

# Race Matters in Bankruptcy Reform

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## I. INTRODUCTION

In an earlier work,<sup>1</sup> I argued that Congress and federal courts either consciously or unconsciously exhibited a bias in favor of people with certain financial attributes (the “Ideal Debtor”) in crafting the relief provided by the federal Bankruptcy Code (the “Code”).<sup>2</sup> After examining census and other empirical data, I concluded that the Ideal Debtor is white and, for that reason, race mattered in bankruptcy.<sup>3</sup>

On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of (“BAPCPA”) was signed into law and became fully effective for cases filed on or after October 17, 2005.<sup>4</sup> After considering bankruptcy reform for almost a decade, Congress ultimately concluded that some debtors were abusing bankruptcy laws by, among other things, discharging debts they had the means to pay.<sup>5</sup> To curb this perceived abuse, Congress decided to radically overhaul the consumer provisions of the Code by generally making it harder for an opportunistic or “Abusive Debtor” to discharge his debts. Given the sweeping nature of these changes, it is appropriate to consider whether race matters in bankruptcy reform.

Part II of this Article briefly reviews the goals and structure of bankruptcy relief. Part III describes the Ideal Debtor pre-BAPCPA and briefly explains why, pre-BAPCPA, whites likely received the most benefits from filing for bankruptcy. Part IV presents the “Abusive Debtor” profile that caused Congress to enact BAPCPA; then, it briefly describes BAPCPA’s most significant changes to the existing consumer bankruptcy laws. Part V of the Article briefly discusses how BAPCPA affects the pre-BAPCPA Ideal Debtor; then, presents the demographic features of the debtor profile that would be most harmed by BAPCPA. Part VI notes that the financial characteristics attributed to the Abusive Debtor are more likely to be found in white debtors. Indeed, despite the Code’s general bias in favor of white debtors, a hypothetical *white* debtor would be harmed more than a hypothetical minority debtor by BAPCPA’s most controversial provision (i.e. the means test) because whites have relatively higher incomes. Likewise, given their higher home ownership rates, white homeowner debtors would be harmed more by the limitations BAPCPA places on homestead exemptions and exemption planning than minority debtors would.

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1. A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2005) [hereinafter *Race Matters I*].

2. 11 U.S.C. §§ 101-1532 (2000 & Supp. V 2005).

3. See *infra* Section III.

4. Bankruptcy Abuse Prevention and Consumer Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

5. H.R. REP. NO. 109-31, pt. 1 (2005), as reprinted in 2005 U.S.C.C.A.N. 88; S. REP. NO. 105-253, at 23-26 (1998).

Part VI observes, however, that other BAPCPA provisions widen the racial benefits gap, including those that make more student loan and family support debts nondischargeable as well as giving more favorable treatment to debtors who have interests in retirement accounts or who send their children to private schools. Because even BAPCPA's supporters conceded that few people would flunk the means test<sup>6</sup> and because BAPCPA places only modest restrictions on homeowners, the Article concludes by suggesting that bankruptcy laws likely will continue to disproportionately benefit white debtors.

## II. BANKRUPTCY RELIEF

### A. Goals

Bankruptcy laws are designed to make sure that deserving (i.e. poor and honest) debtors get a fresh financial start by discharging their debts, and that creditors are treated fairly in an orderly debt resolution proceeding.<sup>7</sup> Until Congress enacted BAPCPA, consumers who sought bankruptcy relief had an almost unfettered right to decide whether to attempt to repay their debts. That is, consumers pre-BAPCPA could almost always choose whether to discharge some debts while relinquishing all but exempt assets in Chapter 7 or discharge significantly more debts, keep almost all assets (including those they could not exempt) but attempt to repay at least some debts in Chapter 13. In addition, most pre-BAPCPA debtors could decide whether to propose a three or five year Chapter 13 repayment plan.<sup>8</sup>

Debtors historically chose Chapter 13 over Chapter 7 if they wanted to keep homes, cars, and other nonexempt assets.<sup>9</sup> Because pre-BAPCPA debtors had the right to decide whether to attempt debt repayment, a Chapter 7 debtor who theoretically had income that could be used to repay his debts in a Chapter 13 proceeding was not required to do so. However, courts were not completely powerless since they had the authority to curtail conduct they found to be abusive. That is, pre-BAPCPA courts could dismiss Chapter 7 cases if they concluded that granting bankruptcy relief would be a "substantial abuse" of the Code.<sup>10</sup> Pre-BAPCPA courts considered a number of factors when deciding whether to dismiss a Chapter 7 case for substantial abuse. A partial list includes the following: whether the debtor appeared to have income sufficient to repay debts in Chapter 13, whether the debtor's proposed

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6. See *infra* note 120.

7. *Race Matters I*, *supra* note 1, at 1727 (discussing dual goals).

8. However, the presumption, both in the Code and in practice, was that plans would last no longer than three years. *Id.* at 1727-29 (summarizing debtors' choice under pre-BAPCPA Code); 11 U.S.C. § 1322(d) (2000), *amended by* 11 U.S.C. § 1322(d) (Supp. V 2005) (statutory presumption of three year plan).

9. *Race Matters I*, *supra* note 1, at 1728.

10. 11 U.S.C. § 707(b) (2000), *amended by* 11 U.S.C. § 707(b) (Supp. V 2005).

budget contained too many unnecessary, or *any* extravagant household expenses, and whether the debtor wanted to use his income to provide support for non-legal dependents such as adult children, parents, or grandchildren.<sup>11</sup>

### B. Treatment of Debts

Both the pre-BAPCPA and amended Code specify the order in which debts will be paid and lists those debts that can never be discharged. Based largely on policy grounds, the Code gives certain unsecured claims priority treatment, including taxes, wage-related claims, and domestic support obligations, such as alimony and child support.<sup>12</sup> Lawyers also receive favorable treatment in bankruptcy cases since administrative expenses, which include attorneys fees, have traditionally been entitled to payment before other unsecured claims.<sup>13</sup>

Family support debts have always been a politically protected class of debts. In addition to being a priority claim, most family support obligations were presumptively nondischargeable pre-BAPCPA.<sup>14</sup> While obligations and payments “in the nature of support” could never be discharged, pre-BAPCPA debtors could sometimes discharge nonsupport obligations ordered as part of a divorce or separation.<sup>15</sup>

Pre-BAPCPA, student loans made or guaranteed by government units were also presumptively nondischargeable in both Chapter 7 and 13.<sup>16</sup> Student loans could be discharged only if debtors could show that repaying the debt would impose an “undue hardship” on them and their dependents.<sup>17</sup> Pre-BAPCPA, courts typically refused to consider whether the debtor received any legitimate educational benefits from the school (often a trade school) that received his loan proceeds. Instead, if the court concluded that forcing the debtor to repay the loan would not be an undue financial hardship, the loan debt was nondischargeable even if the debtor received no marketable skills or training from the school.<sup>18</sup>

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11. *Race Matters I*, *supra* note 1, at 1729-30 (discussing factors courts considered when deciding whether a Chapter 7 filing was abusive); 11 U.S.C. § 707(b) (2000), *amended by* 11 U.S.C. § 707(b) (Supp. V 2005).

12. 11 U.S.C. § 507(a) (2000), *amended by* 11 U.S.C. § 507(a) (Supp. V 2005).

13. 11 U.S.C. § 503(b) (Supp. V 2005).

14. 11 U.S.C. § 523(a)(5) (2000), *amended by* 11 U.S.C. § 523(a)(5) (Supp. V 2005).

15. *Id.* § 523(a)(15) (2000), *amended by* 11 U.S.C. § 523(a)(15) (Supp. V 2005). Typically, payments “in the nature of support” are child support or alimony, and many “nonsupport obligations” include equitable property distributions or obligations arising from hold-harmless agreements.

16. *Id.* § 523(a)(8) (2000), *amended by* 11 U.S.C. § 523(a)(8) (Supp. V 2005).

17. *Id.*

18. *See, e.g.,* *Murphey v. Sallie Mae (In re Murphy)*, 305 B.R. 780, 791, 798 n.21 (Bankr. E.D. Va. 2004) (rejecting the view that the “tangible benefit a debtor

### C. Treatment of Assets

While a Chapter 7 debtor's pre-petition assets can be used to pay creditor claims, assets acquired after the bankruptcy petition is filed generally are excluded from Chapter 7 estates.<sup>19</sup> In contrast, post-petition assets — including future wages — are included in Chapter 13 estates. In fact, most Chapter 13 debtors make the payments required by their repayment plans using post-petition wages.<sup>20</sup> In effect, while a Chapter 13 debtor's tangible assets theoretically can be liquidated and used to repay his debts, Chapter 13 debtors typically keep their present assets, exempt and non-exempt, and instead use future income to repay their past debts.

Notwithstanding this broad, inclusive definition of estate property, the pre-BAPCPA and existing Code categorically exclude certain types of property from all debtors' bankruptcy estates. Bankruptcy laws allow debtors to exempt property to ensure that debtors will not leave bankruptcy destitute. Thus, debtors may keep all property — regardless of value — held in trust or subject to a restriction on transfer under applicable nonbankruptcy laws.<sup>21</sup> This allows a debtor who is the beneficiary of property held in a spendthrift trust, or debtors who have interests in tax-qualified retirement plans that contain transferability restrictions, as virtually all do, to keep those funds rather than use the funds to pay creditor claims.<sup>22</sup>

While the Code contains a uniform list of assets that are categorically excluded from the debtor's estate, there is a wide disparity in the type and amount of property individual debtors can exempt under either the federal bankruptcy or applicable state exemptions provisions.<sup>23</sup> Because the public policy of this country generally favors home ownership, the Code and almost all state laws let debtors exempt at least a portion of the value of their home.<sup>24</sup>

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obtained from a student loan obligation" should be considered when deciding whether to discharge the student loan debt). *Cf. Speer v. Educ. Credit Mgmt. Corp. (In re Speer)*, 272 B.R. 186, 192 (Bankr. W.D. Tex. 2001).

19. 11 U.S.C. § 541(a) (2000).

20. *Id.* § 1306(a).

21. *Id.* § 541(c)(1).

22. *Race Matters I*, *supra* note 1, at 1735-36. A spendthrift trust is one that has terms that prevent the beneficiary from assigning his interests to another party and also prevent creditors from reaching his interests. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, IIA THE LAW OF TRUSTS 83 (4th ed. 1987). Typically, the settlor creates a spendthrift trust to protect the beneficiary from his own folly, inefficiency, or misfortune. *Id.*

23. This disparity occurs because Congress permits state legislators to decide whether their residents can choose between bankruptcy or state exemption laws or whether they must rely on the state exemptions. 11 U.S.C. § 522(b) (Supp. V 2005). See generally Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 398 (2005).

24. *Race Matters I*, *supra* note 1, at 1736 n.47.

Indeed, a few states (including Florida and Texas) give debtors an almost unlimited homestead exemption *even if* the home is expensive and they bought the home immediately before filing for bankruptcy as part of pre-filing “exemption planning.”<sup>25</sup> Similarly, if allowed by the debtor’s applicable state exemption laws, the debtor can keep property he and his spouse own as tenants by the entirety and the Code makes it harder to sell entirety property even if it is nonexempt. Likewise if allowed by applicable state law, the Code, both pre-BAPCPA and as amended, lets married debtors prevent creditors from seizing entireties property regardless of its value.<sup>26</sup>

Even if debtors do not own entireties property or cannot take an unlimited homestead exemption, the pre-BAPCPA Code favored homeowner debtors.<sup>27</sup> For example, Chapter 13 debtors who were delinquent on their mortgage payments but had equity in their homes generally could use bankruptcy to keep their homes.<sup>28</sup> Indeed, even if the mortgage holder accelerated the mortgage loan and sued the debtor for the loan balance, mortgage holders would find it difficult to foreclose on a Chapter 13 debtor’s home if the debtor kept current on her mortgage payments and agreed to cure the loan default through the Chapter 13 plan.<sup>29</sup> This favorable treatment for homeowners is in stark contrast to the benefits bankruptcy laws give renter debtors. That is, debtors who rent residential property typically will be evicted if they fall behind on their rent payments unless they cure the default *and* give the landlord assurances that there will be no future defaults.<sup>30</sup>

#### D. Costs

It is virtually impossible for debtors to discharge their debts in bankruptcy without incurring some expenses. Though litigants in almost every other judicial setting had been allowed to file *in forma pauperis* for years, pre-BAPCPA debtors were forced to pay filing fees.<sup>31</sup> By making all debtors pay the filing fee, Congress effectively deemed some poor people to be too poor to file for bankruptcy.<sup>32</sup> Though most localities have always had *pro*

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25. *Id.* at 1736. See also 151 CONG. REC. S2462-02, 2467 (2005) (statement of Sen. Lautenberg), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005\\_record&page=S2467&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=S2467&position=all) (suggesting that BAPCPA “protects the mansions of multimillionaires who file for bankruptcy protection but makes it easier for landlords to evict tenants from their homes”).

26. *Race Matters I*, *supra* note 1, at 1736-37.

27. *Id.* at 1737.

28. *Id.*

29. *Id.*

30. In pre-BAPCPA Chapter 7 cases, curing the default had to occur within sixty days after the case was filed. *Id.* at 1737-38.

31. 28 U.S.C. § 1930(a) (2000), amended by 28 U.S.C. § 1930(a) (Supp. V 2005).

32. *Race Matters I*, *supra* note 1, at 1741.

*bono* bankruptcy programs or other free legal services, those services generally were made available only for debtors whose wages were being or likely would be garnished or those who had nonexempt property that could be seized.<sup>33</sup>

Given the scarcity of free legal assistance, pre-BAPCPA debtors could expect to pay attorney's fees ranging from \$400 to \$1,750 in Chapter 7 cases and \$400 to \$3,000 in Chapter 13 cases.<sup>34</sup> These fees would be higher if debtors went to see the lawyer before filing for bankruptcy exemption planning advice, i.e. advice on how to convert non-exempt assets into exemptible property or to otherwise maximize their available exemptions in bankruptcy. In addition, while debtors can pay their Chapter 13 attorney's fees through their plans, Chapter 7 debtors are almost always forced to pay their attorneys before the case is filed. Attorneys who handle Chapter 7 cases traditionally demanded payment upfront because the vast majority of Chapter 7 cases are administratively insolvent and, thus, lacked funds to pay any unsecured claims, including their attorneys' fees.<sup>35</sup> Indeed, anecdotal evidence suggests that pre-BAPCPA Chapter 7 debtors purportedly were advised to borrow money from friends or relatives or not pay other bills to be sure they had enough money to pay their attorney and the mandatory filing fees.<sup>36</sup>

### III. THE IDEAL DEBTOR

Everyone who files for bankruptcy generally receives *some* debt relief. But, as I discussed in *Race Matters I*, debtors who had certain types of debts, assets, and other economic attributes (the "Ideal Debtor") would benefit significantly more than other filers.<sup>37</sup> As the next sections show, given the demographic characteristics of different racial groups, the pre-BAPCPA Ideal Debtor was white.

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33. *Id.* at 1742.

34. *Id.*

35. *Id.* at 1731; *Personal Bankruptcy Consumer Credit Crises: Hearing Before the Subcomm. on Administrative Oversight and Courts of the S. Comm. on the Judiciary*, 105th Cong. 61 (1997) (statement of Dr. Michael E. Staten, Director, Credit Research Center - Purdue University), available at 1997 WL 176667 (F.D.C.H.); NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT 137 (1997).

36. *Race Matters I*, *supra* note 1, at 1742 & n.74.

37. In describing the attributes associated with the Ideal Debtor, I do not mean to suggest that every white debtor has all those financial or social attributes. Likewise, in describing the type of debtor who hypothetically would benefit most from bankruptcy laws, I recognize that there probably are not a significant number of actual debtors who fit the Ideal Debtor profile. Instead, as I did in *Race Matters I*, I discuss the attributes associated with the pre-BAPCPA "Ideal Debtor" to show how unconscious racial biases may have caused legislators and courts to enact or interpret laws in ways that favor certain demographic groups.

### A. Marriage

The Code, like most other state and federal laws, favors heterosexual married debtors. The Code exhibits this bias by, among other things, letting married debtors file a joint petition and, if allowed by applicable state law, exempt their tenants by the entirety property from all but joint creditors.<sup>38</sup> This marriage bias creates a benefits gap given the significant differences in marriage rates by race. For example, while Asians are less likely to be divorced, and have comparable marriage rates to whites, they are more likely than whites to be never married.<sup>39</sup> Hispanics are also more likely than whites to be never married or separated.<sup>40</sup> Blacks are the most likely to be single: they are more likely to be never married, and to be separated, widowed, or divorced than the total population.<sup>41</sup> This trend is especially prevalent among black women.

Black women are almost three times as likely to live in households with no husband present<sup>42</sup> and are more likely overall to be never married than white or Hispanic women.<sup>43</sup> Given the racial marriage gap, the number of black women who are never married, their larger proportions of nonmarital births, their higher minority fertility rates, and the increased incidence of divorce generally, almost half of all black households currently are headed by females.<sup>44</sup> In addition, though the number of black families has increased

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38. *Race Matters I*, *supra* note 1, at 1736, 1741-42. See also *In re Stone*, Case No. 04-75013 (Bankr. W.D. Va. Oct. 7, 2005) (refusing to grant deceased Chapter 13 debtor a hardship discharge, in part, because he had a surviving "lady friend," not a surviving dependent widow).

39. See TERRANCE REEVES & CLAUDETTE BENNETT, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, THE ASIAN AND PACIFIC ISLANDER POPULATION IN THE UNITED STATES: MARCH 2002 at 3 tbl.1, (Current Population Reports P20-540, May 2003), available at <http://www.census.gov/prod/2003pubs/p20-540.pdf>.

40. See U.S. DEP'T OF COMMERCE, CENSUS BUREAU, MARITAL STATUS OF THE POPULATION 15 YEARS OR OLDER BY SEX, HISPANIC ORIGIN, AND RACE: 2004, at tbl.2.1 (Current Population Survey, 2004), available at [http://www.census.gov/population/socdemo/hispanic/ASEC2004/2004CPS\\_tab2.1.html](http://www.census.gov/population/socdemo/hispanic/ASEC2004/2004CPS_tab2.1.html).

41. See JESSE D. MCKINNON & CLAUDETTE E. BENNETT, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, WE THE PEOPLE: BLACKS IN THE UNITED STATES 5 (Census 2000 Special Reports, CENSR-25, Aug. 2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>.

42. *Id.* at 6.

43. JASON FIELDS, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 9 tbl.4 (Current Population Reports, P20-553, Nov. 2004), available at <http://www.census.gov/prod/2004pubs/p20-553.pdf>.

44. *Id.* at 8 tbl.3. Whereas white single-mother households are more likely to be the result of a divorce than an out-of-wedlock birth, black single-mother households are less likely to be the result of a divorce. *Id.* at 9.

over the last thirty years, there are considerably more white married-couple families and married couple households<sup>45</sup> than black married-couple families or households.<sup>46</sup> Indeed, while more minority households exist now than in 1970, the racial marriage gap between whites and blacks has actually widened.<sup>47</sup>

### B. Employment and Income

To receive the most pre-BAPCPA benefits, the Ideal Debtor needed to have *some* disposable income and a fairly steady income stream. Debtors needed a consistent income stream to be sure they had the necessary components to a successful bankruptcy application: access to a lawyer who would give them pre-filing exemption planning advice, funds to pay the bankruptcy filing fee, and money to pay the bankruptcy lawyer's fees to prepare the petition and schedules.<sup>48</sup> Moreover, if the debtor wanted to keep non-exempt assets or assets he could not fully exempt, he needed income sufficient and stable enough to fund a (presumptively) three-year Chapter 13 repayment plan.<sup>49</sup>

Due in large part to the educational attainment gaps between whites and blacks and Hispanics,<sup>50</sup> blacks have always had higher unemployment rates

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45. *Id.* at 2-3 tbl.1.

46. See MCKINNON & BENNETT, *supra* note 41, at 6 fig.4 (finding that 52.5% of all households were married couples, but only 32.1% of black households were married couples). The number of Hispanic households that are married couples, in contrast, is larger than the percentage of all households. See ROBERTO R. RAMIREZ, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, WE THE PEOPLE: HISPANICS IN THE UNITED STATES 7 fig.5 (Census 2000 Special Reports, CENSR-18, Dec. 2004), available at <http://www.census.gov/prod/2004pubs/censr-18.pdf> (finding that 55.1% of Hispanic households were married couples).

47. *Race Matters I*, *supra* note 1, at 1747-48. Ironically, this gap may start to close, not because minorities are marrying more, but because the number of white married households is also declining. See Joy Jones, *Marriage is for White People*, WASH. POST, Mar. 26, 2006, at B01.

48. See *Race Matters I*, *supra* note 1, at 1743.

49. *Id.* at 1743-44.

50. PETER FRONCZEK, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY FROM THE 2004 AMERICAN COMMUNITY 11 (Am. Cmty. Survey Reports, ACS-01, Aug. 2005), available at <http://www.census.gov/prod/2005pubs/acs-01.pdf> (noting that a "person's level of education is considered to be a predictor of their earnings"); FIELDS, *supra* note 43, at 9 tbl.4. See also Peter Schmidt, *Study Blames Obstacles, Not Lack of Interest, for Shortage of Black and Hispanic Scientists*, CHRON. HIGHER EDUC., Apr. 4, 2006, at 39; *Latest Data Confirm a College Affordability Gap for Students from Middle- and Lower-Income Families*, S. REGIONAL EDUC. BOARD FACT BOOK BULL., June 2006, at 1, available at <http://www.sreb.org/main/EdData/Bulletin/60E08-June06.pdf>.

than whites and Hispanics.<sup>51</sup> As well, Hispanics have a higher unemployment rate than whites.<sup>52</sup> Not surprisingly, this racial employment gap creates a racial income gap. Asian households, especially native-born households, have higher median incomes than white households<sup>53</sup> and, indeed, Asian men had the highest median earnings in 2004 of all groups.<sup>54</sup> For other racial groups, though, incomes for whites are substantially higher<sup>55</sup> and the gap for blacks and whites has actually increased since the late 1960s.<sup>56</sup>

While both black and Hispanic incomes lag behind white median household incomes,<sup>57</sup> the Hispanic-white gap is striking. White male median earnings (\$45,473) in 2004 exceeded Hispanic male median earnings (\$26,749) by more than 70%.<sup>58</sup> The black-white income gap is not as stark and, in fact, it closes in some instances. For example, the gap narrows when married-couple households are considered and the gap between female workers is less than the gap between male workers.<sup>59</sup> Moreover, due to the increase in the number of black millionaires, there has been somewhat of a narrowing of the gap at the upper income levels.<sup>60</sup> Despite this progress, the black-white income gap stubbornly persists at all income levels.<sup>61</sup>

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51. PATRICK J. KELLY, AS AMERICA BECOMES MORE DIVERSE: THE IMPACT OF STATE HIGHER EDUCATION INEQUALITY 1-2, 15, 17 (Nat'l Ctr. for Higher Educ. Mgmt. Servs., Nov. 2005) available at <http://www.higheredinfo.org/raceethnicity/InequalityPaperNov2005.pdf>. See also MCKINNON & BENNETT, *supra* note 41, at 11 (noting that “[t]he percentage of [b]lack men in the labor force was about 10 percentage points lower than for all men”).

52. *Race Matters I*, *supra* note 1, at 1753.

53. *Id.* at 1755 (“Some attribute . . . this racial group’s relatively higher educational attainment rates and work hours, especially for the female household members.”).

54. FRONCZEK, *supra* note 50, at 9.

55. Indeed, whites earn more than other racial groups at each educational level, and the racial gap between whites and the members of other racial groups widens as the education level rises from high school to college. See KELLY, *supra* note 51, at 19.

56. *Race Matters I*, *supra* note 1, at 1754.

57. FRONCZEK, *supra* note 50, at 10 tbl.5. “Black household income is likely lower than other racial groups’ income because blacks have lower marriage rates and higher percentages of female-headed households, both of which decrease household income.” *Race Matters I*, *supra* note 1, at 1755.

58. FRONCZEK, *supra* note 50, at 10 tbl.5.

59. MCKINNON & BENNETT, *supra* note 41, at 13-14; U.S. DEP’T OF COMMERCE, CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 435 No. 655 (2002) available at <http://www.census.gov/prod/2003pubs/02statab/income.pdf> (showing that the gap narrows for married couples and that the gap for female workers is narrower than that for male workers).

60. *Id.* at 433 No. 652 (showing an increase in the number of black millionaires).

61. *Race Matters I*, *supra* note 1, at 1755-56.

*C. Wealth*

## 1. Generally

Although good in the abstract, having a high income does not provide the same overall benefits as having significant wealth. Generally speaking, individuals who have wealth (stocks, bonds, home equity, business ownership, etc.) are better off than those with income.<sup>62</sup> This is because wealth can always be liquidated and serve as an income replacement if a person loses his job or incurs unexpected expenses.<sup>63</sup> In addition, wealth can help individuals or their family members acquire more wealth, start a business, or pay for college.<sup>64</sup> Because wealth is distributed among U.S. households far more unevenly than income, the racial wealth gap is even more profound and persistent than the income gap.<sup>65</sup>

At all income levels, white households have significantly more real and personal property than black or Hispanic households. For example, the median household net worth for whites in 2000 was \$79,400, and was \$55,000 for all groups. In stark contrast, the median net worth of black households was \$7,500 and was \$9,750 for Hispanic households.<sup>66</sup> For families in the lowest earning quintile, the gap is especially pronounced. While overall median net worth for the lowest earning quintile, including home equity, was \$7,396, white families in this group had a median net worth of \$24,000, compared to \$57 for black families and \$500 for Hispanic families.<sup>67</sup>

There is also a racial gap in all types of property ownership. Because black and Hispanic median household income remains lower than median white household income, blacks and Hispanics not surprisingly have substantially fewer personal assets (including stocks, interest-bearing bank accounts, dividends, royalties, etc.) than whites.<sup>68</sup> Likewise, because self-employment correlates positively with wealth, it is not surprising that blacks own busi-

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62. *Id.* at 1756.

63. *Id.*

64. *Id.*

65. *Id.*

66. SHAWNA ORZECOWSKI & PETER SEPIELLI, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000, at 2, 6, 12 (Current Population Reports, P70-88, May 2003), available at <http://www.census.gov/prod/2003pubs/p70-88.pdf>. See also NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 2005, at 5 (Apr. 6, 2006), available at <http://www.nul.org/publications/SOBA/2005SOBAEXCSUMMARY.pdf> (reporting that median net worth for blacks is ten times less than white net worth).

67. *Race Matters I*, *supra* note 1, at 1757.

68. *Id.* at 1764; JARED BERNSTEIN ET AL., PULLING APART: A STATE-BY-STATE ANALYSIS OF INCOME TRENDS 43 (Center on Budget and Policy Priorities, Economic Policy Institute, Jan. 2006), available at [http://www.epinet.org/studies/pulling06/pulling\\_apart\\_2006.pdf](http://www.epinet.org/studies/pulling06/pulling_apart_2006.pdf).

nesses at rates disproportionately lower than whites and are more likely to be wage earners, as opposed to business owners.<sup>69</sup>

## 2. Exemptible Assets

Even though bankruptcy laws were designed to provide relief to the poor but honest debtor, the Ideal Debtor pre-BAPCPA would own mostly exemptible property or would convert nonexempt property to exempt property before filing for bankruptcy.<sup>70</sup> Debtors with exemptible assets (like homes) could leave both Chapter 7 and Chapter 13 and keep those assets.<sup>71</sup> Moreover, lower-income but higher wealth debtors would be required to devote only part of their relatively low disposable income to repay pre-petition debts in Chapter 13.<sup>72</sup> In contrast, higher-income but no-exemptible-asset debtors would leave Chapter 7 assetless and — even under pre-BAPCPA law — could be denied a discharge.<sup>73</sup> A number of pre-BAPCPA courts concluded that a debtor who could afford to repay his debts would not be allowed to proceed in Chapter 7 because doing so would be “abusive” and that, instead, he should be forced to at least attempt to repay his debts in Chapter 13.<sup>74</sup> Likewise, a higher-income but no-exemptible-asset debtor would leave Chapter 13 having to use her post-petition earnings to pay more of her debts than her higher wealth but lower income counterpart.<sup>75</sup>

The Ideal Debtor pre-BAPCPA would own an expensive home and preferably live in a state that let him exempt most, if not all, of the value of

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69. *Race Matters I*, *supra* note 1, at 1767. Though minorities lag behind whites in business ownership, minority business ownership rates are increasing faster than the national average. See U.S. DEP’T OF COMMERCE, CENSUS BUREAU, 2002 SURVEY OF BUSINESS OWNERS PRELIMINARY ESTIMATES OF BUSINESS OWNERSHIP BY GENDER, HISPANIC OR LATINO ORIGIN, AND RACE: 2002 (July 27, 2005), available at <http://www.census.gov/csd/sbo/sector/sec00.HTM>; U.S. DEP’T OF COMMERCE, CENSUS BUREAU, 1997 ECONOMIC CENSUS MINORITY- AND WOMEN- OWNED BUSINESSES UNITED STATES (July 12, 2001), available at <http://www.census.gov/epcd/mwb97/us/us.html>. Specifically, while the number of businesses in the United States increased by 10% between 1997 and 2002, the increase for minority owned businesses was much higher. *Id.* The increase for native Hawaiian- and other Pacific Islander-owned businesses increased by 67%; the rate for black-owned businesses increased by 30%; the rate of increase for Asian-owned businesses was 13%. *Id.*

70. *Race Matters I*, *supra* note 1, at 1743.

71. *Id.* at 1745.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* While some judicial districts always have had a high percentage of Chapter 13 plans that repay creditors in full, most pre-BAPCPA Chapter 13 debtors with modest incomes repaid only a limited amount of their debts, especially if they had relatively high, reasonably necessary living expenses. *Id.*

that home.<sup>76</sup> For most people, the bulk of their wealth is held in their homes and more than 68% of total households owned their homes in 2002.<sup>77</sup> There is, again, a significant racial disparity in homeownership. Overall, homeownership rates decreased slightly between 2004 and 2005 (from 69% to 68.9%). However, homeownership rates for whites in 2005 (75%) far exceeded the rates for blacks (less than 49%), Hispanics (less than 50%), Native Americans (58%), and Asians (60%).<sup>78</sup> While these groups are less likely than whites to be homeowners, blacks and Hispanics are more likely to have more mortgage debt, which is largely unaffected by bankruptcy laws.<sup>79</sup>

The pre-BAPCPA Ideal Debtor also would either be the beneficiary of a spendthrift trust or have an interest in a large ERISA-qualified retirement fund, both of which would be excluded from their bankruptcy estates. Spendthrift trusts are generally not used by the types of people who most often file for bankruptcy and, instead, typically are planning devices used by the rich. In contrast, it is not unusual for debtors to have pensions or retirement funds when they file for bankruptcy. Who is most likely to have retirement savings, again, varies because there is a racial gap in pension ownership. Workers who lack pension income are largely young, lower income, nonwhite, female, and single.<sup>80</sup> In addition, although slightly more than half of all families have some type of retirement account, the percentage of household net worth that

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76. The Ideal Debtor might also liquidate non-exempt assets to purchase an expensive home. However, the Ideal Debtor needed to avoid having a significant amount of equity in the home. A pre-BAPCPA Chapter 13 debtor with significant home equity would run the risk of having a court refuse to confirm his Chapter 13 repayment plan unless he agreed to sell his home and use the proceeds to both secure less expensive housing and repay some debts. *Race Matters I*, *supra* note 1, at 1746.

77. *Id.* at 1758.

78. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP (2005), available at <http://www.census.gov/hhes/www/housing/hvs/annual05/ann05t20.html>. See also NAT'L URBAN LEAGUE, *supra* note 66, at 5 (characterizing the black homeownership rate as stagnant and noting higher denial rates for mortgages and home improvement loans).

79. *Race Matters I*, *supra* note 1, at 1758-59. Mortgage obligations, though technically dischargeable, effectively survive bankruptcy cases. *Id.* at 1735. While a Chapter 7 debtor's personal obligation to repay home mortgage debt can be discharged, the mortgage holder's lien on the debtor's home survives the bankruptcy. *Id.* Thus, even if the loan is a nonrecourse loan or the debtor receives a discharge and is not personally obligated to repay the mortgage, the creditor can foreclose on the debtor's home even after the debtor receives a discharge in Chapter 7. *Id.* Chapter 13 homeowners face similar limitations, since their Chapter 13 plans cannot be confirmed unless they, in essence, agree to pay their mortgage debt in full. 11 U.S.C. §§ 1322(b)(2), 1325(a)(5) (Supp. V 2005).

80. See Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1526-27 (2004).

is held in retirement accounts, the total amount invested, and the participation rate in retirement plans varies dramatically by race.<sup>81</sup>

Since blacks and Hispanics tend to be younger,<sup>82</sup> have less income, and are more likely to be never-married than whites, it is not surprising that the pension participation rate for whites is higher than it is for blacks, is significantly higher than it is for Hispanics, and is somewhat higher than the rate for Asian Americans.<sup>83</sup> The pension disparities also may exist because blacks and Hispanics have relatively higher unemployment and underemployment rates, and whites are more likely to be employed by the types of employers who provide pension plans.<sup>84</sup> In addition, because whites have higher incomes and greater wealth, it is not surprising that minorities have smaller pensions because participation rates, as well as amounts and values of tax-deferred retirement accounts, increase with income and wealth.<sup>85</sup> Finally, because recent immigrants often send funds to relatives in their home countries, this also may explain why certain minority groups may choose to have higher current earnings rather than to decrease their earnings by contributing to an employer-provided plan.<sup>86</sup>

#### D. Dependents

For several reasons, the Ideal Debtor pre-BAPCPA needed relatively high living expenses for herself and her dependents. Courts reached conflict-

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81. *Race Matters I*, *supra* note 1, at 1765.

82. MCKINNON & BENNETT, *supra* note 41, at 4 (noting that black median age is 5 years younger than the national median age); U.S. CENSUS BUREAU, POPULATION BY SEX, AGE, HISPANIC ORIGIN, AND RACE: 2004, at tbl.1.1, available at [http://www.census.gov/population/socdemo/hispanic/ASEC2004/2004CPS\\_tab1.1a.pdf](http://www.census.gov/population/socdemo/hispanic/ASEC2004/2004CPS_tab1.1a.pdf) (indicating that 34.3% of Hispanics in 2004 are less than 18 years old, and only 5.1% are over age 65, while 25.5% of whites are under age 18 and 12% of whites are over age 65).

83. *Race Matters I*, *supra* note 1, at 1765-66; Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, 2004, 2005 EMP. BENEFIT RES. INST. 8 fig.2, available at [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_10-20051.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-20051.pdf).

84. Blacks and Hispanics often work for smaller employers who do not sponsor retirement plans; similarly, many work part-time and are excluded from coverage by their employers because of their part-time status. *Race Matters I*, *supra* note 1, at 1766; Copeland, *supra* note 83, at 7-8.

85. Ana M. Aizcorbe et al., *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances*, 89 FED. RES. BULL. 1, 11 (2003), available at <http://www.federalreserve.gov/pubs/bulletin/2003/0103lead.pdf>; Copeland, *supra* note 83, at 13 fig.5, 14 fig.8.

86. See generally Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board*, 59 AM. SOC. REV. 890, 895 (1984) (noting that Samoan families that help family members emigrate to the United States expect cash payments in return).

ing results both as to the types of expenses that are reasonable and the people debtors could claim as dependents. For example, when considering a motion to dismiss a Chapter 7 petition for substantial abuse, courts often scrutinized expenses like voluntary contributions to retirement plans or private school tuition payments for children when deciding whether a Chapter 7 debtor's petition was abusive because she had the ability to repay some of her debts in Chapter 13.<sup>87</sup> Similarly, courts evaluated Chapter 13 debtors' proposed expenditures, including expenses for dependents or household members, when deciding whether their plans devoted all disposable income to debt repayment.<sup>88</sup> In addition, when deciding whether debtors could discharge a student loan, courts were required to consider whether repaying the debt would impose an "undue hardship" on them and their dependents.<sup>89</sup> Finally, bankruptcy and some state exemption laws permit debtors to exempt certain monetary payments they are entitled to receive if those payments are reasonably necessary for the support of the debtor or his dependents.<sup>90</sup>

Though courts were often required to make decisions about debtors and their dependents in both Chapter 7 and 13 cases, the pre-BAPCPA Code gave only one partial definition for the term "dependent." When deciding whether debtors could exempt payments that were necessary for the support of the debtor or his dependents, the Code provided that the term "dependent" included a spouse — even one who is not actually dependent on the debtor.<sup>91</sup> Unfortunately, the pre-BAPCPA Code did not define "dependent" for any other purpose in the Code, and courts did not precisely or consistently explain which family member would be deemed a debtor's dependent. For example, some courts concluded that anyone who reasonably relied on the Chapter 13 debtor for support and for whom the debtor had reason to and did support financially, including adult children, parents, or grandchildren, was a dependent whose expenses could be deducted before reaching disposable income. Other courts adopted a more restrictive view and would not allow debtors to exclude expenses for nonlegal dependents — even if the individuals were actually dependent on the debtor for support — because doing so effectively would force creditors to subsidize the debtor's lifestyle choice to support parents, adult children, grandchildren, or domestic partners and their children.<sup>92</sup> Similarly, when deciding whether it would be an undue hardship to require a debtor to repay a student loan, some courts used a flexible definition

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87. *In re MacDonald*, 222 B.R. 69, 77 (Bankr. E.D. Pa. 1998).

88. *Race Matters I*, *supra* note 1, at 1728-29.

89. *See, e.g., Bray v. Educ. Credit Mgmt. Corp.*, (*In re Bray*), 332 B.R. 186 (Bankr. W.D. Mo. 2005); *Doe v. Educ. Credit Mgmt. Corp.* (*In re Doe*), 325 B.R. 69 (Bankr. S.D.N.Y. 2005).

90. *Race Matters I*, *supra* note 1, at 1738.

91. 11 U.S.C. § 522(a)(1) (2000).

92. *Bossardet v. Educ. Credit Mgmt. Corp.* (*In re Bossardet*), 336 B.R. 451, 454, 459 (Bankr. D. Ariz. 2005) (disregarding expenses of adult children, including an incarcerated adult son, and elderly parents); *Bray*, 332 B.R. at 194, 195.

that included nonlegal dependents. In contrast, other courts refused to consider the expenses of nonlegal dependents, even if they actually depended on the debtor for financial support.<sup>93</sup>

How “dependent” is defined matters largely because household composition and the economic relationships between households of family members vary by race. While Hispanics have the largest family households, black and Asian households also are larger than the average size of white households.<sup>94</sup> Blacks and Hispanics are more likely to be in intergenerational households (parent, child, grandchild) and black and Hispanic adults are more likely than whites to provide financial support to their parents, other non-nuclear relatives, and fictive kin.<sup>95</sup> For a number of reasons, blacks and Hispanics are more likely than other racial groups to rear or informally adopt children who are in their extended family or who are not related to them biologically.<sup>96</sup> Similarly, while black children are *more* likely than children of other races not to live with either of their parents, and, of all children who do not live with their parents, blacks are the *least* likely to live with people other than relatives.<sup>97</sup>

Grandparent-headed households have increased dramatically. While numerically most of the grandparents who live with grandchildren are white, only 2% of white grandparents live with their grandchildren while between 6-10% of minority grandparents live with their grandchildren. Within the minority groups, Hispanic grandparents are the most likely to be primary care-

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93. See *Doe*, 325 B.R. at 74-75 (presenting judicial views of “dependent”). See also *Schilling v. Montalvo (In re Montalvo)*, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (discussing living arrangement of debtor, his wife/fiancee, and the seven children, including the fiancee’s daughter’s boyfriend and a foster child, who lived with them).

94. U.S. CENSUS BUREAU, AVG1. AVERAGE NUMBER OF PEOPLE PER HOUSEHOLD, BY RACE AND HISPANIC ORIGIN, MARITAL STATUS, AGE, AND EDUCATION OF HOUSEHOLDER: 2004 (2004), available at <http://www.census.gov/population/socdemo/hh-fam/cps2004/tabAVG1.csv>; U.S. CENSUS BUREAU, AVG2. AVERAGE NUMBER OF PEOPLE PER FAMILY HOUSEHOLD, BY RACE AND HISPANIC ORIGIN, MARITAL STATUS, AGE, AND EDUCATION OF HOUSEHOLDER: 2004 (2004), available at <http://www.census.gov/population/socdemo/hh-fam/cps2004/tabAVG2.csv>; MCKINNON & CLAUDETTE, *supra* note 41, at 6.

95. See Mireya Navarro, *Many Families Add Third Generation to Their Households*, N.Y. TIMES, May 25, 2006, at A24 (noting that multigenerational living is common in Asian and Hispanic countries). It is not unusual for the extended black family to expand beyond blood relatives and include “fictive kin,” which are people who are not related though they may provide more support services than blood kin. Connie M. Kane, *African American Family Dynamics as Perceived by Family Members*, 30 J. BLACK STUDIES 691, 693 (2000). See also Lempert & Monsma, *supra* note 86, at 901-04 (noting that in Samoan culture, sending money to relatives “may seem every bit as compelling as the need” to pay your debts).

96. *Race Matters I*, *supra* note 1, at 1746-52.

97. *Id.* at 1750.

givers for their grandchildren while Asian grandparents are the least likely to be the primary caregivers for those grandchildren.<sup>98</sup> Given the increase in single-parent households and the economic hardships single-parent households face, it is not surprising that more than half of all grandparents appear to spend money on their grandchildren's educational needs, and a significant majority help pay their living or medical expenses. While it is unclear whether minority grandparents provide proportionately more financial support than other grandparents, this seems likely since Hispanic and black grandparents are more likely than white grandparents to be the primary caregivers of their grandchildren or to have a grandchild live in their home.<sup>99</sup>

### *E. Debts*

The Ideal Debtor pre-BAPCPA needed to have few, if any, nondischargeable debts, including student loans, alimony or child support obligations, and nondischargeable credit card debt. With respect to student loans, the income and wealth racial gaps discussed above indicate that the typical black and Hispanic college student is more likely to be from a lower income household and likely will receive smaller parental contributions for their educational expenses.<sup>100</sup> In addition, white and Asian college students are more likely to persist to receive their college degree than blacks, Hispanics and Native Americans.<sup>101</sup> This ultimately creates an earnings gap, as workers with a college degree earn almost twice as much as those who have only a high

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98. TAVIA SIMMONS & JANE LAWLER DYE, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, at 2 (Census 2000 Brief, C2KBR-31, Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>.

Another study indicates that a significantly higher percentage (13%) of black children live with their grandparents, relative to Hispanic children (8%), or white or Asian children (4%). Amy Goyer, *Intergenerational Relationships: Grandparents Raising Grandchildren*, (Nov. 2005), available at [http://www.aarp.org/research/family/grandparenting/nov\\_05\\_grandparents.html](http://www.aarp.org/research/family/grandparenting/nov_05_grandparents.html). The black grandparent number, while relatively high, is small relative to the estimated 60% of Native American children who are purported to be raised by their grandparents. *Id.*

99. TERRY LUGAILA & JULIA OVERTURF, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, CHILDREN AND THE HOUSEHOLDS THEY LIVE IN: 2000, at 2, 7 (CENSUS 2000 SPECIAL REPORTS, CENSR-14, Mar. 2004), available at <http://www.census.gov/prod/2004pubs/censr-14.pdf>.

100. *Race Matters I*, *supra* note 1, at 1770. See also *Latest Data Confirm*, *supra* note 50 (discussing college affordability gap for students from middle- and lower-income families). See generally Schmidt, *supra* note 50.

101. KELLY, *supra* note 51, at 18; see REEVES & BENNETT, *supra* note 39. See generally J. Fredericks Volkwein et al., *Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206 (1998).

school diploma.<sup>102</sup> Because whites tend to have higher earnings than minorities with the same educational level, even those minorities who have attended college will likely have less income available to repay their student loans than will white college attendees.<sup>103</sup> Finally, since low-income students and students whose parents did not attend college are statistically more likely to default on student loans than other students, blacks and Hispanics appear to have higher student loan default rates.<sup>104</sup>

As for family support obligations, many single-parent households are entitled to financial assistance from the noncustodial parent, though not all custodial parents who are awarded financial support actually receive it. There is a clear racial disparity among those people who are ordered to pay child support and those who receive child support payments. Relative to their total population in the United States,<sup>105</sup> blacks are more likely than whites to have an obligation to provide child support. Thus, out of the total population that *provided* support in 2002, 67% were white, 16.4% were black, and 14.4% were Hispanic.<sup>106</sup> Out of the total population that *received* child support in 2002, 67% were white, 19% were black, and 12% were Hispanic.<sup>107</sup> That blacks are more likely to be ordered to pay child support and that whites are less likely to receive support is not surprising given the relatively lower marriage rates, the higher fertility rates, and the larger proportions of non-marital births among blacks.<sup>108</sup>

Most credit card debts were dischargeable pre-BAPCPA. However, credit card debts that were incurred as a result of fraud, or that were for luxury goods or service that exceeded \$1,225 in the aggregate and were incurred

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102. See Press Release, U.S. Census Bureau, College Degree Nearly Doubles Annual Earnings, Census Bureau Reports (Mar. 28, 2005), available at <http://www.census.gov/Press-Release/www/releases/archives/education/004214.html>.

103. KELLY, *supra* note 51, at 19 (noting that minorities earn substantially less than whites at almost all educational levels).

104. J. Fredericks Volkwein & Alberto F. Cabrera., *Who Defaults on Student Loans? The Effects of Race, Class, and Gender on Borrower Behavior*, in CONDEMNING STUDENTS TO DEBT: COLLEGE LOANS AND PUBLIC POLICY (Richard Fossey & Mark Bateman eds. 1998); Volkwein et al., *supra* note 101. See also *Race Matters I*, *supra* note 1, at 1770 n.218.

105. In 2004, 75.6% of all Americans were white, 12.2% were black, and 14.2% were Hispanic. U.S. CENSUS BUREAU, 2004 American Community Survey; Data Profile Highlights; Fact Sheet, available at <http://factfinder.census.gov>.

106. TIMOTHY S. GRALL, UNITED STATES DEPARTMENT OF COMMERCE, CENSUS BUREAU, SUPPORT PROVIDERS: 2002, at 2 (Current Population Reports, P70-99, Feb. 2005), available at <http://www.census.gov/prod/2005pubs/p70-99.pdf>.

107. *Id.*

108. JANE LAWLER DYE, UNITED STATES DEPARTMENT OF COMMERCE, CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2004, at 3-5 (Current Population Reports, P20-555, Dec. 2005), available at <http://www.census.gov/prod/2005pubs/p20-555.pdf>.

within 60 days of the filing, were nondischargeable.<sup>109</sup> In addition, if a debtor used a credit card to get a cash advance that exceeded \$1,215 within 60 days of the filing, the debt was presumed fraudulent and nondischargeable if the purchases were for luxury goods.<sup>110</sup> Because blacks and Hispanics have lower incomes and significantly fewer assets than whites, they appear to rely more heavily on credit card debt than whites. In addition, blacks, Hispanics, and Asians all appear to pay more than the national average toward their monthly credit card bills. Finally, blacks, Hispanics and Asians have higher credit card debt than the national average.<sup>111</sup>

### F. Conclusion

There is, of course, no reason to believe that Congress intentionally discriminated against minorities when they enacted bankruptcy laws that favored whites, or that courts interpreted the pre-BAPCPA Code in a way that favored whites. Nonetheless, the demographic characteristics of the minority population made it more likely that whites would be the Ideal Debtor. The pre-BAPCPA Code gave benefits based on marital status, which had a disproportionately negative effect on minorities due to their lower marriage rates. Likewise, the Ideal Debtor pre-BAPCPA needed to have stable employment, some disposable income, and have wealth that was concentrated in retirement plans or other property, like exempt assets, that could be shielded from creditors' collection attempts. Again, these factors likely favored potential white debtors. Finally, the Ideal Debtor Pre-BAPCPA needed to have only legal dependents and have few nondischargeable debts; attributes that more likely are found in white debtors. Since a hypothetical white debtor would receive more bankruptcy benefits than those received by a hypothetical minority debtor, race mattered under the pre-BAPCPA Code.

The next Part of this Article will consider whether the Ideal Debtor also benefits under BAPCPA and, more importantly, whether race continues to matter in bankruptcy.

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109. 11 U.S.C. § 523(a)(2)(C) (2000), amended by 11 U.S.C. § 523(a)(2)(C) (Supp. V 2005).

110. *Id.*

111. Javier Silva & Rebecca Epstein, *Costly Credit: African-Americans and Latinos in Debt*, May 2005, available at <http://www.demos.org/pubs/Costly%20Credit%20final.pdf>; *Race Matters I*, *supra* note 1, at 1775.

#### IV. THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT

##### A. Policy Justifications for BAPCPA

Historically, bankruptcy laws have not considered *why* a debtor needed debt relief, nor have prior laws conditioned relief on whether the debtor was over-indebted for good or bad reasons.<sup>112</sup> And while BAPCPA itself does not explicitly make distinctions based on why the debtor filed, its supporters contended that the pre-BAPCPA Code made it too easy for “deadbeats” to get out of paying bills they could afford to pay and that bankruptcy laws needed to be reformed to restore “personal responsibility and integrity in the bankruptcy system.”<sup>113</sup> To prevent people from using bankruptcy “as a tool for fraud to cheat their way out of debt,”<sup>114</sup> BAPCPA supporters insisted on eliminating, or at least severely curbing, a debtor’s statutory right to decide whether to discharge debts in Chapter 7 rather than repay them in Chapter 13.<sup>115</sup> While Section 707(b) of the pre-BAPCPA Code gave judges the authority to dismiss abusive filings, Congress and other critics of the pre-BAPCPA Code concluded that judges did not adequately detect fraud and abuse and that they allowed too many debtors with “means” to avoid repaying their debts under Chapter 7.<sup>116</sup>

BAPCPA’s proponents maintained that the pre-BAPCPA Code gave high-income debtors a perverse incentive to engage in dishonest, opportunistic, financially irresponsible behavior<sup>117</sup> and that discharging debts had just

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112. ROBIN JEWELER, CRS REPORT FOR CONGRESS, BANKRUPTCY RELIEF AND NATURAL DISASTER VICTIMS, at 2 (Sept. 14, 2005), *available at* [http://www.opencrs.com/rpts/RL33082\\_20050914.pdf#search='bankruptcy%20relief%20and%20natural%20disaster%20victims'](http://www.opencrs.com/rpts/RL33082_20050914.pdf#search='bankruptcy%20relief%20and%20natural%20disaster%20victims').

113. H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89.

114. *See* 151 CONG. REC. E737 (daily ed. Apr. 22, 2005) (statement of Rep. Tiahrt).

115. H.R. REP. NO. 109-31, pt. 1, at 12 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 (“[T]he rate of repayment to creditors would increase as more debtors were shifted into chapter 13.”).

116. H.R. REP. NO. 109-31, pt. 1, at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92. Indeed, one critic went so far as to say that bankruptcy judges, who he branded as not “real judges,” were part of the problem because they failed to exercise discretion in the ways that favored creditors. *See* Peter G. Gosselin, *Judges Say Overhaul Would Weaken Bankruptcy System*, L.A. TIMES, Mar. 29, 2005, at A1.

117. *See* H.R. REP. NO. 109-31, pt. 1, at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92. (“[T]he present bankruptcy system has loopholes and incentives that allow and-sometimes-even encourage opportunistic personal filings and abuse.”); 144 CONG. REC. H10224, H10234 (1998) (statement of Rep. Goodlatte) (“Under the current system, some irresponsible people filing for bankruptcy run up their credit

become an easy process that no longer carried any stigma.<sup>118</sup> To curb the opportunistic Abusive Debtor, BAPCPA imposes a number of eligibility and reporting requirements that are designed to make it harder to file for *all* debtors to receive a discharge of their debts. While the characteristics associated with the Ideal Debtor pre-BAPCPA are not co-extensive with the characteristics associated with the Abusive Debtor, BAPCPA's attempt to harm the latter also will harm the former. That is, by making it more difficult for anyone to receive a quick and relatively painless Chapter 7 discharge, BAPCPA curtails many of the benefits previously available to the pre-BAPCPA Ideal (white) Debtor.

### *B. Means Test*

The centerpiece of BAPCPA is a "means test." In general, the means test formula considers debtors' "current monthly income" ("CMI")<sup>119</sup> and expenses to determine which debtors have the ability to repay their non-priority unsecured debts over a five year period. The means test formula purports to determine which debtors are abusing the privilege of discharging their debts in Chapter 7 and which are truly deserving of this relief.<sup>120</sup> Chapter 7 debtors whose income is below the applicable median income, which is determined by comparison to similar households in the state where the debtor files, are exempt from the means test and presumptively are deemed deserving of relief.<sup>121</sup>

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card debt immediately prior to filing knowing that their debts will soon be wiped away.").

118. S. REP. NO. 105-253, at 23-24 (1998).

119. Ironically, CMI is neither current, monthly, nor income. Rather than use actual current income, CMI is calculated by considering the total funds (including income and other non-income funds) the debtor received in the six months before the bankruptcy filing. By averaging the funds a debtor received over a 6 month period, the means test could impute fictitious income to a debtor whose income decreased as a result of losing a job or as a result of a failed business venture. Moreover, this definition encourages debtors with predictably seasonal income (school teachers, landscapers, lifeguards, construction workers, etc.) to file for bankruptcy when their actual prior income is low relative to their anticipated future income.

120. No one — not even BAPCPA's most ardent advocates — honestly believed that the means test would generate a presumption of abuse in a significant number of cases because most people who file for bankruptcy have income below the applicable medians. *See, e.g.,* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665 (2005); Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 277-78 (2005) (citing empirical studies finding little abuse pre-BAPCPA).

121. 11 U.S.C. § 707(b)(7)(A) (Supp. V 2005). The only above-median Chapter 7 debtors who are entirely exempted from the means test are disabled veterans whose debts arose because they were on active duty or performing a homeland security activity during time of war. *See id.* § 707(b)(2)(D). The Chapter 13 means test applies to

“Median family income” is calculated by reference to Census Bureau data.<sup>122</sup> Because the Code must rely on census data (and definitions), it is not clear how to calculate household size for purposes of the means test. That is, when deciding whether the means test applies or whether to dismiss a debtor’s Chapter 7 filing, the court must compare the debtor’s CMI to the median “family” income of a person that lives in a “household” the size of the debtor’s. The Census Bureau defines a family as two or more people related by birth, marriage, or adoption who reside in the same housing unit. “Household” is defined more broadly and includes both family and non-family households. Households consist of all people who occupy a housing unit regardless of relationship and may include multiple unrelated individuals or families living together.<sup>123</sup>

Debtors with above-median income may proceed in Chapter 7 only if they “pass” the means test. Debtors pass the test by showing that their CMI, after subtracting certain expenses outlined in the Internal Revenue Service collection financial standards and secured and priority debts,<sup>124</sup> is less than a specified benchmark. In calculating the amount of income that debtors theoretically would have to pay their debts, the means test requires the debtor to multiply their deemed monthly income by 60, since the presumption in the Code now is that Chapter 13 debtors will fund a 5 (not 3) year plan. If the test shows that the debtor has less than either \$100 in monthly disposable income or \$6,000 in disposable income over five years, the presumption of abuse is rebutted.<sup>125</sup> A debtor with monthly disposable income between \$100-\$166.66

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*all* debtors, not just those with above-median income. There is, at least, the presumption that below median Chapter 13 debtors’ plans will be for three (not five) years. *Id.* § 1322(d)(2).

122. *Id.* §101(39A)(A).

123. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPA) – DEFINITIONS AND EXPLANATIONS (Jan. 20, 2004), available at <http://www.census.gov/population/www/cps/cpsdef.html>.

124. 11 U.S.C. § 707(b)(2)(A)(ii)(I). Using IRS guidelines is somewhat problematic. Because these standards are used to help IRS agents determine a taxpayer’s ability to pay delinquent taxes, the standards are intentionally restrictive and “somewhat draconian.” See *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary*, 105th Cong. 99 (1997) (testimony of Kenneth R. Crone, Senior Vice President, Visa U.S.A., Inc.). Moreover, since the standards are internal guidelines, the IRS can change them — and, thus, the means test — without providing notice or seeking public comment. Finally, relying on these standards adds even yet more inconsistencies in consumer bankruptcy cases since some standards, including those for food, clothing, and housekeeping supplies, are used in all cases nationally while other standards, such as housing, utilities, and transportation, are local and, will thus vary by county within each state. See IRS.gov, <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited Sept. 25, 2006).

125. 11 U.S.C. § 707(b)(2)(A)(i).

might be denied relief in Chapter 7 unless she has non-priority unsecured debt that exceeds a certain benchmark.<sup>126</sup> A Chapter 7 filing for a debtor whose disposable income exceeds either \$166.66 monthly or \$10,000 over 5 years is presumptively abusive regardless of the amount of unsecured debt.<sup>127</sup> The debtor cannot proceed in Chapter 7 unless she demonstrates “special circumstances.”<sup>128</sup> Proving special circumstances requires the debtor to itemize each additional expense or adjustment to income and provide documentation and a detailed explanation for those special circumstances.<sup>129</sup> A debtor who cannot rebut the presumption will be deemed a Chapter 7 Abusive Debtor and courts may dismiss the Chapter 7 petition or, with the debtor’s consent, convert the debtor’s case to Chapter 13.<sup>130</sup>

Both the justifications for the means test and the formula itself raise a number of potentially troubling issues. First, empirical data show that more than 60% of Chapter 13 debtors do not complete plan payments.<sup>131</sup> Despite this relatively high failure rate, the only relief option for a debtor who fails the means test is to proceed in Chapter 13 and propose a plan that repays debts over a period of 60 months, as opposed to the pre-BAPCPA norm of 36. Perhaps even more problematic, though, is that BAPCPA generally and the means test specifically are riddled with counterintuitive ambiguities and have created a series of interpretive problems.<sup>132</sup>

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126. *Id.*

127. *Id.*

128. For example, debtors who flunk the means test because of fictitious income that is included in the five year average should be able to rebut the presumption that this income is available to them by showing that they were permanently laid off from a job and that there is no reasonable likelihood that they will have a job that pays them comparable wages in the near future. When the means test is applied in Chapter 13, however, debtors are *not* allowed to seek adjustments to their income for “special circumstances.”

129. 11 U.S.C. § 707(b)(2)(B)(i)-(ii).

130. *Id.* § 707(b)(1).

131. *Personal Bankruptcy: A Literature Review*, CONG. BUDGET OFF. Papers 31 (Sept. 2000), available at <http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf>.

132. For a particularly witty response to the bill’s drafting ambiguities, see *In re Riddle*, 344 B.R. 702 (Bankr. S.D. Fla. 2006), where the court, in attempting to interpret automatic dismissals under 11 U.S.C. § 521, writes (in a tribute to Dr. Seuss’s Green Eggs and Ham):

*What does automatic dismissal mean?*

*And by what means can it be seen?*

*Are we only left to guess?*

*Oh please Congress, fix this mess!*

*Until it’s fixed what should I do?*

*How can I explain this mess to you?*

*Id.* See also *In re Rodriguez*, 336 B.R. 462, 469 (2005) (discussing credit counseling requirement and noting that, “[l]ike much of BAPCPA, it is hard to tell whether terminology is used with active intention or sloppy inattention.”).

*C. Costs*

While the total amount due on filing, including fees and administrative expenses, more than doubled between BAPCPA's enactment date and the first anniversary of its enactment,<sup>133</sup> BAPCPA does provide some relief for truly indigent debtors. For the first time, courts can waive filing fees for debtors whose income is below 150% of the poverty level.<sup>134</sup> This is especially fortunate since, in addition to imposing higher filing fees, the reporting requirements imposed on both debtors and lawyers have caused legal fees to increase. That is, pre-BAPCPA, debtors or their lawyers were required to file the bankruptcy petition, schedules that list creditors, assets, income, etc., and a statement of financial affairs. BAPCPA requires considerably more as debtors must provide that information plus a host of other documents, including copies of all payment "advices" (*i.e.*, pay stubs), a statement of monthly net income explaining how the amount was calculated, a means test calculation, an annual income statement, and tax returns.<sup>135</sup> The penalty for non-compliance is harsh, as BAPCPA provides that the case automatically is dismissed<sup>136</sup> or that it may be delayed if the debtor fails to provide required information.<sup>137</sup> These new reporting requirements, in turn, force debtors' coun-

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133. Section 325 of BAPCPA originally increased Chapter 7 filing fees to \$200, but *decreased* Chapter 13 filing fees from \$155 to \$150 (ostensibly to encourage more debtors to file under Chapter 13). Congress amended BAPCPA to increase the Chapter 7 fee by an additional \$20 as part of the 2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231. That the increase was included as a technical amendment in this bill is somewhat ironic, since it forced all debtors — even those below-median debtors who presumptively deserve Chapter 7 relief — to pay higher filing fees to help finance foreign aid and the Iraq war. In addition to the \$220 filing fee, other fees due on filing are \$54, making the total fees due \$274.

In February 2006, Congress increased Chapter 7 filing fees again (from \$220 to \$245) and increased Chapter 13 filing fees from \$150 to \$235) as part of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4. Total Chapter 7 fees due on filing are \$299. Stated differently, between the time BAPCPA was signed into law (April 2005) and the first anniversary of the signing, Congress increased the cost of filing under both Chapter 7 and 13 by 63%. Moreover, by using bankruptcy filing fees to help offset the federal deficit, Congress substantially diminished the economic incentive for debtors to file for relief under Chapter 13 (\$235) rather than Chapter 7 (\$245).

134. 28 U.S.C. § 1930(f)(1) (Supp. V 2005). One unfortunate consequence of the decision to allow Chapter 7 debtors to avoid paying filing fees is that, because trustees' compensation comes from the filing fee in each case, the Chapter 7 trustees in those cases will not likely be paid for any work they do on those cases.

135. 11 U.S.C. §§ 521(a), § 1308(a).

136. *See Riddle*, 344 B.R. 702.

137. 11 U.S.C. § 521(a)(6)(B). The automatic dismissal may be delayed for no more than 45 days if the debtor can show cause. *Id.* It may be delayed indefinitely if

sel to conduct more extensive (and expensive) investigations into their clients' financial affairs to ensure that the debtor complies with these new requirements and also to ensure that the lawyer complies with the new ethical requirements BAPCPA imposes.<sup>138</sup>

BAPCPA also imposed a financial counseling requirement that increased debtors' filing costs. Many members of Congress appeared to believe that bankruptcy filings had increased because debtors were not financially literate.<sup>139</sup> To increase debtor financial literacy, BAPCPA makes debtors ineligible for bankruptcy relief unless they receive a "briefing" from a credit counseling agency approved by the Office of the United States Trustee ("OUST") within 180 days before they file for bankruptcy.<sup>140</sup> All debtors — even if they are financially literate or they filed for bankruptcy for reasons other than reckless spending — must satisfy this eligibility requirement. BAPCPA permits courts to waive this requirement for a limited period, not to exceed 45 days, if debtors show "exigent circumstances" and show that they tried to get counseling at least five days before filing their bankruptcy petitions but were unable to do so.<sup>141</sup> In addition, Chapter 13 debtors must receive financial management training from an approved financial education provider before they can receive a discharge.<sup>142</sup>

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the trustee requests that the case not be dismissed because the debtor made a good faith attempt to provide the information, and it would be in the creditors' best interest for the case to proceed. *Id.*

138. BAPCPA imposes new sanctions on Chapter 7 debtor's counsel if the debtor's case is dismissed for abuse. 11 U.S.C. § 707(b)(4). This undoubtedly will require lawyers to scrutinize the debtor's purported income more closely by reviewing the pay stubs to calculate monthly income. Lawyers may need to obtain credit reports on their clients to verify that the debtors have listed all debts, and may need to review court records to ensure that there are no relevant judgments, liens, or pending suits involving their clients.

139. See H.R. REP. NO. 109-31, pt. 1, at 18 (2005), as reprinted in 2005 U.S.C.A.N. 88, 104; 151 CONG. REC. E704-03 (daily ed. Apr. 19, 2005) (statement of Rep. Moore), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005\\_record&page=E704&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=E704&position=all).

140. This counseling can occur either over the phone or the Internet. 11 U.S.C. § 109(h)(1). The Office of the United States Trustee lists the approved agencies on its website. See [http://www.usdoj.gov/ust/eo/bapcpa/ccde/de\\_approved.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/de_approved.htm) (last visited Oct. 1, 2006). Debtors "pass" online briefings typically by answering a series of questions that are posed after each section. See, e.g., American Bureau of Credit Services, Inc., <http://americanbureauofcredit.com/pricing.html> (last visited Oct. 1, 2006).

141. 11 U.S.C. § 109(h)(3). This requirement can be waived completely only for debtors who are mentally incapacitated, severely disabled or on active duty in a military combat zone. *Id.* § 109(h)(4).

142. *Id.* § 1328(g)(1). Chapter 13 debtors in some jurisdictions can efficiently satisfy the financial management requirement, since most Chapter 13 trustees in those areas provide this debtor education in cases in which they serve as the standing trustee. See Barbara P. Foley & Angela Egner, *Creating A Debtor Edu-*

BAPCPA requires credit counseling fees to be reasonable and providers are required to offer the instruction without regard to the debtor's ability to pay.<sup>143</sup> A number of agencies have surfaced post-BAPCPA to provide pre- and post-petition debtor education and it appears that the debtors who are aware of this requirement can quickly satisfy the pre-petition counseling requirement by using one of the providers on the Internet.<sup>144</sup> While this eligibility requirement is theoretically easy to satisfy,<sup>145</sup> it nonetheless increases *all*

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*ation Program*, 18-1 NAT'L ASS'N OF CHAPTER 13 TRUSTEES Q. 1, 14-17 (2006); United States Trustees, [http://www.usdoj.gov/ust/eo/bapcpa/ccde/de\\_approved4-2.htm#VA](http://www.usdoj.gov/ust/eo/bapcpa/ccde/de_approved4-2.htm#VA) (last visited Sept. 27, 2006); U.S. Trustee Program, [http://www.usdoj.gov/ust/eo/bapcpa/ccde/de\\_approved.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/de_approved.htm) (last visited Nov. 9, 2006).

143. 11 U.S.C. § 111(c)(2)(B) (2000). The typical cost for the courses, which usually must be paid in cash or money order, is approximately \$50-\$75 for both the pre-filing and pre-discharge education. *See* American Bureau of Credit, <http://www.americanbureauofcredit.com/pricing.html> (last visited Sept. 27, 2006); GreenPath Debt Solutions, [http://www.greenpathbk.com/faq\\_consumer.htm](http://www.greenpathbk.com/faq_consumer.htm) (last visited Sept. 27, 2006); California Credit Counseling Services, <http://www.californiacccs.org/bkcounseling> (last visited Sept. 28, 2006).

Though guidelines issued by the Office of the United States Trustee state that approved credit counseling agencies cannot withhold services because of an inability to pay, neither BAPCPA or OUST has explained what fee would be unreasonable and what criteria should be used to determine whether a debtor is unable to pay the fees. *See* U.S. Department of Justice, [http://www.usdoj.gov/ust/eo/bapcpa/ccde/docs/DE\\_Application\\_Instructions.pdf](http://www.usdoj.gov/ust/eo/bapcpa/ccde/docs/DE_Application_Instructions.pdf) (last visited Sept. 27, 2006). Some providers waive the fee if the debtor would satisfy the requirements to have a waiver of the filing fees. *See* Money Management International, <http://www.moneymanagement.org/OurProgram/bankruptcy-counseling.asp?CMP=OTC-PBCPRAD> (last visited Sept. 27, 2006) (waiver where debtor's household income is less than 150% of poverty level); BK Help, [www.bkhelp.org/att.fees.php](http://www.bkhelp.org/att.fees.php) (last visited Sept. 27, 2006) (waiver based on household income and inability to pay based on budget analysis).

144. Many of the internet providers contain overtly hostile information concerning bankruptcy, even under the link that takes users to bankruptcy counseling. For example, the Consumer Credit Counseling Service of Montana, Inc. states that "[b]ankruptcy is the last resort for consumers in dire financial need, *and for good reason*" and disparagingly observing that, while "widely advertised as a 'quick fix' to your financial issues, bankruptcy is not always the answer to your problems." *See* Consumer Credit Counseling Service of Montana, <http://www.cccsmt.org/modules/content/index.php?id=4> (last visited Sept. 28, 2006) (first emphasis added).

145. *But see In re Sosa*, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005) (characterizing the requirement as an "inane" and "absurd" one that applies to all debtors "no matter how dire the circumstances the person finds themselves in at that moment"). Whether it is "easy" also would depend on whether the potential debtor has access to high-speed Internet access and has a debit card that can be used to pay for the counseling (most providers, not surprisingly, do not accept credit cards).

debtors' costs, even undisputedly poor and honest debtors who should be entitled to a quick Chapter 7 discharge. Moreover, early reports question the efficacy of requiring debtors to spend both time and money participating in pre-filing counseling, since those studies suggest that few people who have participated in credit counseling had any realistic financial option *other than* filing for bankruptcy.<sup>146</sup> Finally, this requirement has proven to be problematic for potential debtors who do not speak English as their first language since most approved counseling agencies offer counseling only in English.<sup>147</sup>

#### *D. Marriage and Dependents*

BAPCPA does not remove any of the marriage benefits contained in the Code, and it may indirectly provide additional benefits to married debtors.<sup>148</sup> Some of the new BAPCPA requirements involving married debtors, their dependents, and their household living arrangements are unclear. For example, the means test formula relies on median family income – which is derived from Census Bureau data. Because of inconsistencies in the definition of “family” and “household,” it is unclear whether all members that live in a debtor’s household are considered for the purposes of the means test, or whether household will be limited to only those people in the debtor’s household who are the debtor’s legal dependents.<sup>149</sup> Since the means test considers the debtor’s household size at the time of the petition and debtors with house-

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146. See Caroline E. Mayer, *Bankruptcy Counseling Law Doesn't Deter Filings*, WASH. POST, Jan. 17, 2006, at A1 (discussing early reports of Money Management International Inc., one of the largest credit counseling organizations in the United States, that stated that few people who received counseling could afford to repay their debts outside of bankruptcy).

147. See *In re Petit-Louis*, 338 B.R. 132 (Bankr. S.D. Fla. 2006). While the OUST website indicates that a number of providers offer counseling by telephone in languages other than English, the providers' web sites typically are in English and do not disclose which languages are available for telephonic session. See Executive Office for U.S. Trustees (EOUST), <http://www.usdoj.gov/ust/> (last visited Sept. 29, 2006). For example, while Green Path Debt Solutions is listed as providing counseling in more than 150 languages, the information it provides on its web site is in English and its “FAQ” page makes no mention of the availability of services in any language other than English. See GreenPath Debt Solutions, [http://www.greenpathbk.com/faq\\_consumer.htm](http://www.greenpathbk.com/faq_consumer.htm) (last visited Sept. 28, 2006).

148. See *In re Parker*, 336 B.R. 678 (Bankr. S.D.N.Y. 2006) (finding that Chapter 13 debtor-husband received benefit of automatic stay despite prior bankruptcy filings that, under BAPCPA, otherwise would have denied him this benefit due to filing jointly with his wife).

149. A debtor’s household could be large if cohabitating heterosexual or homosexual couples, parents, and the debtor’s adult children are included. Compare 11 U.S.C. § 707(b)(2) (Supp. V 2005) with IRS - Collection Financial Standards, <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited Sept. 28, 2006).

holds larger than four are allowed to depart from the IRS standards and add \$525 to their monthly expenses,<sup>150</sup> BAPCPA ostensibly provides additional benefits to debtors who live in larger, non-traditional households which, according to the census definition, should ignore blood lines or legal duties.

Debtors who live in non-traditional households, or who provide support to family members even though they have no legal duty to do so also may receive other benefits from BAPCPA. For example, BAPCPA lets debtors continue to provide care support for their elderly or ill household members or members of their immediate family.<sup>151</sup> For the purposes of this provision, BAPCPA uses an expansive definition of household member that includes parents, grandparents, siblings, children, grandchildren, other dependents, or spouse.<sup>152</sup> While BAPCPA does not explicitly give debtors the right to provide support for household members who are not their biological relatives, it at least recognizes that debtors may live with or provide financial support to more than just their spouse and children.<sup>153</sup>

The means test may, however, harm debtors who receive financial support from family members who do *not* live in the same household. A debtor's CMI includes income from all sources, including money others paid for the household expenses of the debtor or the debtor's dependents on a regular basis even if they have no legal duty to do so.<sup>154</sup> Because of this, family members who have routinely given the debtor or her family cash to help her meet her living expenses might find that this generosity increases the debtor's CMI and, potentially, causes her to fail the means test.

Finally, BAPCPA also fails to curb other behavior which, pre-BAPCPA, likely would have been viewed as abusive. For example, by relying on census and IRS standards, BAPCPA perhaps inadvertently permits high income debtors to have higher budgets than lower income debtors even if the high income debtor lives in a smaller household. The IRS standards do not purport to force delinquent taxpayers to make drastic lifestyle changes. These standards generally permit taxpayers to maintain their existing lifestyles and, for that reason, are biased in favor of higher income taxpayers.<sup>155</sup> Similarly,

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150. 11 U.S.C. §§ 707(b)(6)(C), 1325(b)(3)(C).

151. *Id.* § 707(b)(2)(A)(ii)(II).

152. As is true with so many BAPCPA provisions, it is unclear whether BAPCPA treats these family members as legitimately included in the debtor's household, or whether this group can be viewed as the debtor's immediate family. It is unlikely that Congress meant the latter though the ambiguous provision can be read that way.

153. *See also* 11 U.S.C. § 362(l)(1)(B) (referring to "adult dependent of the debtor").

154. 11 U.S.C. § 101(10A)(B). Determining regularity might prove challenging if, for example, debtor's adult children (or the parents of debtors) fail to keep close track of how much money they give the debtor, or how many groceries or tanks of gas they buy for the debtor.

155. For example, a taxpayer who lives alone and earns \$5,834 monthly is entitled to a higher monthly food budget (\$483) than the food budget (\$463) for a four person

BAPCPA protects a debtor's lifestyle choice to send his child to a private or parochial school because debtors can now include up to \$1,500 in actual expenses for their minor children to attend private or public school if they explain why those expenses are reasonable and necessary and not already included in the IRS standards.<sup>156</sup>

### *E. Debts*

BAPCPA makes several debts that were dischargeable in pre-BAPCPA Chapter 13 cases nondischargeable. For example, certain debts related to taxes, fraud, embezzlement, breach of fiduciary, and willful or malicious conduct that had been part of Chapter 13's "super" discharge are now nondischargeable in both Chapter 7 and 13.<sup>157</sup> By clarifying that *all* student loans, stipends, or educational scholarships — not just loans made or guaranteed by governmental entities — are nondischargeable, BAPCPA also makes it harder for debtors to discharge student loan debt in both Chapter 7 and 13.<sup>158</sup>

Because many in Congress concluded that too many people were using credit cards irresponsibly, BAPCPA makes it harder to discharge certain credit card debts. BAPCPA creates a presumption that credit card debts for "luxury goods and services" that exceed \$500 in the aggregate within 90 days of the filing are nondischargeable.<sup>159</sup> The Code provides that luxury goods and services do not include those reasonably necessary for the debtor and his dependents' support.<sup>160</sup> However, BAPCPA also provides that debtors who use a credit card to get a cash advance that exceeds \$750 within 70 days of

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household that earns \$1,249 monthly. *See* Internal Revenue Service — National Standards for Living Expenses, <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html> (last visited Sept. 28, 2006). Likewise, a one person household that earns \$5,834 monthly is entitled to a monthly apparel and services budget of \$216 while the budget for a four person household that earns \$5,800 monthly is \$201. *Id.*

156. 11 U.S.C. § 707(b)(2)(A)(ii)(IV). By requiring debtors to show that private school tuition payments are reasonably necessary, BAPCPA fails to resolve a hotly disputed issue in pre-BAPCPA Chapter 13 cases: whether private education expenses are reasonably necessary and can be deducted from disposable income. *See Race Matters I, supra* note 1, at 1776 n.19; David S. Kennedy & R. Spencer Clift, III, *Reasonable and Necessary Expenses under Section 1325(b) of the Bankruptcy Code, Postconfirmation Considerations, and the Effect of Conversion and Dismissal of Chapter 13 Cases*, 32 U. MEM. L. REV. 789, 808-12 (2002).

157. *Compare* 11 U.S.C. § 1328(a) (Supp. V 2005) *with* 11 U.S.C. § 1328(a) (2000), *amended by* 11 U.S.C. § 1328(a) (Supp. V 2005).

158. 11 U.S.C. § 523(a)(8) (Supp. V 2005).

159. *Id.* § 523(a)(2)(C)(i)(I). Pre-BAPCPA, the nondischargeability presumption arose for luxury goods and services exceeding \$1,255 within 60 days from the date of filing. 11 U.S.C. § 523(a)(2)(C)(i)(I) (2000), *amended by* 11 U.S.C. § 523(a)(2)(C)(i)(I) (Supp. V 2005).

160. 11 U.S.C. § 523(a)(2)(C)(ii)(II) (Supp. V 2005).

the filing will be presumed fraudulent and nondischargeable *regardless* of whether the debtor used the money to buy luxury goods or goods that could be considered more necessary.<sup>161</sup>

Largely in response to criticisms that BAPCPA would harm women and children,<sup>162</sup> BAPCPA makes *all* domestic support obligations nondischargeable whether the obligations are owed to private creditors or governmental entities, and also now prevents debtors from discharging non-support debts that were dischargeable pre-BAPCPA. BAPCPA further increases the protections domestic support obligations receive in bankruptcy cases by giving those debts first priority in payment in Chapter 7.<sup>163</sup> Finally, debtors cannot confirm a Chapter 13 plan unless support debts are paid in full<sup>164</sup> and BAPCPA excepts from the automatic stay garnishment or wage orders to collect domestic support obligations from property of the estate.<sup>165</sup>

### F. Wealth

#### i. Homestead

Early versions of BAPCPA were criticized because they appeared to create a loophole that let debtors who owned mansions in states with unlimited homestead exemptions keep those mansions.<sup>166</sup> Indeed, the debtor could

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161. *Id.* § 523(a)(2)(C)(i)(II). Pre-BAPCPA, these cash advances were nondischargeable if they exceeded \$1,215 within 60 days from the date of filing. In contrast, § 523(a)(2)(C) (2000), amended by 11 U.S.C. § 523(a)(2)(C) (Supp. V 2005), made these debts dischargeable only if the purchases were for luxury goods.

162. Elizabeth Warren, Op-Ed., *A Quiet Attack on Women*, N.Y. TIMES, May 20, 2002, at A19.

163. 11 U.S.C. § 507(a)(1) (Supp. V 2005). Of course, that women and children may be the first in line to collect is largely irrelevant in cases that are administratively insolvent and have no assets to pay *any* unsecured creditors. See Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 37-41 (2002). Moreover, by placing mothers and children ahead of the trustee who gets paid if he finds and liquidates non-exempt property, BAPCPA somewhat decreases the trustee's incentive to gather and liquidate assets. *Id.* at 40. In addition, because BAPCPA makes more debts nondischargeable in both Chapter 7 and 13, especially in administratively insolvent cases women and children may find themselves competing with sophisticated commercial creditors (including credit card companies and student loan issuers) who have greater sources to devote to debt collection than those available to most mothers and children. *Id.* at 37-41.

164. 11 U.S.C. § 1325(a)(8).

165. *Id.* § 362(b)(2)(C).

166. See S. REP. NO. 106-49, at 76 (1999); H.R. REP. NO. 109-31, pt. 1, at 15-16 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 102 (discussing the "mansion loophole"); see generally Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397 (2005) (noting

keep the mansion even if he moved to the state just to take advantage of the state's generous exemption laws and purchased the mansion with non-exempt funds that otherwise could have been used to pay creditors' debts. In partial response to those criticisms, Congress made it somewhat harder for debtors who had engaged in pre-petition exemption planning to keep expensive homes.

Specifically, BAPCPA prevents debtors from using their new state's exemption laws unless they lived in the state at least 2 years before filing for bankruptcy.<sup>167</sup> BAPCPA also attempts to prevent debtors from buying an expensive home in anticipation of filing for bankruptcy by providing that debtors cannot claim a homestead exemption that exceeds \$125,000 unless the debtor acquired the property at least 1,215 days before filing for bankruptcy.<sup>168</sup> In addition, if a debtor converted non-exempt property to exemptible property within ten years of the bankruptcy filing with the intent to defraud his creditors, BAPCPA limits his exemption to the value of his exempt property before the conversion.<sup>169</sup> Finally, regardless of the debtor's intent, BAPCPA caps a debtor's homestead exemption if the debtor added value in excess of \$125,000 to the homestead during a specified period before the filing unless the value was transferred from another homestead in the same state.<sup>170</sup>

BAPCPA also prevents serial filers from using bankruptcy to prevent creditors from foreclosing on real property. Pre-BAPCPA, creditors argued that debtors who had no intention of repaying their debts were allowed to file multiple Chapter 13 petitions for the sole purpose of stopping a scheduled foreclosure sale.<sup>171</sup> BAPCPA provides that, where a debtor has filed multiple

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criticisms raised by bankruptcy experts). For examples of debtors who appeared to take advantage of this mansion loophole, see Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1, 43 (2001) (discussing the bankruptcy cases and mansions of actor Burt Reynolds, former Texas governor John Connally, and former baseball commissioner Bowie Kuhn).

167. 11 U.S.C. § 522(b)(3)(A). Specifically, this section provides that the law governing the debtor's exemption will be where the debtor was domiciled for 730 days before the filing and, if the debtor lived in more than one state, where the debtor lived for most of that period. *Id.* Debtors who have moved frequently during that period would be limited to the federal bankruptcy exemptions. *Id.*

168. *Id.* § 522(p)(1).

169. *Id.* § 522(o).

170. *Id.* § 522(p)(1)(D) (making the specified period 1215 days). Generally, the cap applies if the debtor added \$125,000 in value to their home within 3.25 years of filing for bankruptcy. An absolute \$125,000 cap applies to debtors who have engaged in certain acts (including securities fraud violations, or intentional torts that caused serious bodily injury) unless the debtor proves that the home is reasonably necessary for the debtor or his dependents' support. *Id.* § 522(q).

171. See Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749, 753 (2005) (noting that debtors who have no intent to complete a Chapter 13

bankruptcy petitions to protect the same real property and a prior bankruptcy court entered an *in rem* order against the real estate within two years of the current filing, the automatic stay will not prevent a creditor from seeking possession of the property unless the debtor can establish good cause for the current filing.<sup>172</sup>

## ii. Retirement or Employer-Provided Benefits

Though BAPCPA ostensibly was designed to make it harder for high income debtors to shield their assets from creditors and avoid paying their debts, BAPCPA expands the protections given to certain retirement accounts and tax-qualified funds. For example, BAPCPA clarifies that debtors who rely on the federal bankruptcy exemptions may exempt individual retirement accounts as long as the exemption does not exceed one million dollars.<sup>173</sup> BAPCPA also makes loans from pension, profit-sharing, or other tax-sheltered plans nondischargeable<sup>174</sup> and allows Chapter 13 debtors to continue to repay loans borrowed against a tax qualified pension plan without violating the automatic stay.<sup>175</sup> Similarly, BAPCPA excludes from a debtor's Chapter 13 disposable income money the debtor uses to repay pension loans,<sup>176</sup> which is a dramatic reversal from pre-BAPCPA practice.<sup>177</sup> Likewise, Chapter 13 debtors may continue to make contributions to their employer's tax-qualified retirement and health insurance plans because those amounts are excluded from disposable income, and BAPCPA also excludes those amounts from the bankruptcy estate.<sup>178</sup>

BAPCPA also adds protections for certain tax-qualified accounts that were not specifically protected under prior law. For example, BAPCPA excludes from a debtor's bankruptcy estate funds she placed in an educational retirement account or state tuition program at least a year before the filing for

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plan nonetheless can stop an impending repossession or foreclosure sale simply by paying the bankruptcy filing fee); *Final Report of the Bankruptcy Foreclosure Scam Task Force*, 32 LOY. L.A. L. REV. 1063 (1999) (discussing various schemes used to delay/defraud creditors via serial filings and efforts to thwart this behavior); *Aurora Loan Servs. Inc. v. Amey (In re Amey)*, 314 B.R. 864, 866-70 (Bankr. N.D. Ga. 2004) (holding debtor's history of filing four separate Chapter 13 cases in two-year period to prevent foreclosure sale warranted *in rem* relief from automatic stay).

172. 11 U.S.C. § 362(b)(20).

173. *Id.* § 522(n). The million dollar cap excludes rollover amounts and can be lifted for most retirement accounts "if the interests of justice so require." *Id.*

174. *Id.* § 523(a)(18).

175. *Id.* § 362(b)(19).

176. *Id.* § 1322(f).

177. *See, e.g., Kennedy & Clift, supra* note 155, at 812-22 (discussing prior treatment of pension assets and obligations pre-BAPCPA and noting that most courts treated pension loan repayments as disposable income).

178. 11 U.S.C. § 541(b)(7).

her children or grandchildren.<sup>179</sup> Similarly, BAPCPA specifies that health insurance, disability insurance and health savings account expenses are reasonably necessary expenses when performing the means test.<sup>180</sup>

## V. BAPCPA AND THE IDEAL DEBTOR

### A. Income

Because of BAPCPA's requirement that all debtors participate in credit counseling and because of the significantly higher filing fees, it is even more important now that debtors have access to funds to pay for the costs of filing for bankruptcy.<sup>181</sup> Likewise, the Byzantine maze of eligibility hurdles, and pre-filing and post-filing reporting requirements make it all the more important that debtors have access to counsel, or to someone who can explain these new requirements.<sup>182</sup> The Ideal Debtor post-BAPCPA still needs disposable income to pay the increased fees and costs,<sup>183</sup> but cannot have too much of it without "flunking" the means test.

BAPCPA's means test is clearly designed to harm high-income debtors and to push all debtors into longer Chapter 13 repayment plans. The means test considers a debtor's current income as well as income the debtor received over a five year period when calculating his CMI. Thus, a debtor who had a high income four years before the bankruptcy filing but subsequently lost that income might be denied relief in Chapter 7 if he is deemed to have non-existent income. Of course, BAPCPA supporters and opponents alike concluded that the means test would affect few debtors because most people who file for bankruptcy have relatively low incomes and staggering debt bur-

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179. *Id.* § 541(b)(5), (b)(6). There is a \$5,000 cap for funds contributed between 1 and 2 years before the filing. *Id.* § 541(b)(5)(C), (b)(6)(C).

180. *Id.* § 707(b)(2)(A)(ii)(I).

181. Even if the debtor's filing fee is waived, filing *pro se* is not a realistic option. There were very few *pro se* filers pre-BAPCPA, and that number likely will decrease since bankruptcy petitions and schedules are even longer and more detailed than they were under the pre-reform law, and the means testing formula is almost undecipherable. Moreover, even if the debtor files *pro se*, given the complexity of BAPCPA's filing and reporting requirements, it is even more likely that a *pro se* petition will be dismissed because of procedural defaults. See *In re Bass*, 2006 WL 1593978, slip op., at 2 (Bankr. W.D. Tenn. Jun. 6, 2006) (admitting that "the bankruptcy community, attorneys, trustees, the court clerk's staff, and the court itself" failed to give *pro se* debtor the information she needed to file her case); Andrea Coombes, *Do-It-Yourself Bankruptcy: Be Careful*, WALL ST. J., Dec. 4, 2005.

182. See, e.g., *In re Valdez*, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005) (questioning whether Congress intended to harm poor, ignorant debtors who are unaware of BAPCPA's counseling requirement).

183. Some contend that legal fees have increased considerably, perhaps as much as 75%. See Coombes, *supra* note 180; Mike Nixon, *Bankruptcy Law Reforms Punish Lawyers, Middle Class*, ST. LOUIS DAILY REC., Apr. 15, 2006.

dens.<sup>184</sup> Nonetheless, because BAPCPA's goal is to deny Chapter 7 relief to debtors — especially debtors with above-median income — and instead push them into a Chapter 13 plan, debtors need a stable income to fund a plan that likely will last for five years.

Debtors also need disposable income post-BAPCPA because the new requirements BAPCPA imposes have affected the legal costs they must pay. Bankruptcy judges, practitioners, and members of Congress who voted against the bill all noted that the increased duties, reporting requirements, and liabilities associated with any failure to perform the duties placed on lawyers would cause legal fees to increase in all consumer cases. They also stressed that these additional duties and requirements would decrease the number of lawyers who would be willing to handle inexpensive consumer bankruptcy cases. At least anecdotally, that seems to be what is happening.<sup>185</sup> In addition to having to increase their fees, lawyers can no longer tell their clients to delay paying certain debts in order to save money to pay the bankruptcy filing fee and the lawyer's fee. BAPCPA explicitly states that private attorneys cannot counsel their clients to incur debts in anticipation of a bankruptcy filing even if the debtor intends to ultimately pay the debts.<sup>186</sup> Given this restriction on attorney speech, unless someone other than her private lawyer tells the potential debtor to strategically stop paying some debts or she thinks of this strategy on her own, the debtor may find herself unable to file for bankruptcy unless she finds free or low-cost legal services. Alternatively, she may file a *pro se* petition though it likely will be dismissed because of a failure to comply with BAPCPA's requirements.<sup>187</sup>

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184. See 151 CONG. REC. E737-02 (daily ed. Apr. 14, 2005) (statement of Rep. Tiahrt). See also Personal Bankruptcy, *supra* note 130, at 24 (noting that, at most, 15% of Chapter 7 filers likely had the ability to repay more than 25% of their non-priority unsecured debt); see *Personal Bankruptcy Consumer Credit Crises*, *supra* note 35 (conceding that no more than 25% of consumers would have the ability to pay more than one-third of their debts).

185. See Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J. 1, 69 (2005); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 277 (2005); Julie Reynolds, *Debt Relief, or Grief? The Bankruptcy Act of 2005*, DC BAR, Aug. 2005, [http://www.dcbar.org/for\\_lawyers/washington\\_lawyer/august\\_2005/bankruptcy.cfm](http://www.dcbar.org/for_lawyers/washington_lawyer/august_2005/bankruptcy.cfm) (interviewing bankruptcy law professors and debtors' counsel); Democratic Dissenting Views on S. 256 (2005), [http://www.house.gov/judiciary\\_democrats/s256dissent109cong.pdf](http://www.house.gov/judiciary_democrats/s256dissent109cong.pdf). Of course, a cynic would conclude that decreasing debtors' access to counsel was one of BAPCPA's purposes.

186. 11 U.S.C. § 526(a)(4) (Supp. V 2005). In addition, courts have noted that they can consider whether the debtor has paid or promised to pay an attorney when deciding whether the debtor is entitled to a waiver of the filing fee. *In re Nuttall*, 334 B.R. 921, 924-25 (Bankr. W.D. Mo. 2005).

187. For example, the court in *In re Bass*, 2006 WL 1593978, slip op. (Bankr. W.D. Tenn. Jun. 6, 2006), in dismissing the *pro se* debtor's case noted that she likely

### B. Wealth

As noted above, pre-BAPCPA, debtors were accused of exempting mansions from their creditors, or of converting non-exempt assets into exemptible ones and avoiding debt repayment. Because of this, BAPCPA attempts to make it harder for debtors to convert exemptible assets into non-exempt wealth, typically in the form of real property. The homestead caps and restrictions make it harder for debtors to engage in pre-filing exemption planning. Furthermore, BAPCPA also harms opportunistic homeowners by allowing courts to grant relief from the automatic stay if a debtor has filed multiple bankruptcy petitions and a bankruptcy court entered an *in rem* order against the property.<sup>188</sup> Together, these provisions narrow the gap between homeowners and renters.

However, other BAPCPA provisions widen the wealth gap. Specifically, BAPCPA allows all mortgage debt and all other secured debt payments to be deducted in full when calculating CMI. In contrast, renters are limited to deducting only the amount permitted by the IRS standards.<sup>189</sup> If a debtor's rental expenses exceed the cap in the IRS standards, renters would be permitted from deducting the full amount of their actual housing costs while homeowners would be allowed to deduct their full (secured) mortgage payments.<sup>190</sup> As noted above, BAPCPA also gives greater protections to debtors who have interests in retirement funds or who want to continue to make contributions to, or repay loans borrowed against, their retirement funds. Given this, BAPCPA makes it even more important that debtors have high — but exemptible — wealth.

### C. Marriage and Dependents

Married debtors continue to be favored post-BAPCPA. However, some debtors with high necessary reasonable expenses may be harmed by BAPCPA because the means test formula uses the IRS standards, not the

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would have been entitled to free *pro bono* services, but that no one had told her of this possibility. Ironically, if a debtor qualifies for legal aid or can find a *pro bono* attorney, he could then be told to stop paying certain debts and save money to pay the legal fees since those lawyers are not covered by the restriction on attorney speech. 11 U.S.C. § 526(a)(4).

188. BAPCPA also extends the period in which the trustee can recover funds that a debtor contributed to an asset protection trust if there is proof that the debtor acted with the actual intent to defraud creditors. *Id.* § 548(e).

189. Compare 11 U.S.C. § 707(b)(2)(A)(ii)(I) and Internal Revenue Service, National Standards for Allowable Living Expenses, <http://www.irs.gov/businesses/small/article/0,,id=104696,00.html> (last visited Oct. 1, 2006) (means test limitations on rental expenses) with 11 U.S.C. § 707(b)(2)(A)(iii) (unlimited deduction for secured debt).

190. *Id.*

broader “reasonably necessary” expense standard used pre-BAPCPA. These standards are by design relatively low since they are used to determine a taxpayer’s ability to pay delinquent taxes. In general, the IRS standards allow high income debtors to have higher budgets than lower income debtors.<sup>191</sup> However, unless the expense is a secured debt payment that can be paid in full, a high but reasonable expense exceeding the IRS standards cannot be deducted when calculating disposable income in Chapter 13 or when performing the means test in Chapter 7.

BAPCPA *may* provide benefits to debtors who live in multi-generational households or who provide support to people who are not legal dependents.<sup>192</sup> In other words, since the means test generally relies on Census Bureau standards, it arguably favors debtors who live in non-traditional households by letting them deduct higher expenses related to the living expenses of non-relatives or with relatives who are not their legal dependents. In addition, BAPCPA lets debtors deduct actual reasonable and necessary expenses to continue to provide care and support for elderly, chronically ill, or disabled household members of immediate family members.<sup>193</sup> BAPCPA does not require that the debtor have a legal duty to provide that support nor does it explain the legal relationship the debtor must have to the household member. BAPCPA thus appears to recognize that, increasingly, adult children are providing financial support for their elderly parents and that debtors may provide care for members of their extended families even if they have no legal duty to provide this care.<sup>194</sup>

#### *D. Debts*

The pre-BAPCPA Chapter 13 super-discharge has been substantially eroded. Because virtually all student loan and domestic support debts are nondischargeable, it is even more important that the post-BAPCPA Ideal Debtor have only dischargeable debts.

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191. *See supra* note 154.

192. This would especially be helpful, since a recent needs assessment study conducted by a Chapter 13 Trustee’s office found that many debtor households provide support or care for people who are not immediate family members. Foley & Egner, *supra* note 141, at 14-15.

193. 11 U.S.C. § 707(b)(2)(A)(ii)(II) (Supp. V 2005). By using the term “continuation,” only debtors who provided this support pre-petition would be allowed to claim these expenses in their bankruptcy cases. *Id.*

194. *Id.* § 707(b)(2)(A)(ii)(II).

## VI. BAPCPA AND RACE

### A. Anticipated Consequences

The post-BAPCPA Code contains many of the racial benefit disparities I noted in *Race Matters I*. However, many of the Abusive Debtor attributes are more likely to be found in whites. By revising the Code to harm the Abusive Debtor, certain provisions of BAPCPA will have a disproportionately negative harm on the hypothetical white debtor. For example, BAPCPA's centerpiece is a means test that is designed to penalize higher income debtors. Given the racial income gap, it is likely that the means test will have a disproportionately negative effect on potential white debtors, even though most have assumed that the means test will affect very few filers generally. In addition, because of the income gap, minorities are more likely than whites to have incomes below 150% of the poverty level and, thus, to satisfy the requirement for having their filing fees waived

White debtors also may be harmed by BAPCPA's treatment of "family" and "household." Minority households are on average larger than white households. As such, they may benefit from the means test formula's reference to the Census Bureau's definition of household. The post-BAPCPA Code still does not explicitly define dependent to include all people with whom the debtor has either a legal or familial relationship. Nonetheless, because the means test is partially defined by reference to households rather than blood lines, it arguably benefits minority debtors since they are more likely to live in multi-generational households. Similarly, since BAPCPA uses the phrase "adult dependent of the debtor," it implicitly recognizes that parents, or adult children of the debtor, may be dependent on the debtor for financial support.

Since minorities appear to spend relatively more to support non-legal dependents, BAPCPA may disproportionately benefit them by allowing them to continue to pay the actual reasonable and necessary expenses for the support of elderly household members. In contrast, the means test calculates the debtor's CMI by considering the amount family members regularly provide for the debtor or debtor's dependents' household expenses. Because of this, minority debtors who regularly receive assistance from family members, such as grandparents who help pay their debtor-children's living expenses or children who help pay their debtor-parent's living expenses, may be disproportionately harmed by this new definition.

Although the homestead exemption still exists, BAPCA eliminates some of the homeowner bias by making it harder for debtors to purchase new expensive homes on the eve of bankruptcy and then shield that wealth from their creditors. Unfortunately, certain aspects of BAPCPA exacerbates the appearance that the Code favors the ultra-wealthy (white) debtor. BAPCPA generally makes it easier for debtors to continue to contribute to pensions or repay pension loans regardless of amount. Moreover, because Chapter 13 debtors are allowed to deduct even high secured debt payments to determine

disposable income, BAPCPA lets wealthier debtors continue to own expensive homes and make mortgages on those homes rather than force them to sell those homes and repay more of their debts.<sup>195</sup> In addition, because there are a disproportionate number of whites who send their children to private schools, BAPCPA's partial deduction for private school expenses likely will widen the benefits gap.<sup>196</sup>

BAPCPA's restriction on the types of debts that can be discharged is also likely to have a larger, negative effect on minority debtors. The racial income and wealth gaps cause minorities to incur significantly higher student loan debt. Since BAPCPA expands the types of creditors who can prevent loans from being discharged and continues to ignore the quality of education debtor's received in return for the loans, this will likely have a disproportionately negative effect on debtors who are minorities. Similarly, because blacks and Hispanics have higher fertility rates, lower marriage rates, and consequently are more likely to be required to pay child support, the fact that BAPCPA makes virtually all domestic support obligations nondischargeable, even if paid to a government, widens the benefits gap. Finally, the fact that BAPCPA makes it harder to discharge credit card debt in Chapter 7 will likely widen the Code's racially disparate impact because minorities tend to have higher credit card debt than whites.

### *B. Unanticipated Consequences*

BAPCPA clearly was designed to punish people who acted opportunistically to abuse bankruptcy laws. Unfortunately, it likely will have harsh, unintended racial consequences for largely innocent victims. On August 29, 2005 — after BAPCPA was enacted but before it became fully effective — Hurricane Katrina devastated the Louisiana and Mississippi coasts. Many of those affected by Katrina were forced to relocate and, thus, lacked access to those financial records not destroyed by the flood waters. Katrina's survivors, including many bankruptcy lawyers, were geographically displaced by the hurricane. And, it was clear in the days immediately following the levee broke that attorneys' offices and court buildings would be closed for months.<sup>197</sup>

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195. See Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J., 1, 68 (2005) ("Perversely, this use of the abuse test in chapter 13 makes the wealthiest debtors pay less than under existing law.").

196. See S.P. Broughman & Nancy L. Swaim, *Characteristics of Private Schools in the United States: Results From the 2003–2004 Private School Universe Survey 3* (2006), available at <http://nces.ed.gov/pubs2006/2006319.pdf>.

197. (187) See Brad Townsend & Lee Haycock, *A Legal Quagmire Without Precedent: Katrina's Aftermath Stymies Louisiana's Judicial System*, DALLAS MORNING NEWS, Sept. 9, 2005, at 1A, available at 2005 WLNR 24690496; Patti Bond, *Katrina: The Aftermath: Legal Affairs Put in Limbo: Officials Fear Some Records Didn't Survive*, ATLANTA J.-CONST., Sept. 11, 2005, at 1G.

Sensing the magnitude of the harm the residents of that region would face, members of Congress proposed legislation within a week of the hurricane that was designed to protect the families and small businesses who were financially devastated by the hurricane.<sup>198</sup> This legislation would have allowed Katrina survivors to do the following: file for bankruptcy under pre-BAPCPA law, exclude disaster relief payments they received from CMI, and, include expenses they incurred as a result of being a victim of a natural disaster from CMI. The legislation also would have allowed courts to increase Katrina survivors' monthly expenses and would have given courts the discretion to extend certain time periods for Katrina survivors if their status as a victim of a natural disaster necessitated an extension.<sup>199</sup> Other legislation generally sought to delay BAPCPA's effective date.<sup>200</sup>

BAPCPA's supporters' fervent determination to enact the law caused them to oppose and ultimately defeat all legislative attempts to provide bankruptcy relief to the survivors of Hurricanes Katrina or Rita.<sup>201</sup> It is possible, of course, that some of the displaced hurricane survivors did not need this legislative relief because they had their financial records and filed for bankruptcy in another region before BAPCPA's October 17 effective date. And those survivors whose incomes were well below the poverty line likely would still be entitled to a Chapter 7 discharge post-BAPCPA because they would not be subjected to the means test. Still others may have had no need to file for bankruptcy because they were so poor that they simply were judgment-proof

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198. See Press Release, Eight Congressional District of New York, Nadler, Conyers, Watt, Jackson Lee to Introduce Bill to Relieve Debt Burden on Katrina Survivors, (Sept. 1, 2005), available at [http://www.house.gov/list/press/ny08\\_nadler/DebtreliefKatrina090105.html](http://www.house.gov/list/press/ny08_nadler/DebtreliefKatrina090105.html) (expressing desire to prevent Hurricane Katrina survivors from harm, or an "unintended financial whammy" that might be caused by BAPCPA). See also Letter to Hon. David M. Walker, Comptroller General (Oct. 18, 2005) (requesting study of BAPCPA's consequences on Katrina's victims).

199. Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. (2005); Katrina Emergency Relief Act of 2005, S. 1637, 109th Cong. (2005).

200. Financial Safeguards for Hurricane Survivors Act of 2005, H.R. 3662, 109th Cong. (2005); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005). Ironically, while Congress was originally considering BAPCPA in 2005, one member of Congress offered an amendment to protect the victims of natural disasters. H.R. REP. NO. 109-31, pt. 1 (2005), as reprinted in 2005 U.S.C.C.A.N. 88. That amendment, like virtually all others that would have made it easier for people to avoid the effects of BAPCPA, was defeated without debate. *Id.*

201. The only concession Congress made to recognize the devastation Katrina caused was to authorize the bankruptcy court in New Orleans to hold court in Baton Rouge. See Federal Judiciary Emergency Special Sessions Act of 2005, Pub. L. No. 109-63, § 152, 119 Stat. 1993, 1994-95.

or they otherwise would not benefit from filing for bankruptcy.<sup>202</sup> Indeed, some of the above-median income hurricane survivors may still have “passed” the means test either because they had high expenses or non-priority unsecured debts, or because they could convince the court, the US Trustee, and their creditors that “special circumstances” rebutted the presumption of abuse.

However, countless other hurricanes survivors no doubt failed to file for bankruptcy relief before October 17 because either they could not find their financial documents and would not be able to recreate them easily or quickly, because there were no available lawyers, or simply because they were overwhelmed by the other details in their dislocated lives. These potential filers and others who may have consciously chosen not to file for bankruptcy because the full extent of their economic losses was not yet apparent may find that they will be caught in the new trap Congress set for the Abusive Debtors. For example, some Katrina survivors may be unable to rely on their new state’s exemption laws if they moved to a state with more favorable exemption laws,<sup>203</sup> Still other Katrina survivors may “flunk” the means test because of their higher pre-Katrina earnings. While one would hope that above circumstances mean that Katrina survivors would be able to demonstrate “special circumstances” and rebut any presumption of abuse, they could not satisfy this requirement without providing documentation that itemizes their expenses and income adjustments unless a court found some way to waive this mandatory requirement.<sup>204</sup>

Congress’ refusal to waive BAPCPA’s requirements for hurricane survivors also may lead to some absurd results. Assuming they have access to a computer, the hurricane survivors could just as easily satisfy the mandatory credit counseling requirement by getting “counseling” on the Internet whether they lived in New Orleans or Houston. It is hard to imagine, though, what is gained by forcing Chapter 7 debtors who are Katrina survivors to participate in pre-petition credit counseling that explains “the consequences of bankruptcy, such as the potentially devastating effect it can have on their credit rating.”<sup>205</sup> It is quite likely that they all are fully aware of those consequences

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202. *But cf.* Robert M. Lawless, *Bankruptcy Filing Rates After a Major Hurricane*, 6 NEV. L.J. 4 (2005) (empirical analyses of bankruptcy filing rates following hurricanes).

203. This is a likely possibility since so many Katrina survivors moved to Texas, which essentially has an unlimited homestead exemption. *See* Rick Lyman, *Reports Reveal Katrina’s Impact on Human Landscape*, N.Y. TIMES, June 7, 2006, at A1 (discussing increase in Houston population caused by hurricane evacuees).

204. *See generally* JEWELER, *supra* note 112 (discussing inflexibility of BAPCPA requirements).

205. H.R. REP. NO. 109-31, pt. 1, at 18 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 103 (explaining need for pre-petition credit counseling).

relating to their current economic plight.<sup>206</sup> Likewise, one wonders how much Katrina survivors would benefit from post-petition financial management training in Chapter 13. They likely do not need “guidance about how to manage their finances, so that they can avoid future financial difficulties”<sup>207</sup> unless that guidance also explains ways to prevent a levee from breaking and flooding almost an entire major metropolitan area or it explains how they could prevent a repeat of the federal government’s abysmal response to a national disaster.<sup>208</sup>

Fortunately, the Office of the United States Trustee (“OUST”) provided some early relief to Katrina victims. Specifically, OUST agreed not to file enforcement motions against Katrina victims who could not provide wage or income documentation. It also agreed that income loss, expense increases, and other financial problems caused by Katrina would constitute special circumstances that could rebut the presumption of abuse in the means test.<sup>209</sup> OUST also temporarily waived the credit counseling requirement for debtors who lived in the districts affected by Katrina.<sup>210</sup>

The full extent of Katrina’s economic harm to the residents of the Gulf Coast has yet to be determined. However, given the socioeconomic profile of one of the largest cities affected by Katrina (New Orleans), it is likely that blacks will suffer disproportionately greater economic losses than whites. Specifically, before Katrina caused her widespread dislocation, 67% (or roughly 325,940) of the approximately 484,000 New Orleans residents were black.<sup>211</sup> Of course, not all of the black residents would necessarily benefit from filing for bankruptcy since almost 28% of all residents (and 35% of

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206. See *In re Petit-Louis*, 344 B.R. 696, 701 (Bankr. S.D. Fla. 2006) (suggesting that the counseling requirement “is the equivalent of requiring a person who has suffered a heart attack to listen to a lecture on exercise, diet and the evils of cholesterol before allowing such person to undergo open heart surgery”).

207. H.R. REP. NO. 109-31, pt. 1, at 18 (2005) (explaining need for Chapter 13 financial management courses).

208. A FAILURE OF INITIATIVE, H.R. REP. NO. 109-396 (2006).

209. Press Release, United States Department of Justice, U.S. Trustee Program Announces Enforcement Guidelines for Bankruptcy Debtors Affected by Natural Disasters (Oct. 5, 2005), available at [http://www.usdoj.gov/ust/eo/public\\_affairs/press/docs/pr20051005.htm](http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051005.htm).

210. See Press Release, United States Department of Justice, U.S. Trustee Program Announces Approval of Debtor Education Course Providers for Bankruptcy Filers and Waiver of Debtor Education Requirement (Oct. 7, 2005), available at [http://www.usdoj.gov/ust/eo/public\\_affairs/press/docs/pr20051007.pdf](http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051007.pdf).

211. See U.S. Census Bureau Website, State and County QuickFacts: Orleans Parish, Louisiana, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited Oct. 1, 2006). In contrast, a recent Census Bureau study reveals that the areas hit by Katrina and Rita “became whiter, less poor and more mobile.” Lyman, *supra* note 201, at A1.

blacks) lived below the federal poverty line.<sup>212</sup> Moreover, while it is too early to determine the precise economic impact Katrina had by race, a recent study indicates that Katrina's impact in both Louisiana and Mississippi was disproportionately borne by blacks, renters, the poor, and those who were unemployed.<sup>213</sup> Again, while there is no indication that Congress refused to provide even temporary legislative relief to Katrina's survivors because, as the rapper Kanye West declared about President George W. Bush, they didn't "care about black people,"<sup>214</sup> BAPCPA's post-enactment effects continue to show why race matters in bankruptcy reform.

## VII. CONCLUSION

On the surface, there is nothing overtly "racial" about BAPCPA or the pre-BAPCPA Code and both appear to be race neutral.<sup>215</sup> Certainly, there is no indication that the members of Congress who voted for BAPCPA or refused to enact the Katrina bankruptcy relief measures exhibited any overt animus against racial minorities. Indeed, though everyone concedes that few people of any race will "fail" the test, because minority income is relatively lower than white income, means testing theoretically harms whites more than minorities.

For some, this would end any racial analysis of BAPCPA. However, whether Congress enacted BAPCPA knowing or hoping that it would have disproportionately negative effects on minorities is largely irrelevant given this country's checkered racial past. The racist economic patterns caused by historical social and institutional practices and habits make it imperative that politicians and scholars consider whether facially neutral laws have racially disparate effects and avoid enacting or revising laws that perpetuate

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212. State and County QuickFacts, *supra* note 210. To use an example, 98.7% of the Lower Ninth Ward was black and 99.9% of the homes in that area were heavily damaged. More than one-third (36.4%) of the residents in that area lived below the poverty line and, thus, likely would not benefit from filing for bankruptcy. Even if they *did* choose to file for bankruptcy, most would undoubtedly "pass" the means test. See John R. Logan, *The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods* at 11, <http://www.s4.brown.edu/Katrina/report.pdf>.

213. *Id.* at 1, 7 (stating that 45.8% of the heavily damaged areas were in predominantly black neighborhoods while only 26.4% of the undamaged areas were in black neighborhoods).

214. See Lisa de Moraes, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html>.

215. *But cf.* Donald Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2140-42, 2156-57 (2003) (contending that Southern legislators supported the abolition of debtors' prisons and a broader bankruptcy discharge to protect white debtors from the "slavery" of debt).

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economic racial disparities. Congress failed to do this when it enacted BAPCPA. One hopes that the next time members of Congress consider revising bankruptcy laws, they will remember that race matters.