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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By Linda Coco

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

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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")\textsuperscript{3} with the primary purpose of responding to a continuing "upward trend" in consumer bankruptcy filings.\textsuperscript{4} The House of Representatives report on BAPCPA 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."\textsuperscript{5} The Report adopted the view that filing a consumer\textsuperscript{6} bankruptcy petition is a moral rather than an economic act.\textsuperscript{7} Building on dominant cultural discourses of individualism and moral behavioralism, the Report asserts: "[s]hoplifting is wrong; bankruptcy is also a moral act [in that] . . . .There is a conscious decision not to keeps one’s promises."\textsuperscript{8} The stated goal of the Act, then, is to restore "personal financial responsibility and integrity in the bankruptcy system."\textsuperscript{9}

In furtherance of this goal, BAPCPA has several provisions intended to limit and regulate the consumer debtor’s access to bankruptcy relief,\textsuperscript{10} the most important of which is the "means test."\textsuperscript{11} The means test is intended to divert and force high income "can pay" individual debtors from chapter 7\textsuperscript{12} dissolution into chapter 13\textsuperscript{13} repayment. The primary purpose of the new law is

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\textsuperscript{2} British Anthropologist David Greaber begins his recent text on the history of debt relations with this sentence from a dinner party conversation. See \textsc{David Greaber}, Debt: The First 5,000 Years 4 (Melville House 2011). It captures what French Sociologist Pierre Bourdieu’s would describe as his notion of the \textit{doxa} found in debt relations in the U.S. \textit{Doxa} is the manner in which "every established order tends to produce the naturalization of its own arbitrariness." \textit{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." See \textsc{Pierre Bourdieu}, Outline of a Theory of Practice 164 (Cambridge Univ. Press). In the U.S., Enlightenment notions of individualism strongly inform the dominant discourses surrounding debt relationships. Risk and responsibility are assigned according to shifting collective beliefs concerning individualism and personal responsibility. Changes in collectively held notions are traceable to larger social forces such as class.


\textsuperscript{5} Id. The purpose of the 1978 Code is contrasted with the purpose of BAPCPA which was enacted 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. H.R. Rep. 95-595, at 4 (1977). (The purpose of the 1978 Bankruptcy Code was to address "the inadequacy of relief that the Bankruptcy Act provides for consumer debtors. The last major revision of the Bankruptcy Act was in 1938, before any significant amount of consumer credit had been extended. In the post-war years, consumer credit has become a major industry, and buying on time has become a way of life for a large segment of the population. The bankruptcy rate among consumers has risen accordingly, but without the required provisions in the Bankruptcy Act to protect those who need bankruptcy relief. This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor.") The 2005 amendments clearly represent a shift in the policy choices of Congress in the category of \textit{seismic} or \textit{cataclysmic}. See \textsc{Margaret Howard}, The Law of Unintended Consequences, 31 S. It. L. U.L. J. 451 (2007).

\textsuperscript{6} In the bankruptcy legal field two categories of bankruptcy petition filers are consumer and entity.

\textsuperscript{7} 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, available at http://thenewamerican.com/trump/. Four time bankruptcy fider 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 \textit{The Apprentice}; it’s not personal. It’s just business.”


\textsuperscript{9} Id.

\textsuperscript{10} Eligibility provisions for chapter 7 (11 U.S.C. § 707(b)); required pre-bankruptcy credit counseling (11 U.S.C. § 109(h)); dismissal provisions for repeat filers (11 U.S.C. §. 362(c)(3)&(4)).

\textsuperscript{11} 11 U.S.C. § 707(b)(2).

\textsuperscript{12} 11 U.S.C. § 727. Discharge. Under this section, the debtor is granted a total discharge of all debts.

\textsuperscript{13} 11 U.S.C. § 1328. Discharge. Under this section, the debtor is granted a discharge only after completion of all payments under the plan.
to prevent a chapter 7 filing by debtors with income above the median thereby 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 $30,000.14 In light of its stated purpose, BAPCPA appears to be “an exquisite example of law unhinged from reality”15 because Congress crafted the Act based on an utterly misinformed premise about who files bankruptcy.16 Therefore, BAPCPA is failing miserably at accomplishing its stated purposes. 17 Instead BAPCPA triggers unintended effects and consequences.18

One consequence of BAPCPA is the drastic reduction in the number of consumer bankruptcy filings.19 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.20 In the years that followed, researchers found consumer filings have remained significantly lower than the expected number of filings even though numbers of total filings are reaching pre-BAPCPA levels.21 Since the enactment of BAPCPA, a financial meltdown occurred in the U.S. economy. It stands to reason that, based on such circumstances, the rate of bankruptcy filings should have increased significantly, and yet, the rate increased only moderately.22 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.”23

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.”24 BAPCPA’s complex and burdensome provisions create financial and procedural barriers against consumer debtors receiving a fresh start as intended by the 1978 Code.25 The 2005 Act forecloses families from considering bankruptcy as a real option for relieving financial distress.26 The Consumer Bankruptcy Project reports that BAPCPA

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16 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 S6 (Oxford Univ. Press 1989); See also Lawless, supra note #, at 352-54; and KATHERINE M. PORTER, BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Stanford Univ. Press 2012); See also Braucher, supra note #, at 350.
17 Lawless, supra note #, at 358; Braucher, supra note #, at 350; Howard, supra note #, at 451.
18 Howard, supra note #, at 452 (2007) (Citing sociologist Robert Merton “identifies factors that lead to unintended consequences. Several of the factors particularly relevant in the bankruptcy context are, namely, ignorance, error, and . . . imperious immediacy of interests”).
19 Howard, supra note #, at 458.
21 Did Bankruptcy Reform Fail?, supra note #, at 347. (“Our results indicate that the bankruptcy rate sharply decreased immediately after BAPCPA was enacted in the fourth quarter of the 2007. . . and that the bankruptcy rate at the end of 2007 was 40% below where it would have been without the passage of the law”).
22 In 2008, there were 894,855 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, BAPCPA Tables 1A, 1B, & 1D. U.S. Bankruptcy Courts. (2008-2010).
24 Jean Braucher, Means Testing Consumer Bankruptcy: The Problem of Means, 7 FORDHAM J. OF CORP. & FIN. L. 403-48 (2002); (Professor Braucher aptly predicted 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.” Id. at 404. She further explains: “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.”) Id. at 407.
26 The Consumer Bankruptcy Fee Study, Final Report identifies 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
functions “like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual income circumstances.”

It appears to have the insidious result of destroying the effectiveness of 1978 Bankruptcy Code.

The effects of BAPCPA are often described as “unintended consequences,” but perhaps, as legal scholar Margaret Howard remarks, there are “no unintended consequences here.” These changes do not appear accidental. The 1978 Code was criticized as “too liberal,” because it helped millions of middle class families obtain a fresh start. BAPCPA does what Elizabeth Warren cautioned in 1997: that the introduction of the proposed amendments to the 1978 Code would not strengthen the consumer bankruptcy system but rather “it would be destroyed.” However, BAPCPA has not only destroyed key consumer oriented aspects of the 1978 Code, but it has also created neoliberal mechanisms for reallocating all of the risks and responsibilities of the lending relationship to the shoulders of borrowers.

BAPCPA is referred to by bankruptcy professionals as the “leave no creditor behind” law, because in its poor drafting, confusion, and inconsistency, BAPCPA manages to shift 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. Debtors are forced to continue either to 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


Lawless, supra note #, at 353.
Howard, supra note #, at 459.
Bankruptcy Judge Joe Lee: Very much undone. But the misrepresentation that the act, that this was all because the act was too liberal, the ’78 code was too liberal—after we worked out everything together [bankruptcy professionals with Congress] so that it passed, the final version after conference, the final version of the act passed the House on the consent calendar, without a single objection from either side of the aisle. I am sure that if it had been too liberal, that somebody would have said so”).
PORTER, supra note #, at 10; (“more than 90 percent of bankrupt people are members of the middle class”); Elizabeth Warren & Deborah Thorne, A Vulnerable Middle Class: Bankruptcy and Class Status, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Stanford Univ. Press 2012). (The authors provide 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 percent of Americans are situated, broadly speaking, in the middle class”). Id. at 28. See KATHERINE NEWMAN, FALLING FROM GRACE: DOWNWARD MOBILITY IN THE AGE OF AFFLUENCE 35 (Univ. of Cal. Press 1999); See also, The White House’s Middle Class Task Force, supra note ###. (The task force defines “middle class” both socially and economically as “working families” whose annual income ranges from $55,000 to $123,00, and who aspire to home ownership, a car, college education for their children, health insurance, retirement security and occasional family vacations).
Comment by Bankruptcy Judge Nancy Alquist, Annapolis, Maryland (Spring 2005). (Fieldnotes on file with author).
standards) resulting in dismissals of bankruptcy cases. In effect, the needy individual is precluded from using the bankruptcy system, thus increasing the individual’s overall debt load, because while the individual is prevented from filing, high monthly interest continues to accrue.\(^3^4\) This process is known as the “sweat box.”\(^3^5\) Inside the bankruptcy system, BAPCPA makes filing and staying in chapter 7 more difficult for debtors, thereby benefitting creditors through increased debt servitude.\(^3^6\) The new law forces debtors into repayment plans,\(^3^7\) limits dischargeable debts,\(^3^8\) prevents bifurcation of debt into secured and unsecured portions,\(^3^9\) and requires reaffirmation agreements.\(^4^0\) 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 appear to protect consumers at all. In fact, the incongruously-named Act is antagonistic to the purpose of the 1978 Code 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.\(^4^1\) 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.\(^4^2\) Under the guise of preventing abuse, BAPCPA imposes a litany of confusing procedures and requirements on consumer debtors and their counsel; therefore it contravenes the purpose of the 1978 Code which sought 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,”\(^4^3\) and it undermines “one of the few areas of consumer law that works reasonably well to meet consumer needs.”\(^4^4\) BAPCPA successfully frustrates the operation of the 1978 Code, because it manifests fundamental changes in the class and power structures of the U.S. economy. Anthropological theory’s wide angle lens reveals these social and economic structural shifts.

The context of American society\(^4^5\) and culture\(^4^6\) provides a broadened frame for understanding the economic shift reflected in the transformation of bankruptcy law and policy

\(^{3^4}\) Weller, supra note #, at 347; (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”).

\(^{3^5}\) 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.I.L.L. REV. 375 (2007); (Professor Mann argues 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 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).

\(^{3^6}\) 11 U.S.C. § 707(b)(2). See also Official Forms B22A and B22C.

\(^{3^7}\) Id.

\(^{3^8}\) 11 U.S.C. § 541.

\(^{3^9}\) 11 U.S.C. § 1325. (Hanging sentence).

\(^{4^0}\) 11 U.S.C. § 524 (k).


\(^{4^3}\) Warren, supra note ##, at 492.


\(^{4^5}\) 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, e.g., FELIX K. KEESSING, CULTURAL ANTHROPOLOGY: THE SCIENCE OF CUSTOM 30 (Rinehart & Company 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.”)

\(^{4^6}\) The author employs the terms “culture” and “cultural” to denote notions, beliefs, values, and other organizing concepts that shape human behavior and practices. See KEESSING, supra note ##.
from the time of the Bankruptcy Reform Act of 1978 and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Applying an anthropological perspective, University of California, Berkeley professor Laura Nader explains that law, legal categories, and processes are constituted by social and cultural beliefs, values, behaviors, and practices. 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. 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, national and international economic and political structures shifted, giving rise to the neoliberal “free market” model. These shifts have caused deep changes in the social structures of American and European countries and second and third world countries. Viewed through the 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 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.

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48 Id. at 191, R.489. In effect, Thompson argues that the ‘state of emergency’ cry was a load of bollocks and, in fact, the act with its new criminal categories was an attempt to enforce and solidify the social, political and economic order. Thompson’s elucidates that what is a “crime” and who is an “offender” under the law is a category of social, political and economic processes. Particular behaviors are considered deviant and unacceptable via situated interests of a legal structure. Unacceptable social behavior defined in the Black Act involve those behaviors which affront the political powers (and people) of the day (i.e. Walpole, Yorke, and Paxton). The moral order was defined by the ruling political elite.


50 The author believes as Milton Friedman, that “there is an intimate connection between economics and politics.” MILTON FRIEDMAN, CAPITALISM AND FREEDOM 8 (Univ. of Chi. Press 1962).

51 “Neoliberal” and “neoliberalism” are used in this article as tools applied to analyze a national trend in political and economic practices. This national trend has homologous international structures. Fashioned in Washington D.C. in 1989 as a set of policies and practices for Latin American, neoliberal notions find root in the “Washington Consensus” formulated by John Williamson. Initially, the policy and practices were drafted as “reforms” Latin America must adopt to escape the debt crisis. They include fiscal discipline, reordering public expenditure priorities, tax reform, liberalization of interest rates, competitive exchange rates, trade liberalization, liberalization of inward foreign investment, privatization, deregulation and property rights. See Ravi Kanbar, The Co-Evolution of the Washington Consensus and the Economic Development Discourse, Available at, www.people.cornell.edu/pages/sk145 (2008). For a theoretical understanding of “neoliberalism” see Dag Einar Thorsen, The Neoliberal Challenge: What is Neoliberalism?, 2(2) CONTEMP. READINGS IN L. & SOC. JUST. 188-214 (2012) (Professor Thorsen clarifies the meaning of the term “neoliberalism” by explaining that it is similar to and yet different from traditional liberalism as a political ideology (as found in the works of John Locke, Adam Smith, Montesquieu, Thomas Jefferson, John Stuart Mills and others). Liberalism, according to Thorsen, is broadly defined as a political ideology tending to favor constitutional changes that lean in the direction of freedom and democracy. Neoliberalism can be seen as a descendant or off-shoot from liberalism, and yet, it is still very different from it. Neoliberalism aligns with economic liberalism or classic liberalism rather than with a social or modern liberalism. Neoliberalism, in the various forms identified by Thorsen, is a loosely demarcated set of political beliefs that hold the conviction that the only function of “the state is to safeguard personal liberty, understood as a mercantile liberty for individuals and corporations.” Id. at 203. Within this, a system of unregulated free markets with free trade should be implemented. Unregulated markets with a finely tunes logic are thought to “set free the creative potential and the entrepreneurial spirit. . . and thereby lead to more individual liberty and well-being, a more efficient allocation of resources.” Id. at 204.
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 which resulting in a socio-economic experience of “debtfare.” Debtfare is interlocking payment obligations that last for years, such as mortgage payments, credit card payments, car loan payments, and other monthly debt obligations. 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 relations and limit their social and physical mobility within these relations.” 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. Thus, the insidious effect of BAPCPA is the creation of a large group of Americans servicing burdensome debts without any relief.

In part II, this article considers the international implementation of the neoliberal economic model and its homologous structures adopted in the U.S. Most significantly, the article 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 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 “embedded liberalism.” 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 the increase in the rate of productivity. 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

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53 PORTER, supra note #, 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”).
54 Genevieve LeBaron & Adrienne Roberts, Toward a Feminist Political Economy of Capitalism and Carcerality, 36 SIGNS 1, 19-44 (2010).
57 HARVEY, supra note #, at 10-11. (Embedded liberalism is a form of political organization characterized by a class compromise between capital and labor. Its 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 (healthcare, education).
58 Annual Report of the White House Task Force on the Middle Class, at 3 (Feb. 2010) Vice President of the United States; available at, http://www.whitehouse.gov/strongmiddleclass/reports. (The report documents 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).
impacted the economy. Embedded liberalism reduced the volatility of the market and created economic stability.

In the late 1970s, as profits for large corporations began to stagnate and incomes for investors began to decline, a shift in the economic model occurred. In the U.S., the former Fordist-Keynesian political-economic organization characterizing the post-World War II years of “embedded liberalism” began to break down, and the Fordist-Keynesian economic model gave way to the rise of the neoliberal “free market” model. The influence of embedded liberalism waned, and it was replaced by a new political-economic form identified as “neoliberalism.” This model emerged with the help of select economists and political leaders who supported neoliberal theories advanced by powerful policy and education institutions. 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. The cornerstone of a neoliberal political-economic order is privatization and deregulation. 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. Capital accumulation by individual actors is of primary importance and treasured within the neoliberal market place. 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.

Attempting to ensure increases in corporate profit and investor income, in the 1980s, governments employed neoliberal economic models engaging in projects to reduce corporate costs and increase corporate markets. The U.S. and European governments facilitated the export of capital to cultivate new markets around the world and engaged in deregulation and reregulation to (re)establish favorable conditions for capital accumulation by a class of economic elites (and restore the power of that group).

First, in an attempt to cut costs, political leaders supported policies to diminish the power of labor and destroy collective rights. Collective rights and structures standing in the way of market logic include social protections, worker protections, unions, associations, and

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59 Harvey, supra note ##, at 10-17.
60 WACQUANT, supra note ##, at 48.
61 Harvey, supra note ##, at 11-15.
62 [see note 47
64 Neoliberal theoretical origins are traced to a group of economists known as the “Chicago boys.” The group includes: Milton Friedman, Alfred Marshall, William Stanley Jevons, and Leon Walras. See Harvey, supra ##, at 8 & 20.
65 The Washington Consensus…. Ronald Reagan, Margaret Thatcher, Deng Xiaoping, Bill Clinton, Tony Blair…. See Harvey, supra ##, at 1-38.
66 Harvey, supra note ##.
67 Id. at 7.
68 Id. at 64-65.
69 Id.
70 Id.
71 Id. at 1.
72 Loïc Wacquant, Three steps to a historical anthropology of actually existing neoliberalism, 9 SOC. ANTHROPOLOGY 1.1-14 (2011).
73 Loïc Wacquant, Three steps to a historical anthropology of actually existing neoliberalism, 9 SOC. ANTHROPOLOGY 1.1-14 (2011).
Free market mandates require a dereliction of labor law and a deregulation of employment. 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. This lending ultimately resulted in the debt crisis of the 1980s, and the threat of bankruptcy by Mexico in 1982. The IMF mandated austerity onto debtor nations to repay the banks. The most pronounced manifestation of the neoliberal economic model was observed in response to this debt crisis.

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. The Washington Consensus included reforms such as fiscal discipline, reordering public expenditure priorities, tax reform, liberalization of interest rates, competitive exchange rates, trade liberalization, liberalization of inward foreign investment, privatization, deregulation, and private property rights. In practice, neoliberalism resulted in capital accumulation by dispossession.

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 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 OECD countries.” In effect, globally, neoliberalism (re)establishes favorable conditions for capital accumulation by a class of economic elites and restores the power of that group. In other words, a rigid class structure has been reasserted. This shift needs to be understood socially as well as economically.

In his work, UC Berkeley sociologist Loïc Wacquant has expanded the understanding of the impacts of the neoliberal economic model in the social world. He writes that we must develop “our conception of [neoliberalism], and move from an economic to a fully sociological understanding of the phenomenon.” 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

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74 Id. (Wacquant, 3 steps)  
77 Id. (Harvey, Enigma)  
78 Id. (Harvey, Enigma)  
79 John Williamson, Did the Washington Consensus Fail? INST. FOR INT’L ECON. Nov. 6, 2002. See also, Kanbar, supra note ##.  
80 Kanbar, supra note ##.  
81 Harvey, supra note #. (2005 Brief) pp. 160-165. (David Harvey explains 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.)  
82 Organization for Economic Co-operation and Development (“OECD”) countries include most first world countries; Kanbar, supra note #, at 11.  
83 Wacquant, supra note ##, at 1-14. (3 steps)  
84 Annual Report of the White House Task Force on the Middle Class, supra note #, 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 concentration since 1928, the year before the market crash that began the Great Depression”).  
consequential.” 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.” 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.” On the other hand, for those at the opposite end of the class continuum, neoliberal state institutions have not provided liberalization at all. In fact, the middle and lower classes have experienced liberalization very differently and distinctly.

For the middle and lower classes, the neoliberal turn has meant job insecurity, lack of unemployment benefits, wage stagnation and decline, decrease of social mobility, work week extension, lack of healthcare, pension uncertainty, social security insolvency, environmental degradation, and privatization of resources. This change is identified as the “great risk shift.” Over the past three generations, economic risk has been increasingly shifted from the broad shoulders of government and corporations onto the backs of American workers and their families. While large investment banking institutions are dubbed “too big to fail,” middle class Americans are failing at ever increasing rates, and 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 paired with total wealth decrease in terms of assets for the majority of the U.S. population. From 1947 to 1979, worker income increased with productivity percentage gains. Since 1979, real wages have increased only 0.4% annually while

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86 Wacquant, supra #, (3 steps) p.1.
87 Id. at 9.
88 Id.
89 HARVEY, supra note #, at 9. (A Brief History).
92 Campbell, supra note #, at 59-73.
94 Heather Boushey & Joshua Holland, If This Is Such a Rich Country, Why Are We Getting Squeezed?, ALTERNET, July 18, 2007 at 2. Available at, http://www.alternet.org. 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.
96 In 1980, 40% of workers were covered by pensions. By 2004, the percentage was reduced to 20. See The Plastic Safety Net, supra note, #, at 18. Worker pensions are further instable due to privatization and securitization. Soederberg, supra note #, at 224-41.
97 Harvey, supra note #, at 172.
98 See generally, PORTER, supra note #.
100 Id. (Hacker)
productivity has grown 2% annually.\textsuperscript{104} From 1987 to 1997, corporate profits rose 90% while the median family income rose only 3%.\textsuperscript{105} During the past three decades, middle class incomes have not risen when adjusted for inflation.\textsuperscript{106} 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 \[10\%\] share in 2007 is equal to 49.7 percent, a level higher than any other year since 1917 and even surpasses 1928, the peak of stock market bubble in the “roaring” 1920’s.”\textsuperscript{107}

Middle class Americans have also experienced a total wealth decrease in terms of assets. Equity value in homes from 2005 to 2008 diminished by 43%.\textsuperscript{108} During this time, an estimated $2 trillion in retirement wealth was lost in 401(k) and individual retirement accounts.\textsuperscript{109} 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.\textsuperscript{110} Thus, middle class Americans are living in a state of economic and social insecurity and downward mobility.\textsuperscript{111}

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,\textsuperscript{112} and consumer borrowing kept profits high for lending institutions.\textsuperscript{113} This opportunistic hocking of debt, at teaser rates, to the middle class created the conditions of possibility 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.”\textsuperscript{114} 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.\textsuperscript{115} 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.

\textsuperscript{104} Annual Report of the White House Task Force on the Middle Class, supra note #, at 3. See also, Piketty, supra note #, at 1-39.
\textsuperscript{105} Hacker, supra note #, at 201.
\textsuperscript{106} Piketty, supra note #, at 1-39.
\textsuperscript{107} Emmanuel Saez, Striking it Richer: The Evolution of Top Incomes in the United States, Mar. 2, 2010, at 3. (WEBSITE); See also, Piketty, supra note #, at 1-39.
\textsuperscript{108} Hacker, supra note #, at 222.
\textsuperscript{109} Id. (Hacker)
\textsuperscript{110} Hacker, supra note #, at 221-22.
\textsuperscript{111} See generally, HUGH GUSTERSON & CATHERINE BESTEMAN, THE INSECURE AMERICAN: HOW WE GOT HERE & WHAT WE SHOULD DO ABOUT IT (Univ. of Cal. Press 2010).
\textsuperscript{113} This is the process by which banks endogenously expand money supply in response to demand for funds. Schumpeter describes endogenous money this way: “there 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 questions, not of transforming purchasing power which already exists in someone’s possession, but of the creastion of a new purchasing power out of nothing.” J.A. Schumpeter 73 (1928). THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST AND THE BUSINESS CYCLE. Cambridge: Harvard University Press.
\textsuperscript{114} Wacquant (2009), supra note #, at 304. (Professor Wacquant develops 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.)
\textsuperscript{115} Wacquant (2010), supra note #, at 213.
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 policies.\textsuperscript{116} Interconnected debt enforcement structures work to confine middle class individuals into servicing debt relations as a primary form of existence.\textsuperscript{117} 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. Like the lower classes, the middle classes also experience the opposite visage of neoliberalism: a 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,\textsuperscript{118} revolving credit card debt,\textsuperscript{119} home equity debt,\textsuperscript{120} and educational debt.\textsuperscript{121} 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 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.\textsuperscript{122} These rollbacks include weakening the power of lending regulations\textsuperscript{123} and eliminating the

\textsuperscript{116} Campbell, supra note ##.
\textsuperscript{117} Harvey, supra note ##, at 160-65; (David Harvey explains 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.)
\textsuperscript{118} Federal Reserve Flow of Funds, http://www.federalreserve.gov/releases/z1/ (In 2010, the average consumer mortgage debt reached over $10 billion.)
\textsuperscript{119} The Plastic Safety Net, supra note #, at 7-10; (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 3 and half years.)
\textsuperscript{120} The Plastic Safety Net, supra note #, at 14-17; (“Homeowners increasingly look to their home equity as a source of funds to help deal with rising household debt. . . . Like 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.”)
\textsuperscript{121} The Student Loan “Debt Bomb”: America’s Next Mortgage-Style Economic Crisis?, Report by the National Association of Consumer Bankruptcy Attorneys (Feb. 2, 2012).
\textsuperscript{123} TETT, supra note ##. (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
oversight of financial authorities facilitating the creation of mortgage-backed securities and eliminating credit card lending consumer protections. This deregulation gave holders of capital and capital markets greater freedom, power, and mobility. 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. 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 percent twenty years before.”

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”)) and Collateralized Loan Obligations (“CLO’’)). Such financial products generated enormous profits out of payment streams on loans for investors. They also allowed substantial gain at no cost for banks. Banks, attempting to generate fees in the lending and securitization process, 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 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,” “stated income” loans, “no doc” loans, and

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 MORGENSON, supra note ##, at 106-77; McLean, supra note ##, at 109.

In Marquette National Bank of Minneapolis v. First Omaha Service Corp., the Supreme Court interpreted the Nation Bank Act to permit the banking industry to charge interest rates allowed by the state in which the bank is located. Marquette National 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 Mercantante, The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt, 53 S.D. L. REV. 37 (2008). (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. Charles R. Morris. (PAGE NUMBER)

Wacquant (2009), supra note #, 305 (The economy and financial sector are experiencing the most liberalization. Wacquant writes: control 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.”)

CHARLES R. MORRIS, THE TRILLION DOLLAR MELTDOWN: EASY MONEY, HIGH ROLLERS, AND THE GREAT CREDIT CRASH 54 (Pegasus 2008) (Citing the economic philosophy of Former Treasury Chairman, Alan Greenspan). See also, Tett, supra note ##, 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.” For the most significant event in finance in the past decade has been the extraordinary development and expansion of financial derivatives.”).

Morris, supra note ##, at 54.

Morris, supra note ##, 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 also, Tett, supra note ##.

Morris, supra note ##, at 40. (“The bankers…had seen how residential mortgage banks 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”).

“liar” loans. Lenders offered consumers risky adjustable rate mortgages and interest-only loans. These practices increased the home ownership rate from 64 percent in 1994 to 69.9 percent in 2004. Of these loans, the subprime mortgage rate increased from 9 percent in 1996 to 20 percent in 2006.

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. From 2001 to 2006, through its “Live Richly” campaign, Citi Bank told consumers that “There’s got to be at least $25,000 hidden in your house. We can help you find it.” Fleet, now part of Bank of America, asked consumers, “Is your mortgage squeezing your wallet? Squeeze back.” Wells Fargo told consumers to “Seize your someday.” These campaigns urged consumers to take on second mortgages to pay off credit cards, 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 $100 billion in 1988, and the outstanding debt reached $1 trillion in 2007. In 1978, home equity loans totaled only $20 million. Once considered a loan of last resort, lenders convinced consumer borrowers that second mortgages were a good idea.

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. Greenspan encouraged banks at America’s Community Bankers Annual Convention in Washington D.C. in 2004 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.” This equity extraction served to convert unsecured debt to secured debt, thereby 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

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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. Bianco, supra note ##, at 7.
134 Id.
135 Mara Lee, Subprime Mortgages: A Primer, NPR (Mar. 23, 2007). (The subprime mortgage is "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 ##, at 6.
137 Paul Allen & Bill Pearson, And Nest 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 (McKinsey estimates over $1.5 trillion in 1986) should help sustain retail credit demand in the more attractive segments of the market.”)
139 Id. (Story)
140 Id. (Story)
141 BRETT WILLIAMS, DEBT FOR SALE; A SOCIAL HISTORY OF THE CREDIT TRAP 18-25 (Univ. of Pa. Press 2004). See also The Plastic Safety Net, supra note ##, at 4. (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 Anthoy, supra note ##, at 78; Story, supra note ##.
143 Allen, supra note ##.
144 Anthoy, supra note ##, at 78.
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 se curitization.”\textsuperscript{147} The first credit card asset backed securities were issued in 1987.\textsuperscript{148} As part of securitization, the Journal of Retail Banking advised its readers to tap into the debt capacity of middle income consumers stating that, “Fortunately for retail banks, there is still significant debt capacity in the consumer market, even though some segments are already over stretched.”\textsuperscript{149} During this time, revolving unsecured credit was aggressively marketed to a broad cross-section of consumers using misleading language and offering debt as supplemental income.\textsuperscript{150} In 2008, the credit card asset backed security market was a $915 billion investors market.\textsuperscript{151} Credit card asset-backed securities have become the primary vehicle by which the card industry funds unsecured loans to consumers.\textsuperscript{152}

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.\textsuperscript{153} Downward mobility for the majority of Americans was in full swing during the 1980s and 1990s when real wages began to stagnate and flatten while the costs of living increased. Just when they needed it most, families in need were offered opportunities to take on more unsecured debt through the tools described above.\textsuperscript{154} Attempting to maintain basic standards of living,\textsuperscript{155} many Americans latched onto easy credit.\textsuperscript{156} Outstanding consumer debt totals for 2009 were $886 billion, up from $680 billion in 2000.\textsuperscript{157} In 2012, the projected consumer credit card debt is approximately $870 billion.\textsuperscript{158}

Finally, educational loans represent another type of debtfare experienced by the middle class. In the late 1980s, the Journal of Retail Banking Services discussed various ways that its subscriber banks could entice the right consumers to take on revolving credit loans for the creation of reliable investment securities. The Journal proposed “cross-selling new educational and health care credit products to underleveraged consumers.”\textsuperscript{159} 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, and the average college graduate owes $25,250 at graduation.\textsuperscript{160}

b. Debt Trap and BAPCPA

The interconnected debt obligations or debtfare create a debt trap. Servicing some form of debt is the norm, and debtfare is a way of life for a majority of Americans. 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.”\textsuperscript{161} Thus, the debt trap results in financial distress and financial failure.

The debt trap causes consumers to turn to the bankruptcy system for relief. Increased consumer debt is shown to cause an increase in consumer bankruptcy filings.\textsuperscript{162} The more consumers owe in various forms of debt obligations, the more consumer bankruptcies are filed.\textsuperscript{163} The only reason for consumer filings is unmanageable debt loads; 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 she or he 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.\textsuperscript{164}

III. Barriers, Trap Doors, and Payment Plans: Bankruptcy Reform Reinforces “Debtfare”

BAPCPA is part 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, the power of the federal bankruptcy system to regulate the lives of middle class Americans is expanded under BAPCPA. 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 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 and reignite and re-enforce notions of social stigma denying debtors 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

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\textsuperscript{160} The Student “Loan Debt Bomb,” supra note ##, at 1.
\textsuperscript{161} Gusterson, supra note ##, at 7.
\textsuperscript{162} RONALD MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS AROUND THE WORLD 4 (Cambridge Univ. Press 2006).
debtors falling out of the bankruptcy system and losing the protection of the automatic stay. Fourth, after the debtor survives the initial filing requirements, scrutiny of the debtor’s income and expenses 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. In effect, BAPCPA’s mandated austerity reduces the overall benefits gained from the bankruptcy process. The result is that 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.”

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 is to instill a sense of responsibility and integrity in the consumer debtor. In the House Report, Congress adopts 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.” 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 that favors granting debt relief. In effect, BAPCPA imposes instead a bad faith hurdle that hinders debtors from obtaining debt relief.

Little empirical evidence supports the notion that stigma has 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.” 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. Rather, increases in bankruptcy filings results from burdensome debt loads.

In BAPCPA, Congress establishes a moral overlay upon legal processes that complicates and masks the systemic economic structure creating the foundation of each debtor’s experience in bankruptcy. The desire to impose stigma or shame upon debtors overlays morality onto rational legal structures. Legal debts can be forgiven, an option that is not always available with moral debts. By enforcing the belief that debt and bankruptcy are sins, that bankruptcy is

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165 Fieldwork notes by author, Oakland Cal., (Fall 2002). (Statement of an attorney for the Department of Justice, United States Trustee Office). (on file with author). See Edith H. Jones & Todd J. Zywicki, It is Time for Means-Testing, 1999 B.Y.U.L. REV. 177 (1999). The authors provide a lengthy discussion of their belief that there is a severe reduction of social stigma associated with filing for bankruptcy relief.


167 Sullivan, supra note ##, at 218.


169 Id.

170 Graeber, supra note ##, 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.”)
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.”

Numerous individuals in dire need of bankruptcy protection and relief postpone filing a bankruptcy petition because of the social stigma associated with debtor status, and waiting to file a bankruptcy petition is often the worst possible result for both the debtor and creditors. During the non-filing period, the debtor is 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, a debtor 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.

This moral overlay was propagated by members of Congress, legal scholars, and some bankruptcy legal field actors who hold the conviction that social stigma should attach to the status of bankruptcy debtor. These actors believe that reducing or eliminating stigma for bankruptcy debtors would eliminate the moral overlay and thus transform the cultural perception of debt involving morality rather than it being simply a contractual legal relationship. 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.

b. Barriers to Entry: Fees and Counseling

Increased costs and changes to the initial filing process place greater burdens on the individual debtor than previously experienced under the 1978 Bankruptcy Code. Under the new law, a chapter 7 bankruptcy petition filing fee increased from $195 to $245 and a chapter 13 fee increased from $155 to $235. In addition, the individual debtor must pay a sizeable attorney’s fee for representation in the bankruptcy process. Attorney’s fees have increased due to the increased workload and new responsibilities placed on the bankruptcy attorney as a...
result of the passage of BAPCPA. The increased work load and responsibilities also mean an individual is 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’s fees charged for both chapter 7 and chapter 13 cases have significantly increased as a direct result of the enactment of BAPCPA. The researchers found a 24% increase in the national mean attorney fee in a chapter 13 case from $2,061 for pre-BAPCPA cases to $2,564 in a post-BAPCPA case. Similarly, in chapter 7 cases, there is an increase in the national mean attorney fee of 30% from $821 to $1,072 (in asset cases) or 48% from $654 to $968 (in no asset cases). In effect, the researchers conclude that consumer debtors are paying significantly more in fees to receive the intended relief, and in many instances, the increase in fees prevents access to the bankruptcy court for those individuals most in need.

Another barrier to entry is new eligibility requirements. Under BAPCPA, individual consumer debtors are obligated to attend a briefing concerning credit counseling prior to becoming eligible for bankruptcy filing. This requirement 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. Although the debtor may attempt to file for bankruptcy without the certificate, the court must grant the debtor a waiver due to “exigent circumstances” or an inability to obtain counseling within five days of filing. However, these waivers are not liberally granted because a bankruptcy judge must find the explanation for failing to obtain a credit briefing credible and satisfactory. A credible and satisfactory explanation must establish something beyond the normal circumstances of financial distress. In the likely event the court denies the waiver, the bankruptcy clerk’s office will automatically dismiss the debtor’s petition.

Another filing requirement for the consumer debtor is found in BAPCPA section 315(b) (codified as Section 521). This section imposes several new initial filing requirements on debtors: “payment advices” for the 60 days prior to filing from all employers of the debtor; a

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180 See James J. White, Abuse Prevention 2005, 71 Mo. L. Rev. 863, 874-76 (2006); (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.)

181 The Consumer Bankruptcy Fee Study, supra note #, at 6-7.

182 Id.

183 Id. at 111-13.

184 11 U.S.C. § 109 (h)(1); (Stating, “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”).

185 First Shore Federal Savings and Loan Association v. Garrison C. Hudson, 352 B.R. 391 (2006); (The court considered the meaning of the new BAPCPA provision requiring debtors to obtain a credit briefing in the 180-period proceeding the date of filing the petition.)


187 Dixon v. LaBarge, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006); (The 8th Circuit Bankruptcy Appellate Panel agreeing with the ruling in the Bankruptcy Court found 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.)


statement of net monthly income; and a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of filing. Furthermore, debtors are required to file a copy of income tax returns for the previous year, or, if the court so orders, a copy of the previous three years’ returns. The debtor’s failure to file any of these documents results in immediate dismissal of the case by the clerk of court.

Such immediate dismissals by the clerk create additional problems for debtors, particularly because of the stay limitations of the new amendments if the debtor files another petition within one year. These problems are discussed in more detail below.

c. Repeat Filing and BAPCPA’s Trap Doors

New provisions under BAPCPA are targeted at curbing and limiting a debtor’s ability to repeat file. 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 prior year. In the bankruptcy process, the automatic stay is the most powerful protection for debtors. It prevents creditors from taking action against the debtor or the debtor’s property, and it provides the debtor with critical time to evaluate his or her financial situation without the pressures of credit calls, harassment, and foreclosures. BAPCPA severely limited the automatic stay for debtors who file successive bankruptcy petitions. In addition to limiting and eliminating the automatic stay, the new provisions create a rebuttable presumption that the subsequent petition was filed in bad faith. This presumption is particularly problematic for the chapter 13 debtor who must satisfy new good faith requirements in the plan confirmation process. In many cases, these two together function to completely bar any bankruptcy debt relief.

For the uninformed debtor, failing to comply with the technical requirement of credit counseling may force the debtor outside the bankruptcy system protections. Any cases the clerk dismisses for failure to file the certificate or waiver with the petition are likely to be immediately re-filed. However, those re-filed cases would fall within the repeat filer provisions.

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192 11 U.S.C. §541(e)&(f).
194 Interview with Steven Derby, Bankruptcy Judge, Baltimore Maryland. (Nov. 15, 2006). (“The new Act works similar to a series of trap doors. 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).
195 11 U.S.C. §§362(c)(3)&(4); Subsection (3) states, in part: “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” ; Subsection (4) states, in part: “‘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”).
196 See H.R. Rep. No. 95-595, at 11 (1977), reprinted in 1977 U.S.C.C.A.N. 5963, 5973 and 6082 (“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.”)
198 11 U.S.C. §§ 362 (c)(3)(B) & (4)(B) (These two subsections allow 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.)
199 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. Dixon, 338 B.R. at 388; See also In re Wallert, 332 B.R. 884, 889 (Bankr. D. Minn. 2005); In re Randolph, 342 B.R. 633, 636 (Bankr. M.D. Fl. 2005).
of BAPCPA, severely limiting or eliminating altogether the automatic stay and triggering the bad faith presumption. As a result, a debtor who risks another filing faces an immediate need to prove good faith to the bankruptcy court or risk another dismissal. \(^{200}\) If the debtor’s case is dismissed a second time, all statutory protections for the debtor against creditors would terminate.\(^{201}\) Thus, the credit counseling requirement coupled with the limitation/elimination of the automatic stay in repeat-filer cases function to leave a debtor beyond the protection of the bankruptcy court in the event the debtor fails to obtain counseling or a waiver of the filing requirement.\(^{202}\)

BAPCPA often functions most harshly against those who may have attempted to settle debts outside bankruptcy, as recognized by Bankruptcy Judge Frank Monroe in *In re Sosa*,\(^{203}\) 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, and because of the timing, one of the debtors failed to obtain the credit counseling before filing. Judge Monroe dismissed the case, holding as follows:

. . . 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.\(^{204}\)

Just 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, and 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\(^ {205}\) provides the first statutory screening mechanism to shift consumer debtors out of chapter 7 (complete discharge) and into chapter 13 (repayment plan). 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

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\(^{200}\) 11 U.S.C. § 362 (c)(3).

\(^{201}\) 11 U.S.C. § 362 (c)(4).

\(^{202}\) In re Seaman, 340 B.R. 698, 700-09 (Bankr. E.D.N.Y. 2006); (Bankruptcy Judge Stong addresses the consequences of a 109(h) dismissal of the debtor’s petition and the impact of that dismissal on the debtor’s subsequent filing. Judge Stong explains that such a dismissal results in a limitation on the automatic stay.)

\(^{203}\) In re Sosa, 336 B.R. 113 (Bankr. Western District of Texas 2005).

\(^{204}\) Id. at 115-17.

\(^{205}\) 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.”)
life. This heightened scrutiny of the individual consumer debtor is new in terms of statutory language. The 1978 Bankruptcy Code created a presumption in favor of granting the debtor the relief sought. In an attempt to carve away at the presumption in favor of a debtor discharge, the 1984 Amendments to the Code added a provision that allows the United States Trustee to challenge the chapter 7 discharge on the grounds that granting the discharge would be a substantial abuse of the bankruptcy system. If a finding is made and substantial abuse established, the debtor’s case is dismissed or converted, with consent, to a chapter 13. Under the new law, the presumption in favor of granting the relief sought by the consumer debtor is entirely removed. The individual in need of bankruptcy protection must prove that he or she is eligible for the relief sought under chapter 7.

Under the means test, debtors are permitted a diminutive allowance that caps permissible living expenses. Congress decided in drafting BAPCPA that the bankruptcy debtor’s permissible living expenses should be those specified in the Collection Financial Standards of the Internal Revenue Service (“IRS”). The IRS crafted these allowed living expense standards for delinquent taxpayers and income tax evaders. 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.” For example, the guidelines give a family of four living in Orange Country, Florida an allowance of $2,200 for rent or mortgage and $765 for all food each month. Thus, the standards provide the taxpayer and his or her family with only the bare minimum to live. This allowance, meant as a punishment for tax evaders, imposes a harsh “bread and water” standard of living on the debtor, and any income exceeding the allowance is interpreted as indicating to the bankruptcy court that the debtor has the ability to pay unsecured debts. 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.

206 Pre-BAPCPA, the United States Trustees Office in the Department of Justice performed an informal means test on a case-by-case basis.
207 Statutory Language: “(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.” Presumption: the debtor filing a bankruptcy petition is honest. The previous code section indicated: “a presumption in favor of granting relief requested by the debtor” in the chapter 7 case. Burden of proving dishonesty is on the Federal Government, United States Trustee’s Office. 707(b)(2) motions. Judicial discretion: Once motion was filed and a hearing set, a bankruptcy judge oversaw the determination of whether “substantial abuse” in fact existed.
208 Under the 1978 Code (The Bankruptcy Amendments and Federal Judgeship Act of 1984 added section 707(b)), Code section 707(b) requiring a showing on the part of the moving party (UST needed to bring the motion) of “substantial abuse” for the debtor to file a chapter 7 petition to force the debtor into a chapter 13 repayment plan. Statutory Language: “(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.”
209 BAPCPA Section 102 (a) Codified at 11 U.S.C. § 707 (b)(1), after notice and hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may 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.
211 11 U.S.C. §707(b)(2)(A)(ii)--(iv). (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.)
214 Id. at 5.15.1.1. Expectations. See also, Wedoff, supra note #, at 254.
216 IRS, supra note #, Wedoff, supra note #, at 254.
217 Wedoff, supra note #, at 231. (New provision in §707(b) creates “an apparently strict formula for presuming sufficient debt-paying ability”).
These allowed amounts are imposed 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 the individual can remain in chapter 7 and receive a full discharge of unsecured debts or convert to a chapter 13 bankruptcy and repay unsecured creditors a portion or all of the debt owed. 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. Disposable income is the amount chapter 13 debtors are required to pay to the chapter 13 trustee over a three to five year period.

In effect, BAPCPA regulates and controls debtors through intense scrutiny down to the last dollar spent on food or toilet paper. In this way, BAPCPA is a control mechanism aimed at managing the middle classes. Thus, 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 for a bankruptcy case. In both chapter 7 and chapter 13, the intention of the drafters of the 1978 Bankruptcy Code is frustrated by new limitations on the debtor’s exemptions, 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 and while mandating increased debt responsibility for debtors. These new provisions destroy the spirit of the 1978 Bankruptcy Code by severely limiting the debtor’s fresh start.

First, section 522(f), providing debtors’ with the ability to avoid liens on exempt property, is limited by the operation of BAPCPA section 313. In its original form, section 522(f) provided the debtor 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, and it gave debtors the power to avoid non-purchase money security interest in certain household and personal goods. The new provisions, however, adopt the Federal Trade Commission’s limited definition of “household goods.” It specifies which items are not household goods and provides monetary and numerical caps for electronics, jewelry, and antiques. Further, BAPCPA section 322 imposes monetary thresholds on state homestead exemptions. Debtors are limited to $136,875 of

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219 11 U.S.C. §1325(b). See Wedoff, supra note #, at 240-41. (Judge Wedoff’s article provides a comparison table depicting the calculations in the “means test” in relation to the calculations for “disposable income.” He explains that the amounts are identical.)
220 11 U.S.C. §1325(b)(4). (This section states 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. Below median income debtors are to propose plans of no less than three years.)
223 BAPCPA, supra note #, (2005).
227 BAPCPA, supra note #, (2005).
exempt value in any real property used as a residence, but this monetary cap only applies if the debtor acquired the property within the 1,215-day period preceding the petition filing.\textsuperscript{229} Thus, these new provisions 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.\textsuperscript{230} This provision marks a change from the 1978 Bankruptcy Code which allowed debtors to discharge a portion of their educational debts as long as the debt was held by a private lender.\textsuperscript{231} Private lenders now enjoy the same status in bankruptcy as the federal government because private loans are non-dischargeable pursuant to Section 523(a)(8).\textsuperscript{232} Moreover, this new requirement directly contradicts the recommendation of the 1997 National Bankruptcy Review Commission calling for repeal of section 523(a)(8).\textsuperscript{233} 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 with respect to repaying both public and private student loans.\textsuperscript{234}

Third, BAPCPA section 304 eliminates the option to reaffirm a purchase money debt on personal property. Under the 1978 Code, a chapter 7 debtor 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”). Now within forty-five days of the meeting of creditors, the chapter 7 debtor must either redeem the property or enter into a reaffirmation agreement with the secured creditor.\textsuperscript{235} BAPCPA also provides the form for reaffirmation\textsuperscript{236} and requires the debtor to disclose income and expenses to show sufficient funds to pay on the obligation. Once the debtor signs the reaffirmation agreement and it is accepted by the court, the pre-bankruptcy obligation becomes a post-bankruptcy debt.

Reaffirmation agreements remove the “fresh start” as related to the debt owed on the collateral securing the loan. By reaffirming the entire obligation, the debtor must also reaffirm the unsecured portion of the debt requiring the debtor to pay in full any shortfall resulting from a repossession and sale of the collateral. If the debtor becomes unable to pay on the obligation post-discharge, the creditor will seize the collateral, sell it, apply the proceeds to the outstanding reaffirmed debt, and then sue the debtor for the shortfall. The chapter 7 discharge will not negatively affect a creditor’s ability to collect the shortfall from the debtor because the debt relates to a post-petition agreement. Thus, again, BAPCPA frustrates the spirit of the 1978 Bankruptcy Code.

\begin{footnotesize}
\footnote{229 11 U.S.C. §522(p)(1).}
\footnote{230 11 U.S.C. §523(a)(8)(B).}
\footnote{231 11 U.S.C. §523(a)(8)(i). This subsection under the 1978 Code did not exempt private educational loans. See H.R. Rep. 95-595 (1977). The House of Representative Report in 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-dischargeable. Particularly, this view is expressed by former House Representative James O’Hara. \textit{Id.} at 132-52. This is precisely what BAPCPA does: it protects the private lender.}
\footnote{232 11 U.S.C. §523(a)(8)(B) 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.}
\footnote{233 Report of the National Bankruptcy Review Commission, Vol. I, at 6 Oct. 20, 1997. The Commission recommended 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 show how the undue hardship provision has become a broad rule leading to its virtual inapplicability to protect needy debtors. \textit{Id.} at 207-17.}
\footnote{234 11 U.S.C. §523(a)(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor.}
\footnote{235 11 U.S.C. §521(a)(6).}
\footnote{236 BAPCPA, \textit{supra} note ##, at section 203. (Amending 11 U.S.C. §524(k)).}
\end{footnotesize}
Fourth, Section 306 of BAPCPA reduces the chapter 13 debtor’s ability to strip-down a secured debt. Under the 1978 Code, debtors could bifurcate a secured loan into secured and unsecured portions of, for example, a car loan. The chapter 13 plan payment would include a payment for the secured portion of the debt. 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 the debtor has purchased a car within two and half years of filing the petition, the debtor must pay the full contract amount through the chapter 13 plan. Thus, debtor is again denied the benefit of the fresh start under the 1978 Code.

BAPCPA limits the discharge given to chapter 13 debtors upon completion of plan payments by expanding the nondischargeable provisions of section 1328. 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, credit card misuse, and failure to notify creditors of the bankruptcy in time to allow assertion of claims. Further, interest continues to accrue on these debts while the debtor is paying a chapter 13 plan. 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. 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 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, but as shown above, it protects the creditor in the debt relationship rather than the borrower. 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 increased their volume of lending because loans (payment streams) were pooled and sold off 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 example of credit cards is illustrative. Consider the post-BAPCPA profits of credit card lenders. [put in data on record profits for credit card lenders].

The process of liberating the financial markets revealed an opposite visage of the neoliberal machinery for the populations at the middle and bottom of the class structure 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.

IV. Dominant Cultural Discourse\(^{246}\) of Moral Behavioralism: Stigmatized Fiscal Identities and Collective Amnesia

“I pay my debts each month. What is wrong with people?”\(^{247}\)

The neoliberal vision of a social collective is captured by the statements of former Prime Minister of Britain Margaret Thatcher when she said, “there is no such thing as society, only individual woman and men.”\(^{248}\) 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.\(^{249}\) 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 market place. As discussed elsewhere by the author, Enlightenment notions of individualism, reason, free will, and progress\(^{250}\) are the cornerstone 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 market place are viewed through the lens of Christian morality and sin\(^{251}\) such that individual humans, unlike corporations, are instructed to “remember the sanctity of their obligations.”\(^{252}\) From this perspective, loan agreements are moral obligations rather than simply contracts in the “free” market place; 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

\(^{246}\) Stuart Hall, Foucault: Power, Knowledge and Discourse, in DISCOURSE THEORY & PRACTICE: A READER, 72 (Margaret Wetherell, Stephanie Taylor & Simon Yates ed., 2001); 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. Discourse is about the production of knowledge through language. But since all social practices entail meaning, and meaning shape and influence what we do—our conduct—all practices have a discursive aspects. . . .It is about language and practice. . . .Discourse,” Foucault argues, “constructs the topic. It defines and produces the objects of our knowledge. It governs the way that a topic can be meaningfully talked about and reasoned about. It also influences how ideas are put into practices and used to regulate the conduct of other. Just as discourse ‘rules in’ certain ways to talk, write, or conduct oneself, so also, by definition, it ‘rules out,’ limits and restricts ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it.”

\(^{247}\) Interview with informant #35, tg., (June 2010). (on file with author).

\(^{248}\) Harvey, supra note ## (Brief history), at 23; Citing D. Yergin & J. Stanislaw, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND MARKET PLACE THAT IS REMAKING THE MODERN WORLD (Simon Shuster 1999).

\(^{249}\) Thorsen, supra note ##, at 204.

\(^{250}\) Linda Coco, Law review and dissertation.

\(^{251}\) The Bible informs the notion of financial forgiveness and the bankruptcy 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.

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. Individual debtors are viewed by others as solely responsible for their consequences and status in the marketplace and social world. Debtors also view themselves through this same lens. Contrastingly, 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. 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. Notwithstanding, 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. Critics 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 responsibility and personalized shame. A social and economic paradox is generated and a trap is set for the middle class population. As society experiences the cutting back of the welfare state it leaves “larger and larger segments of the population exposed to impoverishment” and as “the social safety net is reduced to a bare minimum in favor of a system that emphasizes individual responsibility and the victim is all too often blamed.”

Finally, 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 lack 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?”

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253 BOURDIEU, supra note #. (Bourdieu describes the inculcation and operations of the disciplining apparatuses of dominant discourses in his notions of logic of practice, misrecognition, habitus, and doxa. Bourdieu writes that human identity, conduct, and social interaction is shaped by a kind of tacit practical knowledge or logic. This practical knowledge is rarely recognized or rationally articulated by the agent. Rather the agent upholds an official view of social behavior and interaction, a meta-pragmatic discourse. The agent misrecognizes the meta-pragmatic discourse as the correct way to understand her conduct rather than attempting to understand or discover the practical knowledge beneath. Practical knowledge remains tacit within conduct and interaction in that it “goes without saying, because it comes without saying.” Id. at 167. However, this kind of knowledge organizes social space, time, the movements of the body and thought. Practical knowledge forms the sedimented layers of the individual’s habitus and the collectively held doxa.)

255 Loic Wacquant. 204
257 Id. at 51.
VI. Conclusion-Tightening the Belts of the Poor as the Belts of the Rich are Loosened.

“What really owes what to whom?”

“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.”

During the 2008 economic crisis, public money was used as a cash infusion for private investment entities. They were “too big to fail.” The year following the infusion of public money, several of these entities lodged record profits and bonuses for their executive 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 debtor expenses and requiring repayment under bread and water chapter 13 plans only applies to “individuals with primarily consumer debts,” not large investment firms. The reckless gambling behaviors of these firms which tanked the entire economy go unchecked. The creators of the conditions making the failure of the middle class possible were rewarded.

Middle class American now face a lifetime of repayment. 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 the economy. The flow of money, the life blood of capitalism, is truncated and the velocity of capital slowed. Thus, it 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 Graeber 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 humans societies. Under BAPCPA, the risks and responsibilities traditionally shared by the lender and borrower in the debt relationship are now transferred into the shoulders of the borrower.

258 Graeber, supra note ## Debts, at 13.
260 The Debt Trap Series, The Debt Trap: A Series About the Surge in Consumer Debt and the Lenders that Made it Possible, N.Y. TIMES. (explains that millions of Americans are deeping in debt, and that they now face a lifetime of repayment), Available at, http://www.nytimes.com/interactive/2008/07/20/business/20debt-trap.html.
Using the notions found in the dominant discourse of moral behavioralism, this shift appears natural, inevitable and just.