

2012

## Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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### Recommended Citation

Coco, Linda (2012) "Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," *California Western Law Review*. Vol. 49 : No. 1 , Article 3.

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# CALIFORNIA WESTERN LAW REVIEW

VOLUME 49

FALL 2012

NUMBER 1

## **DEBTOR'S PRISON IN THE NEOLIBERAL STATE: "DEBTFARE" AND THE CULTURAL LOGICS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

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### ABSTRACT

The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005, amending the Bankruptcy Reform Act of 1978, marks a transformation in bankruptcy law and policy that is representative of larger shifts in dominant economic and political models from "embedded liberalism" to free market "neoliberalism." BAPCPA's provisions are part of the new practices of the emergent neoliberal state as they relate to the American middle class segment of the population. In disciplining the middle class, BAPCPA shifts the risk and the responsibility of the lending relationship onto consumer debtors. BAPCPA does this by keeping financially distressed individuals servicing debt obligations both inside and outside the bankruptcy system. Socio-cultural theory

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\* Associate Professor of Law, Barry University. The author thanks Loïc Wacquant, G. Ray Warner, Laura Nader, Nancy Sheper-Hughes, Dean Leticia Diaz, Elizabeth Megale, Carlo Pedrioli, Marc Edelman, Anthony G. Matricciani, M.K. Matricciani, Louis Rosen, David Adam Bradsky, Tok Thompson, John Berry and Leslie Terry. The idea for this article results from four years of qualitative ethnographic fieldwork in the U.S. on bankruptcy.

provides a broadened frame for understanding the economic shift reflected in this fundamental transformation in legal mandates.

### TABLE OF CONTENTS

ABSTRACT .....	1
TABLE OF CONTENTS.....	2
I. INTRODUCTION: THE EFFECTS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 .....	3
II. NEOLIBERALISM: A SET OF GLOBAL POLITICAL AND ECONOMIC PRACTICES ADOPTED LOCALLY .....	12
<i>A. America's Middle Income Families and the Market     Conditions Creating the Possibility of "Debtfare" .....</i>	20
<i>B. Debt Trap and BAPCPA .....</i>	27
III. BARRIERS, TRAP DOORS, AND PAYMENT PLANS: BANKRUPTCY REFORM REINFORCES "DEBTFARE" .....	28
<i>A. Stigma: Re-Imposing a Cultural "KEEP OUT" Sign.....</i>	29
<i>B. Barriers to Entry: Fees and Counseling.....</i>	32
<i>C. Repeat Filing and BAPCPA's Trap Doors .....</i>	35
<i>D. Increased Scrutiny and Requirements for the Bankruptcy     Debtor Once in Bankruptcy Process.....</i>	37
<i>E. Reduction of Protection and Benefit in Bankruptcy Process</i>	40
IV. DOMINANT CULTURAL DISCOURSE OF MORAL BEHAVIORALISM: STIGMATIZED FISCAL IDENTITIES AND COLLECTIVE AMNESIA .....	45
VI. CONCLUSION—TIGHTENING THE BELTS OF THE POOR AS THE BELTS OF THE RICH ARE LOOSENED. ....	47

"Surely one has to pay one's debts."<sup>1</sup>

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1. See DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 4 (2011). Debt relations capture what French Sociologist Pierre Bourdieu would describe as his notion of the *doxa* found in debt relations in the U.S. *Doxa* is the manner in which "every established order tends to produce . . . the naturalization of its own arbitrariness." PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 164 (Cambridge Univ. Press). *Doxa* is the experience and social process through which "the natural and social world appear self-evident. This experience we call *doxa*, so as to distinguish it from an orthodoxy or heterodoxy, belief systems implying awareness." *Id.* In the U.S., Enlightenment notions of individualism strongly inform the dominant discourses surrounding debt relationships. *Id.* Risk and responsibility are assigned according to shifting collective beliefs concerning individualism and

## I. INTRODUCTION: THE EFFECTS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA" or "Act")<sup>2</sup> with the primary purpose of responding to a continuing "upward trend" in consumer bankruptcy filings.<sup>3</sup> The House of Representatives report on BAPCPA ("Report") characterized the reason for this upward trend as a "lack of personal financial accountability," leading to an abuse of the system because debtors' petitions are "bankruptcy filings of convenience."<sup>4</sup> The Report adopted the view that filing a consumer<sup>5</sup> bankruptcy petition is a moral rather than an economic act.<sup>6</sup> Building on dominant cultural discourses of individualism and moral

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personal responsibility. *Id.* Changes in collectively held notions are traceable to larger social forces such as class. *Id.*

2. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). Most provisions of the Act became effective Oct. 17, 2005. *Id.*

3. H.R. REP. NO. 109-31, at 2-4 (2005). (Judiciary Comm.). To Accompany S. 256. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

4. *Id.* at 2. BAPCPA's purpose was to "improve bankruptcy law and policy by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." Although appearing to have concern for debtors, BAPCPA actually works to the major disadvantage of the debtor. It in effect eviscerates the consumer relief goals of the 1978 Code. Conversely, the purpose of the 1978 Bankruptcy Code, was to address "the inadequacy of relief that the Bankruptcy Act provides for consumer debtors... This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor." H.R. REP. NO. 95-595, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 5963, 5973 and 6082. The 2005 BAPCPA amendments "clearly represent a shift in the policy choices of Congress in the category of *seismic* or *cataclysmic*." Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U.L.J. 451 (2007).

5. There are two types of bankruptcy petition filers: consumer and entity.

6. A bankruptcy petition filing by an entity such as a corporation or institution remains a purely economic act; it is a business decision. *See* Bob Adelman, *Donald Trump: The Art of Bankruptcy*, THE NEW AMERICAN, (April 11, 2011, 5:59 PM), <http://www.thenewamerican.com/usnews/politics/item/5764-donald-trump-the-art-of-bankruptcy>. Four time bankruptcy filer Donald Trump told George Stephanopoulos: "I've used the laws of this country to pare debt.... We'll have the company [that's in financial trouble]...we'll throw it into a chapter [11 bankruptcy]. We'll negotiate with the banks. We'll make a fantastic deal. You know, it's like on *The Apprentice*: It's not personal. It's just business."

behavioralism, the Report asserts: “[s]hoplifting is wrong; bankruptcy is also a moral act [in that] . . . There is a conscious decision not to keep one’s promises.”<sup>7</sup> The stated goal of the Act, then, is to restore “personal responsibility and integrity in the bankruptcy system.”<sup>8</sup>

In furtherance of this goal, BAPCPA has several provisions intended to limit and regulate the consumer debtor’s access to bankruptcy relief,<sup>9</sup> the most important of which is the “means test.”<sup>10</sup> The means test is intended to divert and force high-income “can pay” individual debtors from chapter 7 dissolution (granting debtors a total discharge of all debt)<sup>11</sup> into chapter 13 repayment (granting debtors a discharge only after completion of all payments under the plan).<sup>12</sup> The primary purpose of the new law is to prevent a chapter 7 filing by debtors with income above the median, instead forcing them to repay their creditors through a chapter 13 plan. The Consumer Bankruptcy Project data show that the majority of consumer bankruptcy filers have a family income well below the means test threshold of between \$20,000 and \$30,000.<sup>13</sup> In light of its stated purpose, BAPCPA appears to be “an exquisite example of law unhinged from reality”<sup>14</sup> because Congress crafted the Act based on an utterly misinformed premise about who files bankruptcy.<sup>15</sup> Therefore, BAPCPA is failing

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7. H.R. REP. NO. 109-31, at 3 (2005).

8. *Id.* at 2.

9. *See, e.g.*, 11 U.S.C. § 707(b) (2010) (discussing eligibility provisions for chapter 7); *see also* 11 U.S.C. § 109(h) (2010) (discussing mandatory pre-bankruptcy credit counseling); *see also* 11 U.S.C. § 362(c)(3)&(4) (2010) (discussing dismissal provisions for repeat filers).

10. 11 U.S.C. § 707(b)(2) (2010).

11. 11 U.S.C. § 727 (2010) (granting debtors a total discharge of all debts).

12. 11 U.S.C. § 1328 (2010) (granting debtors a discharge only after completion of all payments under the plan).

13. Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 358 (2008).

14. Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 353 (2008).

15. A comprehensive profile of the consumer debtor is found in data collected from consumer petitions filed in 1981, 1991, 2001, and 2007 by the Consumer Bankruptcy Project. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 49-62 (1989); *see also* Lawless, *supra* note 13, at 352-54; *see also* KATHERINE M. PORTER, BROKE: HOW

miserably at accomplishing its stated purposes.<sup>16</sup> Instead, BAPCPA is triggering unintended effects and consequences.<sup>17</sup>

One consequence of BAPCPA is the drastic reduction in the number of consumer bankruptcy filings.<sup>18</sup> At the end of 2007, a year before the mortgage crisis, bankruptcy filings were 20% to 40% lower than they would have been without BAPCPA.<sup>19</sup> In the following years, consumer filings have remained significantly lower than the expected number of filings even though numbers of total filings are reaching pre-BAPCPA levels.<sup>20</sup> Since the enactment of BAPCPA, a financial meltdown occurred in the U.S. economy. Based on such circumstances, one would expect the rate of bankruptcy filings to increase significantly, and yet, the rate increased only moderately.<sup>21</sup> Although this reduction could be explained by high-income debtors taking responsibility to pay their debts, legal scholars reject this argument, because "studies estimated that only three to eleven percent of chapter 7 cases involved such debtors, prior to BAPCPA."<sup>22</sup>

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DEBT BANKRUPTS THE MIDDLE CLASS (2012) 1-24; *see also* Braucher, *supra* note 14, at 352-353.

16. Lawless, *supra* note 13, at 358; Braucher, *supra* note 14, at 349; Howard, *supra* note 5, at 451.

17. Howard, *supra* note 4, at 452 ("Sociologist Robert Merton identified factors that lead to unintended consequences. Several of the factors are particularly relevant in the bankruptcy context, namely, ignorance, error, and . . . the 'imperious immediacy of interest.'").

18. *Id.* at 458.

19. Christian E. Weller, Bernard J. Morzuch & Amanda Logan, *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate*, 84 AM. BANKR. L.J. 327, 328 (2010).

20. Lawless *supra* note 13, at 349-51. ("If bankruptcy filings had continued at the same level as they had been immediately before enactment of BAPCPA, about 1.6 million petitions would have been filed in 2007—about twice as many as the 827,000 bankruptcies that actually occurred. The sharp reduction in filings after the amendments represents about 800,000 families that would have filed but did not.")

21. U.S. BANKRUPTCY COURTS, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT STATISTICS (2008-2010), *available at* <http://www.uscourts.gov/statistics/bankruptcystatistics.aspx> (In 2008, there were 694, 855 Chapter 7 filings, 356,352 Chapter 13 filings, and 851 Chapter 11 filings. In 2009, there were 984,125 Chapter 7 filings, 399,519 Chapter 13 filings and 1,476 Chapter 11 filings. In 2010, there were 1,071,769 Chapter 7 filings, 430,900 Chapter 13 filings and 1,900 Chapter 11 filings.)

22. David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of*

Before the passage of BAPCPA, bankruptcy scholars emphasized this possible effect of the proposed legislative reforms and predicted that the new law would make “access to bankruptcy more difficult for all.”<sup>23</sup> BAPCPA’s complex and burdensome provisions create financial and procedural barriers which prevent consumer debtors from receiving a fresh start, as intended by the 1978 Code.<sup>24</sup> The 2005 Act forecloses families from considering bankruptcy as a real option for relieving financial distress.<sup>25</sup> The Consumer Bankruptcy Project reports that BAPCPA functions “like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual income circumstances.”<sup>26</sup> It appears to have the insidious result of destroying the effectiveness of the 1978 Bankruptcy Code.

The effects of BAPCPA are often described as “unintended consequences,” but perhaps, as legal scholar Margaret Howard suggests, there are “no unintended consequences here.”<sup>27</sup> These changes do not appear accidental. The 1978 Code was criticized as “too liberal,”<sup>28</sup> because it helped millions of middle class families<sup>29</sup>

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2005, 15 AM. BANKR. INSTI. L. REV. 223, 319 (2007).

23. Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 408-13 (2002) (predicting that the new legislation would fail in executing on its stated purpose and that it “would make access to bankruptcy more difficult for all, imposing new costs and hurdles and thus pricing the worst off out of the system.” She further explained: “The predictable effect of making bankruptcy more complicated and expensive would be to deny relief to those with little ability to repay. Debt collectors would be able to squeeze a little more. . . from debtors denied the protection of the bankruptcy system.”).

24. H.R. REP. NO. 95-595, at 4 (1977).

25. LOIS R. LUPICA, AM. BANKR. INST. AN NAT’L CONFERENCE OF BANKR. JUDGES, *THE CONSUMER BANKRUPTCY FEE STUDY: FINAL REPORT* 112 (2011) [hereinafter *The Consumer Bankruptcy Fee Study*] (identifying this phenomena as “BAPCPA’s unintended effects” which have turned a system meant to assist the “poor, but unfortunate debtors” on its head. The study details the numerous ways in which BAPCPA neither creates uniformity nor generates a fair result for the participants. Judges state that the law was not “in the best interest of the system as a whole”).

26. Lawless, *supra* note 13, at 353.

27. Howard, *supra* note 4, at 458.

28. Interview by Bradley Williams with Bankruptcy Judge Joe Lee in Lexington, Kentucky (Oct. 19-20, 2005). National Conference of Bankruptcy Judges, Oral History Collection 1993-2004, Nat’l Bankruptcy Archives at Biddle

obtain a fresh start. BAPCPA does what Elizabeth Warren cautioned in 1997: BAPCPA introduced proposed amendments to the 1978 Code that did not strengthen the consumer bankruptcy system, but rather, destroyed it.<sup>30</sup> BAPCPA has not only destroyed key consumer oriented aspects of the 1978 Code, but it has also created neoliberal mechanisms for reallocating the risks and responsibilities of the lending relationship onto the shoulders of borrowers.

Bankruptcy professionals refer to BAPCPA as the "leave no creditor behind"<sup>31</sup> law because in its poor drafting, confusion, and inconsistency,<sup>32</sup> it manages to shift the risk and responsibility of the lending relationship onto consumer debtors by keeping financially

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Law Library, Univ. of Pa., School of Law, *available at* <http://www.law.upenn.edu/bl/archives/bankruptcy/digicoll/oralhistories.html>.

29. See Katherine Porter, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, in *BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 10 (Katherine Porter, ed., 2012) ("... [M]ore than 90[%] of bankrupt people are members of the middle class."); see also Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, in *BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 28 (Katherine Porter, ed., 2012) (providing a definition of the middle class using income indicators, status markers, lifestyle choices, assets, and values. They also explain using the work of sociologist Martin Marger that there are "three levels of middle class—upper-middle, lower-middle, and working class—and when all three are combined, 68 to 80[%] of Americans are situated, broadly speaking, in the middle class"); see also, OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES, ANNUAL REPORT OF THE WHITE HOUSE TASK FORCE ON THE MIDDLE CLASS 10 (2010) [hereinafter *The White House's Middle Class Task Force*] (defining "middle class" both socially and economically as "working families" whose annual income ranges from \$55,000 to \$123,000, and who aspire to home ownership, a car, college education for their children, health insurance, retirement security and occasional family vacations), *available at* <http://www.whitehouse.gov/strongmiddleclass/reports>.

30. Elizabeth Warren, *Reforming Bankruptcy Law: Four Proposals: A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L. J. 483, 506 (1997).

31. *New Bankruptcy Law*, WHITE & CASE (Oct. 17, 2005) <http://www.whitecase.com/news/detail.aspx?news=49>.

32. Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97-98 (2007); see also Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1296 (2006) (explaining that BAPCPA is also identified by bankruptcy professionals as the BARF Act, "Bankruptcy ReForm Act or Bankruptcy Abuse Reduction Fiasco, because Congress was inconsistent in drafting various provisions in the new Act).



distressed individuals servicing debt obligations both inside and outside the bankruptcy system. Debtors are forced to continue to either pay high interest rate payments outside bankruptcy or allocate all of their disposable income to their debts through bankruptcy. Thus, BAPCPA benefits issuers of credit cards, car lenders, and mortgage holders in both instances.

BAPCPA benefits creditors by putting up barriers to entry (e.g., increased court costs and attorney fees) and creating pitfalls (e.g., credit counseling requirements and new eligibility standards) resulting in dismissals of bankruptcy cases. In effect, the needy individual is precluded from using the bankruptcy system. This increases the individual's overall debt load because in the time the individual is prevented from filing, high monthly interest continues to accrue.<sup>33</sup> This process is known as the "sweat box."<sup>34</sup> Inside the bankruptcy system, BAPCPA makes filing and staying in chapter 7 more difficult for debtors, benefitting creditors through increased debt servitude.<sup>35</sup> The new law forces debtors into repayment plans,<sup>36</sup> limits dischargeable debts,<sup>37</sup> prevents bifurcation of debt into secured and

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33. Weller, *supra* note 20, at 347 (explaining that post-BAPCPA, debtors "may have faced the same economic reasons for bankruptcy but delayed filing due to the higher costs and lower benefits of bankruptcy after BAPCPA. They may have financed this delay by borrowing more money on their credit cards.").

34. Ronald J. Mann, *Consumer Bankruptcy and Credit in the Wake of the 2005 Act: Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 375-76 (2007) (arguing that the new Act, rather than achieving its stated purpose of catching can pay debtors, actually works to benefit issuers of revolving credit loans with high interest rates by keeping individuals in need outside the bankruptcy system, the sweat box. He further argues that the means test alone would not give the credit industry enough return in the form of bankruptcy chapter 13 plan payouts to justify the lobbying expenditures and campaign contributions that led to the Act's passage. Rather, the most significant effect of the new Act is to slow the time of inevitable bankruptcy petition filing by consumers. This allows for the issuers to gain increased pre-bankruptcy high interest rate credit card payments for longer than under the 1978 Bankruptcy Code. Mann argues that the Act does limited good for the credit card issuers once the consumer debtor files the bankruptcy petition.).

35. See 11 U.S.C. § 707(b)(2) (2010); see also U.S. Bankruptcy Official Form B22A; see also U.S. Bankruptcy Official Form B22C.

36. See 11 U.S.C. § 707(b)(2) (2010).

37. See 11 U.S.C. § 541(b) (2010).

unsecured portions,<sup>38</sup> and requires reaffirmation agreements.<sup>39</sup> Thus, BAPCPA represents a fundamental shift in legal and policy structures of the 1978 Bankruptcy Code.

Although entitled the "Consumer Protection Act," BAPCPA does not protect consumers at all. In fact, the incongruously named Act is antagonistic to the purpose of the 1978 Code. The purpose of which was to make "bankruptcy a more effective remedy for the unfortunate consumer debtor" faced with "the tremendous rise" in the consumer credit market and consequent "outstanding consumer" debt.<sup>40</sup> Contrasted with the 1978 Code, BAPCPA's purpose and structure eliminate the presumption in favor of granting debtors a discharge and replace it with a mandatory presumption of abuse that debtors must initially overcome.<sup>41</sup> Under the guise of preventing abuse, BAPCPA imposes a litany of confusing procedures and requirements on consumer debtors and their counsel, contravening the purpose of the 1978 Code, which was to provide debtors with a clean slate and a fresh start. BAPCPA destroys a "safety valve [for society] to deal with financial consequences of misfortunes,"<sup>42</sup> and it undermines "one of the few areas of consumer law that work[ed] reasonably well to meet consumer needs."<sup>43</sup> BAPCPA frustrates the operation of the 1978 Code, because it manifests fundamental changes in the class and power structures of the U.S. economy. The wide-angle lens of anthropological theory reveals these social and economic structural shifts.

The context of American society<sup>44</sup> and culture<sup>45</sup> provides a broadened frame for understanding the economic shift reflected in the

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38. See 11 U.S.C. § 1325 (2010).

39. See 11 U.S.C. § 524(k) (2010).

40. H.R. REP. NO. 95-595, 5966 (1977).

41. H.R. REP. NO. 109-31, 13 (2005).

42. Warren, *supra* note 30, at 492.

43. Braucher, *supra* note 14, at 413.

44. The author uses the terms "society" and "social" to discuss the structures that arrange human interactions such as institutions, organizations, government bodies, communities, and all structures of human organization. See FELIX M. KEESING, CULTURAL ANTHROPOLOGY: THE SCIENCE OF CUSTOM 30 (1960); ("[p]ut most simply, 'culture' puts the focus on the customs of a people; 'society' puts it upon the people who are practicing the customs.").

45. The author employs the terms "culture" and "cultural" to denote notions,

transformation of bankruptcy law and policy from the time of the Bankruptcy Reform Act of 1978 to the BAPCPA of 2005. Applying an anthropological perspective, University of California, Berkeley professor Laura Nader explains that social and cultural beliefs, behaviors, and practices constitute law, legal categories, and processes.<sup>46</sup> Social forces shape the substance of law and most aspects of legal practice. Legal structures and categories, as British legal historian E.P. Thompson explains, not only convey information (semantic meaning), but also express and reflect social divisions and inequalities.<sup>47</sup> In other words, legal structures and categories have pragmatic and contextual meanings. To understand the 2005 amendments to the 1978 Code, therefore, one must situate them within the larger political-economic organizations of American culture and society.

Since the enactment of the Bankruptcy Code of 1978,<sup>48</sup> national and international economic and political<sup>49</sup> structures have shifted, giving rise to the neoliberal<sup>50</sup> “free market” model. These shifts have caused deep changes in the social structures of American and European countries, as well as second and third world countries. Viewed through an anthropological lens, the new bankruptcy law creates legal categories and processes that are informed and constituted through the beliefs, values, behaviors, and practices emergent from these new economic and political structures. BAPCPA’s legal structures and categories are part of a larger structure

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beliefs, values, and other organizing concepts that shape human behavior and practices. *See id.*

46. LAURA NADER, *LAW IN CULTURE AND SOCIETY* 1-10 (1969) (disagreeing with the view that law is separate from social processes, experiences, and meanings and explaining that anthropologists are trained to place all human created institutions within the culture from which they emerge).

47. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 191* (Penguin Books, 1st American ed., 1975) (discussing the social, political and economic processes that define what is considered a “crime” and “offender.”).

48. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 254 (codified as 11 U.S.C. §§ 101-1501).

49. The author believes, as does Milton Friedman, that “there is an intimate connection between economics and politics.” MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 8 (40th Anniversary ed., Univ. of Chi. Press, 1962) [hereinafter FRIEDMAN, *CAPITALISM*].

50. For a further discussion of neoliberalism, see *infra* Section II.

manifesting a particular set of political and economic beliefs about debt and debt relations for the middle class that ultimately replicates and solidifies social divisions and inequalities.

The recent BAPCPA amendments to the Bankruptcy Code of 1978, when considered through a sociological and anthropological lens, are part of this neoliberal turn. Free-market policy and the practice of deregulation facilitated enormous debt loads, resulting in a socio-economic experience of "debtfare"<sup>51</sup> for the average American.<sup>52</sup> Debtfare is interlocking debt obligations that last for years, such as mortgage, credit card, car loan, and other monthly payments. Debtfare is a socially constructed trap. Political scientists Genevieve LeBaron and Adrienne Roberts explain debtfare as structures that "lock people's current and future life choices and possibilities into unequal and unfree capitalist social relations and . . . limit their social and physical mobility within these relations."<sup>53</sup> BAPCPA supports the structures of debtfare by limiting the possibility of a discharge of debts and by regulating the manner, form, and amount of debt repaid. By forcing repayment to lenders both inside and outside the bankruptcy system, BAPCPA mandates a lifestyle of austerity for middle class debtors.<sup>54</sup> Thus, the insidious effect of BAPCPA is the creation of a large group of Americans servicing burdensome debts without any relief.

Part II of this article considers the international implementation of the neoliberal economic model and its homologous structures adopted in the U.S. Most significantly, it discusses the manner in which neoliberal policies and practices established the conditions possible for middle class debtfare. Part III details the manner in which BAPCPA is an extension of those approaches and how BAPCPA

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51. Susanne Soederberg, *The US Debtfare State and the Credit Card Industry: Forging Spaces of Dispossession*, 45 *ANTIPODE* 493 (March 2013).

52. Porter, *supra* note 29, at 4 ("In the mid-1980s, the ratio of debt to personal disposable income for American households was 65 percent. During the next two decades, U.S. household leverage more than doubled, reaching an all time high of 133 percent in 2007. Measured in the aggregate, the ratio of household debt to gross national product reached its highest level since the onset of the Great Depression.").

53. Genevieve LeBaron & Adrienne Roberts, *Toward a Feminist Political Economy of Capitalism and Carcerality*, 36 *SIGNS* 1, 20 (2010).

54. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 99-101 (2007) [hereinafter HARVEY, *NEOLIBERALISM*].

ensures debtfare. Part IV discusses the dominant cultural discourses of moral behavioralism and the model of individualism and personal responsibility as they work to make neoliberalism appear natural, inevitable, and just.

## II. NEOLIBERALISM: A SET OF GLOBAL POLITICAL AND ECONOMIC PRACTICES ADOPTED LOCALLY.

To understand neoliberalism, it is necessary to consider its predecessor, embedded liberalism. After World War II, the U.S. population experienced the realization of the Fordist-Keynesian economic model,<sup>55</sup> “embedded liberalism.”<sup>56</sup> This period marked consistent economic growth for the middle class because this model ensured wage increases for the average worker and income increases for executives and investors, along with an increase in the rate of productivity.<sup>57</sup> Prior to the advent of embedded liberalism, the U.S. economy experienced high rates of economic growth but suffered from volatile swings in the marketplace that negatively impacted the economy.<sup>58</sup> Embedded liberalism reduced the volatility of the market and created economic stability.

In the late 1970s, as profits of large corporations began to stagnate and incomes for investors began to decline, there was a shift in the economic model.<sup>59</sup> In the U.S., the former political-economic

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55. FRIEDMAN, *CAPITALISM*, *supra* note 49, at 22-36. *See also* MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES 1867-1960*, 530-35 (1971).

56. Embedded liberalism is a form of political organization characterized by a class compromise between capital and labor. It includes fiscal and monetary policies used to dampen business cycles and to ensure reasonably full employment. The state intervened in “industrial policy” and moved to set standards for the social wage by constructing a variety of welfare systems, e.g. healthcare and education. *See* HARVEY, *NEOLIBERALISM*, *supra* note 54, at 10-12.

57. *The White House’s Middle Class Task Force*, *supra* note 29, at 3 (documenting the status and position of the middle class including the increased gap between productivity and wages, economic inequality and mobility, shifts in gender roles, and work-life balance).

58. HARVEY, *NEOLIBERALISM*, *supra* note 54, at 11.

59. WACQUANT, *PUNISHING THE POOR*, *supra* note 51, at 49.

organization of embedded liberalism began to break down,<sup>60</sup> and gave way to the rise of a new political-economic form identified as the "neoliberal" or "free market" model.<sup>61</sup> This model emerged with the help of economists<sup>62</sup> and political leaders<sup>63</sup> who supported neoliberal theories advanced by powerful policy and education institutions.<sup>64</sup> With the support of political leaders and prominent economic institutions, neoliberal theorists' ideas and notions became globally dominant.

Neoliberal theory posits that individual freedoms are best guaranteed by unregulated trade practices.<sup>65</sup> The cornerstone of a neoliberal political-economic order is privatization and deregulation.<sup>66</sup> Only free market mandates should mediate aspects of economic, political, and social life. Competition, according to the ground rules of the free market, between and among individuals and institutions is the primary means of social and cultural interactions.<sup>67</sup> Capital accumulation by individual actors is of primary importance and treasured within the neoliberal marketplace.<sup>68</sup> Therefore, the paramount feature of governing rests upon the notion that state apparatuses exist to protect and favor individual private property. In theory, the goal of the emerging neoliberal state is to facilitate the appropriate conditions for competition and capital accumulation.<sup>69</sup>

Attempting to ensure increases in corporate profit and investor income, many governments employed neoliberal economic models,

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60. HARVEY, NEOLIBERALISM, *supra* note 54, at 12.

61. DAVID HARVEY, THE CRISIS OF CAPITALISM 1-10 (2010) [hereinafter HARVEY, CRISIS].

62. Neoliberalism's theoretical origins are traced to a group of economists known as the "Chicago boys." See HARVEY, NEOLIBERALISM, *supra* note 54, at 8 & 20. The group includes: Milton Friedman, Alfred Marshall, William Stanley Jevons, and Leon Walras. See *id.*

63. Including Ronald Reagan, Margaret Thatcher, Deng Xiaoping, Bill Clinton, and Tony Blair. See generally HARVEY, NEOLIBERALISM, *supra* note 54, at 1-38.

64. HARVEY, NEOLIBERALISM, *supra* note 54, at 8.

65. *Id.* at 7.

66. *Id.* at 64-65.

67. *Id.*

68. *Id.*

69. *Id.* at 7.

engaging in projects to reduce corporate costs and increase corporate markets in the 1980s.<sup>70</sup> The United States and many European governments facilitated the export of capital to cultivate new markets around the world and engaged in deregulation and reregulation, in an effort to (re)establish favorable conditions for capital accumulation by a class of economic elites (and to restore the power of that group).<sup>71</sup>

First, in an attempt to cut costs, political leaders supported policies that diminished the power of labor and destroyed collective rights. Collective rights and structures standing in the way of market logic include social protections, worker protections, unions, associations, and cooperatives.<sup>72</sup> Free market mandates require a dereliction of labor law and a deregulation of employment.<sup>73</sup> Second, political leaders supported the expansion of capital and markets into the new economies across the globe. Most notably, New York investment banks lent money to developing Latin American and African countries.<sup>74</sup> This lending ultimately resulted in the debt crisis of the 1980s, and the threat of bankruptcy by Mexico in 1982.<sup>75</sup> The International Monetary Fund (IMF) mandated austerity onto debtor nations to repay the banks.<sup>76</sup> The Mexican Debt Crisis of 1982 was the most pronounced manifestation of the neoliberal economic model.

The “Washington Consensus,” formulated by economist John Williamson to address the Latin American free market creation and debt structures, led to the global spread of the neoliberal turn.<sup>77</sup> It

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70. Loïc J. D. Wacquant, *Three Steps to a Historical Anthropology of Actually Existing Neoliberalism*, 9 SOC. ANTHROPOLOGY 1-14 (2011) [hereinafter Wacquant, *Three Steps*].

71. *Id.*

72. *Id.*

73. Susanne Soederberg, *Cannibalistic Capitalism: The Paradoxes of Neoliberal Pension Securitization*, 226 SOCIALIST REG. 225-26 (2011).

74. DAVID HARVEY, *THE ENIGMA OF CAPITAL AND THE CRISIS OF CAPITALISM* 10-11 (Oxford Univ. Press 2010) [hereinafter HARVEY, *ENIGMA*].

75. *Id.*

76. *Id.*

77. John Williamson, Peterson Inst. For Int’l Econ., *Outline of Speech at the Center for Strategic & Int’l Studies: Did the Washington Consensus Fail?* (Nov, 6, 2002), available at <http://www.iie.com/publications/papers/paper.cfm?researchid=488>; see also Ravi Kanbur, *The Co-Evolution of the Washington Consensus and the Economic Development Discourse* (Cornell Univ. Dept. of Applied Econ. Working Paper No. 09-05, 2009), available at

included reforms such as fiscal discipline, reordering public expenditure priorities, tax reform, competitive exchange rates, and the liberalization of interest rates, trade, inward foreign investment, privatization, deregulation, and private property rights.<sup>78</sup> In practice, neoliberalism resulted in capital accumulation by dispossession.<sup>79</sup>

Wherever one looks across the globe, neoliberal policies in practice have resulted in

sharp increases in inequality within rapidly growing countries over the past twenty years. Whether it is China, India, Bangladesh, Vietnam, Russia, Ghana, South Africa, [or] Mexico . . . rapid growth seems to be accompanied by rising inequality. This has been matched by rising inequality within the [Organization for Economic Co-Operation and Development or "OECD"<sup>80</sup> countries].<sup>81</sup>

Globally, neoliberalism (re)establishes favorable conditions for capital accumulation by a class of economic elites, restoring the power of that group.<sup>82</sup> In other words, it reasserts a rigid class structure.<sup>83</sup> This shift needs to be understood socially as well as economically.

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[http://dyson.cornell.edu/research/researchpdf/wp/2009/Cornell\\_Dyson\\_wp0905.pdf](http://dyson.cornell.edu/research/researchpdf/wp/2009/Cornell_Dyson_wp0905.pdf).

78. Kanbur, *supra* note 77.

79. HARVEY, NEOLIBERALISM, *supra* note 54, at 160-65 (explaining that on a global scale the Neoliberal project is a project of wealth redistribution from the pre-industrialized nations to the industrialized nations. Harvey describes this process as "capital accumulation by dispossession" and it comprises four features: privatization and commodification, financialization, management and manipulation of crisis through the debt trap, and state redistributions. In the United States, the feature most relevant to the middle class is the management and manipulation of crisis through the debt trap. Middle class Americans are finding themselves in deeper and deeper with less assets and security than ever. In the recent mortgage crisis, many were forced to walk away from over secured homes leaving their original investment.).

80. Organization for Economic Co-operation and Development ("OECD") countries include most first world countries. See OECD Members and Partners, <http://www.oecd.org/about/membersandpartners/> (last visited Sept. 9, 2012).

81. Kanbur, *supra* note 77, at 10.

82. Wacquant, *Three Steps*, *supra* note 70, at 1-14.

83. *The White House's Middle Class Task Force*, *supra* note 29 at 5 ("Figure 3 shows the share of total income . . . going to the top one percent of households over a span of more than 90 years. In the most recent year of available data—2007—over 23 percent of income was held by the top 1 percent, the highest level of income



In his work, University of California, Berkeley sociologist Loïc Wacquant expands the understanding of the impacts of the neoliberal economic model in the social world. He argues that we must develop “our conception of [neoliberalism], and move from an economic to a fully sociological understanding of the phenomenon.”<sup>84</sup> He explains that what is “neo” about neoliberalism is the remaking and redeploying of the state as the core agency that actively “fabricates subjectivities, social relations and collective representations suited to make the fiction of markets real and consequential.”<sup>85</sup> In sociological and anthropological terms, the liberalization and privatization of the last three decades have meant something very different for the lower and middle classes in the U.S. (and across the globe) than for the upper class.

The neoliberal state “displays opposite visages at the two ends of the class structure.”<sup>86</sup> On one hand, neoliberal state institutions are liberating and uplifting for the upper classes in that these institutions act to “leverage the resources and expand the life options of holders of economic and cultural capital.”<sup>87</sup> On the other hand, those at the opposite end of the class continuum have experienced liberalization very differently and distinctly.

For the middle and lower classes, the neoliberal turn<sup>88</sup> has meant job insecurity,<sup>89</sup> lack of unemployment benefits,<sup>90</sup> wage stagnation

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concentration since 1928, the year before the market crash that began the Great Depression.”).

84. Loïc J. D. Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25(2) SOC. F. 197, 212 (2010) [hereinafter Wacquant, *Crafting*].

85. Wacquant, *Three Steps*, *supra* note 70, at 1.

86. *Id.* at 9.

87. *Id.*

88. HARVEY, NEOLIBERALISM, *supra* note 54, at 9.

89. In 2011, the unemployment rate in the U.S. hovered around 8.9% or about 13 million Americans out of work. See Bureau of Labor Statistics. U.S. Dep’t of Labor, <http://www.bls.gov/cps/> (last visited Aug. 20, 2012).

90. Unemployment benefits are disappearing: in 1975 the duration of benefits was 15 months, and in 2004 the duration is 6 months. See CTR. FOR RESPONSIBLE LENDING, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA at 18-21, available at <http://www.responsiblelending.org/credit-cards/research-analysis/DEMOS-101205.pdf> [hereinafter *The Plastic Safety Net*] (reporting on findings from surveys of over 41 million people in 15 million households in the

and decline,<sup>91</sup> decrease of social mobility,<sup>92</sup> work week extension,<sup>93</sup> lack of healthcare,<sup>94</sup> pension uncertainty,<sup>95</sup> social security decline,<sup>96</sup> environmental degradation,<sup>97</sup> and privatization of resources.<sup>98</sup> This change has been identified as the "great risk shift."<sup>99</sup> Over the past generation, "[e]conomic risk has been increasingly shifted from the broad shoulders of government and corporations onto the backs of American workers and their families."<sup>100</sup> While large investment banking institutions are dubbed "too big to fail,"<sup>101</sup> middle class Americans are failing at ever increasing rates.<sup>102</sup> Every risk and responsibility in the process of disintegration of the social contract is attributed to them.

The most significant aspect of the neoliberal turn for the middle class is income inequality and wage stagnation, combined with a

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U.S.).

91. Campbell, *supra* note 51, at 65.

92. *Middle of the Class*, ECONOMIST (July 14, 2005) available at <http://www.economist.com/node/4148885/>.

93. Heather Boushey & Joshua Holland, *If This Is Such a Rich Country, Why Are We Getting Squeezed?*, ALTERNET (July 17, 2007), [http://www.alternet.org/story/57180/if\\_this\\_is\\_such\\_a\\_rich\\_country%2C\\_why\\_are\\_we\\_getting\\_squeezed](http://www.alternet.org/story/57180/if_this_is_such_a_rich_country%2C_why_are_we_getting_squeezed) (noting that the typical working family puts in an extra 533 hours of work per year compared to a generation ago to maintain the same standard of living).

94. *The White House's Middle Class Task Force*, *supra* note 29, at 9.

95. In 1980, 40% of workers were covered by pensions. By 2004, the percentage was reduced to 20. See *The Plastic Safety Net*, *supra* note 91, at 18. Worker pensions are further unstable due to privatization and securitization. See Soederberg, *supra* note 74, at 224-41.

96. Jacob S. Hacker, *The Middle Class at Risk*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 220 (Katherine Porter ed., 2012).

97. HARVEY, NEOLIBERALISM, *supra* note 54, at 172.

98. See generally Porter, *supra* note 29, at 1-21.

99. Hacker, *supra* note 96 at 218-34.

100. *Id.*

101. See generally ANDREW ROSS SWORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FAUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS —AND THEMSELVES. (Mti. Upd. Ed., Penguin Books, 2011) (2009) (a popular phrase to describe certain financial institutions which are so large and interconnected that their failure would destroy the entire economic system).

102. See generally BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 218-34 (Katherine Porter ed., 2012).

decrease in total wealth in terms of assets for the majority of the U.S. population. From 1947 to 1979, worker income increased with productivity percentage gains.<sup>103</sup> Since 1979, real wages have increased only 0.4% annually while productivity has grown 2% annually.<sup>104</sup> From 1987 to 1997, corporate profits rose 90% while the median family income rose only 3%.<sup>105</sup> During the past three decades, middle class incomes have not risen when adjusted for inflation.<sup>106</sup> The income distribution for the top 10% of the class structure has steadily increased over the last twenty-five years, with only slight reductions during recessions. Economist Emmanuel Saez writes: "After decades of stability in the post-war period, the top decile [10%] share has increased dramatically over the last twenty-five years and has now regained its pre-war levels. Indeed, the top decile share in 2007 is equal to 49.7[%], a level higher than any other year since 1917 and even surpasses 1928, the peak of stock market bubble in the 'roaring' 1920s."<sup>107</sup>

Middle class Americans have also experienced a decrease in total wealth in terms of assets. For example, equity value in homes from 2005 to 2008 diminished by 43% from 2005 to 2008.<sup>108</sup> During this time, an estimated \$2 trillion in retirement savings were lost in 401(k) and individual retirement accounts.<sup>109</sup> Further, over fifty million working middle class Americans lack health care insurance, resulting in a large percentage of their income being used to pay for health care.<sup>110</sup> Thus, middle class Americans are living in a state of economic and social insecurity and downward mobility.<sup>111</sup>

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103. *The White House's Middle Class Task Force*, *supra* note 29, at 3. See also Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States 1913-1998*, CXVIII(1) Q. J. OF ECON. 1 (2003).

104. *The White House's Middle Class Task Force*, *supra* note 29, at 3. See also Piketty, *supra* note 103.

105. Hacker, *supra* note 96, at 201.

106. See Piketty, *supra* note 104, at 37-38.

107. Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* 3(2009), available at <http://escholarship.org/uc/item/8dp1f91x>; see also, Piketty, *supra* note 104, at 2.

108. Hacker, *supra* note 97, at 222.

109. *Id.*

110. *Id.* at 221.

111. See generally HUGH GUSTERSON & CATHERINE BESTEMAN, THE

The financial sector preyed on the vulnerable middle class because it knew wage stagnation and loss of wealth would mean consumers would lose purchasing power. If consumers could no longer purchase manufactured goods, then corporate income and profits would fall, lowering the financial return to the upper classes. In response, revolving consumer credit became increasingly available<sup>112</sup> and consumer borrowing kept profits high for lending institutions.<sup>113</sup> This opportunistic hocking of debt at teaser rates to the middle class created favorable conditions for debtfare to rise as a way of life for a majority of Americans.

For lower classes in the U.S., this insecurity, social disorganization, and economic destruction has manifested in a carceral state, which increases disciplinary practices and creates "prisonfare."<sup>114</sup> Increases in police forces, courts, and prisons are the "institutional machinery" and the "symbolic frames" through which neoliberal tenets are being socially imprinted on the lower class populations.<sup>115</sup> For the middle classes, easy credit and borrowing were the solution for economic insecurity and downward mobility. Debt structures arose as a fundamental mechanism of neoliberal

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INSECURE AMERICAN: HOW WE GOT HERE & WHAT WE SHOULD DO ABOUT IT (Univ. of Cal. Press 2010).

112. See David Harvey, Professor at the Graduate Center of the City University of New York, Lecture on the Crisis of Capitalism, <http://davidharvey.org/2010/06/rsa-crises-of-capitalism-talk-animated/> (last visited Sept. 9, 2012).

113. This is the process by which banks endogenously expand money supply in response to demand for funds. Schumpeter describes endogenous money this way: "[T]here is another method of obtaining money for this purpose. . . . This method of obtaining money is the creation of purchasing power by banks . . . . It is always a question, not of transforming purchasing power which already exists in someone's possession, but of the creation of a new purchasing power out of nothing...." J.A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST AND THE BUSINESS CYCLE 73 (5th ed., Redvers Opie trans., Harvard Univ. Press 1955).

114. WACQUANT, PUNISHING THE POOR, *supra* note 51, at 304. (developing the phrase "prisonfare" to describe a shift in U.S. governing philosophy and practice from welfare to workfare and prisonfare for the lower, destabilized classes. He writes: "the rolling back of the social safety net and the rolling out of the police-and-prison dragnet and their knitting together into a carceral-assistential lattice" is an exercise in state crafting).

115. Wacquant, *Crafting*, *supra* note 84, at 213.

policies.<sup>116</sup> Interconnected debt enforcement structures work to confine middle class individuals into servicing debt relations as a primary form of existence.<sup>117</sup> State and federal policy, laws, and courts work from without and within the bankruptcy system as institutional machinery that imprints neoliberal tenets onto the middle class. Legally mandated debt structures, similar to police and prisons, lock participants into particular life choices and limit future possibilities by requiring their situated participation in unequal and unfree capitalist debt relations. Compared to the upper classes, the lower classes experience the opposite visage of neoliberalism: a paternalistic contraction of life chances antithetical to the upper-class liberalization.

*A. America's Middle Income Families and the Market Conditions  
Creating the Possibility of "Debtfare"*

The average American family currently lives in a state of debtfare: mortgage debt,<sup>118</sup> revolving credit card debt,<sup>119</sup> home equity debt,<sup>120</sup> and educational debt.<sup>121</sup> Debtfare is not simply one debt form, such as a mortgage or a credit card. It is the interlocking of several debt forms that limit and imprison the typical consumer into servicing debt

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116. Campbell, *supra* note 51, at 65-69.

117. HARVEY, NEOLIBERALISM, *supra* note 54, at 160-65.

118. FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES, FEDERAL RESERVE, <http://www.federalreserve.gov/releases/z1/20120308/z1r-2.pdf> (last visited Aug. 28, 2012) (demonstrating that in 2010, the average consumer mortgage debt reached over \$10 billion).

119. *The Plastic Safety Net*, *supra* note 90, at 7-10 (describing how in 2005, the average credit card debt for low and middle-income indebted households in America was \$8,650. The majority of households had been in debt for longer than a year with the average length being 43 months, or just over three and half years.).

120. *Id.* at 14-17 ("Homeowners increasingly look to their home equity as a source of funds to help deal with rising household debt. . . . [Of] over 30 million U.S. households, 40 percent of the homeowners in our survey refinanced or got a second mortgage during the past three years. Over half of these households used proceeds from a mortgage refinance . . . to pay down credit card debt.").

121. THE NAT'L ASS'N OF CONSUMER BANKR. ATTORNEYS, THE STUDENT LOAN "DEBT BOMB": AMERICA'S NEXT MORTGAGE-STYLE ECONOMIC CRISIS? (2012), available at <http://nacba.org/Portals/0/Documents/Student%20Loan%20Debt/020712%20NACBA%20student%20loan%20debt%20report.pdf> [hereinafter *The Student Loan Debt Bomb*].

relations as a primary form of social and economic participation. It is a combined debt load that crushes and bankrupts middle class individuals. In the last thirty years, with the liberalization of the financial markets, the necessary conditions were created to facilitate this consumer debt load. These conditions include deregulation of markets, Wall Street's securitization inventions, the Federal Reserve's historically low interest rates, lenders' internal practices, and middle class wage stagnation.

In the last three decades, the U.S. government, working with the financial sector, loosened major laws protecting the collective integrity of the banking and credit institutions.<sup>122</sup> These rollbacks included weakening lending regulations<sup>123</sup> and eliminating the oversight of financial authorities, facilitating the creation of mortgage-backed securities and eliminating consumer protections in credit card lending.<sup>124</sup> This deregulation gave holders of capital and capital

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122. See generally BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS* (2010); see also GRETCHEN MORGENSEN & JOSHUA ROSNER, *RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON* (2011); see also GILLIAN TETT, *FOOLS GOLD: THE INSIDE STORY OF J.P. MORGAN AND HOW WALL ST. GREED CORRUPTED ITS BOLD DREAM AND CREATED A FINANCIAL CATASTROPHE* (2009).

123. TETT, *supra* note 122, at 73 (describing how on November 12, 1999, President Bill Clinton signed the Financial Services Modernization Act of 1999 effectively killing the Glass-Steagall Act of 1933. The Glass-Steagall act created a firm demarcation for banks between trading of debt and equity securities and commercial banking. The 1933 law set up a regulatory structure that protected consumers and individual investors. This put into place the notion of combining commercial and investment banking to construct "one-stop shopping" banking empires. The 1999 legislation is considered the work of Sanford I. Weill, the chief executive of Travelers Group, which he wanted to merge with Citibank to create Citigroup. The Glass-Steagall Act stood in the way.). See also MORGENSEN & ROSNER, *supra* note 122, at 106-77; MCLEAN & NOCERA, *supra* note 122, at 109.

124. In *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*, the Supreme Court interpreted the National Bank Act to permit the banking industry to charge interest rates allowed by the state in which the bank is located. *Marquette Nat'l Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299 (1978). Such rates could be exported to consumers in other states even if the rate was above the consumer's home state's usury limits. The holding in this case began the deregulation of state usury laws. See James J. White, *The Usury Trompe L'Oeil*, 51 S. C. L. REV. 445 (2002); See also Steven Mercatante, *The Deregulation of Usury*

markets greater freedom, power, and mobility.<sup>125</sup> Lending activities increasingly took place outside the oversight of financial authorities, thereby leaving checks on such activities to market “pricing and counterparty surveillance” as the basis for sustaining safety and soundness.<sup>126</sup> Non-regulated entities began to dominate the financial world to such a degree that by 2006, “only about a quarter of all lending occurred in regulated sectors, down from about 80[%] twenty years before.”<sup>127</sup>

In this deregulation climate, investment institutions were able to create new forms of investment products by packaging loans as asset backed securities (“ABS”) (e.g., Collateralized Mortgage Obligations (“CMO”))<sup>128</sup> and Collateralized Loan Obligations (“CLO”).<sup>129</sup> Such

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*Ceilings, Rise of Easy Credit, and Increasing Consumer Debt*, 53 S.D. L. REV. 37 (2008) (explaining that usury laws varied by state and limited the interest rates lenders could charge. In effect, they cost banks profits. Therefore, lending costs were incredibly high until the *Marquette* holding establishing the “lex loci” rule later extended to include late fees as a kind of interest. See *Simley v. Citibank*, 517 U.S. 735 (1996)). In 1980, the Depository Institutions Deregulation and Monetary Control Act of 1980 was enacted by Congress, further removing the power from the states.

125. WACQUANT, PUNISHING THE POOR, *supra* note 51, at 305 (arguing that the economy and financial sector are experiencing the most liberalization: “[C]ontrol is now being re-emphasized in every area of social life—with the singular and startling exception of the economy, from whose deregulated domain most of today’s major risks routinely emerge.”).

126. CHARLES R. MORRIS, THE TRILLION DOLLAR MELTDOWN: EASY MONEY, HIGH ROLLERS, AND THE GREAT CREDIT CRASH 54 (2008) (citing the economic philosophy of Former Treasury Chairman, Alan Greenspan). See also TETT, *supra* note 122, at 75. (“Fed Chairman Alan Greenspan had long been a champion of free-market principles, and by 1999 he was a leading voice against regulation . . . [Greenspan declared:] ‘By far the most significant event in finance in the past decade has been the extraordinary development and expansion of financial derivatives . . .’”).

127. MORRIS, *supra* note 126, at 54.

128. *Id.* at 40 (“The CMO . . . had a profound impact on the mortgage industry. Traditionally mortgage lenders were one-stop shops—they interviewed applicants, approved the credits, held the mortgages, collected monthly payments, and managed default workouts and foreclosures. Within a few years of the advent of the CMO, the industry decomposed into highly focused subsectors. Mortgage bankers solicited and screened applicants. Thinly capitalized mortgage banks bid for the loans and held them until they had enough to support a CMO. Investment banks designed and marketed the CMO bonds. Servicing specialists managed collections and defaults.”). See generally TETT, *supra* note 122.

financial products generated enormous profits for investors out of payment streams on loans.<sup>130</sup> They also allowed substantial gain at no cost to banks. Attempting to generate fees in the lending and securitization process, banks heavily advertised to consumers and engaged in reckless and deceptive lending practices.

In the consumer mortgage market, the debtfare process for the middle class is particularly apparent. The liberalization of the financial world incentivized banks to entice middle class Americans to take on more secured debt in the form of mortgages and equity loans. To facilitate the transfer of the risk to other investors in the ABS process, mortgage lenders sought to quicken the mortgage lending process to collect fees and sell the resulting loan payment stream. Unregulated lenders relaxed their lending standards to facilitate the securitization process by engaging in egregious underwriting practices: "teaser rates,"<sup>131</sup> "stated income" loans, "no doc" loans, and "liar" loans.<sup>132</sup> Lenders offered consumers risky adjustable rate mortgages and interest-only loans.<sup>133</sup> These practices increased the home ownership rate from 64% in 1994 to 69.9% in 2004.<sup>134</sup> Of these

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129. MORRIS, *supra* note 126, at 60. ("The bankers . . . had seen how residential mortgage bankers could run booming lending businesses with only wisps of capital. The secret was securitization—packing up loans in the form of collateralized mortgage obligations (CMOs) and selling them off to pension funds . . . banks embraced securitization. Instead of holding their commercial loans, corporate loans, high-yield takeover loans, emerging market loans, . . . on their books, the way bankers always had done, they began to package them up as collateralized loan obligations").

130. *Id.*

131. A teaser rate is a very low but temporary introductory rate that increases significantly after the initial period. See Katalina M. Bianco, *The Subprime Lending Crisis: Causes and Effects of the Mortgage Meltdown*, in CCH MORTGAGE COMPLIANCE GUIDE AND BANK DIGEST 7 (2008), available at [http://business.cch.com/bankingfinance/focus/news/subprime\\_wp\\_rev.pdf](http://business.cch.com/bankingfinance/focus/news/subprime_wp_rev.pdf).

132. "Stated income," "no doc" or "liar" loans are those where the borrower does not provide documentation to substantiate the income stated on the application to finance a home purchase. See *id.*

133. *Id.* See also Jerry Anthony, *Home Burdens: The High Costs of Homeownership*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 78 (Katherine Porter ed., 2012).

134. See generally Bianco, *supra* note 131. See also Anthony, *supra* note 134.



loans, the subprime mortgage<sup>135</sup> rate increased from 9% in 1996 to 20% in 2006.<sup>136</sup>

Consumers were further encouraged to take out home equity loans or second mortgages to supplement their incomes. Bankers considered home equity an asset reserve and encouraged consumers to tap into it.<sup>137</sup> From 2001 to 2006, through its “Live Richly” campaign, Citibank told consumers, “There’s got to be at least \$25,000 hidden in your house. We can help you find it.”<sup>138</sup> Fleet, now part of Bank of America, asked consumers, “Is your mortgage squeezing your wallet? Squeeze back.”<sup>139</sup> Wells Fargo told consumers to “Seize your someday.”<sup>140</sup> These campaigns urged consumers to take on second mortgages to pay off credit cards,<sup>141</sup> remodel or renovate their homes, purchase high-ticket items, or take a vacation. These campaigns worked. The amount of outstanding home equity loans grew from \$1 billion in 1982 to \$188 billion in 1988, and the outstanding debt reached \$1 trillion in 2007.<sup>142</sup> In 1978, home

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135. Mara Lee, *Subprime Mortgages: A Primer*, NPR (Mar. 23, 2007), <http://www.npr.org/templates/story/story.php?storyId=9085408> (explaining that subprime mortgages are “given to borrowers with credit scores of 620 or below. . . . Because subprime borrowers are seen as ‘higher risk,’ their loans carry interest rates that are at least 2 percentage points higher than those offered to borrowers with better credit.”).

136. Bianco, *supra* note 131, at 6.

137. Paul Allen & Bill Pearson, *And Next for Retail Credit . . . Boom or Bust for Bankers?*, 9 J. RETAIL BANKING SERVICES 5-15 (Winter 1987/1988). (“The relatively stable amount of unencumbered financial assets and tremendous reserves of household equity that exists . . . [estimated at over \$1.5 trillion in 1986] . . . should help sustain retail credit demand in the more attractive segments of the market.”).

138. Louise Story, *Home Equity Frenzy Was a Bank Ad Come True*, N.Y. TIMES, Aug. 15, 2008, available at <http://www.nytimes.com/2008/08/15/business/5sell.html?pagewanted=all>.

139. *Id.*

140. *Id.*

141. BRETT WILLIAMS, DEBT FOR SALE: A SOCIAL HISTORY OF THE CREDIT TRAP 18-25 (2004). See also *The Plastic Safety Net*, *supra* note 91, at 14 (explaining that in 2005, the mortgage lending industry promoted consolidation and refinancing of unsecured credit card debt using a home equity line making the debt secured against the consumer’s home).

142. Anthony, *supra* note 133, at 78; Story, *supra* note 139.

equity loans totaled only \$20 million.<sup>143</sup> Once considered a loan of last resort, lenders convinced consumer borrowers that second mortgages were a good idea.<sup>144</sup>

Instead of protecting consumers from these predatory lending practices, former Federal Reserve Bank Chairman Alan Greenspan supported "equity extraction" as a way to pay-down high interest rate credit cards.<sup>145</sup> In 2004, Greenspan encouraged banks at America's Community Bankers Annual Convention to continue to assist consumers with "extract[ing] some of that built-up equity in their homes," because "the surge in cash-out mortgage refinancing likely improved rather than worsened the financial condition of the average homeowner."<sup>146</sup> This equity extraction served to convert unsecured debt to secured debt, increasing the debt servitude of America's middle class.

Another type of middle class debtfare is revolving unsecured credit. Deregulation and asset-backed securities also spurred lenders to reach out to consumers through credit card payment streams, encouraging greater debt loads among the middle class. During the mid to late 1980s, the banking industry was told to gear up for "retail credit securitization."<sup>147</sup> The first credit card asset backed securities were issued in 1987.<sup>148</sup> As part of securitization, the *Journal of Retail Banking* advised its readers to tap into the debt capacity of middle income consumers, arguing, "Fortunately for retail banks, there is still significant debt capacity in the consumer market, even though some segments are already over stretched."<sup>149</sup> During this time, the banking industry aggressively marketed revolving unsecured credit to a broad

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143. Allen & Pearson, *supra* note 137.

144. Anthony, *supra* note 133, at 78.

145. Alan Greenspan, Chairman, Fed. Reserve, Remarks at Am.'s Cmty. Bankers Annual Convention: The Mortgage Market and Consumer Debt. (Oct. 19, 2004), *available at* [www.federalreserve.gov/boarddoc/speeches/2004/20041019/default.htm](http://www.federalreserve.gov/boarddoc/speeches/2004/20041019/default.htm).

146. *Id.*

147. Allen & Pearson, *supra* note 137, at 7.

148. MARK FURLETTI, AN OVERVIEW OF CREDIT CARD ASSET-BACKED SECURITIES I, Federal Reserve Bank of Philadelphia (2002), *available at* [www.philadelphiafed.org/consumer-credit-and-payments/payment-cards.center/events/workshops/2002/CreditCardSecuritization\\_012002.pdf](http://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards.center/events/workshops/2002/CreditCardSecuritization_012002.pdf).

149. Allen & Pearson, *supra* note 137, at 7.

cross-section of consumers using misleading language and offering debt as supplemental income.<sup>150</sup> In 2008, the credit card asset backed security market was a \$915 billion investors market.<sup>151</sup> Credit card asset-backed securities have become the primary vehicle by which the credit card industry funds unsecured loans to consumers.<sup>152</sup>

For middle-class American consumers, credit cards are not wealth generating. Credit cards are used to supplement income and provide a “safety net” for consumers faced with unexpected car and home repairs, illness and medical expenses, job loss, and basic living expenses.<sup>153</sup> Downward mobility for the majority of Americans was in full swing during the 1980s and 1990s when real wages began to stagnate while the costs of living increased. Just when they needed it most, the banking industry offered families in need opportunities to take on more unsecured debt through the tools described above.<sup>154</sup> Attempting to maintain basic standards of living,<sup>155</sup> many Americans latched onto easy credit.<sup>156</sup> Outstanding consumer debt totals for 2009

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150. WILLIAMS, *supra* note 141, at 55-57 (explaining that the banking industry, when discussing target marketing consumers for credit cards, used metaphors of war and water such as beachhead, penetrate, saturation, float, debt capacity, and target.); *see also*, Mercatante, *supra* note 124.

151. Morris, *supra* note 126, at 121.

152. FURLETTI, *supra* note 148, at 1.

153. *The Plastic Safety Net*, *supra* note 90, at 7-15.

154. WILLIAMS, *supra* note 141, at 9; (“In 1991, [bankers] observed that maxed-out citizens were finding it difficult to buy groceries and pay taxes, noted the increasing costs of health insurance, and scurried to capture that market. For example, *Credit Card Management* . . . noted that ‘rising health care costs may be the catalyst needed to make credit card acceptance among health care providers commonplace.’ In 1991, Visa and Mastercard pushed hard on supermarkets, knowing that they were concerned about the recession. They urged these stores to accept credit cards to drive up sales . . .”).

155. Basic standard of living means a wage hovering around \$50,000 a year. *Historical Income Tables: Households*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/hhes/www/income/data/historical/household/> (last visited Aug. 28, 2012).

156. *The Plastic Safety Net*, *supra* note 90, at 4.

were \$886 billion, up from \$680 billion in 2000.<sup>157</sup> In 2012, the projected consumer credit card debt is approximately \$870 billion.<sup>158</sup>

Finally, educational loans are another type of debtfare the middle class experiences. In the late 1980s, the *Journal of Retail Banking Services* ("Journal") discussed various ways subscriber banks could entice consumers to take on revolving credit loans, creating reliable investment securities. The *Journal* proposed "cross-selling new educational and health care credit products to underleveraged consumers."<sup>159</sup> Consumers over the last three decades were encouraged to take on unsecured loans to pay for education. Last year, collective outstanding student loan debt reached \$1 trillion; the average college graduate owes \$25,250 at graduation.<sup>160</sup>

### B. Debt Trap and BAPCPA

The interconnected debt obligations of debtfare create a debt trap. For the majority of Americans, servicing some form of debt is the norm and debtfare is a way of life. As sociologists Hugh Gusterson and Catherine Besteman explain:

[Debt is] an essential feature of neoliberal society. It greases the wheels of consumerism by enabling Americans to stretch to the edge of their means; it is also an apparatus for transferring wealth . . . from those who need money to those who already have more; and by squeezing more work out of the indebted it enforces social discipline."<sup>161</sup>

Thus, the debt trap results in financial distress and failure, causing consumers to turn to the bankruptcy system for relief. Increased consumer debt increases consumer bankruptcy filings.<sup>162</sup> The more consumers owe in various forms of debt obligations, the more

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157. U.S. CENSUS BUREAU, THE 2012 STAT. ABSTRACT: THE NAT'L DATA BOOK, 740 (2012), available at <http://www.census.gov/prod/2011pubs/12statab/banking.pdf>.

158. *Id.*

159. Allen & Pearson, *supra* note 137, at 9.

160. *The Student Loan Debt Bomb*, *supra* note 121, at 1.

161. GUSTERSON & BESTEMEN, *supra* note 111, at 7.

162. RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS AROUND THE WORLD 4 (2006).

consumer bankruptcies are filed.<sup>163</sup> Unmanageable debt loads are the only reason for consumer filings; consumers enter into bankruptcy to deal with burdensome debt. Under the 1978 Bankruptcy Code, the debtor was presumed a good faith actor and received a fresh start through bankruptcy. However, BAPCPA presumes that the debtor is a bad actor until her or she proves otherwise. Once filed, BAPCPA forces the debtor to pay creditors a portion of the debtor's income and live on a "bread and water" diet for years. Similar to the IMF's approach to debtor nations, under BAPCPA, debtors experience legally mandated austerity to squeeze every dollar from the financially distressed debtor.<sup>164</sup>

### III. BARRIERS, TRAP DOORS, AND PAYMENT PLANS: BANKRUPTCY REFORM REINFORCES "DEBTFARE"

BAPCPA is one of the disciplining practices of the neoliberal state. Similar to Wacquant's discussion of the expansion of the penal apparatuses in the form of more police and prisons invading and regulating the lower classes, BAPCPA expands the power of the federal bankruptcy system to regulate the lives of middle class Americans. The provisions of the 2005 Act operate as deterrents, barriers, and disciplinary tools that ultimately make it difficult for the debtor to emerge from the bankruptcy system with its intended benefit of a fresh start. As a result, consumers delay the time of filing or forgo filing the bankruptcy petition entirely. The debtor is therefore denied even the minimal protections still remaining from the 1978 Code.

BAPCPA's impact on the middle class is effectuated in many areas. First, the Act seeks to re-moralize consumer debt relations as well as reignite and re-enforce the social stigma of debtors, denying them access to a fresh start. Second, the Act creates increased fiscal and procedural barriers to entry for the consumer in financial distress. Third, once in the bankruptcy system, trap doors and pitfalls work to ambush the unwary or the unrepresented, resulting in needy debtors falling out of the bankruptcy system and losing the protection of the

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163. Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 363 (2007).

164. See Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 578-80 (2009).

automatic stay. Fourth, after the debtor survives the initial filing requirements, the debtor's income and expenses are scrutinized to determine the disposable income and the kind of relief, if any, available to the debtor. Finally, BAPCPA reduces the "fresh start" benefits of bankruptcy by requiring repayment plans and reaffirmation agreements, making more debts non-dischargeable, limiting dischargeability of debts, and limiting dollar amounts of exempt property. BAPCPA's mandated austerity reduces the overall benefits gained from the bankruptcy process. As a result, debtors do not get a fresh start.

*A. Stigma: Re-Imposing a Cultural "KEEP OUT" Sign*

"Stigma is decreasing for bankruptcy filers. Debtors do not feel ashamed."<sup>165</sup>

BAPCPA was enacted in response to the increased volume of consumer bankruptcy petitions filed since the enactment of the 1978 Code. Relying on the notion that bankruptcy is a moral act, Congress indicated that the purpose of the new law was to instill a sense of responsibility and integrity in the consumer debtor. In the House Report, Congress adopted the view that the social stigma associated with filing a bankruptcy petition has waned, and that, as Greenspan said, "personal bankruptcies are soaring because Americans have lost their sense of shame."<sup>166</sup> Congress, therefore, desired to "re-stigmatize" the consumer bankruptcy debtor with the enactment of BAPCPA. The Act manifests this intention by eliminating the 1978 Bankruptcy Code's presumption that a debtor is filing a petition in good faith, which favors granting debt relief.<sup>167</sup> In effect, BAPCPA imposes instead a bad faith hurdle, hindering debtors from obtaining debt relief.<sup>168</sup>

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165. Interview with Alan LRV (Fall 2002) (notes on file with author). See also Edith H. Jones & Todd J. Zywicki, *It is Time for Means-Testing*, 1999 B.Y.U.L. REV. 177 (1999) (arguing there is a severe reduction of social stigma associated with filing for bankruptcy relief).

166. *Consumer Bankruptcy Rate Up in Three States*, USA TODAY, (July 20, 2007, 4:02 AM), [http://www.usatoday.com/money/economy/2007-07-20-487927626\\_x.htm](http://www.usatoday.com/money/economy/2007-07-20-487927626_x.htm).

167. 11 U.S.C. § 707(b) (2010).

168. *Id.*

Little empirical evidence supports the notion that the stigma associated with bankruptcy had actually and substantially declined. In fact, evidence suggests the opposite. The Consumer Bankruptcy Project data that have tracked consumer bankruptcy debtors for over twenty years supports “an alternative view that the stigma of bankruptcy has actually increased over the twenty-year period we have studied, and that bankruptcy filings may have risen despite increased shame about declaring bankruptcy.”<sup>169</sup> Further, economists studying the impact of stigma on bankruptcy filings report that there is not a positive correlation between heightened stigma and lowered rates of bankruptcy filings.<sup>170</sup> Rather, burdensome debt loads result in increased bankruptcy filings.<sup>171</sup>

In BAPCPA, Congress established a moral overlay upon legal processes, complicating and masking the systemic economic structure that is the foundation of each debtor’s experience in bankruptcy. The desire to impose stigma or shame upon debtors brings morality onto rational legal structures. Legal debts, unlike moral debts, can be forgiven.<sup>172</sup> By enforcing the belief that debt and bankruptcy are sins,<sup>173</sup> that bankruptcy is shameful, and that the debtor will be socially stigmatized by the community and family members, BAPCPA delays and prevents individuals in financial distress from filing a bankruptcy petition. Thus, BAPCPA’s effect is contrary to “[t]he purpose of bankruptcy, [which] is to protect those in financial, not moral, difficulty.”<sup>174</sup>

Numerous individuals in dire need of bankruptcy protection and relief postpone filing a bankruptcy petition because of the social

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169. SULLIVAN ET AL., *supra* note 15, at 218.

170. Kartik Athreya, *Shame as it Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK OF RICHMOND ECON. Q. 2, 3 (2004), available at [http://www.rich.frb.org/publications/research/economic\\_quarterly/2004/spring/pdf/athreya.pdf](http://www.rich.frb.org/publications/research/economic_quarterly/2004/spring/pdf/athreya.pdf).

171. *Id.*

172. Graeber, *supra* note 1, at 120. (“Legal—rather than moral—debts have other unique qualities. For instance, they can be forgiven, which isn’t always possible with moral debt.”).

173. MARGARET ATWOOD, *PAYBACK: DEBT AND THE SHADOW SIDE OF WEALTH* 41 (2008) (discussing the historical connection between debt and sin).

174. *Barnette v. Evans*, 673 F.2d 1250, 1251 (1982).

stigma associated with debtor status.<sup>175</sup> However, waiting to file a bankruptcy petition often yields the worst possible result for both debtors and creditors. During the non-filing period, debtors are likely to take on more debts in an effort to survive. Also, debtors, in an effort to manage what is ultimately unmanageable, convert unsecured credit card debt into secured debt (by acquiring home equity loans) that will ultimately require full repayment. Unless a debtor's income increases, he or she is unable to manage the debt load alone and ultimately will need to file for bankruptcy. Acquiring secured debt during this delay period makes it more likely than not that a debtor will be forced into a chapter 13 repayment plan, as opposed to a chapter 7 full discharge proceeding.

Members of Congress, legal scholars, and some bankruptcy legal field actors who hold the conviction that social stigma should attach to the bankruptcy debtor status propagate this moral overlay. These actors believe that reducing or eliminating stigma for bankruptcy debtors would eliminate the much needed moral overlay.<sup>176</sup> Debt would be perceived simply as a contractual legal relationship rather than a moral obligation which is not undone by a bankruptcy filing. Although members of Congress and others assert that stigma should not be eliminated from bankruptcy, they are mistaken about the true benefits of advancing a shaming procedure to manage debtfare and the middle class.

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175. Interview with a bankruptcy debtor, in Berkeley, Cal. (June 2011). Linda Coco, *Beyond Failure and Forgiveness: The Debtor's Place in American Fiscal Identity, Bankruptcy and Capitalism* (2011) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author) ("One informant, Mary, describes the impact of the cultural discourse of stigma in the following manner:

I experienced such a burden from the social stigma from external and internal sources that I put off actually acting in my best interest. My finances as a result of the fear generated about the stigma were so much worse; my life so much more difficult because of the delay in filing the bankruptcy petition. Once I went through the bankruptcy process, the stigma and the pressure disappeared. The social pressure from the stigma operates before the actual filing of the bankruptcy petition. The fears of bankruptcy are unfounded about what financial failure all mean socially, economically and every other way. Before the bankruptcy petition filing, I felt almost suicidal. This feeling was completely unfounded and unnecessary. Self-hatred and turmoil ruled my life. Before I filed, I tried to pay the credit card debts. This did not help me. That was irrational and it made everything worse. I actually paid the [original] credit card debt in total repeatedly.").

176. H.R. REP. NO. 109-31, at 1-4 (2005).



*B.. Barriers to Entry: Fees and Counseling*

Increased costs and changes to the initial filing process place greater burdens on the individual debtors than under the 1978 Bankruptcy Code.<sup>177</sup> Under the new law, a chapter 7 bankruptcy petition filing fee increased from \$195 to \$245<sup>178</sup> and a chapter 13 fee increased from \$155 to \$235.<sup>179</sup> In addition, individual debtors will likely have to pay sizeable attorney's fees for representation in the bankruptcy process.<sup>180</sup> Attorney's fees have increased due to the increased workload and new responsibilities<sup>181</sup> placed on bankruptcy attorneys as a result of the passage of BAPCPA.<sup>182</sup> The increased

177. The Consumer Bankruptcy Fee Study, *supra* note 25.

178. 28 U.S.C. § 1930 (a)(1)(A) (2008). Section 325 of the 2005 Act designated this dollar amount as \$220. Subsequently, the amount was increased to \$245 by the Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 10101 (2006), effective Apr. 9, 2006.

179. 28 U.S.C. § 1930 (a)(1)(B) (2008). Section 352 of the 2005 Act initially decreased the filing fee from \$155 to \$150. The amount was increased to \$235 by the Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 10101 (2006), effective Apr. 9, 2006.

180. The Consumer Bankruptcy Fee Study, *supra* note 25, at 6.

181. 11 U.S.C. § 707 (b)(4)(B), (C), & (D) (2010). Under revised § 707(b), sanctions are imposed against debtor's attorney if the case is dismissed as an abuse under § 707(b) and the court finds that the attorney violated rule 9011 of the Federal Rules of Bankruptcy Procedure (the bankruptcy equivalent to Civil Rule 11: a rule that authorizes a court to impose sanctions against an attorney who commences a frivolous action). Another component of the new sanctions legislation provides that the signature of a debtor's attorney on the bankruptcy petition is a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition " and determined that "the petition . . . is well grounded in fact; and is warranted by existing law or a good faith argument for the extension . . . and does not constitute an abuse." See § 11 U.S.C. § 707(b)(4)(C)(ii)(I) & (II) (2010). And under the new BAPCPA provisions, debt relief agencies are given further restrictions and mandates. See 11 U.S.C. §§ 526-528 (2010). The Supreme Court recently held that bankruptcy attorneys are "debt relief agencies" covered by these new provisions. *Milavetz, Gallop & Milavetz, P.A. v. U.S.* 130 S. Ct. 1324 (2010).

182. See James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 874-76 (2006) (describing how after conducting qualitative research with several consumer debtor attorneys, Professor White discovered that the costs of legal representation for individual consumers in the bankruptcy process increased since the enactment of BAPCPA. The fee hike is related to the need to collect and verify debtor information necessitating multiple meetings with clients prior to filing the petition.).

workload and responsibilities also mean individuals are less likely to be able to navigate the bankruptcy system alone, thereby increasing the number of debtors who must hire an attorney.

The Consumer Bankruptcy Fee Study reports that attorney fees for both chapter 7 and chapter 13 cases have significantly increased as a result of BAPCPA. Researchers found a 24% increase in the national mean attorney fee in chapter 13 cases from \$2061 for pre-BAPCPA cases to \$2564 in post-BAPCPA cases.<sup>183</sup> Similarly, in chapter 7 cases, there has been an increase in the national mean attorney fee of 30% from \$821 to \$1072 (in cases with assets) or 48% from \$654 to \$968 (in cases with no assets).<sup>184</sup> Researchers concluded that consumer debtors are paying significantly more in fees to receive the intended relief; in many instances, this increase in fees prevents the neediest individuals from accessing the bankruptcy court.<sup>185</sup>

Another barrier to entry includes new eligibility requirements. Under BAPCPA, individual consumer debtors are obligated to attend a briefing in credit counseling prior to becoming eligible for bankruptcy filing.<sup>186</sup> This means that before filing a bankruptcy petition, an individual in financial distress must engage in a cumbersome process involving: (1) contacting an approved agency; (2) paying that agency \$50; (3) listening to a credit briefing; and (4) obtaining a certificate of credit counseling.<sup>187</sup> Although the debtor may attempt to file for bankruptcy without the certificate, the court may only grant the debtor a waiver in "exigent circumstances" or in the case of an inability to obtain counseling within five days of filing.<sup>188</sup> However, these waivers are not liberally granted since a

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183. The Consumer Bankruptcy Fee Study, *supra* note 25, at 6-7.

184. *Id.*

185. *Id.* at 111-13.

186. 11 U.S.C. § 109(h)(1) (2010) ("An individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing the petition by such individual, received from an approved nonprofit and credit counseling agency described in section 111(a) an individual or group briefing . . . that outlined the opportunities for available credit counseling").

187. *First Shore Fed. Savings & Loan Ass'n v. Garrison C. Hudson* (In re Hudson), 352 B.R. 391 (2006); (considering the meaning of the new BAPCPA provision requiring debtors to obtain a credit briefing in the 180-day period preceding the date of filing of the petition).

188. 11 U.S.C. § 109(h)(3)(B)(4) (2010).

bankruptcy judge must find the explanation for failing to obtain a credit briefing credible and satisfactory. A credible and satisfactory explanation must be something beyond the normal circumstances of financial distress.<sup>189</sup> In the likely event the court denies the waiver, the debtor's petition is automatically dismissed.

Another section of BAPCPA<sup>190</sup> imposes several new initial filing requirements for the consumer debtor: "payment advices" for the 60 days prior to filing from all employers of the debtor;<sup>191</sup> a statement of net monthly income;<sup>192</sup> and a statement disclosing any reasonably anticipated increase in income or expenditures over the twelve-month period following the date of filing.<sup>193</sup> Debtors are also required to file a copy of income tax returns for the previous year,<sup>194</sup> or, if the court so orders, a copy of the previous *three* years' returns.<sup>195</sup> Debtors' failure to file any of these documents results in immediate dismissal of their cases.<sup>196</sup>

Such immediate dismissals create additional problems for debtors, particularly because of stay limitations of the new amendments for multiple petitions filed within one year. These problems are discussed in more detail below.

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189. *Dixon v. LaBarge*, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006) (agreeing with the ruling in the Bankruptcy Court holding that the debtor found himself in self-created circumstances because he had 20 days under Missouri foreclosure law within which to obtain a credit briefing. The court says, in effect, that the normal circumstances of financial distress are not exigent.).

190. Bankruptcy Abuse Prevention & Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

191. 11 U.S.C. § 521(a)(1)(B)(iv) (2012).

192. 11 U.S.C. § 521(a)(1)(B)(v) (2012).

193. 11 U.S.C. § 521(a)(1)(B)(vi) (2012).

194. 11 U.S.C. § 521(e)(2)(A)(i) (2012).

195. 11 U.S.C. § 521(f)(2) (2012).

196. 11 U.S.C. § 521(e)(2)(B) (2012).

*C. Repeat Filing and BAPCPA's Trap Doors*<sup>197</sup>

New provisions under BAPCPA are targeted at curbing and limiting a debtor's ability to file more than once. The most significant of these limitations is the added provision limiting and denying the automatic stay to individuals who had one or more cases pending before the bankruptcy court in the previous year.<sup>198</sup> In the bankruptcy process, the automatic stay is the most powerful protection for debtors.<sup>199</sup> It prevents creditors from taking action against debtors or their property. It also provides debtors with critical time to evaluate their financial situation without the additional pressure of credit calls, harassment, and foreclosures. BAPCPA severely limits the automatic stay for debtors who file successive bankruptcy petitions.<sup>200</sup> In addition, the new provisions create a rebuttable presumption that subsequent petitions are filed in bad faith.<sup>201</sup> This presumption is particularly problematic for chapter 13 debtors who must satisfy new

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197. Interview with Steven Derby, Bankruptcy Judge, in Baltimore, Md. (Nov. 15, 2006) ("The new Act works similar to a series of trap doors. The debtor must comply with a new requirement under the Act, or the door will open and the debtor will fall out of the bankruptcy system. Forcing the debtor back into the same situation or worse because of new repeat filer provisions. The protections of the bankruptcy system are eliminated.") (on file with author).

198. 11 U.S.C. § 362(c) (2010) ("If a single or joint case is filed by or against the debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed . . . (A) stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to a any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case . . . . If a single or joint case is filed by or against the debtor who is an individual in a case under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed . . . the stay under subsection (a) shall not go into effect upon the filing of the later case").

199. See H.R. REP. NO. 95-595, at 12 (1977) ("The automatic stay is one of the most important protections provided by the bankruptcy laws. The stay provides the debtor with the necessary breathing spell to arrange his financial affairs for a repayment plan.").

200. See generally Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L. J. 749 (2005).

201. 11 U.S.C. §§ 362 (c)(3)(B) & (4)(B) (2010) (allowing the court to either extend or impose the automatic stay on a showing by the debtor that the second petition filing is in good faith).

good faith requirements in the plan confirmation process. In many cases, these two changes function together to completely bar any bankruptcy debt relief.

For uninformed debtors, failing to comply with the technical requirement of credit counseling may force them outside the bankruptcy system's protections.<sup>202</sup> Any cases that are immediately dismissed for failure to file with a certificate or waiver are likely to be immediately re-filed. However, those re-filed cases will fall within the repeat filer provisions of BAPCPA, severely limiting or eliminating altogether the automatic stay and triggering the bad faith presumption. As a result, debtors who risk a second filing face an additional burden of proving good faith or risking another dismissal.<sup>203</sup> If the case is dismissed a second time, all statutory protections for those debtors against creditors are terminated.<sup>204</sup> Thus, the credit counseling requirement, coupled with the limitation or elimination of the automatic stay in repeat-filer cases, function to leave debtors beyond the protection of the bankruptcy court if debtors fail to obtain counseling or a waiver of the filing requirement.<sup>205</sup>

BAPCPA often functions most harshly against those who attempt to settle debts outside the formal bankruptcy system, as recognized by Bankruptcy Judge Frank Monroe in *In re Sosa*,<sup>206</sup> an early BAPCPA opinion. The chapter 13 debtors in *Sosa* attempted to work with their mortgage holder to stop the foreclosure on their home until filing the petition. Because of the timing, one of the debtors failed to obtain the credit counseling before filing. Judge Monroe dismissed the case, holding:

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202. For example, a debtor in a foreclosure situation may rush to stop the foreclosure process by filing a bankruptcy petition just a day before execution, but he will not have the time to obtain a credit briefing. This debtor's petition is likely to be dismissed. See *Dixon v. LaBarge*, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006). See also *In re Wallert*, 332 B.R. 884, 889 (Bankr. D. Minn. 2005); see also *In re Randolph*, 342 B.R. 633-635. (Bankr. M.D. Fl. 2005).

203. 11 U.S.C. § 362(c)(3)(B) (2010).

204. 11 U.S.C. § 362(c)(3)(A) (2010).

205. *In re Seaman*, 340 B.R. 698, 700-09 (Bankr. E.D.N.Y. 2006) (addressing the consequences of a 109(h) dismissal of the debtor's petition and the impact of that dismissal on the debtor's subsequent filing, and explaining that such a dismissal results in a limitation on the automatic stay.).

206. *In re Sosa*, 336 B.R. 113, 114 (Bankr. W. D. of Tex., 2005).

... because the debtors did not request such credit counseling before they filed their case, Congress says they are ineligible for relief under the Act. Can any rational human being make a cogent argument that this makes sense? But let's not stop there. If the Debtors' case is dismissed and they re-file a new case within the next year. . . then the stay in the second case will only be good for thirty days unless the debtor (i) files a motion, (ii) obtains a hearing and ruling by the court within such thirty-day period and (iii) proves by clear and convincing evidence that the second case was filed in good faith.<sup>207</sup>

Like the Sosas, many debtors are prejudiced by the interconnection of the two provisions and find themselves beyond the protections of bankruptcy with little hope of returning. The new law exploits the *pro se* filer's lack of knowledge about these two provisions. Unrepresented filers are particularly susceptible to this prejudice.

#### *D. Increased Scrutiny and Requirements for the Bankruptcy Debtor Once in Bankruptcy Process*

Described as the heart of BAPCPA, the means test<sup>208</sup> provides the first statutory screening mechanism to shift consumer debtors out of chapter 7 and into chapter 13. Means test machinery operates to prevent a debtor from filing a chapter 7 petition, increasing the scrutiny of an individual debtor's fiscal identity and financial life. This heightened scrutiny of the individual consumer debtor is new in terms of statutory language.<sup>209</sup> The 1978 Bankruptcy Code created a

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207. *Id.* at 115-17.

208. Means Test (Forms B22A and B22C) replaced the phrase "substantial abuse" with "abuse," indicating that to allow the debtor to file a chapter 7 petition, the debtor now needs to show that a filing of a chapter petition is not an "abuse." Presumption: the debtor filing the petition is dishonest. (Trustees and Debtor Attorneys call this the "mean test.") The burden of proving honesty is now on the debtor and the debtor's attorney. Congress, with BAPCPA, deleted the language from the 1978 Bankruptcy Code that provided a presumption in favor of granting the debtor the discharge. Judicial Oversight is also REMOVED: United States Trustee and the Chapter 13 Trustee now review the forms and make calculations as to whether there is "abuse.").

209. Pre-BAPCPA, the United States Trustees Office in the Department of Justice performed an informal means test on a case-by-case basis.

presumption in favor of granting the debtor the relief sought.<sup>210</sup> In an attempt to carve away at the presumption in favor of debtor discharge, the 1984 Amendments to the Code added a provision that allows the United States Trustee to challenge the chapter 7 discharge if granting the discharge would be a substantial abuse of the bankruptcy system. If a finding of substantial abuse is established, the debtor's case is dismissed or converted to a chapter 13 with the debtor's consent.<sup>211</sup> The new law *entirely* removes the presumption in favor of granting the relief.<sup>212</sup> Instead, individuals in need of bankruptcy protection must prove that they are eligible for the relief sought under chapter 7.<sup>213</sup>

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210. 11 U.S.C. § 707 (1984) *added by* Bankruptcy Amendments and Federal Judgeship Act of 1984. ("After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request of any interested party in interest (creditor), may dismiss a case filed by an individual debtor under this chapter [chapter 7] whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor." Under this subsection, the debtor filing a bankruptcy petition was honest. The previous code section indicated: "a presumption in favor of granting relief requested by the debtor" in the chapter 7 case. The burden of proving dishonesty was on the Federal Government, United States Trustee's Office, and the judge had the opportunity to exercise judicial discretion to determine whether "substantial abuse" in fact existed).

211. *Id.* (explaining that "substantial abuse" was required for the United States trustee to bring the motion and force the debtor into a chapter 13 repayment plan: "(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request of any interested party in interest (creditor), may dismiss a case filed by an individual debtor under this chapter [chapter 7] whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor"). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, § 102(a), 119 Stat. 23 (codified at 11 U.S.C. § 707(b)(1) (2010)) (giving the court, after notice and a hearing, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, the option to dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter).

213. *See generally* Eugene R. Wedoff, *Means Testing In The New § 707(B)*, 79 AM. BANKR. L. J. 231 (2005).

Under the means test, debtors are permitted a diminutive allowance that caps permissible living expenses.<sup>214</sup> In drafting BAPCPA, Congress decided the bankruptcy debtor's permissible living expenses should be those specified in the Collection Financial Standards of the Internal Revenue Service ("IRS").<sup>215</sup> The IRS crafted these allowed living expense standards for delinquent taxpayers and income tax evaders.<sup>216</sup> The IRS will allow tax evaders only those expenses which are deemed "necessary to provide for the taxpayer's and his or her family's health and welfare and the production of income."<sup>217</sup> For example, the guidelines give a family of four living in Orange County, Florida a monthly allowance of \$2200 for rent or mortgage and \$765 for food.<sup>218</sup> Thus, the standards provide the taxpayer and his or her family with only the bare minimum to live.<sup>219</sup> This allowance, meant as a punishment for tax evaders, imposes a harsh "bread and water" standard of living on the debtor. Any income exceeding the allowance is interpreted by the bankruptcy court as the debtor having the ability to pay unsecured debts.<sup>220</sup> Therefore, the debtor is treated as if he or she has committed a crime or somehow engaged in illegal conduct like tax evasion. The debtor is forced "to pay for" the transgression of acquiring debt in a society that thrives on debt accumulation.

BAPCPA imposes these allowed amounts on the bankruptcy debtor at two pivotal points when the bankruptcy process is initiated. First, the allowance for the expenses is used to determine whether a

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214. 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2010) (stating that expenses include: normal living expenses such as rent or mortgage, food, medical costs, taxes, insurance etc., but expense under the Bankruptcy Code include amounts for secured claims and priority claims.).

215. 11 U.S.C. § 707(b)(2)(A)(ii) (2010).

216. Internal Revenue Service, *Collecting Process*, INTERNAL REVENUE MANUAL § 5(15)(1) [hereinafter IRM], available at [http://www.irs.gov/irm/part5/irm\\_05-015-001.html](http://www.irs.gov/irm/part5/irm_05-015-001.html).

217. IRM, *supra* note 216, at § 5(15)(1)(1). See also, Wedoff, *supra* note 214, at 254.

218. INTERNAL REVENUE SERVICE, *National Standards: Food, Clothing and Other Expenses*, available at <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html>.

219. IRM, *supra* note 216; Wedoff, *supra* note 213, at 254.

220. Wedoff, *supra* note 213, at 231 (explaining that new provision in §707(b) creates "an apparently strict formula for presuming sufficient debt-paying ability").



filing can remain in chapter 7 and receive a full discharge of unsecured debts, or convert to a chapter 13 bankruptcy filing, requiring the individual to repay unsecured creditors a portion or all of the debt owed.<sup>221</sup> Second, once in chapter 13, allowance for the expenses is again used to determine the amount of “disposable income” the debtor will be required to pay to unsecured creditors.<sup>222</sup> Disposable income is the amount chapter 13 debtors are required to pay to the chapter 13 trustee over a three to five year period.<sup>223</sup>

In effect, BAPCPA regulates and controls debtors through intense scrutiny down to the last dollar spent on food or toilet paper.<sup>224</sup> In this way, BAPCPA is a control mechanism aimed at managing the lower and middle class. As markets, capitalists, and investors experience increased financial freedom, the financial lives of middle class and lower-income individuals are increasingly regulated. This dichotomy reflects the essence of neoliberal policies instituted against the middle and lower classes.

#### *E. Reduction of Protection and Benefit in Bankruptcy Process*

Several new provisions in BAPCPA reduce the overall protection and benefit debtors receive in bankruptcy cases. In both chapter 7 and chapter 13, the intention of the drafters of the 1978 Bankruptcy Code is frustrated by new limitations on exemptions for debtors, caps on the value of property exempted, increased protections for non-governmental educational lenders, and forced reaffirmations for debtors of pre-bankruptcy debts, just to name a few. In effect, then, BAPCPA promulgates new powers of recovery for creditors, while mandating increased debt responsibility for debtors. These new

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221. 11 U.S.C. § 707(b) (2010).

222. 11 U.S.C. § 1325(b) (2010). *See* Wedoff, *supra* note 213, at 240-41 (comparing the calculations in the “means test” to the calculations for “disposable income,” which are identical).

223. 11 U.S.C. § 1325(b)(4) (2010) (stating that that debtors with incomes above the median income for the local state are to propose a plan that provides for payments over a five year period, while below median income debtors are to propose plans of no less than three years).

224. *See* UNITED STATES BANKRUPTCY COURT, OFFICIAL FORM 6J: SCHEDULE J: CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S), *available at* [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_1207/B\\_006J\\_1207f.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006J_1207f.pdf).

provisions destroy the spirit of the 1978 Bankruptcy Code by severely limiting debtors' opportunities for fresh starts.

First, section 522(f),<sup>225</sup> providing debtors with the ability to avoid liens on exempt property, is limited by the operation of BAPCPA section 313.<sup>226</sup> In its original form, section 522(f) provided debtors with the power to avoid judicial liens on any property to the extent that the property could be exempted in the absence of the lien. This section also gave debtors the power to avoid non-purchase money security interest in certain household and personal goods.<sup>227</sup> The new provisions, however, adopt the Federal Trade Commission's limited definition of "household goods."<sup>228</sup> It specifies which items are not household goods<sup>229</sup> and provides monetary and numerical caps for electronics, jewelry, and antiques.<sup>230</sup> Further, BAPCPA section 322<sup>231</sup> imposes monetary thresholds on state homestead exemptions. Debtors are limited to \$136,875 of exempt value in any real property used as a residence, but this monetary cap only applies if debtors acquired a property within the 1215-day period before their petition was filed.<sup>232</sup> Thus, these new provisions further limit the fresh start accorded to debtors.

Second, under BAPCPA, section 220 debtors can no longer discharge private educational loans, which have higher interest rates and less flexibility in repayment.<sup>233</sup> This provision marks a change from the 1978 Bankruptcy Code, which allowed debtors to discharge a portion of their educational debts as long as a private lender held the debt.<sup>234</sup> Private lenders now enjoy the same status as the federal

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225. 11 U.S.C. § 522 (2010).

226. BAPCPA, *supra* note 2.

227. 11 U.S.C. § 522(f)(1)-(4) (2012).

228. *Id.*

229. *Id.*

230. *Id.*

231. BAPCPA, *supra* note 2.

232. 11 U.S.C. § 522(p)(1) (2012).

233. 11 U.S.C. § 523(a)(8)(B) (2012).

234. *See* 11 U.S.C. § 523(a)(8)(A)(i) (2012) (stating private educational loans are not exempt). *See* H.R. REP. NO. 95-595 at 132-152 (1977). (discussing the dischargeability of student loans focused exclusively on the class of student loans guaranteed under the Higher Education Act of 1965. Extensive concern was expressed about potential abuse by lenders if educational loans are entirely non-

government in the bankruptcy system because private loans are non-dischargeable pursuant to Section 523(a)(8).<sup>235</sup> This change directly contradicts the recommendation of the 1997 National Bankruptcy Review Commission, calling for repeal of section 523(a)(8).<sup>236</sup> Under 523(a)(8), debtors with significant student loan debt can only obtain bankruptcy relief vis-à-vis those student loans by establishing undue hardship in repaying both public and private student loans.<sup>237</sup>

Third, BAPCPA section 304 eliminates the option to reaffirm a purchase money debt (VERY COMMON PHRASE IN COMMERCIAL LAW AND BANKRUPTCY) on personal property. Under the 1978 Code, chapter 7 debtors could choose to reaffirm a purchase money debt on personal property or, in some circuits, simply continue to pay on the debt and retain the property (identified as a “ride-through”). Under BAPCPA, though, within forty-five days of the meeting of creditors, chapter 7 debtors must either redeem the property or enter into a reaffirmation agreement with the secured creditor.<sup>238</sup> BAPCPA also provides the form for reaffirmation<sup>239</sup> and requires debtors to disclose income and expenses to show sufficient funds to pay on the obligation. Once debtors sign the reaffirmation agreement and the court accepts it, the pre-bankruptcy obligation becomes a post-bankruptcy debt.

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dischargeable. Particularly, this view is expressed by former House Representative James O’Hara. This is precisely what BAPCPA does: it protects the private lender.)

235. 11 U.S.C. § 523(a)(8)(B) (2012) (stating any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual).

236. See REP. OF THE NAT’L BANKR. REV. COMMISSION, Vol. I, at 6-17 (Oct. 20, 1997) (recommending that all educational loans be treated no differently than other unsecured debts. The Commission explains that Congress, when it enacted Educational Amendments Act of 1976 (adopted by the 1978 Bankruptcy), was misinformed about actual abuses. The numbers of defaults did not support the imposition of a showing that the student loan caused an “undue hardship” for the debtor. The Commission shows how the undue hardship provision has become a broad rule leading to its virtual inapplicability to protect needy debtors.).

237. 11 U.S.C. § 523(a)(8) (2010) (granting no exceptions unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor).

238. 11 U.S.C. § 521(a)(6) (2010).

239. BAPCPA, *supra* note 3, at § 203, codified as, 11 U.S.C. §524(k) (2010).

Reaffirmation agreements also remove the fresh start in terms of the debt owed on the collateral securing the loan. By reaffirming the entire obligation, debtors must also reaffirm the unsecured portion of the debt, requiring debtors to pay in full any shortfall from a repossession and sale of the collateral. If debtors become unable to pay on the obligation post-discharge, creditors may seize the collateral, sell it, apply the proceeds to the outstanding reaffirmed debt, and then sue debtors for the shortfall. The chapter 7 discharge will not negatively affect creditors' ability to collect the shortfall from debtors if their debt relates to a post-petition agreement. Thus, again, BAPCPA frustrates the spirit of the 1978 Bankruptcy Code.

Fourth, Section 306 of BAPCPA reduces chapter 13 debtors' ability to strip-down a secured debt.<sup>240</sup> Under the 1978 Code, debtors could bifurcate a secured loan into secured and unsecured portions of, for example, a car loan.<sup>241</sup> The chapter 13 plan payment would include a payment for the secured portion of the debt.<sup>242</sup> The unsecured portion of the obligation was paid in the same manner as other unsecured debts under the plan. This practice allowed debtors to pay the actual value of the vehicle rather than the entire purchase contract amount. BAPCPA eliminates this protection. Now, if debtors have purchased a car within two and half years of filing a petition, they must pay the full contract amount through the chapter 13 plan.<sup>243</sup> Thus, debtors are further denied the benefit of the fresh start offered under the 1978 Code.

BAPCPA also limits the discharge given to chapter 13 debtors upon completion of plan payments by expanding the nondischargeable provisions of section 1328.<sup>244</sup> This section states that certain debts are no longer dischargeable in a chapter 13 case, such as debts for unfiled, late-filed, and fraudulent tax returns,<sup>245</sup> credit card misuse,<sup>246</sup> and failure to notify creditors of the bankruptcy in time to allow assertion

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240. BAPCPA, *supra* note 2, codified as 11 U.S.C. §1325 (2010).

241. 11 U.S.C. § 1325(a)(5) (2010).

242. *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

243. 11 U.S.C. § 1325 (2010).

244. 11 U.S.C. § 1328(a)(2) (2010).

245. 11 U.S.C. § 523(a)(1) (2010).

246. 11 U.S.C. § 523(a)(2) (2010).

of claims.<sup>247</sup> Further, interest continues to accrue on these debts while debtors are paying in chapter 13 plans.<sup>248</sup> This eliminates a powerful debtor tool, the “superdischarge.”

BAPCPA is successful at destroying the effectiveness of the fresh start provisions found in 1978 Bankruptcy Code, which was intended to protect consumers. The drafters of the 1978 Code appreciated the allocation of risk and responsibilities in the traditional lending relationship. A lender/creditor lends money to a borrower/debtor. The lender charges the borrower interest on the loan to compensate for the lack of the use of lent funds and for protection if the borrower defaults. The lender assumes the risk that the borrower may default, and that is why the lender charges interest. The borrower assumes the responsibility of repaying the loan with interest as part of the relationship. The 1978 Code recognized that when a borrower becomes unable to pay, social and legal mandates ensure protection against unfair practices.

BAPCPA, on the other hand, purports to protect consumers. However, as shown above, it protects creditors in the debt relationship much more than borrowers. BAPCPA functions to reduce lender and investor risk of default on a loan payment stream by transferring the entire responsibility of default onto the debtor. The securitization frenzy of the last thirty years incentivized lenders to increase their volume of lending because loans (payment streams) were pooled and sold to investors. The key to reducing lender and investor risk with securitization is to prevent default and ensure the payment streams. BAPCPA mandates all kinds of repayment forms. With this assurance, lenders can sell payment streams at even higher rates because the risk of debtor default is low and repayment rates are highly secured.

The process of liberating the financial markets revealed an opposite visage of the neoliberal machinery for the middle and lower classes than for the upper classes. In these positions, the neoliberal state institutions are not so liberating or uplifting. The machinery of the neoliberal state is castigatory, paternalistic, and restricting when it comes to managing these populations.

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247. 11 U.S.C. § 523(a)(3) (2010).

248. 11 U.S.C. § 1322(b)(10) (2010).

#### IV. DOMINANT CULTURAL DISCOURSE<sup>249</sup> OF MORAL BEHAVIORALISM: STIGMATIZED FISCAL IDENTITIES AND COLLECTIVE AMNESIA

"I pay my debts each month. What is wrong with people?"<sup>250</sup>

The statements of former Prime Minister of Great Britain, Margaret Thatcher, capture the neoliberal vision of a social collective: "there is no such thing as society, only individual women and men."<sup>251</sup> In denying the impact of collective forces found in economic and political structures, individuals are conveniently held entirely responsible and accountable for their financial and social positions.<sup>252</sup> In this vision of the social world, the individual's fiscal identity, either as a success or as a failure, is traced directly to the choices and decisions that he or she "freely" makes in the marketplace. As discussed elsewhere by the author, Enlightenment notions of individualism, reason, free will, and progress<sup>253</sup> are the cornerstones of neoliberalism's model for individual fiscal identity. Under a neoliberal framework, the individual's experience of debtfare is therefore solely a result of character and conduct and not a result of the conduct of lenders and investment bankers.

For individual consumers, debt and financial failure is socially and culturally mapped by another disciplining discourse: Christian morality and sin. The individual's decisions and actions in the marketplace are viewed through this lens,<sup>254</sup> such that individual

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249. Stuart Hall, *Foucault: Power, Knowledge and Discourse*, in DISCOURSE THEORY & PRACTICE: A READER, 72 (Margaret Wetherell, Stephanie Taylor & Simon Yates eds., 2001) (explaining that the meaning of the word "discourse" as adopted from the Michel Foucault is "a group of statements which provide a language for talking about—a way of representing the knowledge about—a particular topic at a particular historical moment).

250. Interview with informant #35 (June 2010) (on file with author).

251. HARVEY, NEOLIBERALISM, *supra* note 54, at 23; (citing D. YERGIN & J. STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND MARKET PLACE THAT IS REMAKING THE MODERN WORLD (1999)).

252. Dag Einar Thorsen, *The Neoliberal Challenge: What is Neoliberalism*, 2 CONTEMP. READINGS IN L. & SOC. JUST. 188, 204 (2010).

253. Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge's Non-Article III Status*, 16 MICH. J. RACE & L. 181 (2011).

254. The Bible informs the notion of financial forgiveness and the bankruptcy

humans, unlike corporations, are instructed to “remember the sanctity of their obligations.”<sup>255</sup> From this perspective, loan agreements are moral obligations rather than simply contracts in the “free” marketplace. Therefore, an individual’s failure to perform according to the terms of the debt agreement becomes an immoral and unethical act within the network of social relations. The individual, unlike corporations and banks, is therefore constricted by yet another layer of social and economic control.

These dominant discourses of personal responsibility and Christian morality supporting the neoliberal structure succeed in a powerful process of *misrecognition*.<sup>256</sup> Society views individual debtors as solely responsible for their consequences and status in the marketplace and social world. Debtors also view themselves through this same lens. The individual debtor is rarely viewed as part of a large set of uncontrollable and collective economic and political practices and processes. This misconception produces a powerful ethos of meritocratic individualism convenient to the neoliberal state’s policy and practices of deregulation of collective protections.

The common belief is that wage earners who become unemployed are responsible for their own fates. Neoliberal theory holds that unemployment is always voluntary.<sup>257</sup> Persons experiencing burdensome debt are accused of making poor financial decisions. Owners of homes that are over-secured and under water are judged for reaching beyond any actual ability to pay. Those casting judgment do not consider that the number of decent-paying jobs has decreased, interest rates on revolving credit have sky-rocketed, and Wall Street’s mortgage bubble has artificially driven up prices of single-family homes. They also fail to consider that consumers often must turn to unsecured credit in the wake of family illness or job loss when there is a lack of other social support systems.

The dominant discourses create a normalization of social insecurity by employing notions of disconnected individual

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discharge; it provided the 1978 Bankruptcy Code’s seven-year time span between discharges of debt, and the Bible provides a model for the relationship between the creditor and debtor. *Deuteronomy* 24:6:15.8iii.

255. BRUCE MANN, *THE REPUBLIC OF DEBTORS* 262 (2002).

256. BOURDIEU, *supra* note 1, at 164.

257. HARVEY, *NEOLIBERALISM*, *supra* note 54, at 53.

responsibility and personal shame.<sup>258</sup> These discourses generate a social and economic paradox and set a trap for the middle class population. As the welfare state is cut back, "larger and larger segments of the population [are] exposed to impoverishment" and as such, "the social safety net is reduced to a bare minimum in favor of a system that emphasizes individual personal responsibility. . . [and] the victim is all too often blamed."<sup>259</sup>

In *Debt for Sale: A Social History of the Credit Trap*, anthropologist Brett Williams questions the naturalization of this model of fiscal identity. She asks, "In the face of this rude exploitation [i.e., employment insecurity, marketing and advertising of the culture of consumerism in every part of social life, the rising costs of education and healthcare, and the organized credit industry—target marketing, easy credit, and increasing opportunities to use credit in daily life] why aren't we angry at banks? Why instead do we blame debtors?"<sup>260</sup>

#### VI. CONCLUSION—TIGHTENING THE BELTS OF THE POOR AS THE BELTS OF THE RICH ARE LOOSENED.

"Who really owes what to whom?"<sup>261</sup>

"Many years ago my father asked his children in a dinner-table conversation, 'Why will capitalism always survive?' His answer: 'because socialism will always be used to save it.'"<sup>262</sup>

During the 2008 economic crisis, public money was used as a cash infusion for private investment entities. These private entities were considered "too big to fail." The year following the infusion of public money, several of these entities lodged record profits and bonuses for their executives and employees. Their reckless behavior was rewarded. No government unit or bankruptcy court imposed a plan of austerity on these institutions. BAPCPA's allowances limiting

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258. WACQUANT, PUNISHING THE POOR, *supra* note 51, at 204.

259. HARVEY, NEOLIBERALISM, *supra* note 54, at 53.

260. BRETT WILLIAMS, DEBT FOR SALE: A SOCIAL HISTORY OF THE CREDIT TRAP, 51 (2004).

261. GRAEBER, *supra* note 1, at 13.

262. Ralph Nader, *King George & Comrade Paulson*, THE NATION, Oct. 13, 2008, at 6.



debtor expenses and requiring repayment under “bread and water” chapter 13 plans only apply to “individuals with primarily consumer debts,” not large investment firms. The reckless gambling behaviors of these firms, which tanked the entire economy, remain unchecked. The creators of the conditions making the failure of the middle class possible were rewarded.

Middle class Americans now face a lifetime of repayment.<sup>263</sup> The extensive protections of the 1978 Code are limited and the purpose of the Code frustrated. What neoliberal models fail to recognize is that the health of this country’s economy has always depended on the free flow of money. Money must move to generate wealth. As the largest segment of the population, the middle class has traditionally been the engine driving the economy with its purchasing power. While servicing debtfare, the middle class is precluded from the wealth creation process. The cumulative debt load or crushing debt overhang from the interlocking debt structures will absorb the future incomes of consumers and prevent them from engaging in the economy. This will detract from economic growth. Future income used to pay old debts means less money circulating in the economy. Debtfare truncates the flow of money, the lifeblood of capitalism, and slows the velocity of capital. Thus, it has become apparent that the vision of the drafters of BAPCPA was focused on short-term debt collection, rather than long-term economic health.

An anthropological lens is wide angled. It draws together disparate and seemingly unconnected social and cultural phenomena to reveal larger trends in collective experience. All the indicators in such an analysis signal a dramatic shift in the power and class structures in the U.S. This shift is manifesting in the very basic social relationship between individuals who occupy distinct positions of power: lender (holder of capital) and borrower (in need of capital). As anthropologist David Greaber explains in his recent text entitled *Debt: The First 5,000 Years*, the debt relationship is and has been absolutely fundamental to the structure of all human societies. However, under BAPCPA, the risks and responsibilities traditionally shared by the

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263. See, e.g., *The Debt Trap: A Series About the Surge in Consumer Debt and the Lenders that Made it Possible*, N.Y. TIMES. (explaining that millions of Americans are deep in debt, and that they now face a lifetime of repayment), available at [http://topics.nytimes.com/topics/news/business/series/the\\_debt\\_trap/index.html](http://topics.nytimes.com/topics/news/business/series/the_debt_trap/index.html).

**lender and borrower in the debt relationship are now transferred solely onto the shoulders of the borrower.**

**Using the notions found in the dominant discourse of moral behavioralism, this shift appears natural, inevitable, and just.**

