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Bankruptcy Revision: Process and Procedure

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BANKRUPTCY REVISION: PROCEDURE AND PROCESS

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This article is about bankruptcy procedure and the bankruptcy process. It begins with a short analysis of problems under the former regime, the Bankruptcy Act unencumbered by the recently effective rules. Then, it moves to the rules and analyzes their impact. Finally, bankruptcy procedure under the Proposed Act is discussed. The article presupposes some knowledge of bankruptcy. It is not intended as a practitioner's guide to bankruptcy procedure. This worthy task has already been accomplished.[1] The article focuses on the no- or nominal-asset nonbusiness or consumer bankruptcy. Numerically the most significant, such proceedings compose around ninety percent of the total bankruptcy filings. Characteristics of bankruptcy procedure will be identified by analyzing the role of the bankrupt, the lawyer, and the decisionmaker under each of the three models.

The article's unifying purpose is to locate adherence to and departures from the adversary system in bankruptcy procedure. Under the Act, the adversary system created palpable administrative burdens. Both the rules and the Proposed Act recognize and attempt to obviate these burdens. The procedural responses reflect views of bankruptcy, the legal system, and human nature. Differences will appear, be identified, and examined. These differences and the apparent underlying premises will be discussed. Further generalizations will, it is hoped, emerge. These concern the way policymakers perceive and respond to a social problem.

I. CHOOSING A PROCEDURAL SYSTEM

Legal principles expressed abstractly as substantive rules are meaningless except in the context of the decisionmaking process. Legal

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1. *E.g.*, INSTITUTE OF CONTINUING LEGAL EDUCATION, BANKRUPTCY UNDER THE NEW RULES OF PROCEDURE (L. Lempert ed. 1974) [hereinafter cited as NEW RULES OF PROCEDURE]; Bare, *The New Rules in Straight and Chapter XIII Bankruptcies*, 41 TENN. L. REV. 567 (1974); Lee, *The Changing Bankruptcy Process*, 62 KY. L.J. 909 (1974); Levit, *The New Bankruptcy Rules*, 57 MARQ. L. REV. 1 (1973).

institutions cannot convert disputes directly into results without imposing any cost because the enforcement of legal rights is expensive and time-consuming. Governmental procedures—judicial, administrative, and legislative—create, refine, and maintain legal rights. Ultimate justice mandates expensive, time-consuming procedure. The world, however, must move on. Procedural systems accommodate the quest for ultimate justice with expeditious and inexpensive internal rules. But the process should produce decisions which advance substantive principles in a high proportion of cases. Moreover, the law possesses symbolic and ritual functions. "[I]mportant as it [is] that people should get justice, it [is] even more important that they should be made to feel and see that they [are] getting it."[2]

The adversary system of resolving disputes enjoys considerable popularity. It presupposes that interested persons will participate in shaping the result. Full participation through trained advocates leads to socially acceptable results.[3] Civil procedure in courts of general jurisdiction is based on these premises. But in other decisionmaking environments, many thinkers view trial-type hearings as costly and often unnecessary.[4] Thus, policymakers often consider alternatives to the adversary system. But, before dismissing the adversary system, we must discuss recent scholarship in this field.

Professors Thibaut and Walker used psychological laboratory technique to examine the way "participating" disputants, observers, decisionmakers, and attorneys perceive and respond to procedural models. Their empirical research illuminates the illusive search for "the more just decisionmaking procedure."[5] Some of their conclusions are

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2. 2 J. ATLAY, VICTORIAN CHANCELLORS 460 (1908).

3. Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 587-92 (1961).

4. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.05 (1972).

5. Thibaut, Walker, LaTour, & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1273-75 (1974). Professors Walker and Thibaut have developed a method to analyze decisionmaking systems. They describe five models in a continuum of declining decisionmaker control over procedure. The first model is inquisitorial. In an inquisitorial system, a decisionmaker interacts with the disputants. The decisionmaker retains almost total control of fact development by seeking out witnesses, channeling the inquiry, and reaching a decision. For analytical purposes, the inquisitorial system will be characterized as non-adversary.

Thibaut and Walker call the second model "single investigator." It modifies the inquisitorial system by assigning an investigator or hearing examiner to a "moderately activist decisionmaker." The model defines the investigator as "an impartial and unbiased truthseeker" but places him under the decisionmaker's control. The disputants furnish requested information to the investigator; the investigator makes a detailed report; and the decisionmaker decides the controversy. The disputants are, to a degree, responsible for shaping the facts. The decisionmaker filters the factual data. Thus, the

striking. When allowed to choose freely, research subjects prefer the adversary system. This is apparently because the adversary system accords both disputants an equal opportunity to develop data and to control the decision process.[6] Secondly, because the adversary system may goad the advocate for the "factually disadvantaged" to search diligently for data, the adversary system may distort the decisionmaking process in favor of that disadvantaged party.[7] This is perceived as fairer: so long as opportunities are equal, subjects preferred procedures which favor the disadvantaged.[8] Finally, the experimental results support the proposition that the adversary system counteracts a decisionmaker's tendency to be biased toward one disputant.[9]

Thus, in terms of doing justice and appearing to do justice, Walker and Thibaut prefer the adversary system. Substantial, compelling reasons should appear before an adversary system is converted to an inquisitorial process. But procedure reflects the environment; not all conflicts are appropriately resolved by adversary litigation. First, there must be a controversy: a significant dispute which is worth pursuing. Secondly, delay and expense impose an increased decision cost which may qualify the preference for the adversary system. Society cannot afford to sift every controversy until the parties locate and resolve the last disputed kernel of contention; the government cannot bear to spend one thousand dollars deciding a one hundred dollar case. Thus,

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single investigator model dilutes the decisionmaker's power. But the disputants neither choose the factual data nor present it directly to the decisionmaker. The single investigator model falls short of the adversary system.

The third model, based on United States court-martial, is a variant of the second. It is called "double investigator" because two investigators assist the decisionmaker. But, while both investigators are employed by the decisionmaker, they are charged with planning and developing the disputants' contentions and are asked to assist in reaching a just result. This model facilitates cooperation but places the investigators in a more adversary posture than either of the inquisitorial models.

The adversary system is the fourth model. It is the civil procedure system familiar to American lawyers. Under the adversary system, the judge-decisionmaker is "relatively passive." Openly biased adversaries represent the disputants, develop the legal-factual contentions, and present the case to the decisionmaker. The decisionmaker, with some exceptions, decides the disputants' controversy upon the matter presented.

In bargaining, the fifth model, the decisionmaker vanishes. The disputants or their representatives meet, negotiate, and attempt to resolve the controversy without outside assistance. The bargaining process, while completely controlled by the disputants, operates in the shadow of the formal dispute resolving system. One disputant may cease to negotiate and resort to the formal machinery. This forces a decision and brings the government's coercive enforcement powers to bear. *Id.*

6. *Id.* at 1288-89.

7. Lind, Thibaut, & Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).

8. Thibaut, Walker, LaTour, & Houlden, *supra* note 5, at 1288.

9. Thibaut, Walker, & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972).

as urgency in time and expense increase, people are more willing to accept less party control and more autocratic decisionmaker control.

The Thibaut-Walker empirical analysis envisions a continuum from inquisitorial to adversary. The shift in bankruptcy procedure is from modified adversary to social welfare-administrative. Moreover, delay and expense in an adversary system affect decisions about whether to retain it but cannot be fully tested experimentally. Finally, bankruptcy controversies differ from the controversies about which Thibaut and Walker asked their subjects. But the important factors to consider in choosing a procedural system are discussed by Thibaut and Walker. When policymakers structure a process to resolve disputes, they should consider these factors carefully.

II. CHARACTERISTICS OF BANKRUPTCY

Bankruptcy differs from most adversary litigation. In ordinary civil litigation, the plaintiff asks the tribunal to find facts and reach legal conclusions in his favor. After this is satisfactorily accomplished, the defendant is compelled to pay the plaintiff. In bankruptcy, a debtor asks the court system to "discharge" debts. Creditors are forbidden from collecting.[10] No assets flow as a perquisite of victory; instead, assets cease to flow or are prevented from flowing. Thus, to the extent bankruptcy resembles litigation, it resembles equitable in personam or injunctive litigation rather than in rem or money-recovering litigation.[11]

As a price of discharge, the bankrupt surrenders his non-exempt assets to be converted into cash and distributed to the creditors. But these assets are always worth less than the bankrupt owes. The previous paragraph must be qualified by adding that if the bankrupt has some assets, the creditors may receive something. This introduces two additional elements. The system must gather, administer, and distribute the debtor's assets. Also, the creditors compete among themselves for these assets. In allowing conflicting claimants to settle claims to limited assets, bankruptcy resembles interpleader.[12] In allowing a private trustee, supervised by the court, to gather, administer

10. *See* Bankruptcy Official Form No. 24 in BANKRUPTCY ACT AND RULES (Collier pamphlet ed. 1975) (Discharge of Bankrupt) [hereinafter cited as Bankruptcy Form No.].

11. *Compare id.* (creditors "enjoined from instituting or continuing any action or employing any process to collect . . . debts [discharged]") *with* FED. R. CIV. P. Illustrative Form No. 32 (Judgment on Decision by the Court) ("It is Ordered and Adjudged that the Plaintiff A.B. recover of the defendant C.D. the sum of ——— . . .").

12. 28 U.S.C. § 1335 (1970).

and distribute assets, bankruptcy resembles equity's administering of a decedent's estate. From their beginning, equity courts have been administrative courts. Early equitable courts administered decedent's and incompetent's estates; modern courts of equity possess considerable administrative power, as witnessed by the federal courts' role in desegregating schools.

Bankruptcy became horrendously complex. It must be as complex as the economy it reflects and the irreconcilable conflicts it attempts to reconcile. While the legal profession assumes that lawyers and judges are generalists, specialist judges preside in bankruptcy,[13] and lawyers who are bankruptcy experts handle a high proportion of the cases.[14] Lawyers with a general practice enter bankruptcy court at their client's peril. In addition, a mist of ignorance shrouds bankruptcy; neither science nor reason dispell this ignorance. We simply do not know much about bankruptcy.[15] Furthermore, much of that we do know is irrelevant.[16]

Perhaps, as Professor Stone pointed out, the extraordinary nature of the discharge may explain bankruptcy's technical procedure and abstruse substance. Society believes that people should pay just debts. Exceptions through discharge should avoid becoming "either too easy or too attractive" because "the very technical nature of [bankruptcy] . . . stem[s] from the notion that escape from the ordinary effect of a contractual obligation must of necessity be well guarded and enshrined in ritual, since society wishes it to be considered as abnormal conduct."[17]

III. BANKRUPTCY UNDER THE ACT

The Bankruptcy Act[18] is a mess. The kindest statement is that the Bankruptcy Act was not written to be read aloud. Professor Countryman describes it as "combining, in an incredibly helter-skelter fashion, the substantive rules to be applied to, and the procedure to

13. Bankruptcy Act § 34, 11 U.S.C. § 62 (1970); R. BANKR. P. 901(7).

14. Herzog, *Bankruptcy Tomorrow*, 45 AM. BANKR. L.J. 57, 58-59 (1971).

15. COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93-137, Part I, 93d Cong., 1st Sess. 3, 34, 41, 46, 110 (1973) [hereinafter cited as COMMISSION REPORT].

16. Shuchman, *An Attempt at a "Philosophy of Bankruptcy,"* 21 U.C.L.A.L. REV. 403, 405-09 (1973).

17. Stone, *A Primer on Bankruptcy*, 16 TUL. L. REV. 339, 353-54 (1942).

18. Bankruptcy Act §§ 1-755, 11 U.S.C. §§ 1-1255 (1970).

be followed in disposing of, the cases to which it applies."[19] Other characteristics exacerbate confusion. Bankruptcy incorporates nonbankruptcy law in an almost aleatory fashion. The Act was written by nineteenth century legal minds; many substantive provisions are subtle enough to delight a sophist. The main body of the Act is over seventy-five years old; it suffers the gaps and inconsistencies to be expected after a long series of piecemeal modifications as numerous amendments, many of them inconsistent, ill considered, and wrongheaded, have been sewn onto the tattered garment. Because of social and economic changes, an act designed to liquidate failed mercantile concerns became a haven for enervated consumers. These consumers lack assets. Thus many legitimate bankruptcy controversies are worth too little to adjudicate. But complex procedure remains. Thus superfluous and futile motion dissipates resources. To the eye of uninstructed innocence, many features appear incongruous, pehaps even incompatable. The present bankruptcy system, in short, is not regarded with such wholehearted approval that discussion of alternatives is the pastime of an idle hour.

Time played a joke on the authors of the Bankruptcy Act. The Act was apparently written to administer and distribute to creditors the assets of failed businesses.[20] Discharge was coupled with sanctions to encourage the bankrupt debtor to surrender assets.[21] Businesses continue to fail and to resort to bankruptcy. Mass merchandising, the consumer economy, and easy consumer credit brought the consumer into bankruptcy court. These nonbusiness bankrupts bring no or few assets into bankruptcy court.[22] For these debtors, discharge is the principal, if not the only, goal of bankruptcy.[23] Their creditors receive nothing.

The growth of consumer bankruptcy accompanied the political rise of the common man. Through devices such as recognition of labor unions and unemployment compensation, the politically weaker became entitled to a small amount of protection against economic misfortune. These measures were conscious political choices to extend to

19. Countryman, *The Use of State Law in Bankruptcy Cases I*, 47 N.Y.U.L. REV. 407 (1972).

20. Olmstead, *Bankruptcy, a Commercial Regulation*, 15 HARV. L. REV. 829, 834 (1902).

21. Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 435 (1974).

22. COMMISSION REPORT, *supra* note 15, Part I, at 2-3; D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 20 (1971) (eighty-five percent of all bankruptcies are no- or nominal-asset).

23. Kennedy, *supra* note 21, at 438-51.

the working class a security which had previously been confined to the strong. Bankruptcy must be contrasted. It was intended to benefit the mercantile class. Consumer bankrupts adopted a mercantile institution, developed it into a haven for the lower middle class, and extended to the whole population an opportunity to discharge debts previously thought to be restricted to a minority.[24] The bankruptcy discharge developed a social welfare purpose: the fresh start.[25] Except for piecemeal modifications, however, Congress failed to alter the formal institutional structure to accomodate the consumer bankrupt. This accounts for the distinctive difficulties currently facing bankruptcy.

Bankruptcy was organized on the adversary model to resolve two types of conflicts: bankrupt-creditor and creditor-creditor. The underlying theory is creditor control: unpaid creditors will choose a vigorous trustee to collect the estate, ferret out misconduct, and investigate the bankrupt. The theory has failed.[26] When the bankrupt lacks assets to pursue and distribute, neither conflict is worth resolving. A well advised debtor may convert all nonexempt assets into exempt assets, even if it means moving to a state with more "liberal" exemption statutes.[27] Others less fortunate may be led through bankruptcy but discover only later that they still owe their major debt.[28] With some exceptions, adversary counsel perform poorly: the Brookings study noted that "the apathetic bungling often displayed by individual bankrupts' attorneys is one of the most appalling aspects of the present system."[29]

Bankruptcy was loaded with procedures which assumed adversary interest. The adversary premise presupposes notice and an opportunity to be heard. In the face of uncontested or no-asset cases, however, the adversary features only increased expense and protracted delay.[30] A specialist bar prepared complicated papers for filing; candidates for bankruptcy signed their names more than fifty times, twelve of which were notarized. Trustees, attorneys, accountants, and receivers participated in the bankruptcy process. Effective management was neglected, and paperwork proliferated.

Unanticipated consequences wrench procedure. Policymakers in-

24. D. STANLEY & M. GIRTH, *supra* note 22, at 42-46.
25. *See* Fallick v. Kehr, 369 F.2d 899, 905 (1966) (Friendly, J., dissenting).
26. D. STANLEY & M. GIRTH, *supra* note 22, at 87-94.
27. J. MEYERS, WIPE OUT YOUR DEBTS AND MAKE A FRESH START 125-31 (1973).
28. *See, e.g.*, Allen v. Lindeman, 164 N.W.2d 346 (Iowa 1969).
29. D. STANLEY & M. GIRTH, *supra* note 22, at 80.
30. *Id.* at 161-70.

tend procedure to advance perceived goals. When events destroy underlying premises, someone must develop either new procedures or new reasons for the old procedures. Bankruptcy procedure must accommodate two unanticipated consequences: the consumer bankrupt and the discharge-fresh-start goal. Unanticipated consequences occur all too often in public policy. An analogous unanticipated consequence plagues the welfare-public assistance system. Policymakers intended the aid-to-dependent-children program to benefit the deserving poor, widows and orphans, and to "wither away" as coverage under other branches of the Social Security Act expanded. Instead, the program grew geometrically; and the recipient population became increasingly dominated by the "undeserving poor," urban illegitimates.[31]

Several factors militate against change. The first is inertia. Unless a governmental process causes a demonstrable outrage, pressure to change will be inadequate to overcome inertia. Mere quiet desperation is insufficient. According to the Brookings study, however, public sentiment towards bankruptcy has crossed over from quiet desperation into demonstrable outrage. "Tinkering . . . will not do the job. So widespread and so ingrained are the shortcomings of the present system that radical rather than incremental change is necessary."[32]

Those employed in a system have an interest in continuing to be employed. As Dickens pointed out:

> The one great principle of English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.[33]

But, in a progressive society, the foremost premise of a legal process cannot be to generate work for itself. Present employment, however, creates an incentive to resist change.

Hypertechnical procedure has a utilitarian advantage. It exasperates the person asking for relief. For example, technical pleading rules open traps for the unwary but generally operate against plaintiffs.[34] If, to discharge a debt, the bankrupt must include the creditor's

31. G. STEINER, SOCIAL INSECURITY: THE POLITICS OF WELFARE 18-47 (1966).
32. D. STANLEY & M. GIRTH, *supra* note 22, at 198.
33. C. DICKENS, BLEAK HOUSE 514 (1853).
34. *See, e.g.*, Buckley v. Mandel Bros., 333 Ill. 368, 164 N.E. 657 (1928); Kramer v. Kansas City Power & Light Co., 311 Mo. 369, 279 S.W. 43 (1925); Oklahoma Wheat

zip code, then more debts will continue after bankruptcy. Similarly, if exemptions must be claimed precisely, some bankrupts will lose exempt property. Inevitably, creditors benefit from technicality, sloth, or human error.

Complicated, protracted, and expensive procedures may also be explained because they deter people from resorting to them.[35] Society imposes a stigma on the bankrupt. The person filing bankruptcy publicly admits failure. If, in addition to admitting failure, the bankrupt must face a degrading experience before discharge, then debtors will be less likely to file bankruptcy. The discharge releases the bankrupt from justly created debts. Society expects people to pay their debts. The general principle is served, as Professor Stone pointed out, "by reading to [the bankrupt] a sermon and by performing an unusual amount of ceremony."[36] Perhaps demeaning procedure is part of the price society expects the bankrupt to pay for the discharge.

If the bankrupt is subject to demeaning treatment, it will probably occur at the first meeting of creditors. While the first meeting is frequently a formality and the creditors are often apathetic,[37] an aggressive creditor or referee may convert the debtor's examination into a degradation ceremony. Professor Shuchman suggests several possible effects: the first meeting might be a "rite of expiation" whereby the bankrupt casts off his prior mistakes; it may also be "traumatic and harmful" to the sensitive.[38] Shedding debts should not, it is argued, be "perfunctory" but should be "solemn" and "serious" within the "stark atmosphere of the courtroom" and before the "dignified demeanor of the Court": "[N]o Bankrupt should have the feeling that he can divest himself of his debt without judicial review and as easily perhaps as obtaining a Russian divorce or buying a dog license."[39] This is an unusual premise for the adversary system. Procedure expresses several ideas about people and bankruptcy: debts should be paid; one who fails to pay debts is guilty of a moral or ethical lapse; bankruptcy should include a stigma; before allowing people to avoid debts, there must be a ritual; this ritual should combine admonitory with

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Pool Terminal Corp. v. Rodgers, 180 Okla. 623, 70 P.2d 1080 (1937). *But see* Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953).

35. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1214-15 (1966).

36. Stone, *supra* note 17, at 361.

37. D. STANLEY & M. GIRTH, *supra* note 22, at 76-81.

38. Shuchman, *supra* note 16, at 442-43.

39. Bobier, *Importance of First Meeting of Creditors in Consumer Bankruptcy Proceedings*, 27 PERS. FIN. L.Q. REP. 22 (1972).

demeaning aspects to impress the bankrupt and society that avoiding debts is exceptional and perhaps even anti-social.[40]

Many characteristics of bankruptcy procedure appear to grow out of the "stigma" of bankruptcy.[41] The bankrupt, unlike the average litigant, is a mendicant who asks the government for a service. The bankrupt may be compared, in some respects, to a welfare recipient.[42] There are many historical parallels: the workhouse resembled the debtor's prison; both bankrupts and paupers were compelled to wear distinctive garb: paupers wore a large "P" on their sleeves, bankrupts wore degrading apparel.[43] But influential scholars consider bankruptcy to be an administrative rather than a moral problem.[44] Some scholars go further. Professor Shuchman denies the moral-ethical basis for stigma, stresses the possible deleterious effects of harshness, and concludes that the bankruptcy system should be structured to facilitate easier access to discharge.[45] The supposed social stigma has clearly declined through the years.[46] Procedural changes may reflect this decline. If society imposes a stigma on the bankrupt, procedural amelioration may have little immediate effect on the stigma, except that the bankrupt will be reminded of it less frequently.

Observers characterize the present welfare application process as technical and demeaning; including protracted delays; requiring unnecessary, redundant, and even impossible factual demonstration; and violating personal dignity, self-respect, and privacy.[47] Welfare applicants were subjected to lie detector tests[48] and surprise visits in the middle of the night.[49] Stigma has degrees. For example, a mother explained how she lived on 216 dollars per month by pointing to low public housing rent and subsidized food stamps, but emphasized that she was "not on welfare."[50] Welfare is the ultimate indignity. Bank-

40. Shuchman, *supra* note 16, at 443. *See also* MacLachlan, *Puritanical Therapy for Wage Earners*, 68 COM. L.J. 87, 89 (1963).

41. COMMISSION REPORT, *supra* note 15, Part I, at 62.

42. Kennedy, *supra* note 21, at 444 (locating the geographical center of this impulse in the Midwest).

43. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 441 n.308b (1947); *see* 3 Pa. Stat. at L. 1712-14, ch. 237, § 2, at 224 (1896).

44. Kennedy, *supra* note 21, at 437.

45. Shuchman, *supra* note 16, at 429, 474.

46. Kennedy, *supra* note 21, at 428-46.

47. *See generally* Note, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307 (1967).

48. County of Contra Costa v. Social Welfare Bd., 229 Cal. App. 2d 762, 40 Cal. Rptr. 605 (Ct. App. 1964).

49. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

50. G. STEINER, THE STATE OF WELFARE 4 (1971).

ruptcy, it may be inferred, connotes less stigma than welfare, but how much less is uncertain.

The government operates public assistance through an administrative structure. Bankruptcy, by contrast, is putatively adjudicatory. Both administrative and adjudicative systems, however, may become disfunctional through technical procedure, conflicting policies, and legislative neglect. Thus, the Brookings study of public assistance found high administrative cost, complexity, and inefficiency and concluded "change in administrative organization or procedure is itself considered progress without regard to improved tangible benefits for the recipient."[51] The Brookings conclusion about the bankruptcy system is similar.[52] Generalizing from public assistance, the observer may conclude that an administrative structure may not be a complete answer to cost, complexity, involution, and inefficiency. If society is ambivalent about the system's goal, any process may break down.

While bankruptcy is ostensibly adjudicatory, the bankruptcy decisionmaker is called "referee." The word connotes a junior judge. The title itself may be twisted, as by noting that "he is not wearing a striped shirt."[53] The referee is appointed by the same district judge(s) to whom appeals lie.[54] This is anomalous both for adjudicator and litigant. In addition, the Act deprived the referee of some normal attributes of an adjudicator. When a litigant disobeys a judge, generally the judge may declare that litigant in contempt.[55] But the bankruptcy referee was constrained to "certify the facts to the judge" to adjudicate contempt.[56] Finally, during the process of administering the bankrupts' estates, many of the referee's duties are administrative rather than adjudicative.[57] This creates two problems. First, paper processing is an inefficient and uneconomical way to use expensive, legally-trained referees.[58] Secondly, when the referee participates in administering estates and develops a relationship with the specialist bar, some viewers question the referee's apparent impartiality to adjudicate questions about the estate.[59]

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51. *Id.* at 13.
52. D. STANLEY & M. GIRTH, *supra* note 22, at 2-4.
53. J. MEYERS, *supra* note 27, at 110.
54. Bankruptcy Act §§ 34, 39c, 11 U.S.C. §§ 62, 67c (1970).
55. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 221 (1971).
56. Bankruptcy Act § 41b, 11 U.S.C. § 69b (1970).
57. COMMISSION REPORT, Part I, at 4, 81, 92-94, 104, 135-37.
58. *Id.* at 4.
59. Triester, *Bankruptcy Jurisdiction: Is It Too Summary?* 39 S. CAL. L. REV. 78, 87-89 (1966). *See also* K. DAVIS, *supra* note 4, §§ 13.01, .07.

The adversary premise was instilled in the Bankruptcy Act to liquidate failed businesses. It is unnecessary to administer the uncontested consumer bankruptcy. Creditor control foundered because creditors lack pecuniary incentive to participate in a no-asset bankruptcy. But, in addition to being needless, adversary trappings proved to be mischievous. The Brookings study concluded that bankruptcy is not genuinely judicial but routinely administrative and that adversary proceedings are an expensive and time-consuming hoax.[60]

IV. THE RULES OF BANKRUPTCY PROCEDURE

In the fall of 1973, the new rules became effective.[61] Earlier, the United States Supreme Court had promulgated General Orders and Forms pursuant to section 30 of the 1898 Act.[62] The orders and forms were part of the problem of practicing under the Act. Rulemaking was almost comatose until new enabling legislation passed Congress in 1964.[63] Section 2075 delegates to the Supreme Court the power to promulgate general procedural rules for bankruptcy and annul inconsistent statutes, with the caveat that substantive rights cannot be abridged, enlarged, or modified. This is similar to existing authority in civil, appellate, admiralty, and criminal procedure. An Advisory Committee composed of experts and guided by an excellent reporter labored diligently. The rules which govern present bankruptcy are the product of these labors.

The drafter's dilemma is that substantive, procedural, and jurisdictional provisions are inextricably and indistinguishably entangled in the Act. In the words of Professor Kennedy, "[i]t defies the mind of man to find rhyme or reason in the present organization of the Bankruptcy Act."[64] The rules supersede statutes without repealing them, and only the "procedural" parts are superseded. The Advisory Committee's notes and careful cross-referencing assist somewhat.[65] Two questions depend on judicial decision: whether a rule supersedes a statute, and whether a rule improperly abridges substantive rights. To quote Professor Kennedy again: "[s]ome nice questions of construction can and surely will arise."[66] Because of these problems, the present

60. D. STANLEY & M. GIRTH, *supra* note 22, at 197-99.
61. 411 U.S. 991 (1973).
62. Act of July 1, 1898, ch. 541, § 30, 30 Stat. 544.
63. Act of Oct. 3, 1964, § 1, 78 Stat. 1001 (codified at 28 U.S.C. § 2075 (1970)).
64. NEW RULES OF PROCEDURE, *supra* note 1, at 8.
65. *See* BANKRUPTCY ACT AND RULES (Collier pamphlet ed. 1975).
66. NEW RULES OF PROCEDURE, *supra* note 1, at 7. *See also* Lee, *supra* note 1, at 916.

Act should be revised to conform to the rules and forms. This revision would eliminate redundant, confusing, and superseded statutes and facilitate practice under the rules.

Almost universal approval greeted the rules.[67] Because of the sweeping nature of some of the changes contained therein, this is surprising. The rules attempt to eliminate adversary attributes from spheres which are felt to be inappropriate for such treatment and, correspondingly, to increase the adversary features where appropriate. They are divided into nine roughly chronological parts. This organization will eliminate much index work and searching. The rules diminish the complexity of much of the language. The sentences are no longer than necessary. The Act, in contrast, contains massive, convoluted walls of words which do justice to the stream of consciousness technique at its most obscure.[68] The rules contain general definitions which govern in bankruptcy cases. Part VII accommodates the applicable civil rules to bankruptcy practice.[69] The almost mandatory official forms[70] are also roughly chronological. The Advisory Committee succeeded in writing comprehensive but intelligible forms; it is now possible to study a simple bankruptcy merely by reading through the official forms.

The practical result of these changes will be the only true test of their effectiveness. The rules may, however, improve bankruptcy. Simplifying changes should speed the process and reduce error. For example, the bankrupt need only sign once; this eliminates over forty-nine signatures.[71] Moreover, these changes should make bankruptcy practice more accessible to the average attorney and reduce the specialist bar's monopoly. Merely by clarifying language, streamlining procedure, and broadening access, the rules may reduce the cost of bankruptcy and enhance the adversary system.

The rules eliminate unnecessary attributes of the adversary system from consumer bankruptcies. When a bankrupt has no "dividends" to distribute, creditors have responded with resounding apathy. This effectively removes eighty to ninety percent of straight bankruptcy cases

67. *See, e.g.*, Lee, *supra* note 1, at 916. *But see* Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827 (1973) (concentrating on the procedural-substantive distinction and criticizing the committee for being too timid).

68. The author nominates section 67c(1), a substantive provision which, if not the longest, is most twisted. *See* Bankruptcy Act § 67c(1), 11 U.S.C. § 107c(1) (1970).

69. R. BANKR. P. 901, 902.

70. *See id.* 909.

71. *See id.* 911 & Advisory Comm. Note.

from the realm of creditor control and the adverary system. The bankrupt's only purpose is to discharge debts. The rules recognize this in several ways.

If the bankrupt's schedules indicate too few assets to pay a dividend, the creditors' notice of first meeting may tell them that proof of claims may be omitted; if, however, assets appear later, creditors will be given notice and allowed time to file.[72] Eliminating the filing of claims where there are no assets should cut both unnecessary paperwork and attendance at creditors' meetings: few will attend the wake merely to view the corpse.

The procedure to bar the bankrupt's discharge completely or to determine whether a single debt is discharged is also accommodated to the no- or nominal-asset case. Normally, creditors receive thirty days notice to file a complaint to bar discharge. In a no- or nominal-asset bankruptcy, where creditors receive notice that a dividend is not anticipated, only ten days notice is required.[73] Normally, creditors have between thirty to ninety days after the first meeting to file a complaint to determine whether a particular debt is discharged. When no dividend is anticipated, this time may be set "as early as the first date set for the first meeting of creditors."[74]

These expediting measures should hasten the dividendless bankrupt toward discharge. The bankrupt files and pays the filing fee. The court observes no assets and sends notice to that effect to the creditors. Neither proofs of claim nor objections to discharge or dischargeability are received. The bankrupt attends the first meeting of creditors, but no creditors appear. The bankrupt is forthwith discharged.[75] To effectuate the bankrupt's discharge, creditors "are enjoined from instituting or continuing any action or employing any process to collect such debts . . . ."[76] Accelerating no- or nominal-asset cases and reducing unnecessary paperwork will eliminate some of the Brookings study's major criticisms.[77]

When the "estate" lacks assets to administer, there is small purpose in selecting a trustee except, perhaps, to draw the nominal fee.[78]

72. *Id.* 203(b), 302(e)(4).
73. *Id.* 404(b).
74. *Id.* 409(a)(2).
75. *See id.* 404(d).
76. Bankruptcy Form No. 24, *supra* note 10. *See* R. BANKR. P. 404(f).
77. D. STANLEY & M. GIRTH, *supra* note 22, at 94, 171. *See also* R. BANKR. P. 704(a) (date for adversary trial must be set before summons served), 906(c) (reducing time periods).
78. Bankruptcy Act § 48c, 11 U.S.C. § 76c (1970).

The rules recognize this. The judge may decline to appoint a trustee when the only property is exempt, creditors fail to elect a trustee, and "no other circumstances indicate the need for a trustee."[79] If no trustee is appointed, the judge sets the exemptions apart and files the exemption report.[80] This may also reduce administrative expense substantially.[81] The judge, however, is placed in an anomalous, almost adversary posture in relation to the bankrupt.

The bankrupt's attorneys may be paid by their clients before filing. The Act displays Congress' concern with preventing attorney's fees from devouring the estate.[82] The bankruptcy court may invalidate an unreasonable attorney's fee.[83] The rules advance this by compelling the attorney to disclose "compensation paid or promised."[84] The Brookings study not only attacked the bar's bankruptcy performance,[85] but also condemned the method of settling an attorney's compensation as "a chaotic and indefensible way of setting pay for performance of an important public function."[86] These conclusions emerged from practice before the rules went into effect. Lawyers' performances may subsequently improve. It may be expecting too much in a time of inflation but, if the rules streamline the no- or nominal-asset bankruptcy, fees may even decline.

Bankruptcy is unique; it begins only when there is simply not enough money to pay everyone. Thus, observers lack a convenient yardstick to measure comparable administrative costs. In about three-fourths of the cases, the bankrupt's attorney receives the fee before

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79. R. BANKR. P. 211.

80. *Id.* 403(d).

81. D. STANLEY & M. GIRTH, *supra* note 22, at 190-92.

82. *See* Bankruptcy Act §§ 60d, 64a(1), 11 U.S.C. §§ 96d, 105a(1) (1970). *See also*

> "You are further to reflect, Mr. Woodcourt," becoming dignified to severity, "that on the numerous difficulties, contingencies, masterly fictions, and forms of procedure in this great cause, there has been expended study, ability, eloquence, knowledge, intellect, Mr. Woodcourt, high intellect. For many years, the — a — I would say the flower of the bar, and the — a — I would have presume to add, the matured autumnal fruits of the Woolsack—have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and if the country have the adornment, of this great Grasp, it must be paid for in money or money's worth, sir."
>
> "Mr. Kenge," said Allan, appearing enlightened all in a moment. "Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?"

C. DICKENS, *supra* note 33, at 803.

83. Bankruptcy Act § 60d; 11 U.S.C. § 96d (1970); R. BANKR. P. 220(a).

84. R. BANKR. P. 219(b). *See also id.* 107(b)(3) (bankrupt must pay filing fee before attorney).

85. D. STANLEY & M. GIRTH, *supra* note 22, at 80.

86. *Id.* at 183.

filing; and nothing but the filing fee is available to compensate other participants.[87] Although precise data is hard to come by, observers generally agree that bankruptcy costs too much.[88] Professor Landers, however, analogizes bankruptcy to attorneys' contingency fees based on a percentage of the amount recovered and concludes that twenty-five percent administrative expenses are not "disproportionately high."[89] Perhaps contingent fees based on "creating" a fund are an inadequate analogy to a system which erases debts. Certainly the transaction costs, including attorneys' fees, of the fault-based negligence system are a major reason that reformers press for no-fault. In addition, the personal injury case is almost the archetype adversary controversy. A better analogy to bankruptcy expense may be found in nonfault systems which process benefits from impersonal institutions. Administrative expenses as a proportion of net benefits in Blue Cross and Social Security are five and two percent respectively.[90]

Some of bankruptcy is adjudicative and adversary, some is administrative, and some is social welfare. At a minimum it is incongruous for the recipients of a social welfare service to pay cash, up-front and in advance.[91] In light of the Committee's efforts to simplify and expedite consumer bankruptcy, it is improper to conclude that "[t]here is no evidence to suggest that the Advisory Committee even took note of [widespread complaints about excessive administration expenses], let alone attempted to do something about them."[92] The Committee's response was ameliorative and incremental. The effectiveness of this response can be determined only after its implementation and use.

The rules attempt to accommodate the perceived administrative-adjudicative dichotomy. Parties are allowed to accede to administrative processing of a simple bankruptcy. When something out of the ordinary arises, it may be shifted to either contested[93] or adversary status.[94] Except for contested involuntary petitions,[95] contested matters are those where issues are insufficiently in controversy for full-dress adversary adjudication. Contested disputes in consumer bank-

87. *Id.* at 190-92.
88. COMMISSION REPORT, *supra* note 15, Part I, at 3.
89. Landers, *supra* note 67, at 868-70.
90. Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 290 (1964).
91. *But see* United States v. Kras, 409 U.S. 434 (1973).
92. Landers, *supra* note 67, at 870.
93. R. BANKR. P. 914 & Advisory Comm. Note.
94. *Id.* 701.
95. *Id.* 104, 121.

ruptcies will generally arise when a party objects to creditors' claims,[96] the trustee's report of exempt property,[97] or the fee paid to the bankrupt's attorney.[98] These disputes are routine and will generally not involve large amounts, but are serious enough to summon an impartial decisionmaker. Contested disputes are decided more informally than adversary disputes, but notice and an opportunity to be heard are required.[99] This advances the common sense idea that some controversies can be settled fairly without the time and expense consumed by full-dress adversary proceedings.

The rules single out several bankruptcy proceedings for complete adversary treatment. These are (1) trustee proceedings in bankruptcy court to upset the bankrupt's transfers; (2) secured creditors', trust beneficiaries', and bailors' proceedings to reclaim property; (3) trustees' counterclaims against creditors who have filed claims; (4) trustees' actions to recover money or property; (5) proceedings on bonds; (6) proceedings to recover excessive dividends; (7) proceedings to deny or revoke discharge; (8) proceedings to determine whether a particular debt is discharged; and (9) proceedings to enjoin or to be relieved of a stay.[100] Creditors object to discharge of particular debts in about twelve percent of all no- or nominal-asset bankruptcies.[101] This will be the adversary proceeding's primary impact.

Before the rules were adopted, adversary practice before the referee "confronted the novice with a foreboding array of new concepts and technicalities."[102] With the addition of the rules, adversary proceedings in bankruptcy court should be as easy for the average lawyer as civil practice in the federal district court. When a party files an adversary complaint, part VII of the rules becomes operative.[103]

Professor Shanker observes that "nonbankruptcy lawyers who have practiced in the civil courts . . . may now feel more comfortable in the bankruptcy courts than the old-line bankruptcy practitioner."[104] The bankruptcy rules omit civil procedure rules which are irrelevant to bankruptcy,[105] shorten some time limits to expedite the administra-

96. *Id.* 306(a), 701.
97. *Id.* 403(c).
98. *Id.* 220.
99. *Id.* 914.
100. *Id.* 701 & Advisory Comm. Note.
101. Shuchman, *Impact Analysis of the 1970 Bankruptcy Discharge Amendments*, 51 N.C.L. REV. 233, 247-54 (1972).
102. NEW RULES OF PROCEDURE, *supra* note 1, at 59.
103. R. BANKR. P. 703.
104. NEW RULES OF PROCEDURE, *supra* note 1, at 83-84.
105. *See, e.g.*, FED. R. CIV. P. 71A (condemnation of property).

tion of estates,[106] and change some rules to recognize jurisdictional differences.[107] Most of the civil rules apply, many being adopted by reference.[108] While some civil rules are found outside part VII,[109] the rules in part VII are numbered to correspond to the civil rules. This should heighten the adversary aspects of fully contested controversies.

Commensurate with the Committee's effort to separate administrative and adjudicative aspects of bankruptcy proceedings, the rules attempt to enhance the adjudicator's "image." The Act defines judge as "a judge of a court of bankruptcy, not including the referee."[110] The referee's position was ambivalent; referee's duties ranged from the clerical (countersigning checks)[111] to supervising the trustee and passing on disputed matters as adjudicator. Even as adjudicator, the referee was junior. Interlocutory appeals were available by right, and the district judge could take additional evidence on appeal.[112] There were few appeals, however; the referee had the final say on almost all bankruptcy matters.[113]

The rules emphasize the judicial and de-emphasize the clerical-ministerial attributes of the office. The referee, for example, may delegate ministerial duties,[114] is relieved from countersigning checks,[115] and need not pass on proved but unobjected-to claims.[116] The rules also elevate the referee's adjudicatory role. First, there is a new title —"bankruptcy judge"—which means either the referee or the district judge.[117] It is often necessary to distinguish between the district judge and the referee.[118] In the usual course of a bankruptcy, the former referee is now bankruptcy judge. The bankruptcy judge may conduct jury trials.[119] Moreover, when the district judge reviews the bankruptcy judge, review is on the evidentary record made before the bankruptcy judge,[120] and the bankruptcy judge's findings of fact must

106. *Compare* R. BANKR. P. 712, Advisory Comm. Note, *with* FED. R. CIV. P. 12.
107. *See, e.g.*, R. BANKR. P. 708.
108. *See, e.g., id.* 726.
109. *See, e.g., id.* 911 (FED. R. CIV. P. 11).
110. Bankruptcy Act § 1(20), 11 U.S.C. § 1(20) (1970); *cf. id.* § 1(9), 11 U.S.C. § 1(9) (referee defined as court).
111. R. BANKR. P. 605(c).
112. *Id.* 810; *cf. id.* 752(a).
113. D. STANLEY & M. GIRTH, *supra* note 22, at 155-58.
114. R. BANKR. P. 506.
115. *Id.* 605(c) & Advisory Comm. Note.
116. *Id.* 306.
117. *Id.* 901(7).
118. *See, e.g., id.* 801, 810, 920.
119. *Id.* 115(b)(2), 409(c).
120. *Id.* 810.

be affirmed unless clearly erroneous.[121] Thus, from a clerk-master in chancery-permanent receiver, the Advisory Committee created a full-fledged judge.

Perhaps the most controversial of the rules is that which confers the contempt power on the referee.[122] Previously, all bankruptcy contempts were certified to the district judge. The referee now possesses power to punish in-court misbehavior[123] and out-of-court disobedience,[124] to impose civil contempt for failure to respond to discovery orders,[125] and to utilize coercive contempt to advance remedial goals.[126] The rule limits the referee to a sanction of 250 dollars.[127] If the contempt merits imprisonment or a fine larger than 250 dollars, the referee certifies it to the district judge.[128]

The question which will be raised is whether this rule modifies substantive rights and violates the Enabling Act.[129] It is facile to decide this important issue on a meaningless conclusion like whether the contempt power is "inherent."[130] As Professor Dobbs makes clear in his groundbreaking article, contempt is one of the last wild cards in the legal deck.[131] Some form of contempt power is thought to be necessary to allow a court to carry on the practical business of adjudicating disputes.[132] So long as state courts of limited jurisdiction possess the contempt power, no one should object to a bankruptcy judge imposing a fine of 250 dollars. The amount is not large.[133] The rules

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121. *Id.* 752(a), 810.

122. Bankruptcy Rules and Official Bankruptcy Forms, 411 U.S. 991, 992-94 (1974) (Douglas, J., dissenting).

123. R. BANKR. P. 920(a)(1).

124. *Id.* 920(a)(2).

125. Rule of Bankruptcy Procedure 737 adopts Federal Rule of Civil Procedure 37(b)(1) which provides for civil contempt under certain circumstances.

126. *See* R. BANKR. P. 770.

127. *Id.* 920(a)(3).

128. *Id.* 920(a)(4).

129. *See* 28 U.S.C. § 2075 (1970); NEW RULES OF PROCEDURE, *supra* note 1, at 118-20.

130. *See* R. BANKR. P. 920, Advisory Comm. Note; Landers, *supra* note 67, at 865-67. *But cf.* Bloom v. Illinois, 391 U.S. 194, 196 n.1 (1968); Michaelson v. United States, 266 U.S. 42, 65-67 (1924).

131. Dobbs, *supra* note 55, at 282-84. *See also* Bankruptcy Rules & Official Bankruptcy Forms, 411 U.S. 989, 992-94 (1974) (Douglas, J., dissenting).

132. United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973).

133. *Compare* Landers, *supra* note 67, at 867 ("minimal") *with* Katcher, *Contested Matters*, in NEW RULES OF PROCEDURE, *supra* note 1, at 120 ("there is nothing minor about a $250 fine, even in this era of inflation."). The major-minor line for jury trial of contempts is drawn at six months confinement, which makes a $250 fine pretty minor in comparison. *See* Taylor v. Hayes, 418 U.S. 488 (1974).

require a reasonably protective procedure.[134] Finally, when personalities are involved, the aggrieved referee is disqualified.[135] Recent contempt decisions dilute formerly unconstrained contempt power.[136] When these decisions are considered, it must be concluded that draconian contempt powers are not a vital attribute of a functioning adjudicator. The bankruptcy judge's contempt power is a reasonably necessary and reasonably circumscribed device to maintain the court's dignity and to insure its practical functioning.[137] Professor Landers overstates the case by asserting that the contempt rule is "the 'fudge' method," that "it makes no sense in light of other pronouncements . . . about increasing the prestige and dignity of the bankruptcy court," and that "while the committee was quick and eager to bestow the title [of judge] they were obviously hesitant to confer the power which normally accompanies it."[138]

The bankruptcy judge continues, under the rules, to oversee the trustee who administers the bankrupt's estate.[139] This will make no difference in the large majority of bankruptcies without assets to administer. Where there are assets, this administrative role may detract from the judge's apparent impartiality. There is no parallel in the adversary model. Trial judges hear contested discovery matters,[140] often conduct pretrial hearings,[141] and later preside over trials. Unlike the first meeting of creditors and the estate management, these procedures are seldom *ex parte*. Most litigation, however, lacks an existing fund; and someone must look out for the estate's general interest. While the adversary model is a powerful analogy, it cannot govern the way all disputes are resolved. There must be some compromises with bankruptcy's institutional and practical exigencies. Other models, such as the decedent's estate, should be compared. One additional fact must be considered: there was not enough to go around before bankruptcy was filed. Thus economy, efficiency, and expertise should be considered in addition to the appearance of fairness.

134. The procedure is based on Federal Rule of Criminal Procedure 42, *see* R. BANKR. P. 920, Advisory Comm. Note.

135. *Id.* 920(a)(2). *See* Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

136. Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Taylor v. Hayes, 418 U.S. 488 (1974); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Bloom v. Illinois, 391 U.S. 194 (1968).

137. *See, e.g.*, Menard v. Aldens (E.D. Tenn.) (unreported), *digested in* 48 AM. BANKR. L.J. 184 (1974).

138. Landers, *supra* note 67, at 867.

139. *Id.* at 865, 867.

140. FED. R. CIV. P. 26(c) (motion for protective order), 37(b) (request for sanction).

141. *Id.* 16.

Professor Landers concludes that some of the rules' changes are "cosmetic."[142] There are changes, however, both functional and symbolic. Many of the functional changes were designed to facilitate and expedite the consumer bankruptcy. The questions are (1) whether the Advisory Committee clearly distinguished the administrative from the contested and adjudicative aspects of the proceedings, (2) whether the administrative is expeditious and inexpensive, and (3) whether the adjudicative is satisfactorily adversary. The symbolic changes cannot be so quickly dismissed as cosmetic. The bankruptcy process includes many symbols: the wonderful wizard waves a wand and the debts disappear.[143] Many characteristics of adversary adjudication, such as judicial robes and "oyez," cannot be explained except as tradition and ritual. These symbols celebrate the model of the adversary adjudicator, the impartial and wise person who will concentrate upon a discrete and personal dispute. The Committee's efforts to move the bankruptcy adjudicator in the direction of the adversary adjudicator by conferring upon the former the adversary adjudicator's outward attributes should not be condemned without considering the full value of symbolism in the judicial process.

The rules retain the adversary system's basic premises: party prosecution, party presentation, and an impartial decisionmaker. Thus the bankrupt will receive no better services than the bar provides. Some bankruptcy judges will suggest converting a hopeless Chapter XIII to straight bankruptcy. But the judge cannot correct a foolish mistake. The bankrupt may lose all section 70a property, be discharged from a few minor debts, and emerge from bankruptcy continuing to owe a major debt.[144] The adversary system presupposes knowledgeable advocates; unless such advocates exist, the system cannot function.

V. Procedure Under the Proposed Act

The Commission on the Bankruptcy Laws' two-part report was officially transmitted in mid-1973 and released to the public soon thereafter. Part I includes twelve chapters about the present bankruptcy system and the proposed changes. Part II contains the Proposed Act together with comprehensive notes, commentary, and citations to rele-

142. Landers, *supra* note 67, at 839.

143. D. Earl, The Bankruptians (1966) (Harry and the Wonderful Wizard of Laws).

144. Allen v. Lindeman, 164 N.W.2d 346 (Iowa 1969).

vant legal sources. The proposed revision is coherent and comprehensive, a code rather than an agglomeration of statutes.

The Commission's most sweeping recommendation is to create an independent executive agency called the "United States Bankruptcy Administration."[145] A presidential appointee called the Administrator will head the Administration.[146] Regional offices staffed under the civil service system will be established.[147] Bankruptcy will be organized around the Administration. Except for a few cases, the Administration will serve as counselor to the debtor-bankrupt,[148] clerk,[149] trustee,[150] and adjudicator.[151]

A new bankruptcy court will be created.[152] The Commission rejected the Brookings recommendation that bankruptcy be handled exclusively within an agency by an internal hearing-appeals process.[153] Bankruptcy court judges will be appointed by the President, confirmed by the Senate, and will serve fifteen-year terms.[154] Filing, record keeping, and supervision of trustees will be performed by the Administrator. The bankruptcy judge will possess only adjudicatory functions: deciding contested involuntary petitions,[155] determining discharges,[156] and passing on objected-to claims.[157] While the Proposed Act contracts the court's administrative functions, it enlarges the court's adjudicative power. It abolishes the troublesome plenary-summary dichotomy and extends jurisdiction to "all controversies arising out of any bankruptcy"[158] including "controversies involving property of the estate of the debtor,"[159] and actions to upset transfers and payments.[160] The bankruptcy court will also possess jurisdiction over the bankrupt's exempt property.[161] Finally, the court will have full con-

145. Proposed Act § 3-101, *set forth in* COMMISSION REPORT, *supra* note 15, Part II [hereinafter cited as Proposed Act].
146. *See id.* § 3-102(a).
147. *Id.* §§ 3-102(c)-(d) (professionals "as needed" without regard to civil service).
148. *Id.* § 4-203(a).
149. *See id.* §§ 4-202(b), -207(b) to (c), -307.
150. *See id.* §§ 3-202(b)(5), 5-101(c). *But see id.* §§ 5-101(a), 6-101.
151. *Id.* §§ 4-101, -311, -402(a), 6-204(b).
152. *Id.* § 2-101.
153. COMMISSION REPORT, *supra* note 15, Part I, at 86-88.
154. Proposed Act §§ 2-102(a)-(b).
155. *Id.* §§ 2-207, 4-207(c).
156. *Id.* § 4-505(c).
157. *Id.* § 4-402.
158. COMMISSION REPORT, *supra* note 15, Part I, at 89-91.
159. Proposed Act § 2-201(a)(5).
160. *Id.* § 2-201(a)(7).
161. *Id.* § 2-201(a)(2).

tempt power.[162] This restructuring, the Commission asserts, will substantially reduce the number of bankruptcy judges.[163]

The Commission's report and the Proposed Act have, even in their short life, been criticized. Some critics direct attention to the composition of the Commission. Mr. Phelan observes that the Commission was preoccupied with consumer bankruptcies because the business bankruptcy community was not represented: "no full-time practicing business bankruptcy attorney or bankruptcy judge was appointed to the Commission."[164] Instead, there is a "theoretical and academic approach," apparently because of "the overwhelming preponderance of professors and teachers to the near exclusion of practitioners."[165]

Judge Cyr perceives the matter differently. He notes that "the Commission did not number among its members a single individual with substantial experience in consumer bankruptcy administration or practice."[166] Judge Cyr concludes that the Commission missed the mark in consumer bankruptcy because of "preeminent concern, . . . entirely understandable . . . given the interests and backgrounds of its members, with the problems of business bankruptcy and reorganization law."[167] Both Judge Cyr and Mr. Phelan oppose the proposed Bankruptcy Administration.[168]

The candid and detached observer is hard put to identify the Commission members as either bleeding-heart liberal saps or flint-eyed business community lackeys. Nor can it be reasonably asserted that the Commission was either captured by or co-opted to fuzzy-minded academics. While the Commission's work cannot be uniformly commended, critics should address the merits of the particular proposals and the premises which underlie them.

Procedure under the Proposed Act is difficult to assess. The Proposed Act restructures bankruptcy without providing procedure. In many instances, it anticipates that the Administrator will formulate procedure.[169] For example, the Act leaves the form of voluntary petition

162. *Id.* § 2-201(d).

163. COMMISSION REPORT, *supra* note 15, Part I, at 6, 95, 136 (projecting a fifty percent reduction).

164. Phelan, *The Proposed Bankruptcy Administration (The "FBA")—Bureaucratic Alphabet Soup Gets a Bigger Bowl*, 48 AM. BANKR. L.J. 341, 342 (1974).

165. *Id.* at 343.

166. Cyr, *The Bankruptcy Act of 1973: Back to the Drafting Board*, 48 AM. BANKR. L.J. 45, 46 (1974).

167. *Id.* at 52.

168. *Id.* at 55; Phelan, *supra* note 164, at 343.

169. Proposed Act § 3-302(b).

to the Administrator,[170] who may follow the present rules.[171] Until Congress passes the Act, the President selects an Administrator and the Administrator promulgates rules, procedure will be uncertain. By leaving procedure open, the Commission exposed itself to criticism for peddling the proverbial "pig in a poke."[172]

Professor Landers, writing before the Commission's report appeared, criticized this procedural vacuum. He speculated about the relationship between the Rules Committee and the Bankruptcy Commission,[173] concluded that the rules are "relics," and feared that the Commission might defer to the rules. This would embalm these "relics of the past" as legislation where they will become "fixtures of the future." "It would be unfortunate," Professor Landers states, "if the Advisory Committee passed the ball to the Commission on the ground of lack of power, only to find that the Commission decided to accept the Advisory Committee's work . . . ."[174]

Judge Cyr asserts similar points for different reasons. His view is that the Brookings study was promulgated without considering the salutary effect of the new rules.[175] Criticism of the bankruptcy system should, therefore, be delayed until the rules can be observed in operation. Since "bankruptcy is at least ninety percent procedural,"[176] procedural flexibility and step by step reform will be attained if a procedural advisory committee monitors procedure in a careful and ongoing fashion.[177] At the same time, the Commission should be content to complete only substantive reform.[178] Thus, Judge Cyr hopes and Professor Landers fears that the Commission and the Advisory Committee will unite their efforts to achieve incremental reform.

The Advisory Committee and the Bankruptcy Commission are related; however, personnel overlaps somewhat. For example, Professor Kennedy was Reporter to the Rules Advisory Committee and Executive Director of the Commission on Bankruptcy Laws. It was not clear to Professor Landers whether the rules were the procedural step

170. *Id.* § 4-202(a). *See also id.* § 4-307, Advisory Comm. Note (mode of written notice to be determined by Administrator's rules).
171. *Id.* § 3-202(b)(1), Advisory Comm. Note 4.
172. Cyr, *supra* note 166, at 67.
173. Landers, *supra* note 67, at 836-38.
174. *Id.* at 838.
175. Cyr, *supra* note 166, at 51.
176. *Id.* at 67.
177. *Id.* at 60 n.53.
178. Cyr, *The Abandonment of Judicial Administration of Insolvency Proceedings: A Commitment to Consumer Disservice*, 78 COM. L.J. 37, 38 (1973).

which would be completed by the Commission's proposed legislation, the substantive step.[179] After the Commission report, the relation remains "cryptic." The Proposed Act continues to present rulemaking process.[180] The Proposed Act also creates an Administration[181] and delegates power to that office to "adopt, amend, and repeal" rules.[182] The Commission expects "that the administrator will find it efficient and appropriate to coordinate his rulemaking with that of the Supreme Court for the bankruptcy courts insofar as related subject matter calls for compatible rules."[183]

A panel of distinguished bankruptcy experts responded to questions at a continuing legal education seminar.[184] One question was whether the rules would be substantially revised after the Proposed Act passed. The anonymous answerer mentioned some changes: under the Proposed Act, judicial and administrative matters will be separated and the administrative assigned to a new agency. Cases formerly decided in plenary proceedings outside bankruptcy court will be adjudicated in bankruptcy court. Hence "[c]ertainly, there will have to be a considerable number of changes in the Bankruptcy Rules."[185] On the other hand, there are some continuities. "To a very considerable extent, the draftsmanship of the [proposed] Bankruptcy Act assumes a continuation of these rules or procedure. . . . [T]he draftsmen of the act assumed that the formulation and promulgation of procedural rules will be governed by the same process that now applies. The Proposed Act contains little in the way of procedural rules."[186] This is a good summary, but it leaves the observer as uncertain as he was before.

The Proposed Act continues some procedural trends begun by the rules. It includes the rules' features that expedite consumer bankruptcies. When the bankrupt's schedules reveal that there are no assets to distribute, the notice to creditors informs them that proof of claims is unnecessary.[187] But the bankrupt must disclose property and turn it over to the administrator.[188] If it seems likely that there will be assets

179. Landers, *supra* note 67, at 837 n.29.
180. Proposed Act § 2-204(a).
181. *Id.* § 3-102(a).
182. *Id.* § 3-202(b)(1).
183. *Id.* § 3-202, Advisory Comm. Note 4.
184. Including Vern Countryman, Frank R. Kennedy, and Lawrence P. King. *See* NEW RULES OF PROCEDURE, *supra* note 1, at 191.
185. *Id.*
186. *Id.*
187. Proposed Act § 4-307(a)(4); R. BANKR. P. 203(b).
188. Proposed Act § 4-502; *cf.* R. BANKR. P. 108(e), 402.

to distribute, creditors may be sent notice to file claims.[189] This small continuation from the rules will assist in reducing unnecessary mailing and filing.

The rules provide that the filing of a petition operates automatically to stay certain forms of creditor conduct.[190] This is based on the policy of protecting the bankrupt against creditor tactics which circumvent the discharge.[191] Under the present Act, this stay may have unintended consequences. In Chapter XIII, the statutory standard for a stay of lien enforcement was characterized by flexibility,[192] in part because secured creditors who were "dealt with" by the plan might veto.[193] Secured creditors, who are now automatically prevented from enforcing liens,[194] may argue successfully that they are "dealt with" and may veto. The Proposed Act continues the automatic stay;[195] however, it obviates the perceived difficulty by eliminating the secured creditors' veto.[196] This combines procedural and substantive change better to accomplish bankruptcy's protective function.

The initial notice to creditors will no longer inform them that there will be a first meeting of creditors.[197] Any party or the Administration may apply to examine the debtor.[198] Thus, the Proposed Act eliminates the first meeting and replaces it with an optional examination.[199] From the standpoint of the adversary system, no great loss will occur, since creditors' apathy has already reduced the first meeting to a sham.[200] When there is no controversy, adversary procedure may be unnecessary. Making the examination optional is commensurate with the Commission's pragmatic conclusion that consumer bankruptcy is purely an administrative matter. If the first meeting possesses symbolic or ritual functions,[201] these functions will be, for the most part, eliminated.

The Proposed Act clearly continues a trend, begun under the

189. Proposed Act § 4-401(a); R. BANKR. P. 203(b).
190. R. BANKR. P. 401, 601, 13-401.
191. *Id.* 401, Advisory Comm. Note. *But cf.* Landers, *supra* note 67, at 875.
192. Bankruptcy Act § 614, 11 U.S.C. § 1014 (1970); Hallenback v. Penn Mut. Life Ins. Co., 323 F.2d 566, 572 (4th Cir. 1963).
193. Bankruptcy Act § 652, 11 U.S.C. § 1052 (1970).
194. R. BANKR. P. 13-401(a).
195. Proposed Act § 4-501(a)(1).
196. *Id.* § 6-204(b).
197. *Id.* § 4-307.
198. *Id.* § 3-410.
199. COMMISSION REPORT, *supra* note 15, Part I, at 121.
200. D. STANLEY & M. GIRTH, *supra* note 22, at 21-22, 76-77.
201. *See* text accompanying notes 35-42 *supra*; *cf.* Cyr, *supra* note 166, at 51; Shuchman, *supra* note 16, at 443.

rules, to create a more judicial bankruptcy judge. Today the bankruptcy judge-referee receives petitions, issues notice, presides at the first meeting of creditors, supervises the trustee in collecting the estate, allows exemptions and claims, and grants discharges. The Commission seeks to sever administrative from adjudicative functions to allow judges to judge and administrators to administer.[202] Administration, it is said, will be flexible, uniform, and economical; adversary controversies will occur less frequently and be less costly; and adjudication will be impartial, expert, and speedy.[203] Many functions formerly performed by the referee will be delegated to the Administrator and his staff;[204] many bankruptcy referees will be out of a job.[205]

An additional reason to give administrative functions to the new agency is the appearance of doing justice. The referee presides over and participates in nonadversary proceedings. Information accumulated in nonadversary proceedings may, the Commission fears, influence decisions in adversary proceedings. More particularly, the referee appoints or approves a trustee, and supervises the collection of the estate. Especially where a specialist bar exists, "the referee may not appear to the trustee's adversary as one fitting the model of judicial objectivity."[206] The Commission concludes that "making an individual responsible for conduct of both administrative and judicial aspects of a bankruptcy case is incompatible with the proper performance of the judicial function," and recommends that "bankruptcy judges be removed from the administration of bankrupt estates and be restricted to the performance of essentially judicial functions."[207]

Two comments are in order. First, unseemly trustee-referee relationships are possible only when the bankrupt owns significant assets. In about ninety percent of all bankruptcies, there are only nominal assets, if any. The present rules allow the court to dispense with a trustee in these bankruptcies.[208] Secondly, in addition to separating judicial and administrative functions, the Proposed Act allows the agency to perform as trustee in most bankruptcies[209] and eliminates the automatic first meeting of creditors.[210] This changes the corespondent in

202. COMMISSION REPORT, *supra* note 15, Part I, at 94-96.
203. *Id.* at 81-82.
204. *Id.* at 120-26.
205. *Id.* at 95, 136 (estimating a fifty percent reduction).
206. *Id.* at 93.
207. *Id.* at 93-94.
208. R. BANKR. P. 211.
209. Proposed Act § 5-101.
210. *Id.* § 4-310.

the indecorous relationship and reduces the opportuinty for *ex parte* knowledge. Thus it may be concluded that the administrator-adjudicator problem is inflated, that the rules in some ways obviate the problem, and that other parts of the Proposed Act also confront the problem.

If the present system may be criticized for combining functions, then the proposed agency should be examined to determine whether the new combination satisfies the criticism. Changes in organization cannot alter human nature, and problems growing out of combined functions plague all administrative agencies.[211] Under the Commission's recommendations, the Bankruptcy Administration will administer bankrupt estates. Judge Cyr argues that the Bankruptcy Administration, "created principally to eliminate real and apparent conflicts on the part of the bankruptcy court, would become an executive compendium of conflicting interests, powers, and responsibilities."[212] The Administrator's powers begin with rulemaking[213] and fee setting.[214] When the agency's services are sought, someone in the agency counsels debtors with regular income.[215] The agency receives petitions,[216] sends notice,[217] often serves as trustee,[218] receives claims, objects to claims, sustains or overrules objections to claims,[219] and orders payments to creditors.[220] While administering the estate, the agency may issue a subpoena and examine any person,[221] pass on the conduct of prebankruptcy custodians,[222] appoint creditors' committees,[223] assume or reject executory contracts,[224] and compromise claims or actions against the estate.[225] In dealing with the bankrupt, the agency appraises assets, allows or disallows exemptions,[226] passes on prebankruptcy payments to attorneys,[227] and objects to discharge.[228] Aside from matters specif-

211. K. DAVIS, *supra* note 4, § 13.01.
212. Cyr, *supra* note 166, at 63-64.
213. Proposed Act § 3-202(a)(1).
214. *Id.* § 3-302(b).
215. *Id.* § 4-203(a).
216. *Id.* § 4-202(b).
217. *Id.* § 4-307.
218. *Id.* § 5-101(c).
219. *Id.* §§ 4-401 to -402.
220. *Id.* § 4-405.
221. *Id.* §§ 4-310(a) to (c).
222. *Id.* § 4-603(c).
223. *Id.* § 5-102(a).
224. *Id.* § 4-602.
225. *Id.* § 3-202(b)(5).
226. *Id.* § 4-503(j).
227. *Id.* § 4-311.
228. *Id.* § 4-505(b).

ically excepted, the agency "shall act on all matters that arise" with a limited right of appeal to the bankruptcy court.[229]

To avoid the charge of functional incompatibility, some reshuffling may be necessary.[230] For example, agency personnel consult with the debtor. Full disclosure is necessary to insure good advice. The adversary model assumes that the client will disclose to an advocate who will represent that client as fully as the law allows. In consumer bankruptcies, however, the Commission assumes that the debtor may dispense with a privately retained attorney and rely on the agency's personnel for advice.[231] Following agency counseling, the debtor decides the ultimate remedy.[232] After the debtor files a petition, someone in the agency may object to discharge. In addition, communications during this counseling process are not privileged, and the agency may later subpoena the debtor or any other person to testify under oath. Would a well-advised debtor, knowing all this, disclose fully? The agency's role appears to be ambulatory, shifting from debtor's helper to bankrupt's adversary. When the observer considers the agglomeration of agency functions, the nascent conflict built into some of these functions, and the radical departure from the adversary model, he must question whether the proposed Administration is truly propitious.

Administrative agencies may bring several healthy characteristics to bear on social problems. Agencies may be quick, inexpensive, and expert. It is difficult to imagine an agency employee telling a debtor who owes a 20,000 dollar judgment for alienation of affections that he should seek a bankruptcy discharge.[233] Skeptics, however, may point to particular instances of expensive, bumbling, and surly bureaucracies. From the Circumlocution Office in Dickens' *Little Dorritt*, with its motto "[h]ow not to do it,"[234] to the contemporary Peter Principle that "[i]n a hierarchy every employee tends to rise to his level of incompetence,"[235] governmental operatives have been frequently, and often justifiably, ridiculed. Judge Cyr maintains that incremental reform through judicial reorganization and delegation of administrative tasks to clerical personnel will avoid bureaucratic problems.[236]

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229. *Id.* § 4-101(a).
230. Lee, *supra* note 1, at 934.
231. COMMISSION REPORT, *supra* note 15, Part I, at 160.
232. Proposed Act § 4-203(b).
233. Allen v. Lindeman, 164 N.W.2d 346 (Iowa 1969); *see* Proposed Act § 4-506 (a)(7).
234. *See generally* C. DICKENS, LITTLE DORRITT (1857).
235. L. PETER, THE PETER PRESCRIPTION 11 (1972).
236. Cyr, *supra* note 166, at 58-59. *See also* Lee, *supra* note 1, at 934.

Those who believe with Professor Thode that "justice is best served in the long run by operation of the system according to authoritative rules, including legally binding ethical standards for advocates, who are vital cogs in the system"[237] will mourn when an adversary process is converted to an administrative one. Agency decisions which emphasize discretion and de-emphasize adversary participation are felt to be less legitimate and to possess less moral force than court decisions.[238] The central problem in bankruptcy reform, however, is what to do with an imperfect adversary system. Although a well-informed attorney can give good remedial advice to a debtor,[239] several factors militate against this: bankruptcy is complex, almost beyond understanding; bankruptcy has a disreputable ambiance, and many lawyers disdain it; and consumer bankruptcy neither produces nor generates a fee. However, even a disfunctional adversary system may have valuable attributes. Procedural and substantive changes may simplify bankruptcy. Law schools and continuing legal education may educate the bar. Legal specialization may develop. The Commission apparently considered these alternatives but recommended a new agency. At this writing, the race between privately retained advocates and agency expertise has been won by the agency.

Commentators have long felt that there is less that is traditionally legal in consumer bankruptcy than meets the eye. One way to express this is to say that the adversary model is unsuitable. Another way is to say that consumer bankruptcy is a social or sociological problem rather than a legal problem.[240] If consumer bankruptcies are conceived as sociological, consumer bankrupts may be perceived as a social welfare problem.

From the conclusions that the adversary system had failed and that bankruptcy was properly an administrative process, the Brookings study reasoned that an agency should provide financial counseling. An agency representative would analyze the debtor's financial status, and explain the advantages and disadvantages of available remedies. If the debtor chose bankruptcy, the agency would continue to provide financial counseling.[241] Other commentators observe that without debt or

237. Thode, *supra* note 3, at 589-92.

238. *Cf. id.* at 589.

239. *See, e.g.*, Wickham, *Bankruptcy or not? Advice for Attorneys Who Counsel Consumer Debtors*, 41 TENN. L. REV. 667 (1974).

240. S. RUTBERG, TEN CENTS ON THE DOLLAR: THE BANKRUPTCY GAME 128 (1973); Coogan, *The Proposed Bankruptcy Act of 1973: Questions for the Non-Bankruptcy Business Lawyer*, 29 BUS. LAWYER 729, 733 (1974).

241. D. STANLEY & M. GIRTH, *supra* note 22, at 5, 204-05.

budget counseling, the discharge's fresh start goal may be frustrated.[242]

The Commission's conclusions differ slightly. The Proposed Act provides that agency personnel "shall counsel" individual debtors with "regular income."[243] This appears to advance two interests. First, the Commission observed that fewer people avail themselves of wage earner plans than might. Seeking to foster and encourage these plans without making them compulsory, the Commission concluded that an agency should tell debtors about composition, extension, and straight bankruptcy. The fully informed debtor will then choose rationally.[244] This contains a concealed premise: the adversary system is faulty. Neither private attorneys nor referees explain all alternatives to debtors. The Commission anticipates that debtors may dispense with privately retained lawyers and that agency personnel will assume a more activist or inquisitorial stance than that of impartial adjudicator.[245] Thus, the agency will extend legal-financial advice to the debtor. This, coupled with substantive changes,[246] will lead to a more meaningful fresh start.

The second reason the Commission recommends counseling appears to grow out of the Commission's ideas of the causes of bankruptcy and to involve basic ideas about bankruptcy, the economy, and the relationsip between citizen and government. It appears to be distinctly related to bankruptcy's social welfare purpose. The Commission Report's chapter entitled "A Philosophical Basis for a Federal Bankruptcy Act"[247] seems, on first reading, to be less of a philosophy than a series of excuses for doing without one. The philosophy is, perforce, capitalistic; it also assumes mass consumption of goods and services based on readily available credit. People should pay their just debts, but not always. When debtors cannot pay, a bankruptcy discharge will wipe the slate clean.

The Commission expresses its philosophy, justifies bankruptcy, and relates bankruptcy to the debt-paying credit economy with one phrase: "debtors with 'fresh starts' are better enabled to participate in the credit economy."[248] The report states "it is fitting that the bankruptcy process afford . . . diagnostic services that identify the

242. Herzog, *supra* note 14, at 60-61; Landers, *supra* note 67, at 877.
243. Proposed Act § 4-203. *See id.* § 1-102(28).
244. COMMISSION REPORT, *supra* note 15, Part I, at 159-60.
245. *Id.* at 160.
246. *See, e.g.*, Proposed Act §§ 4-503 (uniform exemptions), -507(a) (banning post-bankruptcy reaffirmation of discharged debt).
247. COMMISSION REPORT, *supra* note 15, Part I, at 61-84.
248. *Id.* at 68.

causes of financial difficulty, counseling that improves the debtor's . . . capabilities as a participant in the open credit economy, and referrals to . . . other agencies equally but differently specialized, for example, family counseling agencies and mental health clinics."[249] Counseling, therefore, should "help the debtor acquire greater skill and knowledge as a participant in the open consumer credit economy" and "alert him about sources of assistance in his community for dealing with nonfinancial problems, *e.g.*, illness or marital difficulty, that have had or threaten adverse economic consequences."[250]

Earlier discussion supposed that agency advice would be financial. The preceding, however, connotes more lifestyle than budgetary advice. The Commission assumes that the counselors will be nonlawyers.[251] When computing expense, the Commission used "an average of four hours" counseling in each case.[252] Because the Commission concludes that privately retained attorneys will be unnecessary,[253] the total cost to society may not rise.[254] Moreover, the Commission suggests that the general benefit of counseling may be substantial enough to warrant support from general revenues.[255] Thus, a social worker paid by the taxpayer may replace the privately retained attorney.

The Commission recommendation to extend counseling to lifestyle appears to be based on the notion that personal inadequacy leads to bankruptcy. While mentioning the complex of legal, economic, and intangible causes, the report focuses on individual deficiencies. The report quotes a study which concluded that a group of bankrupts had

> a tendency toward emotional immaturity and . . . they were lacking in frustration tolerance. They were evasive, worrying, and easily annoyed. They tended to be shy, withdrawing, cautious, and retiring. . . . They were identified as a group that was unable to keep in contact with all that was going on around them. The group was described as one that lacked will control and character stability. They were also found to be tense, excitable, restless, fretful, and impatient.[256]

Further on, and in the report's own words:

> The higher incidence of marital difficulties and other family problems among financially burdened debtors than among the

249. *Id.* at 74.
250. *Id.* at 79.
251. *Id.* at 122.
252. *Id.* at 139.
253. *Id.* at 160.
254. *Id.* at 139.
255. *Id.* at 150.
256. *Id.* at 48.

> general population; the employment, rehabilitation, and other nonfinancial difficulties stemming from accident and illness; and the personality inadequacies that lead to irrational spending, compulsive gambling, drunkenness, and other excesses all suggest that many bankrupts may benefit from specialized counseling and treatment service beyond the scope of budget counseling.[257]

Thus "the primary responsibility for reducing the causes of bankruptcy lies with the individual and the primary social responsibility lies in the assistance of education, counseling, and professional treatment of personality or character inadequacies."[258]

While in the abstract the report hesitates to label or blame,[259] the report's practical focus adopts what the abstract statement eschews. Bankruptcy will not be a dehumanizing, impersonal bureaucracy. Instead, bankruptcy will be a center to treat consumer maladies and to refer elsewhere for more extensive therapy. The consumer economy's walking wounded will stagger into bankruptcy from whence they will emerge healed, hearty, and ready to consume again. The conclusion that the adversary model is incongruous in consumer bankruptcy does not compel a second conclusion that consumer bankruptcy is a social welfare problem instead of a legal problem. Indeed, the Commission's proposals extend consumer bankruptcy beyond the adversary model, beyond the inquisitorial-administrative model, and into the realm of the social welfare or therapeutic state.

We know only a little about the consumers who are caught up in bankruptcy. The studies, Professor Shuchman observes, are based on data which "seems, variously, poorly gathered, fragmented, incomplete, and not addressed to the problems that would help us to formulate a philosophy of bankruptcy."[260] The Commission Report admits as much.[261] In addition, social science failed to analyze an important control group, the "insolvent" consumers who abstain from bankruptcy.[262]

Social scientists bring their attitudes to their studies.[263] They may define social problems as personal or political. When problems are defined as political, the social scientist's task may be over. Defining problems as personal opens a new field of endeavor for the therapy-

257. *Id.* at 53.
258. *Id.* at 52.
259. *Id.* at 53.
260. Shuchman, *supra* note 16, at 412-13 (footnotes omitted).
261. COMMISSION REPORT, *supra* note 15, Part I, at 53.
262. *Id.* at 46; Shuchman, *supra* note 16, at 412, 468.
263. This paragraph is based on Caplan & Nelson, *Who's To Blame?*, PSYCHOLOGY TODAY, Nov. 1974, at 99.

oriented. Thus, simple self-interest skews social science toward person-centered problem definition, research, and conclusions. Like a four-year-old boy with a new birthday hammer who discovers that everything needs hammering, the psychologist or social worker ascertains that individuals are responsible for their own problems and urges counseling to correct the observed defects. If the diagnosis is unchallenged, helping figures will be provided to control the deviant individuals. But person-oriented research neglects hard questions about society. Before opprobrious personal conclusions are affixed, someone might attempt to determine whether the person so described has sufficient objective reasons to be troubled. What appears to an observer as deviant behavior may be a rational response to an unfortunate situation.

Counseling's first premise is that there is something wrong with the person counseled. Medical terminology like "diagnosis" and "treatment"[264] borrows prestige from a respected profession. The analogy from curing disease and setting broken bones to rehabilitating bankrupts is, however, broad and imperfect. It should be examined skeptically and carefully. Similar devices exist: traffic judges compel drinking drivers to attend a series of lectures on alcohol's unhealthy potential; military commanders formerly summoned soldiers to movies about the adverse consequences of certain sexual conduct. This observer nevertheless must ask whether counseling, instead of being genuinely therapeutic, is the social price imposed upon the bankrupt in return for discharge. Is counseling the "sermon" and "ceremony" Professor Stone referred to as part of the debt-extirpating ritual?[265]

The way policymakers define a problem determines both what is done and what is not done about it. If personal characteristics cause a problem, the solution can concentrate on individuals and ignore problems of the larger society. The Commission Report assumes that the bankruptcy system is rooted in a credit-fueled, consumption economy. The bankrupt, an overzealous consumer, must be educated and returned to consume more wisely.[266] Several questions may be asked about the economic foundations of this model. On one plane, are a society's accomplishments measured primarily by its level of production? On another, is an individual's achievement indexed by his level of consumption?[267] Should excessive credit consumption be construed

264. Stone, *supra* note 17, at 349, 354.
265. *Id.* at 361.
266. COMMISSION REPORT, *supra* note 15, Part I, at 71.
267. J. GALBRAITH, THE NEW INDUSTRIAL STATE 38 (1967).

as evidence of inadequacy? Or may it be a reasonable response to a materialistic society which creates demand and manages consumption?[268] Does consumption which creates debt liberate or stultify?[269] If "unnecessary" buying sustains economic momentum, then should the buyer of unnecessary items who cannot pay be viewed as a casualty or a hero? Consumer bankruptcy may be a question not of failure but of the standards of success. Perhaps the time approaches when people cease to regard accumulating material goods as the measure of economic success and the guarantee of human happiness.

The Commission Report deals with bankruptcy reform, not social reform in general. By stressing personal causes and solutions, the report may de-emphasize many variables and analogies. The present Act was passed during the laissez-faire age. Reformers should consider bankruptcy's part in the entire scheme of public regulation, for example, the government's role in controlling economic fluctuation. Statistics from late 1974 and early 1975, the time this article was written, will show rocketing bankruptcy filings. Perhaps the bankruptcy system could develop a painless processing method for these victims of governmental mismanagement. By centering on "internal" causes, the Commission neglects these relationships.

If bankruptcy accomplishes social welfare functions, reformers might explore existing welfare analogies. When the present Act was passed, public welfare was limited to "indoor relief" in the county poorhouse and sparce general assistance. Intervening social and political developments such as unemployment compensation, old age pensions, survivors insurance, disability payments, public assistance, and changes in the financing of medical services could be considered. One particular analogy bears mention. Bankruptcy, like other welfare programs, has a stigma. Everyone talks about the stigma, but no one analyzes it very thoroughly. Some view bankrupts as moral cripples, affix a public assistance stigma, and oppose any revision; others view bankrupts as unfortunate victims, affix only a minor stigma, and favor comprehensive revision.[270] The Commission proposals reflect the second orientation.[271]

Some stigma remains. The proposal to counsel bankrupts reveals an official conclusion that bankrupts, at a minimum, need to be edu-

268. *Id.* at 205.
269. *Id.* at 271-73.
270. COMMISSION REPORT, *supra* note 15, Part I, at 62; Shuchman, *supra* note 16, at 416-17.
271. Kennedy, *supra* note 21, at 437.

cated. Observers frequently assail public assistance, particularly aid to dependent children, as demeaning.[272] In the 1960's, "services" were provided to rehabilitate recipients of aid to dependent children.[273] The romantic ideal collided with cold practicality. "Services," instead of an exact concept, turned out to be an exceedingly fuzzy one. The idea that trained caseworkers offering services would rehabilitate welfare recipients failed to work in practice.[274] Before bankruptcy embraces services, this precedent should be explored. It makes scant economic sense to substitute a useless counselor for a lawyer.

Welfare is difficult to relate to bankruptcy. Few welfare recipients are candidates for bankruptcy, for they neither own enough assets to lose much to creditors nor receive enough income to run up large debts.[275] The programs are not coordinated. At least in New York, the welfare authorities refuse to pay extra benefits to enable welfare recipients to file bankruptcy.[276] If this is observed from the creditor's point of view, the desire to affix a stigma appears more practical and reasonable. The creditor is also a taxpayer. Must the creditor pay taxes to pay welfare to pay the bankruptcy filing fee to discharge just debts to allow the debtor a fresh start? Nevertheless, some scholars support easing the application procedure in both bankruptcy and welfare to make the process less demeaning and stigmatic.[277]

Perhaps the food stamp program is a better analogy to bankruptcy than the public assistance program. Certified low income consumers purchase food stamps which buy more food than the stamps cost; the difference between cost and face value varies with income, family size, and "need." Food stamps, like bankruptcy, contain an element of magic: the wonderful wizard turns a quarter into a dollar. However, it is the kind of dollar which can only be spent for edible commodities.[278] There is one salient difference. Bankruptcy destroys just debts without benefitting anyone except the bankrupt. But food stamps may "create" wealth. In addition to aiding the needy, food stamps are a

272. *See, e.g.*, G. STEINER, *supra* note 31, at 49 (remarks by Representative Martha Griffith).

273. Act of July 23, 1962, Pub. L. 87-543, § 101(a)(2), 76 Stat. 174 (codified at 42 U.S.C. § 603(a)(3) (1970)).

274. G. STEINER, *supra* note 31, at 24-25, 31, 37, 39.

275. Shuchman, *supra* note 16, at 468-69.

276. United States v. Kras, 409 U.S. 434, 438 (1973).

277. G. STEINER, *supra* note 31, at 88-94; Shuchman, *supra* note 16, at 474; Note, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307 (1967).

278. *See* Bankruptcy Act § 17, 11 U.S.C. § 35 (1970) (debts not discharged); Proposed Act § 4-506.

thinly veiled subsidy to farmers and retail merchants.[279] Food stamps, viewed in this way, may be truly a free lunch.

There are some interesting food stamp-bankruptcy parallels. Policymakers have failed to define either need or insolvency to disqualify students with future income potential. Thus, many students are eligible and sign up for food stamps to the apparent consternation of the authorities.[280] Also, many former students avail themselves of bankruptcy and discharge the education loans which increased their earning ability.[281] Accordingly, policymakers propose to limit student eligibility for food stamps[282] and to attenuate dischargeability of educational loans.[283]

As the preceding paragraph reveals, society is ambivalent about both food stamps and bankruptcy. Some stigma against bankrupts and food stamp recipients continues to exist. Many think that the bankruptcy's stigma prevents eligible people from filing.[284] Also, labor unions encourage laid-off members to apply for food stamps; but many members hesitate or refuse because they view food stamps as welfare.[285] Some feel that food stamps are demeaning because they deprive the recipient of choice;[286] food stamps will not purchase clothes or even beer.[287] The food stamp stigma differs from the bankruptcy stigma. Few but the obdurately hardhearted object to feeding the hungry. Moreover, the food stamp subsidy may be perceived either as a device to return taxes previously paid or as the equivalent of the shelter subsidy obtained by deducting local taxes and interest from federal income tax. These destigmatizing analogies are inapplicable to bankruptcy.

Low participation by eligible people troubles the food stamp program.[288] There are several reaons: procedural barriers such as inaccessable outlets, complex forms, surly officials, and long lines discour-

279. G. STEINER, *supra* note 31, at 200.

280. Richards, *Students Get Food Stamps*, The Washington Post, Nov. 5, 1974, § C, at 1, col. 6.

281. COMMISSION REPORT, *supra* note 15, Part I, at 176-77.

282. Richards, *supra* note 280.

283. Proposed Act § 4-506(8).

284. COMMISSION REPORT, *supra* note 15, Part I, at 141; Shuchman, *supra* note 16, at 413.

285. The Wall Street Journal, Nov. 12, 1974, at 1, col. 5.

286. G. STEINER, *supra* note 31, at 218, 236.

287. 7 C.F.R. §§ 270.2(s), 271.9(a) (1973) (recipients, however, may buy malt, sugar, and yeast to brew their own beer).

288. G. STEINER, *supra* note 31, at 213-20; Anderson, *The Food Crisis—Hunger Persists in U.S. Despite Progress Made in Past Five Years*, The Wall Street Journal, Dec. 3, 1974, at 1, col. 1 (fifteen of thirty million known eligible receive food stamps); The

age some; many identify food stamps with public assistance and disdain to participate; others are simply too poor to pay for food stamps; and some are unaware of the program.[289] The Department of Agriculture, which administers food stamps, shares some of the blame. The statute mandates "outreach" efforts to "insure the participation of eligible households."[290] In *Bennett v. Butz*[291] the court found that the Department of Agriculture's outreach was dismal[292] and a "total failure" to carry out what Congress intended.[293]

Bankruptcy may be compared. Several of the reasons for low participation in the food stamp program apply equally to bankruptcy. Procedural complexity, welfare stigma, poverty,[294] and ignorance limit the number of bankrupts. No one knows how many are eligible for a discharge.[295] Further, the bankruptcy system does not advertise its services.[296] While a Commission-related study tends "to prefer bankruptcy to remain a highly specialized process of limited legal relief and restricted access,"[297] several Commission proposals are in the nature of "outreach." The idea of rehabilitation assuages stigma; people who may be improved or treated are less disgusting. Bankruptcy will be cheaper. The bankrupt may dispense with an attorney's fee,[298] and indigents may file without a filing fee.[299] The Bankruptcy Administration will be located in local offices and, thus, will be more physically accessible.[300] Agency personnel will disseminate information and expert advice to the debtor.[301] There will generally be less procedural complexity.[302] Although massive advertising campaigns are not anticipated, the proposed revision will have some "outreach" effect. It remains to be seen whether a labor union will encourage laid-off, "insol-

Chapel Hill Newspaper, Nov. 17, 1974, § D, at 1, col. 1 (less than one-third of Orange County's eligible receive food stamps).

289. Anderson, *supra* note 288; Mann, *Group Says Many Fail to Ask for Food Stamps*, The Washington Post, Nov. 22, 1974, § C, at 4, col. 1; The Chapel Hill Newspaper, *supra* note 288.

290. 7 U.S.C. § 2019(e)(5) (1970). *See also* 7 C.F.R. 271.1(r) (1973).

291. 386 F. Supp. 1059 (D. Minn. 1974).

292. *Id.* at 1067.

293. *Id.* at 1065.

294. United States v. Kras, 409 U.S. 434 (1973).

295. COMMISSION REPORT, *supra* note 15, Part I, at 40, 46, 74; Shuchman, *supra* note 16, at 468 n.186.

296. COMMISSION REPORT, *supra* note 15, Part I, at 50.

297. *Id.* at 62.

298. *See id.* at 160.

299. Proposed Act § 3-302(a)(1); COMMISSION REPORT, *supra* note 15, Part I, at 140-41.

300. COMMISSION REPORT, *supra* note 15, Part I, at 76, 118.

301. *Id.* at 47.

302. *Id.* at 76.

vent" members to file for bankruptcy, and how the members and their creditors will respond.

VI. CONCLUSION

In a changing world, institutions cannot pretend to finality. Bankruptcy has long been ripe for reform. The Brookings study marshalled the evidence and remorselessly laid bare bankruptcy's wastefulness and irrationality. With the Commission Report and the Proposed Act, bankruptcy reform is no longer a generality but has a practical focus. Revision is a program rather than an article of faith. It may be asked, however, whether the Proposed Act is an aspiration rather than an immediate possibility. In 1969 the President told Congress that "tinkering with the present welfare system is not enough,"[303] but five years have passed without comprehensive revision. The House and Senate Judiciary Committees, through which bankruptcy revision must pass, spent much of 1974 exercising constitutional duties over the executive branch. These committees face an immense backlog of legislation. If copyright and patent are any precedent, then social, commercial, and technological superannuation of a statute does not automatically lead to revision. The changes proposed for bankruptcy are far-reaching and deserve to be considered carefully. Revision has been greeted with less than universal approbation. The Proposed Act may, therefore, be the field upon which the contending forces cancel one another out.[304] Revising the present Act to conform to the rules and forms, it is submitted, should not be delayed by the prospect of passing the Proposed Act.

The fundamental problem is what to do with an unsuccessful adversary process. Process colors substance, and substance colors process. Procedure is an important instrument for advancing social goals. When substance is vague or complex and policies conflict, procedural questions assume increased importance. Although the adversary model is basic to our thinking about resolving disputes, the adversary system is not chiseled into stone. Concepts of proper procedure shift from time to time. Welfare, previously *parens patriae*-administrative, developed adversary-adjudicative procedure.[305] Prejudgment debt collection, formerly *ex parte*, is developing adversary procedure.[306]

303. G. STEINER, *supra* note 31, at 11.

304. Lee, *supra* note 1, at 933, 938.

305. Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161.

306. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin., 395 U.S. 337 (1969). *But cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

Bankruptcy, conceived as adversary, shifts toward administrative and perhaps to administrative-therapeutic. Procedural solutions to social problems will be formulated, tried, modified, rejected, and reformulated.

We have moved away from the idea that bankruptcy should be complex and perhaps punitive so that it will not be too easy.[307] We have, at the same time, moved toward the idea that "the process of bankruptcy need not be made unpleasant."[308] Procedure reflects this movement. Perhaps this is related to changes in the nature of debt, more particularly to the development of institutional, incorporated, inveterate creditors. Professor Stone's perceptive point may be repeated: "as . . . the debtor-creditor relationship becomes even less personal, the element of 'social wrong' involved in not paying one's debts will diminish and finally lose itself among balance sheets and statistics."[309] Some stigma remains. The Commission, in concluding that bankruptcy's problems can be solved by an administrative restructuring, may fail fully to consider the symbolic, impalpable, and intangible values advanced and retarded by procedural systems.

307. *See* Stone, *supra* note 17, at 345.
308. Shuchman, *supra* note 16, at 474.
309. Stone, *supra* note 17, at 361. *See also* Shuchman, *supra* note 16, at 429-31, 474-75.