of the CBP, which collected information on 2,437 bankruptcy debtors through court records, written questionnaires, and telephone interviews. In this sample, African-American filers ended up in chapter 13 about 55% of the time, as compared to white, Latino, and Asian American filers who ended up in chapter 13 about 29%, 22%, and 24% of the time, respectively.<sup>19</sup> In fact, although protection of a home is widely believed to be the primary motive for filing chapter 13, African-American filers had higher chapter 13 rates than did homeowners (47%).

The disparity of African Americans being more likely to file chapter 13 remained even after statistically controlling for a variety of (1) financial variables such as a filer's monthly income, assets, and debts, (2) legal variables such as attorney representation, prior bankruptcy filings, and chapter 13 filing rates in the district, and (3) demographic variables such as education, occupational prestige, marital status, and so on. The raw difference in African American vs. non-African American chapter 13 rates is thus quite large and unlikely to be explained away by confounding factors.<sup>20</sup>

Results from the second study came from a national random sample of 262 consumer bankruptcy attorneys to whom we had sent a hypothetical vignette about a couple wanting to file bankruptcy. Findings from the sample of consumer bankruptcy attorneys suggested that they were plausibly an important part of creating this effect, by steering African Americans toward the more disadvantageous chapter 13. The attorneys received a hypothetical fact pattern describing a couple who were considering filing bankruptcy. The fact pattern was pretested to ensure it was a tough professional call as to which chapter was most appropriate. The attorneys were asked which chapter \*630 they would recommend to the couple and to give their general impressions of them. The fact pattern portrayed the couple as sympathetic, church-going people who were in the work force but also had to cope with unemployment, medical expenses due to the husband's diabetes, and a few perhaps unwise purchases.

When the survey named the couple filing for bankruptcy as Reggie and Latisha, attorneys recommended chapter 13 about 47% of the time as compared to 32% of the time when the survey identified the couple as Todd and Alison.<sup>21</sup> These figures were not strikingly different from (a) the overall real-world chapter 13 rates of African Americans (55%) and whites (29%) and (b) what a statistical model of the CBP data would predict for an African-American couple (50%) and white couple (28%) who had characteristics matching the given fact pattern.

Why attorneys would recommend chapter 13 more for African-American clients is an open question. On the one hand, attorneys might "know" that African Americans are twice as likely as whites to file chapter 13 and assume this reflects some sort of cultural preference--perhaps a greater preference to save their home. There is some evidence for this, as there was an overall tendency for attorneys to presume Reggie and Latisha would prefer chapter 13 more than Todd and Alison would. On the other hand, their steering might reflect some sort of unconscious bias about African Americans, who might be presumed irresponsible/untrustworthy--and hence would otherwise try to take the "easy way out" with chapter 7. There is some evidence for this last proposition as well. That is, attorneys were likely to rate African American couples who expressed a preference for chapter 7 as lacking in good values and as less competent, relative to their ratings for other couples. Thus, Reggie & Latisha had to "earn" the respect of the attorneys by expressing a preference for chapter 13 in a way that Todd and Allison did not.

## B. REPLICATION OF EARLIER RESULTS

The results from the consumer bankruptcy debtors in the 2007 CBP data along with the survey of attorneys provide converging evidence of racial disparity. Still, the 2007 real-world data occurred as the subprime mortgage market melted

down. Thus, in addition to the usual sound social-science practices that argue in favor of replication whenever possible, there may be added reasons to ensure that results from the 2007 data would replicate with more recent data as the housing market recovered. One of this paper's authors helped to relaunch the CBP in 2013 (the "Current CBP"), giving us an opportunity to see if the previous racial disparity in chapter 13 rates would replicate in a more "normal" (non-crisis) period, when housing prices were not <sup>\*631</sup> crashing. By 2013, national home prices had begun to rise again,<sup>22</sup> and delinquency rates on home mortgages already were falling.<sup>23</sup>

The Current CBP began in February 2013. Every three months, 200 bankruptcy cases are drawn from a national random sample of bankruptcy filers using the federal courts Public Access to Court Electronic Records (PACER) system. Data from the first eight rounds of data collection (ending November 2014) were gathered for the present paper (n = 1,600). Legal and financial variables were collected from court records for all cases. In addition, filers received an eight-page survey in the mail that they could also complete online. The survey collected demographic information, reasons for filing, emotional reactions to bankruptcy, and hardships suffered before bankruptcy. Filers received a \$50 gift card for completing the survey. The response rate for the surveys was 28.8% (n = 461), down from the 2007 response rate of 48.1%, perhaps due to the lack of funding to follow up with telephone calls to nonrespondents. Respondents and nonrespondents did not exhibit statistically significant differences across the major financial variables collected from court records (e.g., debts, assets, income, debt-income ratios), reducing the possibility of response bias, though we cannot rule it out completely. In the statistical analyses reported below, all legal & financial variables (except "foreclosure as a reason for bankruptcy") were collected from court records. The district chapter 13 rate was collected from official statistics of the federal courts. All other variables were collected from the surveys.

The new data revealed that African Americans (n = 120) again filed chapter 13 (vs. chapter 7) at much higher rates (55.0%), compared to people of other groups (26.1% of whites (n = 287) and 28.8% of Latinos (n = 52)) who filed under chapter 13. There were only fifteen Asian-American households. The African-American chapter 13 rate of 55.0% is extremely similar to the 54.7% rate from the 2007 data. In addition, the chapter 13 rate of 26.3% for households where no one identified as African American is similar to the 28.2% figure from 2007. The 2:1 difference between African American and non-African American households in filing chapter 13 was again statistically significant (chi-squared = 32.51, p < .001).

Also, as in 2007, it is possible that race merely covaries with other attributes that affect whether one files chapter 13. Importantly, it could be the case that African Americans merely happen to live in places where the local legal culture leads to predominantly chapter 13 filings. To rule out these <sup>\*632</sup> possibilities, we conduct a logistic regression where the dependent variable is whether the debtor filed chapter 13.<sup>24</sup> The regressions are as similar as possible to our regressions for the 2007 CBP with a few exceptions necessitated by the data. First, smaller sample sizes make it impractical to compute a non-African American chapter 13 rate for the judicial district, and instead we use the overall chapter 13 rate for that district (as recorded by the Administrative Office of the U.S. Courts). Second, occupational prestige score and credit card debt are not computed in the new data. Third, the Current CBP questionnaire has slightly different wording for where the debtor self reports "attempts to work with creditors" prior to bankruptcy.<sup>25</sup> Table 1 reports an abbreviated form of the regression results with the full results reproduced in Appendix I.

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TABLE 1: LOGISTIC REGRESSION ON PROBABILITY OF FILING CHAPTER 13					
	(1)	(2)	(3)	(4)	(5)
African-American household	3.51*	3.54*	3.47*	3.25*	2.39*
Legal & financial circumstances		yes	yes	yes	yes
Attempts to renegotiate debt			yes	yes	yes
Demographic information				yes	yes
Local legal culture					yes
MODEL STATISTICS					
N	428	428	428	428	428
Wald chi-squared	29.9*	160.9*	163.7*	172.4*	191.6*
McFadden pseudo R-squared	.05	.29	.30	.32	.35
Correctly classified	69.2%	79.4%	79.7%	80.1%	80.4%
Legal & financial variables: representation by an attorney, prior bankruptcy, foreclosure as reason for filing bankruptcy, home ownership, monthly income (ln), total assets (ln), priority debt (ln), secured debt/total debt					
Attempts to handle debt: asked creditors to "work with you" on the debt; obtained a loan modification, refinanced the home, or took out a home equity loan; sold the house (including a short sale) or gave it to the bank.					
Demographic information: bachelor's degree or higher, number of dependents, live with a spouse or partner, female head of household					
Local legal culture: overall chapter 13 rate in district					
NOTES: The table reports odds ratios. An asterisk denotes statistical significance at the 5% level. The word "yes" indicates whether a particular vector of control variables was in the equation, not necessarily whether they were statistically significant. Due to extreme outliers, the financial variables were Winsorized at 3.5 standard deviations. The complete results, with odds ratio, are presented in Appendix 1.					

The 2007 data collected as the housing crisis took off and the post-crash 2013-14 data give remarkably consistent results. In fact, the odds ratio for the African American household variable in the full model from the Current CBP, 2.39, is extremely close to the odds ratio for this variable in the full model from the 2007 CBP, 2.46. These odds ratios imply

that, with other variables at their mean values, in both periods, African Americans were twice as likely as people of other races to file for chapter 13 (vs. chapter 7), even after controlling for possibly confounding factors.

The survey response rates are lower in the Current CBP. Again, however, respondents and nonrespondents did not differ on major financial variables collected from the court records. Further, we are reassured that the estimates for African-American and non-African-American filing rates in the more recent data are so strikingly similar to those gathered in the 2007 survey that had a much higher response rate. Overall, the results strongly suggest that the 2:1 racial disparity found in the 2007 data was not a product of the particular circumstance of a subprime housing market crumbling or some other artifact of when the data were collected. Rather, the Current CBP data suggest that the 2:1 racial disparity persists even as housing prices are recovering. Of course, data from more periods is needed to establish further continuity, but it is clear that the 2:1 racial disparity in chapter 13 rates was not a one-off event.

In summary, the prior literature established wide variation in the rate of <sup>\*633</sup> chapter 13 cases across the country and found that African Americans are twice as likely to file chapter 13 than people of other races. In our prior research, this difference did not go away after controlling for possibly confounding factors that might influence chapter choice. These results replicated with more recent data from 2013-14. Furthermore, previous literature and our own research found that attorneys play a significant role in helping to guide clients in their chapter choice. In an experimental vignette study, we found that attorneys were more likely to recommend chapter 13 when the client was perceived as African American as opposed to white. The insiders to the bankruptcy system thus have a "front-row seat" to a stark racial disparity. The remainder of this paper explores whether they recognize it.

### III. MEASURING ATTORNEY PERCEPTIONS OF DISPARITIES IN CHAPTER CHOICE

It was an open question whether the insiders would see the disparity. On the one hand, we assume that people generally have perceptions that coincide with reality--or at least if these perceptions are inaccurate, random errors should average out when aggregated. Any given attorney may not have a good picture of the system overall, but aggregated together, their judgments should be relatively on target. Our previous random sample of <sup>\*634</sup> attorneys making recommendations for an African-American couple versus a white couple reproduced the racial disparity in the CBP data reasonably closely. Attorneys might indeed be aware of the racial difference in chapter 13 rates and have simply been reflecting it back in their recommendations to the couple.

There is, however, a more troubling possibility. That is, it is possible that attorneys--despite having a front row seat to the disparity and recreating this disparity in recommendations to the hypothetical African American vs. white couples--are unaware that the disparity exists. Although there is a real-world 2:1 racial difference, attorneys simply may not pick it up. Stereotypes can be quite powerful and can prevent us from detecting even decent-sized patterns of covariation if those patterns do not align with expectations.<sup>26</sup>

To the extent that attorneys do not know if there is a racial disparity and are aware that they do not know, we would expect them to simply go with the base rates and assume people from all racial groups file at approximately the national average. However, stereotypes are seductive and can provide the illusion of knowing. Early demonstrations about how stereotypes can overpower base-rate information came from Kahneman and Tversky. In one of the first controlled experiments on base-rate neglect, participants were given a series of short personality descriptions and asked to predict which sub-population the described person belonged to. Regardless of whether they were told the person was sampled from a population of 70 engineers and 30 lawyers or 70 lawyers and 30 engineers, participants' guesses reflected the stereotypes of what lawyers and engineers are thought to be like, with minimal (though statistically significant) consideration of whether the description was taken from a sample that was mostly engineers versus mostly lawyers.<sup>27</sup> There have been a number of explanations proposed for why individuals favor stereotypical information over simply

going with the base rates. According to Kahneman and Tversky, "people predict by representativeness, that is, they select ... outcomes by the degree to which (they) represent the essential features of the evidence."<sup>28</sup>

One common stereotype is that African Americans are untrustworthy or irresponsible. Though not as openly endorsed as it once was, the stereotype \*635 does seem to still have some place in contemporary culture even if it is not flagrantly vocalized or even consciously thought.<sup>29</sup> In the previous study, there appears to be some hint of this stereotype's influence among bankruptcy attorneys who seemed to view Reggie and Latisha as less competent and less likely to have good values if they expressed a preference for filing chapter 7, in a way that did not occur when Todd and Alison expressed a preference for chapter 7.<sup>30</sup> If-- like most Americans--some attorneys do have unconscious stereotypical beliefs about African Americans as irresponsible or untrustworthy, we might expect that this would influence their judgments about which groups are likely to file under chapter 13. If this holds, we would expect to find that attorneys (a) do not apprehend that there is a 2:1 racial disparity, (b) do not recognize their own ignorance and simply go with the national base rate, but instead (c) use common stereotypes about who is responsible/trustworthy vs. irresponsible/ untrustworthy to under-predict African-American chapter 13 filings and overpredict white filings.

Using Westlaw, we generated a list of bankruptcy cases filed on five different days of the week in late July and early August 2011 (approximately 1 year before our previous research was published). The result was a list of 23,341 bankruptcy filings from which a random sample of 400 attorneys were selected. Attorneys who had been respondents in our previous study or who were in the same law firm as another survey recipient were excluded.

The survey informed respondents that "we are interested in the perceptions of bankruptcy professionals about how often people from different groups file chapter 13 (vs. chapter 7)." The cover letter informed respondents that they were randomly selected from a group of cases where they had appeared as an attorney of record and contained disclosures typical for human-subjects research. A follow-up letter and another copy of the survey were sent approximately four weeks after the initial mailing.

To minimize the possibility of confusion and to give respondents the national chapter 13 rate, survey instructions told respondents the first question had been completed for them based on the then-current data: "Because 28% of the nation's bankruptcy cases currently are chapter 13, we wrote 28 for the 'nation as a whole.'" Finally, we informed respondents that we were interested in their estimates to the best of their knowledge and asked to make their best guess even if they were unsure.

The survey asked respondents to estimate the percentage of cases that were filed as chapter 13 for:

- Men, filing alone

\*636 • Women, filing alone

- Persons 65 years old and over

- Homeowners

- Persons with a prior bankruptcy filing in the last 8 years
- Whites
- African Americans/blacks
- Hispanics/Latinos
- Asian-Americans/Asians
- Pro se debtors
- Southerners (from the states of AL, AR, FL, GA, LA, MS, NC, SC, TN, TX, VA)

The survey concluded by asking for basic demographic information: the federal judicial district in which the respondent practiced, year of birth, gender, and race/ethnicity of the respondent.

We heard back from 38.3% of our attorney sample. Of the nine surveys returned blank, seven had written comments indicating the attorney was not providing any estimates because his or her practice involved no or very few chapter 13 cases. Our respondents were 84.3% male with a racial breakdown of 91.0% white, 1.5% African American, 6.0% Hispanic/Latino, and 1.5% Asian-American. The mean age was 49.4 years with a median of 52 years. These characteristics were very similar to the respondent pool of bankruptcy attorneys in our previous work.

#### IV. PERCEPTIONS OF RACIAL SORTING IN BANKRUPTCY CHAPTER CHOICE

##### A. ATTORNEY RESPONSES

Our research question asks what bankruptcy professionals knew about the racial disparity in bankruptcy chapter choice. By gathering estimates for the percentages of bankruptcies that were filed as chapter 13 cases, the survey instruments captured one side of this question, but what we want to know is the extent to which these estimates were accurate. To assess the estimates' accuracy, we need to know the real-world percentage at which different groups choose chapter 13.

No government agency regularly collects demographic information on bankruptcy filers. Therefore, we use the detailed demographic data available from the 2007 CBP collected from a national random sample of 2,437 bankruptcy cases. The drawback of using the CBP data is the passage of time from its data collection in 2007 to our surveying bankruptcy attorneys in 2011.<sup>31</sup> At the time of the CBP's data collection, 38.7% of all bankruptcy petitions were filed as chapter 13 cases, but the chapter 13 rate had fallen to 27.9% at the time of the data collection with attorneys in 2011. Also, for our respondents, we provided a baseline estimate that 28% of bankruptcy petitions for the nation as a whole were

chapter 13 cases. Although the overall rate had fallen, there is no reason to think that the demographic composition of chapter 13 filers (which was similar in the 2013-2014 CBP to what it was in the 2007 CBP) was different in 2011, though we cannot rule this out. Given the drop from the 2007 measurement of actual usage to the 2011 survey and national base rate we provided, we would expect attorney estimates to be slightly lower than they might have been had attorneys been surveyed in 2007.

Table 2 compares the estimates from bankruptcy attorneys with the real-world chapter 13 data from the 2007 CBP. The accuracy of estimates (column c) shows three clusters, with greater variation between clusters than within clusters. A large cluster of groups in the middle has mild underestimates of chapter 13 usage. On average, the probabilities given for the middle cluster of groups underestimate chapter 13 usage by 12%--which is extremely close to what one would expect given the 11% drop in overall chapter 13 use from 2007 to 2011. The groups in this middle cluster are: Hispanics, women filing alone, senior citizens, men filing alone, southerners, \*638 Asian Americans, and pro se debtors. Four groups fall outside this middle cluster, though.

TABLE 2. DIFFERENCES BETWEEN ATTORNEY ESTIMATES OF CHAPTER 13 SELECTION AND ACTUAL RATES OF CHAPTER 13

	(A) ATTORNEY ESTIMATE MEAN	(B) REAL WORLD CHAPTER 13 RATES	(C) ERROR
Whites	46.3%	28.6%	+17.8%
Homeowners	54.5%	47.1%	+7.3%
Hispanics	14.0%	21.7%	-7.7%
Women filing alone	23.1%	31.4%	-8.3%
65 and over	14.7%	25.3%	-10.6%
Men filing alone	21.5%	33.3%	-11.8%
Southerners	34.1%	48.6%	-14.5%
Asian Americans	9.9%	24.4%	-14.5%
Pro se debtors	8.6%	25.6%	-17.0%
African Americans	22.0%	54.6%	-32.6%
Prior bankrupts	35.2%	82.6%	-47.4%

NOTES: For different groups, consumer bankruptcy attorneys were asked to "estimate the percentage of bankruptcies in that group that were filed as chapter 13 cases." Attorneys were given a prompt of 28% for the "Nation as a whole," which was the percentage of bankruptcy cases that were chapter 13 cases at the time of the survey. The answers are based on a national random sample of 400 consumer bankruptcy attorneys of which 144 returned the survey for a response rate of 36%.

Column (A) shows the respondents' mean estimate for the percentage of bankruptcies from each group that are filed as chapter 13 cases. Column (B) shows the percentage of cases from each group that were actually chapter 13 cases from real-

world data captured by the 2007 Consumer Bankruptcy Project, a nationally representative sample of 2,437 bankruptcy filers. Column C computes the error of the attorney estimates.

Among all groups we asked about, for only two groups is there an overestimate of chapter 13 use: whites (+17.8%) and homeowners (+7.3%). At the other extreme, attorneys substantially underestimated chapter 13 usage for African Americans (-32.6%) and prior bankrupts (-47.4%).

Considering the results of the previous studies, the attorney underestimate for African Americans stands out. From the real-world data in both 2007 and 2013-14, we found a large, 2:1 racial disparity in chapter choice, which one would think would be difficult to miss. In aggregate, attorneys do miss it. Instead, their perceptions of who uses chapter 13 seem to follow general cultural beliefs about which groups are responsible. In the case of race, this means an actual 2:1 racial disparity of African Americans being more likely to file chapter 13 as opposed to whites becomes flipped to a perception of a 2:1 difference that whites are more likely to file chapter 13 as compared to African Americans.<sup>32</sup>

Breaking the data down a bit differently, we can compute an "ipsative" \*639 (within-person) score for each attorney as the attorney's estimate for African Americans divided by the attorney's estimate for whites. Only 6% of attorneys estimated that the ratio of African American to white chapter 13 filings was 2:1 or greater, whereas 59% of attorneys had flipped perceptions of the world, believing that the white to African American ratio was 2:1 or greater. Overall, 71% of attorneys thought the chapter 13 rate was higher for whites, 13% thought it was equal, and 16% thought it was higher for African Americans.

The attorney estimates appear to line up with American stereotypes of who is a responsible person. Attorneys see homeowners and whites as more likely to attempt repayment to creditors through chapter 13 whereas they see African Americans and prior bankrupts as more likely to seek a full discharge in chapter 7. There is no reason to think that attorneys, as a group, should not hold prevailing American cultural biases about who is a responsible person. That the attorneys are the system's insiders and have a front-row seat to witnessing a 2:1 racial disparity is not enough to overcome the bias.

If attorneys are largely unaware of the systematic tendency of African Americans to end up in chapter 13 and tend to counsel African Americans into chapter 13 (unaware that others are doing the same thing), the attorney estimates fit well with the findings in our previous work. "Reggie and Latisha" had to earn the right to be viewed as good, competent people by expressing a desire to file chapter 13. If attorneys believe that most African Americans irresponsibly file chapter 7, then "Reggie and Latisha" who want to file a chapter 7 are just one more couple trying to get off the hook. However, if they express a desire for chapter 13, the attorneys will view them as competent people of good values.

The underestimation for prior bankrupts is also quite interesting. On this point, the language in the survey instrument was very specific, asking attorneys to estimate the percentage of bankruptcies that were chapter 13 cases for "persons with a prior bankruptcy filing in last 8 years." In the 2007 CBP data, persons filing for bankruptcy in the previous eight years had the highest percentage of chapter 13 use of any group we identified in the data. The reason for high chapter 13 usage has a legal explanation behind it. A person receiving a chapter 7 discharge is ineligible for another discharge for eight years, and a person receiving a chapter 13 discharge is ineligible for another discharge for six years (with some exceptions).<sup>33</sup> Because the primary benefit, \*640 from chapter 7 for a consumer debtor is the discharge, a person with a discharge in his or her immediate past will find little benefit in a chapter 7 filing.<sup>34</sup> Although a chapter 13 discharge might be similarly barred for the same person, persons trying to save a home or other asset might find use for chapter 13 rules that allow the payment of arrearages over time or the curing of defaults that occurred before bankruptcy. The real-world data bear out these advantages. Although only 11.8% of the debtors in the 2007 CBP reported a prior bankruptcy in the eight years before filing, 83.2% of the prior bankrupts filed in chapter 13. Persons with a prior bankruptcy are

likely to be considered irresponsible. When combined with the large underestimation of chapter 13 usage for African Americans, the similarly large underestimation for prior bankrupts supports the idea that attorney estimates appear to reflect American cultural biases about who is a responsible person.

A consumer bankruptcy attorney who reflected on his or her estimates might be likely to realize that prior bankrupts must have high chapter 13 usage. Twenty-four or 17.8% of our respondents overestimated the 83.2% chapter 13 rate for prior bankrupts. These respondents provide a useful subgroup for analysis because they demonstrated both very careful attention to the survey instrument and, given their estimate for the group with the highest chapter 13 rate, possibly a propensity to *overestimate* chapter 13 use. Yet, these respondents displayed a pattern similar to the overall responses. They overestimated the chapter 13 rate for whites--the *only* other group for whom they overestimated chapter 13 rates--by a mean of 10.8%. At the same time, they underestimated the chapter 13 rate for African Americans by a mean of -30.7%. The mean underestimation for all other groups ranged between -0.6% and -8.9%. Thus, although this subset of respondents recognized the obvious legal implications for chapter 13 rates of prior bankrupts, they still displayed attitudes about chapter 13 that seem to reflect the same broad American cultural biases.<sup>35</sup>

#### \*641 B. EXPERIENCE: HIGH CHAPTER 13 DISTRICTS AND AGE

One question is whether experience might improve the accuracy of attorneys' estimates. We addressed this question by examining two variables: the chapter 13 rate in the district and the age of the attorney (used as an imperfect proxy for years of legal experience). As will be seen below, the evidence about whether experience improves accuracy was mixed. At best, it only slightly lessened attorneys' use of stereotypes, still leaving them with an inverted perception of the difference between African Americans and whites.

*Age.* Because we did not ask about years of practice, we could only use attorney age as a proxy for this variable. Surprisingly, age had a negative relationship to overall accuracy, as younger respondents gave more accurate estimates across groups ( $r = -.20, p = .01$ ). It appears that younger respondents' greater accuracy derived from their greater reliance on the national base rate. That is, younger attorneys were more likely to stick closer to the national base rate of 28 percent in their guesses. When we control for how closely attorneys stuck to this base rate, the effect of age is not statistically significant ( $p = .47$ ). The ultimate interpretation of the age effect is still unclear, though. It could be that newer attorneys preferred to use the national base rate because this younger cohort is more reluctant to use group-based stereotypes. Or it could be that younger attorneys stuck to the base rate simply because they knew how much they did not know and were hence reluctant to guess. Regardless of the reason, however, the implication is clear: experience (as proxied by age) does not seem to lead to greater accuracy across groups.

As with accuracy in general, age did not lead to greater accuracy with respect to the four groups for whom stereotypes dominate perceptions. The correlations of age with accuracy of estimates were  $-.1$  ( $p = .25$ ),  $-.17$  ( $p = .05$ ),  $.01$  ( $p = .92$ ), and  $-.04$  ( $p = .67$ ) for whites, homeowners, African Americans, and prior bankrupts, respectively.

*High chapter 13 districts.* Inferences about the effects of experience become slightly more optimistic when we examine the effect of practicing in a district with a high rate of chapter 13 cases. However, even here, experience seems to be no match for stereotypes.

The survey instrument asked respondents to estimate groups' rates of chapter 13 filing across the nation as a whole. Many attorneys might not have experience with chapter 13 beyond their locale. Other consumer bankruptcy attorneys might specialize in chapter 7 and thus not have much knowledge about chapter 13 even in their own locale. Seven attorney respondents \*642 returned blank surveys with comments that they did not do chapter 13 bankruptcy.

Attorneys practicing in areas with the highest usage of chapter 13 should be the attorneys most knowledgeable about it and hence less prone to errors when estimating chapter 13 rates. To assess whether attorney familiarity with chapter 13

led to better estimates of chapter 13 usage patterns, we divided the sample into two groups. The first group contained attorneys who practiced in federal judicial districts where the percentage of bankruptcies filed as chapter 13 cases was below the national average. The second group contained attorneys who practiced in federal judicial districts with chapter 13 rates above the national average. Table 3 reports the results.

TABLE 3. ERROR RATES FOR ATTORNEY ESTIMATES IN JUDICIAL DISTRICTS WITH ABOVE- AND BELOW-MEAN CHAPTER 13 RATES			
	<u>ATTORNEYS IN BELOW-MEAN JUDICIAL DISTRICTS</u>	<u>ATTORNEYS IN ABOVE-MEAN JUDICIAL DISTRICTS</u>	<u>OVERALL ERROR RATE, ALL DISTRICTS COMBINED</u>
Whites	+22.8%	+10.9%	+17.8%
Homeowners	+11.5%	+1.2%	+7.3%
Hispanics	-6.9%	-8.8%	-7.7%
Women filing alone	-12.9%	-1.5%	-8.3%
65 and over	-13.5%	-6.4%	-10.6%
Men filing alone	-13.8%	-8.9%	-11.8%
Southerners	-23.8%	-3.5%	-14.5%
Asian Americans	-14.1%	-15.1%	-14.5%
Pro se debtors	-16.6%	-17.5%	-17.0%
African Americans	-38.1%	-25.0%	-32.6%
Prior bankrupts	-49.7%	-45.5%	-47.4%
NOTES: For different groups, consumer bankruptcy attorneys were asked to "estimate the percentage of bankruptcies in that group that were filed as chapter 13s." Attorneys were given a prompt of 28% for the "Nation as a whole," which was the percentage of bankruptcy cases that were chapter 13s at the time of the survey (n = 144).			
This table compares the errors in the attorney estimates for attorneys located in federal judicial districts above and below the national mean for chapter 13 filings.			

Across most groups, attorneys in districts above the mean chapter 13 rate tended to make better estimates than attorneys in districts below the mean. The raw correlation between the chapter 13 rate in a district and the accuracy of attorneys' answers across groups was  $r = .29$ ,  $p = .001$ . This accuracy cannot be accounted for by attorneys sticking close to the national base rate, because the correlation between district rate and accuracy remains even after controlling for any such tendency (partial  $r$  for district rate =  $.36$ ,  $p = .001$ ). We interpret this correlation between district rate and accuracy as some indication of the survey instrument's validity in that familiarity with chapter 13 did lead to more accurate answers.

As with accuracy in general, district rate of chapter 13 use led to greater accuracy with respect to the four groups for whom stereotypes dominate perceptions. The correlations of district rate with accuracy of estimates were .32 ( $p = .001$ ), .30 ( $p = .001$ ), .45 ( $p = .001$ ), and .14 ( $p = .11$ ) for whites, homeowners, African Americans, and prior bankrupts, respectively.

\*643 Still, the same basic pattern as with the overall data emerges for those practicing in both judicial districts above and below the mean. Relative to their estimates for other groups, attorneys overestimated chapter 13 filing rates for stereotypically responsible groups (whites and homeowners) and underestimated the rates for stereotypically irresponsible groups (African Americans and prior bankrupts).

Again, breaking the data down ipsatively (within-person), in districts where the chapter 13 rate was below the national mean, 70% of attorneys thought the white chapter 13 rate was at least twice as large as the African-American rate, whereas only 3% thought the African-American rate was at least twice as large. In districts where the chapter 13 rate was above the national mean, 43% of respondents thought the white rate was at least twice as large as the African American rate, whereas only 12% thought the African American rate was at least twice as large as the white rate. In these high chapter 13 districts, overall, 57% of attorneys thought the white rate was higher than the African American rate by any amount, 12% thought the rates were equal, and 31% thought the African American rate was higher. Thus, regardless of the local chapter 13 rate, attorneys seem to miss glaring racial differences and seem instead to be guided by American cultural stereotypes about who is responsible or irresponsible. The differences in estimate errors remain large such that a broad range of attorneys have an inverted perception of the world.

#### \*644 C. ROBUSTNESS CHECK: CONTROLLING FOR "INNUMERATE" RESPONSES

We asked our respondents to "estimate the percentage of bankruptcies in that group that were filed as chapter 13s." A concern was that respondents would actually perceive a different question, namely what percentage of chapter 13 bankruptcy filers have the characteristic listed. For example, what percentage of chapter 13 bankruptcy filers are men filing alone, homeowners, African Americans, and so forth? To minimize the possibility of miscommunication, we labeled the column of estimates respondents needed to complete as "Percentage of bankruptcies that were chapter 13." We also completed the first entry for the "Nation as a whole" with an estimate of 28% with a textual explanation that we had completed the first entry this way "because 28% of the nation's bankruptcy cases currently are chapter 13s."

Despite these precautions, it is possible that some respondents still misunderstood these instructions. To identify responses where there was a possible misunderstanding of the survey question, we focused on the four racial categories and adopted two strategies. First, we identified any response where *all* four racial categories were estimated above or below the stated national average of 28%.<sup>36</sup> Second, we identified any survey response where the estimates for the four racial categories summed to between 90% and 110%.<sup>37</sup> For short-hand reference, we refer to responses *not* exhibiting these characteristics as "numerate" responses and then separately examine the results for these "numerate" responses. We recognize that some persons identify as both Hispanic/Latino and white or African American as well as the existence of racial identifications other than those provided to respondents. A response exhibiting an "innumerate" pattern was not necessarily logically impossible. Rather, we use these heuristics to identify respondents that were the most likely to have misunderstood the survey question, and we exclude them from analyses as a type of robustness check on our data.

\*645 Table 4 reports the results excluding responses exhibiting our first definition of "innumeracy," namely responses where the racial categories were all either above or below 28%. The same general pattern emerges as in the overall data. Whites and homeowners remain the only two groups whose chapter 13 rates are overestimated. Using just the responses from attorneys who were most likely not to have misunderstood the survey question actually produces an increase in these overestimation errors. Similarly, African Americans and prior bankrupts remain the groups with large underestimations of chapter 13 usage. For space, we have not separately reported the results using the second definition of "innumeracy," where the racial categories summed to between 90% and 110%. Using this definition, the basic conclusions stay the same.

Whites are now the only group overestimated at +10.0%; homeowners are slightly underestimated at -0.5%. African Americans (-34.6%) and prior bankrupts (-42.7%) remain the only groups with vast underestimates.

TABLE 4. COMPARISON BETWEEN ALL RESPONDENTS AND ONLY "NUMERATE" RESPONDENTS

	<u>ERROR IN ESTIMATED PROBABILITY ALL RESPONDENTS</u>	<u>ERROR IN ESTIMATED PROBABILITY "NUMERATE" ONLY</u>
Whites	+17.8	+25
Homeowners	+7.3	+14.2
Hispanics	-7.7	-6.4
Women filing alone	-8.3	-5.2
65 and over	-10.6	-9.1
Men filing alone	-11.8	-9.5
Southerners	-14.5	-9.3
Asian-Americans	-14.5	-14.3
Pro se debtors	-17.0	-16.4
African Americans	-32.6	-31.0
Prior bankrupts	-47.4	-50.8
NOTES: For different groups, consumer bankruptcy attorneys (n = 144) were asked to "estimate the percentage of bankruptcies in that group that were filed as chapter 13s." To check results against the possibility that some respondents misunderstood the question as asking what percentage of chapter 13 bankruptcy filers have the characteristics listed above, we exclude the responses for persons who returned a survey where the race categories were <i>all</i> either above or below 28% (the chapter 13 rate for the nation as a whole that was given to respondents at the beginning of the survey). For shorthand reference, we refer to the remaining responses as "numerate." The pattern for the so-called "numerate" responses resembles the pattern in the overall data.		

#### D. CONVENIENCE SAMPLE OF MECHANICAL TURK WORKERS

We believe that the pattern of overestimates and underestimates from the attorneys reveals that they are overwhelmingly unaware that African Americans are twice as likely as whites to file chapter 13 versus chapter 7. Further, their perceptions have flipped reality on its head, and a majority (about 60%) guess that whites are twice as likely as African Americans to file chapter 13. Although attorneys are insiders in the bankruptcy system, they \*646 perceive exactly the opposite of what is happening in the system - at least in terms of African-American and white chapter 13 filing rates. Our hypothesis is that attorneys - though part of the system - base their perceptions not on actual experience or inside knowledge, but they instead rely on common American stereotypes about which groups are responsible and which groups are not.

If it is indeed true that attorneys' inaccurate estimates are produced by the application of popular stereotypes (rather than, say, beliefs specific to the legal community, some source of error common only to bankruptcy attorneys, or some other source of insider "knowledge"), then it should be possible to show that the attorneys' errors can be reproduced by a completely naïve population that has no knowledge of the bankruptcy system and can only make guesses based on their stereotypes. We explore this prediction here, using a convenience sample of workers on Amazon Mechanical Turk ("MTurk"), a service that identifies persons who are willing to perform online human intelligence tasks such as taking part in university research.

There is no reason to think MTurk workers are representative of the U.S. population. In fact, they are not. Among other differences, they tend to be more politically liberal (and thus likely more similar to debtor's attorneys) and younger (and thus less likely to use stereotypes), compared to the U.S. population as a whole.<sup>38</sup> Nevertheless, we suspect that the racial stereotypes leading to the mistaken estimates in Study 2 are suitably widespread that MTurk workers will still have the same erroneous belief that whites are much more likely to file under chapter 13 than African Americans are.

We administered a survey to 201 MTurk workers. The survey began with a brief explanation of the difference between chapters 7 and 13. Respondents were then asked to give probabilities of filing chapter 13 for people in various groups. Half the participants were asked in an open-ended format to give the percentage of filers in that group who filed chapter 13. The question format here was equivalent to the question format given to attorneys. Additionally, in an attempt to reduce any innumeracy problems, the other half of the respondents were given sliding scales. For each group, respondents used sliders to indicate the percentage of each group filing chapter 13 and the percentage of each group filing chapter 7. They were told that the two sliders should add up to 100 percent (the sum was automatically calculated by the survey program).

Orthogonal to the response format manipulation, half the respondents were also incentivized to give correct answers, being told that "if your guesses for all the groups were within 10 percentage points of the correct \*647 answer, we will double the payment to you." The other half of respondents were not given this incentive (similar to the attorneys, who were not given incentives). Overall, the scale format did not appear to improve accuracy ( $p = .21$ ), though the incentive slightly did ( $p = .06$ , average distance from true value in incentive condition = 21.94 vs. average distance from true value in no-incentive condition = 23.49). However, for the key questions asking about African-American and white chapter 13 rates, neither format nor incentive had a statistically significant effect on accuracy (both  $p$ 's  $> .24$ ). In Table 5, we collapse across question formatting and incentivizing condition.

TABLE 5. DIFFERENCES BETWEEN ATTORNEYS' ESTIMATES OF CHAPTER 13 RATES, MTURK WORKERS' ESTIMATES, AND ACTUAL RATES OF CHAPTER 13 FILING

	(A) ATTORNEY ESTIMATE	(B) ACTUAL CBP DATA	(C) MTURK ESTIMATES
Whites	46.3%	28.6%	43.0%
Homeowners	54.5% *-	47.1%	48.6%

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Hispanics	14.0% *-	21.7%	23.2%
Women filing alone	23.1%	31.4%	25.1%
65 and over	14.7% *-	25.3%	30.5%
Men filing alone	21.5% *-	33.3%	32.8%
Southerners	34.1%	48.6%	30.2%
Asian-Americans	9.9% *-	24.4%	31.7%
Pro se debtors	8.6% *-	25.6%	25.1%
African Americans	22.0%	54.6%	25.4%
Prior bankrupts	35.2% *+	82.6%	24.7%
Avg. accuracy (absolute value of guess - actual)	24.1% *-		22.7%
Avg. distance from base rate (absolute value of guess - 28%)	20.8% *	13.2%	17.4%
<p>NOTES: For different groups, consumer bankruptcy attorneys and users of Amazon's Mechanical Turk were asked to "estimate the percentage of bankruptcies in that group that were filed as chapter 13s." Both groups were given a prompt of 28% for the "Nation as a whole," which was the percentage of bankruptcy cases that were chapter 13s at the time of the attorney survey. The attorneys' answers are based on a national random sample of 400 consumer bankruptcy attorneys of which 144 returned the survey for a response rate of 36%.</p> <p>Column (A) shows the attorneys' mean estimate for the percentage of bankruptcies from each group that are filed as chapter 13s. Column (B) shows the percentage of cases from each group that were actually chapter 13s from real-world data captured by the 2007 Consumer Bankruptcy Project, a nationally representative sample of 2,437 bankruptcy filers. Column (C) shows the MTurk workers' estimates. A *+ in column A indicates that the average attorney estimate was significantly different from the average MTurk worker estimate, with the attorney mean being closer to the actual data from the CBP. A *- in column A indicates that the average attorney estimate was significantly different from the average MTurk worker estimate, with the attorney mean being farther from the actual data from the CBP.</p>			

As may be seen in Table 5, MTurk workers gave estimates for whites and African Americans that were not significantly different from those given by the attorneys in the first study (MTurk vs. attorney estimates for whites,  $p = .18$ ; MTurk vs. attorney estimates for African Americans,  $p = .11$ ). The MTurk workers on average overestimate the chapter 13 filing rates for whites (a stereotypically responsible group) and underestimate the filing rates for African Americans and prior bankruptcy filers (two stereotypically irresponsible groups). They do not seem to overestimate the chapter 13 filing rate for homeowners (a stereotypically responsible group), though they do seem to underestimate the filing rates for Southerners (a group that is also sometimes stigmatized by outsiders).

Ipsatively (within respondent), 75% of MTurk respondents thought the white chapter 13 rate was higher than the African-American rate, with 48% believing the white rate was at least twice as high as the African-American rate. On the other hand, 21% of respondents believed the African-American rate was higher than the white rate, with only 5% of respondents believing the African-American rate was twice as high.

<sup>\*648</sup> *The wisdom of the crowd and the wisdom of knowing one's ignorance.* For seven categories, the average MTurk estimate was significantly different from the average attorney estimate. For six of these seven differences, the aggregated estimates of MTurk workers were closer to the actual data from the CBP than were the aggregated estimates of attorneys. The exception was the estimate for prior bankruptcy filers where the legal nuances of the prohibitions against successive bankruptcy filing would be most likely to give legal professionals an advantage.<sup>39</sup>

The overall superiority of our relatively naïve MTurk workers to the bankruptcy attorneys is quite surprising.<sup>40</sup> One could perhaps attribute this result to the “miracle of aggregation” or the “wisdom of the crowd,” in which \*649 aggregated judgments are accurate because the random errors of relatively uninformed people cancel each other out. However, one has to wonder why the wisdom of a crowd of MTurk workers exceeds the wisdom of a crowd of experienced bankruptcy attorneys. It is possible this is due simply to the size of the crowd being bigger for MTurk workers ( $n = 201$ ) than for attorneys ( $n = 144$ ). The bigger the crowd, the more likely random errors will cancel out and the estimates will converge on the true number.

However, we think another answer is likely. It was not simply the case that the *aggregate* judgment of MTurk workers was better than the *aggregate* judgment of attorneys. It was also the case that the *individual* judgments of MTurk workers were better than the judgments of individual attorneys. For each individual respondent, we looked at the absolute distance between the respondent's estimate and the CBP data. Using absolute distance does *not* allow random errors to cancel out, because absolute distance is a function of the size of the error rather than size and direction. Across the eleven categories, our relatively naïve MTurk respondents were significantly more accurate than the attorneys were (mean absolute difference for MTurk workers = 22.72 vs. mean absolute difference for lawyers = 24.11,  $p = .05$ ).

Why individual MTurk workers would do better than individual bankruptcy attorneys seems clear from looking at another aspect of the data. Individual MTurk workers were better than individual bankruptcy attorneys because they stuck closer to the base rate of 28%. For each individual, we looked at the absolute distance between their guess for each category and 28%. Each individual's score was the average of the distances across the eleven categories. For MTurk workers, this average distance from the overall base rate of 28% was 17%, whereas for bankruptcy attorneys it was 21% ( $p = .001$ ). This difference largely explains why MTurk workers were more accurate. Using a simple regression analysis, MTurk workers are more accurate ( $p = .05$ ). However, when we add to the regression how far the estimate was from the base rate, the distance from the base rate is significant ( $p = .001$ ), whereas the effect of being an MTurk worker completely disappears. In fact, it reverses. Thus, MTurk workers stuck to the base rate more than the attorneys did. Once we account for this tendency to stick to the base rate, the MTurk users did no better and in fact marginally worse than bankruptcy attorneys. Thus, it appears that our relatively naïve judges (MTurk workers) outperformed our experts (bankruptcy attorneys) solely because they realized how much they did not know and just stuck to the national base rate.

This finding resonates with research in psychology on the fallibility of clinical judgment as well as the fallacy of base-rate neglect (a fallacy that \*650 MTurk workers were less likely to commit than our experts were).<sup>41</sup> More generally, the findings augment the larger point we make in this article about the need for objective data on disparate effects within the justice system and how, without such data, peoples' preconceptions bias not simply their understanding but also their very perception of the facts on the ground.

*Summary.* In sum, MTurk workers had relatively less knowledge of the bankruptcy system than bankruptcy attorneys did. Yet, their responses stuck closer to the national average and consequently were generally more accurate than those of attorneys. More importantly for the present purposes, the same inverted perception of reality shown by attorneys was shown by our relatively naïve MTurk workers: Although African American bankruptcy debtors file chapter 13 at a rate double that of whites, MTurk workers estimated that the white rate was almost double that of African Americans. As such, reliance on common American stereotypes about whites and African Americans seems to go a long way toward explaining the inverted perceptions of the bankruptcy system.

*A general caveat.* We have demonstrated that attorneys and MTurk workers all make similarly inaccurate judgments about the racial disparity in chapter 13 filing. That is, those inside the system have the same misperceptions that relatively naïve outsiders do. However, there is a general caution that must be heeded. Regarding the bankruptcy professionals, it is possible that “that those who know (that the system has inequities), won't tell, whereas those who will tell, don't know.”

We cannot rule out the possibility that our sample of bankruptcy professionals is influenced in this way by nonresponse bias. Our response rate (36%) was decent for a mail survey, but not so high that concerns about nonresponse can be dismissed. It remains a potentially important artifactual explanation for the results. However, we think a nonresponse bias explanation will only go so far. There are a few reasons for this.

First, even if *all* our nonrespondents had perceptions that were completely accurate representations of reality, it is still a bit disturbing to know that 36% of attorneys have, collectively, a flipped perception of reality. Thirty-six percent of attorneys believing that a 2:1 difference "favoring" African Americans is actually a 2:1 difference "favoring" whites represents a sizeable percentage of attorneys who do not know about the racial disparity that seems to exist within the system.

Second, the absolute size of the African American/white misperception effect is so large that the direction of the effect is likely to be reasonably robust to nonresponse biases. In our sample, attorneys estimated that 46% of \*651 white debtors filed chapter 13 whereas only 29% actually did so, according to CBP data. They also estimated that 22% of African American debtors filed chapter 13, whereas 55% did so according to the CBP data. What would the answers of the nonrespondents have to be to make the attorneys' collective estimates accurate? Simple algebra reveals that to make the sample as a whole accurate, all of the remaining 64% of nonrespondents would have to collectively estimate that whites file chapter 13 at a rate of 19% whereas African-Americans file chapter 13 at a rate of 74%. That is, the remaining nonrespondents would have to underestimate the actual white rate (29%) by one-third whereas they would have to overestimate the actual African American rate (55%) by one-third. While this might be the case, we think the possibility of such estimates, particularly the African-American overestimate, is not likely. In the surveys of the attorneys and MTurk workers, there is no filing rate estimate for a group that comes close to 74% (the estimate required to bring the entire sample of attorneys' perceptions of African Americans in line with reality).

Of course, it might be argued that attorneys' perceptions in the present paper are actually accurate and the estimates generated by the CBP data are off. We think this is unlikely. The 2007 CBP survey had a response rate of 47%. To bring the CBP data in line with attorneys' estimates (and assuming that the response rate of African Americans was no different than the general response rate in the CBP), the nonresponding African Americans from the CBP would have had to file chapter 13 at a rate of -7% (an impossible value). For whites, to bring the CBP data in line with attorneys' estimates (and assuming the response rate of whites was no different than the general response rate in the CBP), the nonresponding whites from the CBP would have had to file chapter 13 at a rate of 61%-- not an impossible figure but one higher than that of any other large demographic group we have examined. The court-record data from the CBP respondents also was cross-checked against court records from the CBP nonrespondents. No major differences were found in their financial conditions, making it less likely there was any easily identifiable response bias in the CBP data.

It is also possible that there is some nonresponse bias in the CBP data and some nonresponse bias in the attorney perceptions data that would bring attorney perceptions in line with reality, but assumptions now begin to accumulate. That is, there would have to be a particular sort of nonresponse bias in the 2007 CBP data and a particular nonresponse bias in the 2013-14 CBP replication and a particular nonresponse bias in the Reggie & Latisha vs. Todd & Allison data and a particular nonresponse bias in the present survey of attorneys to make this alternate explanation plausible.

Here another caveat is in order. We have argued that our system insiders departed from reality-based judgments because they relied on biased perceptions \*652 about who is responsible and trustworthy and who is not. We draw our conclusions from the four groups for whom attorneys most diverged from reality (whites and homeowners on the one hand and African Americans and prior bankruptcy filers on the other). There could be other factors attorneys were thinking about, some of which would have led to greater accuracy and some of which would have led to less accuracy. For example, attorneys could have thought that African Americans were disproportionately likely to be financially-strapped homeowners caught in expensive subprime mortgages and desperately trying to save their home. That would likely have led them to greater accuracy in their judgments. They could have thought that African Americans were

disproportionately cash-strapped and needed to file chapter 13 because they could pay their attorneys over time. That too would have led to greater accuracy. They could have been thinking that African Americans had fewer assets to protect. That would have led them to less accuracy in their judgments. If, however, attorneys thought about who had assets to protect-- instead of who was responsible and trustworthy--they would have also likely given much higher estimates for prior bankruptcy filers (who are likely to use chapter 13 to pay arrearages on secured assets) and Asian Americans (who have comparable wealth and higher income than whites, though show more variability as a group).<sup>42</sup>

Further, the supposition that results are likely driven by stereotypes about who is responsible and trustworthy is most consistent with the data from previous studies. That is, it is consistent with attorneys thinking particularly poorly of Reggie and Latisha (vs. Todd and Alison) if they express a preference for chapter 7. It further helps explain why the church-going, relatively responsible Reggie and Latisha are generally presumed to prefer chapter 13 more than Todd and Alison--it plausibly derives from a contrast effect between the reasonably trustworthy exemplar couple and the stereotype about the general category of African Americans as untrustworthy.<sup>43</sup> Though the "responsible and trustworthy" stereotype seems most plausible, the exact content of the stereotype attorneys were using could benefit from further research. What seems beyond question is that attorneys were using some common stereotype (at least, one they shared with MTurk workers) \*653 and that this stereotype prevented them from recognizing even a glaring 2:1 racial disparity that appears in real life.

Preconceptions are important for perceptions.<sup>44</sup> People see what they expect to see and do not see what they do not expect to see.

## V. CONCLUSION

In this paper, we replicated our earlier finding on racial disparity in bankruptcy chapter choice and explored what bankruptcy professionals know about this disparity. Because of the serious financial consequences for the many people in bankruptcy, the overrepresentation of African Americans in chapter 13 bankruptcy should be a major policy concern. As compared to chapter 7 bankruptcy, African Americans tend to end up in a bankruptcy proceeding that takes longer, costs more, and usually leads to less bankruptcy relief. When they arrive in bankruptcy court, society appears to give African Americans less forgiveness than persons of other races.

It is relatively easy to imagine that various actors within the system would have differences of opinion as to *why* African Americans would be more likely to file chapter 13. They might believe that it resulted from the cultural preferences of African Americans, biases of attorneys, biases of other people in the system, differences in up-front costs, the geographic concentration of African Americans in high chapter 13 regions (the South), previous bankruptcy filings that would force one into chapter 13, or the confounding of any number of demographic or economic factors that happen to be related to race.

What is most striking in this paper, however, is not that various actors disagree on the *cause* of the difference. What is striking is that they do not even see the difference. Actors within the system do not even notice a 2:1 racial disparity in chapter 13 choice--and most in fact believe the disparity runs in the opposite direction. Although African Americans in bankruptcy are twice as likely to file under chapter 13 as whites are, bankruptcy attorneys believe that it is whites who are twice as likely as African Americans to do so. Their perceptions of racial disparity and the actual racial disparity are completely inverted.

Such is the power of expectations to drive perceptions. In general, it \*654 seems that stereotypically irresponsible groups (African Americans, prior bankrupts) are believed to file for the immediate discharge of a chapter 7, whereas stereotypically responsible groups (whites, homeowners) are believed to file for the repayment plans of chapter 13. Given only a brief introduction to what chapters 7 and 13 involve, relatively naïve raters (on Amazon's Mechanical Turk) make

guesses as to which groups file under which chapter that are strikingly similar to the guesses of professionals within the system (bankruptcy attorneys). If anything, the naïve MTurk workers tended to be more accurate than system insiders about which groups filed what, solely because the MTurk workers knew how much they did not know and stuck closer to the national base rates.

The results have implications for general beliefs about how well insiders can know their system. It is generally believed that people with a front-row seat in the justice system will know the justice system and have privileged insight into how it works. This is undoubtedly the case in many matters. However, when it comes to matters in which there are powerful social stereotypes, we simply fail to notice (or mentally invert) the inequities appearing before us.

The data have implications for reform of the system in that they make clear that good measurement is needed. In other papers, we have argued that the Department of Justice or the federal courts should explicitly keep track of the race and other demographic characteristics of bankruptcy filers. We believe this paper also illustrates this point--actual data on who files what, rather than general impressions or subjective judgments are likely to tell us what is happening on the ground and whether improvements are being made toward a more equitable system.

As noted, the implications go beyond just bankruptcy. Any system is subject to effects in which insiders fail to notice disparities or even have perceptions that are the inverse of reality. This is not to say that outsiders must always police a system. Insiders may also be able to effectively monitor their own systems. However, they will need hard data, rather than impressions and guesses based on preconceptions. When it comes to forming (false) beliefs and perceiving inequities, what is right before our eyes is often no match for what we already "know."

\*655 APPENDIX 1

TABLE 6: COMPLETE LOGISTIC REGRESSION RESULTS (EXPANSION OF TABLE 1)					
	(1) RACE ONLY	(2) (1) + LEGAL & FINANCIAL CIRCUMSTANCES	(3) (2) + ATTEMPTS TO HANDLE DEBT	(4) (3) + DEMOGRAPHIC INFORMATION	(5) (4) + LOCAL LEGAL CULTURE
African-American household	3.51*	3.54*	3.47*	3.24*	2.39*
Prior bankruptcy		16.06*	16.84*	17.35*	15.65*
Represented by attorney		11.36*	12.0*	10.23*	7.41
Foreclosure as reason for filing bankruptcy		2.62*	2.81*	2.85*	2.98*
Homeowner		0.86	0.90	0.87	0.79
Monthly income (ln)		2.10*	2.11*	2.52*	2.66*

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Total assets (ln)		1.12	1.12	1.13	1.15
Total debt (ln)		0.45*	0.44*	0.40*	0.48*
Priority debt (ln)		1.07*	1.07	1.07	1.06
Secured debt/total debt		8.40*	8.16*	9.30*	7.19*
Tried a loan mod, home refi or home equity loan			0.96	0.94	0.80
Attempted to "work with" creditors			1.56	1.71	1.58
Sell house or give it back to lender			0.79	0.83	0.88
Bachelor's degree or higher				1.65	1.50
Number of dependents				0.77*	0.77*
Live with a spouse or partner				1.06	1.10
Female head of household				1.35	1.55
Overall chapter 13 rate in district					31.61*
Constant	0.36	0.07	0.05	0.04	0.00
<i>Model Statistics</i>					
N	428	428	428	428	428
Wald chi-squared	29.9*	160.9*	163.7*	172.4*	191.6*
McFadden pseudo R- squared	.05	.29	.30	.32	.35
Correctly classified	69.2%	79.4%	79.7%	80.1%	80.4%
<p>NOTES: The odds ratios and statistical significance for all variables from the logistic regressions in Table 1 are reported above. The dependent variable is whether the bankruptcy was filed as a chapter 13 as opposed to a chapter 7 (1 = "yes"). In all models, the filer's race is a statistically significant determinant of selecting into chapter 13. Data are from the Consumer Bankruptcy Project. "Correctly classified" is the number of observations correctly classified by the model. Across all observations, the percentage of chapter 7 cases is 64.7%. Thus, a naïve guess that a particular case was not a chapter 13 would be correct 64.7% of the time.</p>					

\*656 APPENDIX 2: SURVEY INSTRUMENT

A national random sample of attorneys were asked to estimate the rate at which various groups chose chapter 13 after deciding to file bankruptcy. The survey instrument is reproduced below.

We are interested in the perceptions of bankruptcy professionals about how often people from different groups file chapter 13 (vs. chapter 7). For each group below, please estimate the percentage of bankruptcies in that group that were filed as chapter 13s.

The first question has been completed for you as an example. Because 28% of the nation's bankruptcy cases currently are chapter 13s, we wrote 28% for the "nation as a whole."

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Please complete the questions to the best of your knowledge. Even if you are not sure, please make your best guesses. We are interested in your estimates.

GROUP	PERCENTAGE OF BANKRUPTCIES THAT WERE CHAPTER 13
Nation as a whole 28	%
Men, filing alone	%
Women, filing alone	%
Persons 65 years old and over	%
Homeowners	%
Persons with a prior bankruptcy filing in last 8 years	%
White	%
African-American/black	%
Hispanic/Latino	%
Asian-American/Asian	%
Pro se debtors	%
Southerners (from the states of AL, AR, FL, GA, LA, MS, NC, SC, TN, TX, VA)	%

## Background information about yourself

Judicial district in which you most often work: \_\_\_\_\_

Year of birth: \_\_\_\_\_

Gender (circle):

M F

Race/ethnicity (circle all that apply):

White Black/African-American Latino Asian Other (please specify) \_\_\_\_\_

Footnotes

a1 Professor of Psychology, University of Illinois

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The late Jean Braucher, Roger C. Henderson Professor of Law at the University of Arizona, assisted in the data collection for this paper, but her untimely passing prevented her from being able to participate in the development of this manuscript.

1 Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, *passim* (2012). Other work has reported the disparity without controlling for other factors and used data from the Consumer Bankruptcy Project prior to its move to national random samples. See Robert B. Chapman, *Missing Persons, Social Science and Accounting for Race, Gender, Class and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 387 n.226 (2002) (reporting a "relatively uniform" effect from the 1991 CBP data of "stark differences" in chapter choice between African Americans and debtors from other races); Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 232-34 (2009) (reporting from the 2001 CBP data that African Americans were more likely to enter chapter 13 than debtors of other races).

2 Braucher, Cohen & Lawless, *supra* note 1, at 397-405.

3 *Id.* at 405-20.

4 Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, "No Money Down" *Bankruptcy*, 90 S. CAL. L. REV. 1055 (2017).

5 *Id.*

6 Dalíé Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795 (2009).

7 Braucher, Cohen & Lawless, *supra* note 1, at 405.

8 Foohey, Lawless, Porter & Thorne, *supra* note 4, at 36-37 Tables 4-5.

9 U.S. CONST. art. I, § 8.

10 DAVID STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, AND REFORM* 74 (1971). At the time of Stanley & Girth's study, the governing law was the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898). The Bankruptcy Act of 1898 provided for a chapter XIII bankruptcy, a forerunner of today's chapter 13 bankruptcy. See 8 COLLIER ON BANKRUPTCY ¶ 1300.36[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017).

11 *Id.* at 75.

12 Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986).

13 Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 581 (1993).

14 The CBP is a long-running study of consumer bankruptcy filers. The first cohort dates from 1981 with later cohorts drawn in 1991 and 2001, 2007, and 2013-present. Beginning in 2007, advances in information technology allowed national random sampling of bankruptcy filers. Cohorts prior to 2007 were drawn from a subset of judicial districts believed to be nationally representative. Methodologies for the 1981, 1991, 2001, and 2007 CBPs appear in Katherine Porter, *Appendix: Methodology of the 2007 Consumer Bankruptcy Project*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 235 (Katherine Porter, ed., 2012). A further, more detailed methodology for the 2007 CBP appears at Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 391-97 (2008).

15 Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Laws, Models, and Real People: Choice of Chapter in Personal Bankruptcy*, 13 LAW & SOC. INQUIRY 661 (1988).

- 16 Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB POL'Y 801 (1994).
- 17 Braucher, *supra* note 13, at 559-60; Chapman, *supra* note 1, at 387; Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Who Uses Chapter 13*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 267, 270-71 (J. Niemi-Kiesiläinen, et al. eds. 2003); Van Loo, *supra* note 1, at 232-34.
- 18 Braucher, Cohen & Lawless, *supra* note 1.
- 19 *Id.* at 398.
- 20 *Id.* at 398-403.
- 21 *Id.* at 411.
- 22 See S&P Dow Jones Indices LLC, S&P/Case-Shiller U.S. National Home Price Index [CSUSHPINSA], Fed. Reserve Bank of St. Louis, <https://stlouisfed.org/CSUSHPINSA> (last visited Jan. 24, 2017).
- 23 Delinquency Rate on Single-Family Residential Mortgages, Booked in Domestic Offices, All Commercial Banks [DRSFRMACBS], Board of Governors of the Federal Reserve System (US), <https://fred.stlouisfed.org/series/DRSFRMACBS> (last visited Jan. 24, 2017).
- 24 A regression tells a researcher the independent effect of each variable while statistically controlling for other variables in the regression. Thus and for example, we can interpret our regressions as the effect being African American has on chapter choice while holding constant the other variables in the regression equation. ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 273 (2d ed. 2015).
- 25 In 2007, the questionnaire asked bankruptcy debtors if they "did ... do or try to do ... to make ends meet" a series of coping mechanisms, including asking creditors to "work with you on the payments." In the Current CBP, the questionnaire asks what the debtors "did ... do ... to make ends meet" (omitting the language about what they tried to do).
- 26 RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* *passim* (1980).
- 27 Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973).
- 28 *Id.* at 237-38; see also Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293 (1983) (finding that intuitive heuristics (i.e., stereotypes) will lead people to the mathematically impossible conclusion that there is a higher probability of a conjunctive event (e.g., the probability of A and B) than either of the constituent events (e.g., the probability of A and B separately)).
- 29 Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 1 (2009).
- 30 Braucher, Cohen & Lawless, *supra* note 1, at 413-16.
- 31 The methodology for the 2007 CBP is discussed *supra* note 14. We use the 2007 data for gauging accuracy rather than those from the more recent study because of the larger sample size in the 2007 data. Results are similar if we use either the more recent data alone or average it with the earlier data.
- 32 Debtors' attorneys are not the only professionals who play a role in the consumer bankruptcy system. Chapter 13 bankruptcy trustees, who are not government employees but are subject to oversight from the U.S. Trustee Program at the Department of Justice, administer the financial end of a chapter 13 case, collect the debtor's payments on the chapter 13 plan, and disburse payments to creditors. Chapter 13 trustees have substantial discretion and have standing to raise objections to a debtor's chapter 13 plan with the bankruptcy court.  
A few months after we sent the surveys to the attorneys, we sent a survey to all 201 chapter 13 trustees listed on the website for the U.S. Trustee Program. The survey and cover letter were substantially similar to those sent to the attorneys, with the

addition that the trustees' survey asked for each group the basis for the trustee's estimate. As with the attorneys, a follow-up letter and another copy of the survey were sent approximately four weeks after the initial mailing.

The trustee response rate was low with only 17.9% of the trustee population providing useable data. After we mailed our survey to the trustees, reports reached us that the trustees had communicated among themselves about the survey. Rather than simply not responding, a much higher percentage of the chapter 13 trustees returned blank surveys (9.0%) or sent refusal e-mails (6.0%), as compared to attorneys (2.2%). In contrast to the attorney comments accompanying the blank surveys that just disclaimed knowledge of chapter 13, the trustee comments (and emails) tended to be critical of the research. As one trustee wrote: "For the same reasons which I believe are being expressed to you by other Trustees, I don't feel comfortable filling out your survey. Its 'estimates' approach in an area requiring statistical rigor is a bit too unscientific for me." Counting blank responses and refusal e-mails, we heard back from 32.8% of trustees, similar to the response rate for attorneys.

Obviously, it is impossible to draw any firm conclusions from trustees' resistance, except to say that some percentage of trustees were uncomfortable with the research. Trustees might have a different perspective on chapter 13 use than attorneys do. In her 1993 article, Braucher interviewed 57 professionals involved in the bankruptcy system in two cities in Texas and two cities in Ohio. One long-time chapter 13 trustee in Cincinnati mentioned that he thought African Americans were overrepresented in chapter 13 cases and another experienced chapter 13 trustee in Dayton also said that he thought African Americans and "poor people" might be overrepresented in chapter 13, though Braucher does not indicate that anyone else mentioned this during her other 55 interviews. Braucher, *supra* note 13, at 559-60. Nevertheless, it is interesting that in the present data, trustees' estimates for white chapter 13 rates (57%) and African American chapter 13 rates (25%) were close to attorneys' estimates. Overall, trustees showed the same reversal in which a 2:1 disparity with African Americans being more likely to file chapter 13 was seen as a 2:1 disparity with whites being more likely to file chapter 13.

33 Specifically, a debtor can get a second discharge within six years of a previous chapter 13 discharge if the debtor made 100% repayment in the previous case or made 70% repayment through what the court deems the debtor's "best effort." 11 U.S.C. § 727(a)(9). Of course, as with many legal matters, there are further complications. The eight and six-year prohibitions are on successive discharges. If the court dismissed a previous bankruptcy case without issuing a discharge, then the prohibition on successive discharges would not apply. Separate statutory sections regulate successive filings (as opposed to successive discharges), 11 U.S.C. §§ 109(g), 362(b)(19)-(20), (h), and courts also have claimed a general judicial power to dismiss successive filings for a lack of "good faith." None of these legal technicalities change the primary point in the text: persons who filed bankruptcy in the past eight years have vastly diminished incentives to choose chapter 7, as evidenced by the real-world data showing their propensity to select chapter 13.

34 A debtor ineligible for a discharge might file a chapter 7 to get the benefit of the automatic stay against creditor actions. The automatic stay can be severely curtailed after repeated filings. For example, the stay does not go into effect if a chapter 7 debtor filed two or more cases within the previous year that were dismissed. 11 U.S.C. § 362(c)(4). Other benefits from filing a chapter 7 include the right to redeem personal property from a lien securing a dischargeable consumer debt (typically an auto loan), 11 U.S.C. § 722, or the ability to bring an action that avoids judicial liens that impair an exemption or nonpossessory security interests against certain household goods, 11 U.S.C. § 522(f).

35 If one expands the subsample to the thirty-nine attorneys (29% of respondents) who were *on average* accurate for prior bankrupts (average estimate for prior bankrupts = 82.6%), results look quite similar. These attorneys overestimate white filing rates by 12%, underestimate African American filing rates by 28.3%, and are off by only +0.8% to -11.8% (average = -5.2%) for every other group.

36 Because our racial categories were not exhaustive (i.e., there was no "other" category), it is mathematically possible but exceedingly unlikely that the true values for all four racial categories would all be above or below the mean.

37 We alternatively checked for survey responses where the estimates on the racial categories summed between the narrower range of 95 - 105%. Using the narrower range produces the same result reported in the text, namely that the pattern that emerges from the "numerate" data resembles the pattern for the dataset as a whole. We report the results for the more broadly defined range of possible errors as a more conservative approach toward the data.

38 Adam J. Berinsky, Gregory A. Huber, & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351 (2012).

39 See *supra* notes 34-35 and accompanying text.

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- 40 We refer to MTurk workers as “relatively” naïve. Nine percent of our respondents said they personally had filed for bankruptcy with an additional 53% saying they knew an immediate family member, extended family member, friend, or acquaintance who filed for bankruptcy. However, neither going through bankruptcy oneself ( $r = .02$ ) nor knowing someone who did ( $r = .01$ ) were correlated with accuracy in judgments.
- 41 See, e.g., PAUL MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION *passim* (1954); PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? *passim* (2005).
- 42 Ray Boshara, William R. Emmons & Bryan J. Noeth, CTR. FOR HOUSEHOLD FIN. STABILITY, *The Demographics of Wealth-How Age, Education and Race Separate Thrivers from Strugglers in Today's Economy*, Fed. Reserve Bank of St. Louis (2015), <https://www.stlouisfed.org/-/media/Files/PDFs/HFS/1-1-2015-Race-Ethnicity-and-Wealth.pdf>; Jeff Guo, *The Staggering Difference Between Rich Asian Americans and Poor Asian Americans*, WASH. POST WONKBLOG (Dec. 20, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/12/20/why-asian-americans-arent-as-rich-as-they-seem>.
- 43 Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 AM. PSYCHOL. 1019 (2003); Norbert Schwartz & Herbert Bless, *Constructing Reality and Its Alternatives: An Inclusion/Exclusion Model of Assimilation and Contrast Effects in Social Judgment*, in THE CONSTRUCTION OF SOCIAL JUDGMENTS 217 (L.L. Martin & A. Tesser eds., 1991).
- 44 See, e.g., John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983); Harold H. Kelley, *The Warm-Cold Variable in First Impressions of Persons*, 18 J. PERSONALITY 431 (1950); Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998); Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 183 (David L. Hamilton ed., 1981); Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148 (1978).

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# RACE DISPARITY IN BANKRUPTCY CHAPTER CHOICE AND THE ROLE OF DEBTORS' ATTORNEYS

JEAN BRAUCHER,\* DOV COHEN,\*\* AND ROBERT M. LAWLESS\*\*\*

## INTRODUCTION

We are grateful for the attention the *American Bankruptcy Institute Law Review* is giving to our research concerning racial disparity in bankruptcy chapter choice and the role debtors' lawyers may play in producing it. We believe that all players in the consumer bankruptcy system should be concerned about just results in the system in general and racial justice in particular. Thus, although we already have presented this research in the *Journal of Empirical Legal Studies* with great attention to methodological concerns,<sup>1</sup> in these pages we will summarize our findings and analysis for an audience of bankruptcy professionals. We will avoid technical presentation of the data. Where we discuss differences we observed, these differences were statistically significant unless we otherwise note.

The relevant research involves two different studies. These studies in turn need to be understood against a background of other research concerning huge variation in local practices in the bankruptcy system, known as local legal culture, and the important role of professional gatekeepers such as lawyers, trustees, and judges in determining how bankruptcy is used. After briefly describing the consumer bankruptcy options and relevant prior research in Part I, we summarize here findings from the two studies documenting racial sorting in bankruptcy chapter choice and the likely influence of debtors' lawyers.

Part II describes the first study, which looked at real-world cases in a large national random sample and found that African Americans were about twice as likely as debtors of all other races to file chapter 13 as opposed to chapter 7. Furthermore, this racial disparity cannot be fully accounted for either by local legal culture, the financial and legal characteristics of the cases, or the debtor's nonracial demographics. Part III describes the second study, which involved a national random sample survey of attorneys using a hypothetical fact pattern. This study found that on the same financial facts, with the same legal implications, attorneys were more likely to recommend that an African-American couple (suggested by names and other indicators) file in chapter 13 than they were for a white couple. This difference in recommendations was equivalent to about two-thirds of the real world racial disparity in chapter choice found in the first study. We conclude with some analysis and some limited initial proposals.

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<sup>1</sup> Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL L. STUD. 393 (2012).

We doubt that race disparity in chapter choice is the product of intentional discrimination by actors in the consumer bankruptcy system. Rather, it is likely the result of subtle biases operating within a complex system. We have no systematic evidence on whether actors in the system other than debtors' attorneys also play a role in producing racially disparate results. Those actors include bankruptcy judges, other federal judges, officials in the U.S. Department of Justice who have authority over bankruptcy trustees, and standing and panel trustees in bankruptcy around the country. Now that our research has found evidence of race disparity, it is the responsibility of those who oversee the system to investigate the phenomenon further and, if they confirm that there is a problem, address it.

#### I. BACKGROUND ON THE TWO CONSUMER OPTIONS AND ON PRIOR RESEARCH CONCERNING INFLUENCES ON CHAPTER CHOICE

The two main options for consumer debtors filing bankruptcy are chapter 7 and chapter 13,<sup>2</sup> described here with emphasis on empirical research concerning how they are used. Chapter 7, captioned a "liquidation" in the Bankruptcy Code, does not typically involve liquidation because more than 90 percent of cases filed in chapter 7 are so-called "no asset" ones,<sup>3</sup> meaning there are no assets in excess of exemptions to be liquidated for distribution to creditors. Thus the debtor gets a quick fresh start, free of personal liability on most old debts. A very small number of chapter 7 filers are forced by means testing to file in chapter 13; more commonly, debtors who could qualify for chapter 7 choose chapter 13 for a variety of reasons, including simply trying to pay as much as they can to creditors.<sup>4</sup> While chapter 13 is sometimes thought of as the best route to hold on to collateral such as a home or car, the reality is that chapter 7 debtors who are or who can become current can

<sup>2</sup> See 11 U.S.C. §§ 701–27, 1301–30 (2006). Chapter 11, while available to consumer debtors, see *Toibb v. Radloff*, 501 U.S. 157, 161–62 (1991), is much more expensive and is not practical for most individuals; thus chapter 11 was not studied. Chapter 11 filings by individuals are rare as compared to other bankruptcies. In 2011, individuals filed 3,363 chapter 11 petitions, which was 0.2% of 1,363,302 total bankruptcy petitions filed by individuals. See BANKRUPTCY DATA PROJECT AT HARVARD, <http://bdp.law.harvard.edu> (last visited Nov. 5, 2012) (allowing computation of bankruptcy statistics).

<sup>3</sup> See U.S. TRUSTEE PROGRAM, ANNUAL REPORT, FISCAL YEAR 2011 12, 35 (2011) (reporting 1,012,133 chapter 7 cases were filed in districts covered by program, which excludes North Carolina and Alabama, and 69,588 were asset cases, meaning approximately 7% were asset cases, including business filings); see also Dalie Jiménez, *The Distribution of Assets in Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009).

<sup>4</sup> See U.S. TRUSTEE PROGRAM, *supra* note 3, at 20 (reporting 13% of chapter 7 debtors had income above their states' medians and thus were subject to means testing, 7% of those were presumed abusive under 11 U.S.C. § 707(b), and trustee program declined to seek dismissal in 63% of presumed abusive cases, for total dismissal rate of about half a percent); see also Clifford J. White III, *Making Bankruptcy Reform Work: A Progress Report in Year 2*, 16 AM. BANKR. INST. J., June 2007 at 16 (reporting only 27% of chapter 13 filers had income above median; given rates of non-dismissal in chapter 7, presumably even many of those could pass means test).

typically also do so, either with court protection or by creditor acquiescence in continuation of payments or creditor agreement to a reaffirmation of the debt.<sup>5</sup>

Chapter 13 involves a three-to-five year repayment plan, with the discharge typically given only after plan completion.<sup>6</sup> Under a test for confirmation of the plan, debtors are required to commit projected disposable income to repayment of creditors.<sup>7</sup> A chapter 13 debtor also has to pay unsecured creditors at least what they would get in a chapter 7, which is typically either nothing or less than the amount the debtor has to pay anyway under the projected disposable income test.<sup>8</sup> Only about a third of debtors who file in chapter 13 complete their plans and get a discharge.<sup>9</sup> Retention of collateral (most commonly homes and cars) is often a reason for choosing chapter 13 because it allows debtors to make up back payments on secured debts in the plan.<sup>10</sup> Also, sometimes chapter 13 debtors can either cram down secured debts to collateral value or strip off junior liens on homes when the liens are wholly unsupported by collateral value.<sup>11</sup> Debtors also sometimes choose chapter 13 to pay priority debts such as domestic support obligations ahead of general unsecured debts in their plans.<sup>12</sup>

As this brief description of the consumer options indicates, most debtors could choose either chapter. Chapter 7 is quicker and does not involve a plan of repayment from post-petition income, but sometimes goals of retaining collateral and repayment of unsecured creditors cut in favor of the longer course of a chapter 13 plan. Also, while chapter 7 fees are lower, attorneys are often willing to take much of their fees in chapter 13 over time in the plan, so that debtors without savings may use chapter 13 in part to file more quickly.<sup>13</sup>

<sup>5</sup> 11 U.S.C. §§ 362(h), 521(a)(2), 521(a)(6), 524(c). The "ride through" option of just staying current is generally accepted for home mortgages as a debtor right. *See e.g., In re Law*, 421 B.R. 735, 737–38 (Bankr. W.D. Pa. 2010); *In re Hart*, 402 B.R. 78, 81 (Bankr. D. Del. 2009).

<sup>6</sup> 11 U.S.C. §§ 1322(d), 1328(a)–(b).

<sup>7</sup> *Id.* at § 1325(b)(1)(B).

<sup>8</sup> *Id.* at § 1325(a)(4) (providing so-called best interest test, which only requires additional payment if debtor has nonexempt assets in excess of what must be paid under disposable income test over course of plan).

<sup>9</sup> *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 125–26 (2011) (discussing relatively constant one-in-three completion rate over 30 years, along with possibility that chapter 13 completion rate may have increased to more in range of 40 percent since 2005 law and during Great Recession, factors that are hard to untangle and make it hard to determine whether this is a temporary blip).

<sup>10</sup> 11 U.S.C. § 1322(b)(5).

<sup>11</sup> *Id.* at §§ 1322(b)(2), 1325(a)(5), as qualified by the hanging paragraph (providing home mortgages cannot be modified but allowing cramdown on older cars). The U.S. Courts of Appeals have consistently interpreted *Nobelman v. Amer. Sav. Bank*, 508 U.S. 324 (1993), as permitting strip off wholly unsecured junior liens in chapter 13. *See e.g., Lane v. Western Interstate Bancorp (In re Lane)*, 280 F.3d 663, 664–65 (6th Cir. 2002) (holding and discussing four other circuit court decisions in accord).

<sup>12</sup> 11 U.S.C. §§ 1322(a)(2), 507 (calling for full payment of priority claims in chapter 13 and listing priorities, respectively).

<sup>13</sup> Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 51, 56, 58, 69–70 (2012) (reporting mean attorneys' fees after 2005 law became fully effective and through 2009 of \$968 in discharged no-asset cases in chapter 7 and of \$1,072 in discharged asset cases in chapter 7 and \$2,564 in discharged chapter 13 cases and \$1,491 in dismissed chapter 13 cases, with difference

Chapter choice is complex, involving both financial and social or moral considerations, and it is hard for consumer clients to appreciate fully the tradeoffs, making them susceptible to and often desirous of recommendations from their attorneys. Research has indicated that chapter choice is typically guided by attorneys operating within local norms often referred to as "local legal culture."<sup>14</sup> Chapter 13 was developed in Depression-era Birmingham, Alabama,<sup>15</sup> and has remained most popular in the South.<sup>16</sup> A Brookings Institution report on the state of bankruptcy in the 1960s found great variation in incidence of chapter 13 (then Chapter XIII) and attributed the differences primarily to attorney attitudes and to a lesser extent to those of local judges.<sup>17</sup> An interview study of attorneys in the 1980s described a process for chapter choice that was attorney centered.<sup>18</sup> One of the co-authors of the current article conducted interviews of 57 bankruptcy attorneys and trustees in four cities in the early 1990s and found that lawyers tried to serve varying combinations of their own and clients' financial interests as well as their own and their clients' views of appropriate social roles, with views of what the clients wanted filtered through attorneys' own values.<sup>19</sup> As of 2007, local variation in use of chapter 13 ranged from 8.4 percent in the northern district of Iowa to 77.4 percent in the southern district of Georgia.<sup>20</sup> Here are chapter 13 percentages for the lowest and highest chapter 13 districts (with all ten of the highest in the South):

*Lowest Percent of Chapter 13s*

Iowa, Northern – 8.4%  
 North Dakota – 11.0%  
 West Virginia, Northern – 11.1%  
 West Virginia, Southern – 11.1%  
 New Mexico – 12.5%  
 Oklahoma, Northern – 14.3%  
 Hawaii – 14.8%  
 Iowa, Southern – 15.0%  
 Alaska – 15.4%

*Highest Percent of Chapter 13s*

Texas, Southern – 57.4%  
 Texas, Northern – 57.9%  
 Georgia, Middle – 58.2%  
 North Carolina, Eastern – 58.9%  
 South Carolina – 65.5%  
 Alabama, Middle – 70.8%  
 Louisiana, Western – 71.8%  
 Alabama, Southern – 72.4%  
 Tennessee, Western – 74.8%

between discharge cases and dismissed cases in chapter 13 reflecting fact that at least some of chapter 13 fees are typically paid in plan over time).

<sup>14</sup> See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 503 (1993); Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 804 (1994).

<sup>15</sup> Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come From and Where Should It Go*, 10 AM. BANKR. INST. L. REV. 741, 741 (2002).

<sup>16</sup> See *infra* notes 20–21 and accompanying text.

<sup>17</sup> See DAVID STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, AND REFORM* (1971).

<sup>18</sup> See Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 229 (1986).

<sup>19</sup> Braucher, *supra* note 14, at 503.

<sup>20</sup> Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, in *BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 175 (Katherine Porter ed., 2012).

South Dakota – 15.7%

Georgia, Southern – 77.4%<sup>21</sup>

This prior research suggests that chapter choice is heavily influenced by professional gatekeepers and is not a purely independent choice of the debtors who use the consumer bankruptcy system.

## II. STUDY 1: RACIAL DISPARITY IN FILING OF CHAPTER 7 OR CHAPTER 13

Our first study was of real world consumer bankruptcy cases, using data from the Consumer Bankruptcy Project's (CBP) national random sample of cases filed in 2007.<sup>22</sup> Questionnaires were mailed to 4,976 households who had filed a bankruptcy petition, and 2,314 were returned completed, for a response rate of 46.5 percent. Of the respondents, about 23 percent were from African-American households.<sup>23</sup> The study also looked at the bankruptcy schedules and other court filings for those who answered the questionnaires. Other information—including the race of the debtors (not gathered by the bankruptcy system)—was obtained using the questionnaire.

The raw data shows a striking racial difference in use of the two chapters, with 54.7 percent of the African-American households filing in chapter 13, compared to 28.2 percent of debtors of all other races.<sup>24</sup> The rate of use of chapter 13 as opposed to chapter 7 by race was as follows:

African American	54.7%
White	28.6%
Asian	24.4%
Other	23.8%
Hispanic	21.7% <sup>25</sup>

Study 1 also searched for explanations of the race disparity across twenty separate control variables and found no fully satisfying explanation. The prior literature suggested financial and legal characteristics of the debtors' cases and local legal culture were most likely to have an effect. Ten legal and financial variables were examined—total assets, homeownership, income, total debt, total priority debt, percent secured debt, percent credit card debt, threatened foreclosure, prior bankruptcy filing within eight years, and representation by a lawyer.<sup>26</sup> While

<sup>21</sup> *Id.*

<sup>22</sup> Braucher et al., *supra* note 1, at 398. A detailed methodology for the CBP appears at Robert M. Lawless et al., *Did Bankruptcy Reform Fail: An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 387–98 (2008).

<sup>23</sup> For joint filers, we have reported statistics based on whether either person identified as African American. The results do not change if we limit the definition of an "African American" case to joint cases where both filers identify as African American.

<sup>24</sup> Braucher et al., *supra* note 1, at 400.

<sup>25</sup> *Id.* at 401 tbl.2.

<sup>26</sup> *Id.* at 402.

controlling for these factors reduced the racial gap, it was far from eliminated.<sup>27</sup> Local legal culture, measured by the rate of use of chapter 13 by non-African-American debtors in the district, also did not account for racial disparity.<sup>28</sup> The race effect persists over and above the effect of local norms concerning use of chapter 13, so that even in areas with low rates of chapter 13 usage, African Americans use it more.

It should also be noted that Study 1 did not indicate that African Americans were getting more lenient plans or better results in completing them. There was a weak trend for their chapter 13 plans to propose repaying more to their unsecured creditors than plans from debtors of other races (30.9 percent to 26.1 percent).<sup>29</sup> Also, their cases were dismissed from chapter 13 at a higher rate than the cases of debtors of other races (36.2 percent to 25.5 percent, when followed up 10 to 14 months after their filings).<sup>30</sup>

As discussed in Part I, prior research suggested the hypothesis that debtors' attorneys play a role in producing the racial disparity in chapter choice in consumer bankruptcy. Study 2 was designed to test that hypothesis.

### III. STUDY 2: EXPERIMENT WITH ATTORNEYS

Study 2 used a hypothetical case to examine how bankruptcy attorneys might guide clients of different races into different chapters.<sup>31</sup> A national random sample of 596 bankruptcy attorneys were mailed surveys, and 262 of them ultimately responded, for a response rate of 44.0 percent.<sup>32</sup> The surveys in all instances used the same financial facts in the vignette and presented a case on which attorneys could differ as to recommendation of chapter choice. The financial facts in the vignette were approximately at the median of the CBP data.<sup>33</sup> The fictional clients were a cash-strapped couple with two young daughters and an annual income of \$41,400 from the husband's job as a custodian and the wife's job as a teacher's aide. They owned a house on which they owed more than the value, with one missed payment, and a car with three missed payments. Their unsecured debts included elements that were both sympathetic and unsympathetic—for example, for medical expenses from the husband's diabetes and for a family vacation in the Caribbean.<sup>34</sup>

Although identical on the financial facts, the surveys varied on two factors, each with three versions, and attorneys were randomly assigned to the resulting nine variations. One factor concerned the suggested race of the clients (white, African American, and no race indicated), signaled by their names and church affiliations.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 403.

<sup>29</sup> *Id.* at 405. This difference was not statistically significant.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 408–09.

<sup>32</sup> *Id.* at 408.

<sup>33</sup> *Id.* at 424.

<sup>34</sup> *Id.* at 409, 428–29 (discussing and reproducing facts in hypothetical case).

One-third of the surveys concerned "Todd and Allison" who attended the First United Methodist Church, another third concerned "Reggie and Latisha" who attended the Bethel A.M.E. Church, and the last third described "R. and L." who attended "a church." The names and churches for the first two versions were chosen on the basis of statistically likely white and African-American names and denominations.

The other factor concerned a statement of a preference by the clients for chapter 7 or chapter 13. In all surveys, the clients made some platitudinous statements that indicated some motives consistent with chapter 7 and some with chapter 13. In one third of the surveys, however, there was a final statement of preference for chapter 7, in another third a final statement of preference for chapter 13, and in one third no final statement at all. The second factor was designed to minimize the plausibility—or at least the appropriateness—of attorneys making racially disparate recommendations based on their "knowledge" of clients' preferences. We know of no evidence that African Americans in fact have different preferences than debtors of other races, but variation on the second factor was intended to minimize the possibility that any differences in attorney recommendations by race could be explained simply in that way.

The survey results were that attorneys recommended chapter 13 as follows: 47 percent for the African-American couple, 36 percent for the couple with no race indicated, and 32 percent for the white couple.<sup>35</sup> The 15 percentage point racial gap between chapter 13 recommendations to African Americans compared to whites represents fully two-thirds of the 22 percentage point gap found in similar real world cases in Study 1.

Expressed preferences of clients affected attorney recommendations in the survey, but the race effect was stronger: attorneys recommended chapter 13 to African Americans who expressed a preference for chapter 7 at a rate that was trivially higher than that for whites who expressed a preference for chapter 13 (45 vs. 38 percent).<sup>36</sup> When the clients expressed a preference for chapter 13, the attorneys recommended chapter 13 to the African-American couple 63 percent of the time, while for whites and clients with no race indicated, they did so, respectively, only 38 and 37 percent of the time.<sup>37</sup>

Local legal culture did not explain the race disparity in the survey results. Being African American was a statistically significant predictor of an attorney recommendation for chapter 13 even after controlling for the chapter 13 rate in the district or the difference between the attorney's self-reported chapter 13 rate and the district rate or both of these factors together.<sup>38</sup>

<sup>35</sup> *Id.* at 411–12 fig.1.

<sup>36</sup> *Id.* at 411–12 tbl.6.

<sup>37</sup> Where no race was indicated in the survey, attorneys were more likely not to make a recommendation and circle the midpoint on a scale. *Id.* at 412. Also, the race gap was strong when a preference for the outcomes of either chapter was stated but disappeared when no preference for chapter outcomes was stated; our best guess (and inferential statistics) suggest that this is a product of chance variation. *Id.* at 413 & n.9.

<sup>38</sup> *Id.* at 412.

Study 2 also explored the attorneys' perceptions that may help to explain their racially disparate recommendations concerning chapter choice. Attorneys seemed to measure African-American and white couples against different standards. The survey included questions that explored the attorneys' views of their clients' competence (whether they can effectively manage their way through the world) and values (whether they are good people).<sup>39</sup> The results indicated that attorneys likely see an African-American couple who express a preference for chapter 13 as relatively more competent than one that expresses no preference or a preference for chapter 7, while attorneys view a white couple as more competent when expressing a preference for chapter 7 as opposed to no preference or a preference for chapter 13.<sup>40</sup> Thus, the attorneys seemed to consider whites more competent if they took care of their financial interests and wanted a fresh start (the recommendation across all versions of the survey was for chapter 7 more than 60 percent of the time), while African Americans were more likely to be expected to take the longer, generally more burdensome route of a chapter 13 plan to earn their competence by taking care of past mistakes.<sup>41</sup> Similarly, responding to a question about the clients' values, attorneys viewed whites expressing a preference for chapter 7 as having better values than African-American or race-unspecified clients who also expressed a preference for chapter 7.<sup>42</sup>

Other questions asked attorneys about what sorts of outcomes the couple probably wanted before coming for a consultation. Attorneys were far more likely to assume that the couple wanted the type of outcomes provided by chapter 13 if the couple was African American than if the couple was white or of no specified race.<sup>43</sup> Also, the attorneys were far more likely to go along with the stated preference of white clients for chapter 7 than they were for African-American or no-race-specified clients who stated a preference for chapter 7.<sup>44</sup> And further, to the extent that attorneys endorsed the idea that they should guide the client to the right chapter, attorneys also tended to guide white and race-unspecified couples (but not African-American couples) into chapter 7.

Study 2 supports an interpretation that attorney recommendations are a significant factor in producing the racial disparity in chapter choice in bankruptcy, independent of their clients' financial situation, expressed preference as to chapter, or local legal culture. Attorneys appear to believe that Reggie and Latisha (vs. Todd and Allison) differentially prefer chapter 13, but it is unclear whether they are a) making stereotypical but generally accurate judgments when making this assumption or b) are simply engaged in post-hoc rationalization that Reggie and Latisha wanted chapter 13 after all. Regarding the first possibility, to our knowledge, there is no research to document that consumer bankruptcy clients have

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<sup>39</sup> *Id.* at 410.

<sup>40</sup> *Id.* at 414.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 410, 415-16.

<sup>43</sup> *Id.* at 416.

<sup>44</sup> *Id.* at 416-17.

a racially-based preference for chapter 13 or the type of results produced in chapter 13. Furthermore, Study 2 did not find that the effect of race on attorney chapter choice recommendations was moderated by the attorney's age, experience, or volume of cases handled, suggesting that the racial disparity cannot be explained as a product of learning from experience about actual differences in preferences between various racial groups.<sup>45</sup>

On the other hand, we do have some evidence consistent with the second possibility—that attorneys are engaging in post-hoc rationalization when they say that Reggie and Latisha probably wanted chapter 13 all along. In a separate survey of a national random sample of consumer bankruptcy attorneys, we asked respondents about their perceptions of how often people from various demographic groups filed chapter 13 vs. chapter 7. The results of this study (to be reported in full elsewhere) showed that attorneys thought whites and homeowners (stereotypically "good" and competent groups) filed chapter 13 much more than they actually do. On the other hand, the attorneys thought that African Americans and people who had previously filed for bankruptcy (stereotypically "irresponsible" groups) filed chapter 7 much more than they actually do. These assumptions may explain in part why Reggie and Latisha are seen as such a good, competent couple when they express a preference for chapter 13—they are proving themselves to be exceptions to the (assumed) general pattern of African Americans filing for chapter 7. Such results suggest that attorneys in our second study were not assuming that Reggie and Latisha wanted chapter 13 based on the attorneys' experience. They suggest instead that the perception of what Reggie and Latisha wanted: a) resulted from a contrast of this particular couple with general stereotypes about African Americans, b) represented a post-hoc rationalization, justifying their chapter 13 recommendation by believing that Reggie and Latisha probably wanted it all along, or c) both.

Finally, the race effect in recommendations was also not moderated by attorney race (the attorneys surveyed were overwhelmingly white, 89.2 percent, with only 1.6 percent African-American attorneys, too few to account for disparity in recommendations), sex, whether the attorney practiced in the South, or the percentage of chapter 13 cases the attorney reported filing.<sup>46</sup> We do believe that the reasons for the phenomenon we observed are likely complex and multi-causal. The issues certainly merit further study, examining not only the role that other actors, such as trustees or judges, may be playing but also the possibility of different groups having different attitudes toward debt and debt repayment (for whatever historical, religious, or cultural reasons).

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<sup>45</sup> *Id.* at 419.

<sup>46</sup> *Id.* at 419, 423.

## CONCLUSION AND INITIAL PROPOSALS

On the evidence of the two studies described above, the racial gap in use of chapter 13 appears to be substantial, and attorney recommendations appear to be a significant factor in producing it. We emphasize, however, that the precise extent of both the racial gap and attorney influence on it may well be different from what we found, in either direction.

Our guess is that a census of all consumer bankruptcy cases would show a racial gap in chapter choice does exist, though the magnitude of the gap may be somewhat smaller or larger than that found in Study 1. Our first proposal is that those who oversee the consumer bankruptcy system should investigate the issue by collecting demographic information, including race, about bankruptcy filers. Protocols for privacy must be considered, but given that Social Security numbers are now gathered but not made public, that problem is not insurmountable. The bankruptcy system deals with the debt problems of more than 1.5 million consumers each year. It is, in effect, a massive social program, and we know very little about who is benefitting from it and how they are affected.

Concerning the mechanisms that produce a racial disparity in chapter choice, Study 2 is also far from the last word. We only studied one mechanism and not other possibilities, including the views of debtors themselves and whether they differ by race and also the role of other actors in the system such as bankruptcy judges and trustees. The data we gathered are consistent with prior research suggesting that attorneys play a large role in chapter choice. Indeed, in such a complex system, one that is difficult for lay people to understand, debtors' attorneys inevitably have a lot of influence, which is often desired by clients. Study 2 thus is relevant to analysis of much-debated issues about optimal design of the consumer bankruptcy system and whether debtor choice of chapter, guided by attorneys, should play such a large role, producing disparate results. So many factors go into chapter choice—varying financial and social objectives—that subtle and occasionally not-so-subtle racial biases can operate and escape official notice. Racial sorting is likely but one aspect, albeit a significant and disturbing one, of more general unfairness in consumer bankruptcy in the sense of different results for the similarly situated. If such different results derive from similarly situated people simply having different tastes and preferences, this may be legitimate, but it is not if the different results derive from either client confusion or attorney steering.

Rather than addressing here the issue of whether an overhaul is needed to simplify the consumer bankruptcy system, we make a much more modest recommendation—education of all actors in the system, including lawyers, judges, trustees, officials in the U.S. Department of Justice, and clients, about the evidence that a racial gap exists. This may be a useful step to encourage vigilance about possible biases that may affect various stages of the process. Racial bias should be eliminated whether or not the system is more broadly reformed. More Americans have contact with the bankruptcy courts than any other part of the federal judicial

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system,<sup>47</sup> and assuring racial justice in that system deserves attention. We need full information to determine if there is a problem, and if so, it should be addressed.

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<sup>47</sup> Just how much more common bankruptcy is than other types of federal court proceedings is evident in data from the ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS 10 (2012); *see also* BANKRUPTCY DATA PROJECT AT HARVARD, *supra* note 2. In the federal courts in 2011, criminal proceedings were commenced against 103,000 defendants, and there were 294,000 civil cases commenced (many of which involve corporations). In contrast, there were 1.4 million bankruptcy petitions involving 1.8 million individual debtors.