Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys

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Abstract

In "Race, Attorney Influence, and Bankruptcy Chapter Choice," which appeared in the *Journal of Empirical Legal Studies*, we reported on two studies. The first study used real-world bankruptcy data and documented a large racial disparity in bankruptcy chapter choice. Even after controlling for numerous factors, African Americans in bankruptcy used chapter 13 at rates that were approximately twice as great as the rates at which other races chose chapter 13. In the second study, attorneys were more likely to recommend chapter 13 bankruptcy to a couple named "Reggie & Latisha" as compared to a couple named "Todd & Allison."

The American Bankruptcy Institute and the St. John's University School of Law sponsored a symposium entitled "Bankruptcy and Race: Is There a Relation" that explored our earlier studies. We prepared this paper for that symposium and summarize our earlier findings in a more traditional law-review format.

Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys

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I. 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,[1] 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 II, we summarize here findings from the two studies documenting racial sorting in bankruptcy chapter choice and the likely influence of debtors' lawyers.

Part III 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 IV 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

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

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. Part V concludes with some analysis and some limited initial proposals.

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.

II. 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,[2] 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,[3] 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.[4] 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

[2] 11 U.S.C. § 701 et seq and § 1301 et seq. Chapter 11, while available to consumer debtors, *see* Toibb v. Radloff, 501 U.S. 157 (1991), is much more expensive and is not practical for most individuals and thus was not studied. Chapter 11 filings by individual are rare as compared to other bankruptcies. In 2011, individuals filed 3,363 chapter 11 petitions, which was 0.2% of the 1,363,302 total bankruptcy petitions filed by individuals. *See* Bankruptcy Data Project at Harvard (http://bdp.law.harvard.edu) (allowing computation of bankruptcy statistics).

[3] *See* US Trustee Program, ANNUAL REPORT, FISCAL YEAR 2011 at 12, 35 (reporting that 1,012,133 chapter 7 cases were filed in districts covered by the program, which excludes North Carolina and Alabama, and that 69,588 were asset cases, meaning approximately 7% were asset cases, including business filings); Dalie Jiménez, *The Distribution of Assets in Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795 (2009).

[4] US Trustee Program, *supra* note 3, at 20 (reporting that 13% of chapter 7 debtors had income above their states' medians and thus were subject to means testing, that 7% of those were presumed abusive under 11 U.S.C. §707(b) , and that the trustee program declined to seek dismissal in 63% of the presumed abusive cases, for a 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. 16 (June 2007) (reporting that only 27% of chapter 13 filers had income above median; given the rates of non-dismissal in chapter 7, presumably even many of those could pass the means test).

debtors who are or who can become current can 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.[5]

Chapter 13 involves a three-to-five year repayment plan, with the discharge typically given only after plan completion.[6] Under a test for confirmation of the plan, debtors are required to commit projected disposable income to repayment of creditors.[7] 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.[8] Only about a third of debtors who file in chapter 13 complete their plans and get a discharge.[9] 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.[10] 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.[11] Debtors also sometimes choose chapter 13 to pay priority debts such as domestic support obligations ahead of general unsecured debts in their plans.[12]

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.[13]

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[5] 11 U.S.C. §§ 362(h), 521(a)(2), (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 (Bankr. W. D. Pa. 2010) and *In re* Hart, 402 B.R. 78 (Bankr. D. Del. 2009).

[6] 11 U.S.C. §§ 1322(d), 1328(a), (b).

[7] 11 U.S.C. § 1325(b).

[8] 11 U.S.C. § 1325(a)(4) (the so-called best interest test, which only requires additional payment if the debtor has nonexempt assets in excess of what must be paid under the disposable income test over the course of the plan).

[9] *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 125-126 (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 the range of 40 percent since the 2005 law and during the Great Recession, factors that are hard to untangle and make it hard to determine whether this is a temporary blip).

[10] 11 U.S.C. § 1322(b)(5).

[11] 11 U.S.C. §§ 1322(b)(2), 1325(a)(5), as qualified by the hanging paragraph (providing that home mortgages cannot be modified but allowing cramdown on older cars). The U.S. Courts of Appeal have consistently interpreted Nobelman v. American Savings Bank, 508 U.S. 324 (1993) as permitting strip off in chapter 13 of wholly unsecured junior liens. *See e.g. In re* Lane, 280 F.3d 663 (6th Cir. 2002) (so holding and discussing four other circuit court decision in accord).

[12] 11 U.S.C. § 1322(a)(2)(calling for full payment of priority claims in chapter 13) and § 507 (listing priorities).

[13] 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 the 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 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."[14] Chapter 13 was developed in Depression-era Birmingham, Alabama,[15] and has remained most popular in the South.[16] 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.[17] An interview study of attorneys in the 1980s described a process for chapter choice that was attorney centered.[18] 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.[19] 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.[20] Here are chapter 13 percentages for the lowest and highest chapter 13 districts (with all ten of the highest in the South):

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chapter 13 cases and $1,491 in dismissed chapter 13 cases, with the difference between discharge cases and dismissed cases in chapter 13 reflecting the fact that at least some of chapter 13 fees are typically paid in the plan over time).

[14] *See e.g.* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L. J. 501 (1993) and Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistance of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. OF L. & PUB. POLICY 801 (1994).

[15] Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come from and Where Should it Go*, 10 AM. BANKR. INST. L. REV. 741 (2002).

[16] *See infra* notes 20-21 and accompanying text.

[17] David Stanley & Marjorie Girth, BANKRUPTCY: PROBLEM, PROCESS, AND REFORM (1971).

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

[19] Braucher, *supra* note 14.

[20] Dov Cohen & Robert M. Lawless, *Less Forgiven? Race and the Bankruptcy System*, in Katherine Porter, ed., BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 175 (2012).

Lowest Percent of Chapter 13s	*Highest Percent of Chapter 13s*
Iowa, Northern – 8.4%	Texas, Southern – 57.4%
North Dakota – 11.0%	Texas, Northern – 57.9%
West Virginia, Northern – 11.1%	Georgia, Middle – 58.2%
West Virginia, Southern – 11.1%	North Carolina, Eastern – 58.9%
New Mexico – 12.5%	South Carolina – 65.5%
Oklahoma, Northern – 14.3%	Alabama, Middle – 70.8%
Hawaii – 14.8%	Louisiana, Western – 71.8%
Iowa, Southern – 15.0%	Alabama, Southern – 72.4%
Alaska – 15.4%	Tennessee, Western – 74.8%
South Dakota – 15.7%	Georgia, Southern – 77.4%[21]

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.

III. 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.[22] 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.[23] 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.[24] The rate of use of chapter 13 as opposed to chapter 7 by race was as follows:

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[21] *Id.*

[22] Braucher, Cohen, & Lawless, *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).

[23] 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.

[24] *Id*. at 400.

African American	54.7%
White	28.6%
Asian	24.4%
Other	23.8%
Hispanic	21.7%[25]

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.[26] While controlling for these factors reduced the racial gap, it was far from eliminated.[27] 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.[28] 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).[29] 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).[30]

As discussed in Part II, 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.

IV. 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.[31] A national random sample of 596 bankruptcy attorneys were mailed surveys, and 262 of them ultimately responded, for a response rate of

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[25] *Id.* at 401 & Table 2.
[26] *Id* at. 402.
[27] *Id.*
[28] *Id*. at 403.
[29] *Id*. at 405. This difference was not statistically significant.
[30] *Id*.
[31] *Id*. at 408-409.

44.0 percent.[32] 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.[33] 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.[34]

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. 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.[35] 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.

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[32] *Id*.at 408.

[33] *Id*. at 424.

[34] *Id*. at 409, 428-29 (discussing and reproducing the facts in the hypothetical case).

[35] *Id*. at 411-412 & Figure 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).[36] 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.[37]

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.[38]

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).[39] 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.[40] 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.[41] 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.[42]

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

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[36] *Id*. at 411-412 & Table 6.

[37] 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.

[38] *Id*. at 412.

[39] *Id*. at 410

[40] *Id*. at 414.

[41] *Id*.

[42] *Id*. at 410, 415-416.

than if the couple was white or of no specified race.[43] 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.[44] 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 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.[45]

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-

[43] *Id*. at 416.
[44] *Id*. at 416-417.
[45] *Id*. at 419.

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.[46] 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).

V. 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

[46] *Id.* 419, 423.

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 system,[47] 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.

[47] Just how much more common bankruptcy is than other types of federal court proceedings is evident in data from the ADMIN.ISTRATIVE OFFIC E OF U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2011 (available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf) as well as the Bankruptcy Data Project at Harvard (http://bdp.law.harvard.edu). 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.