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CONSUMER BANKRUPTCY IN THE NEOLIBERAL STATE

Michael D. Sousa[*]

ABSTRACT

The rise of financialized capitalism as a component of the neoliberal state has resulted in our debt-based economy, under which utilizing credit—and incurring significant debt—is a necessary strategy for individuals and families to avoid economic marginality and to maintain some semblance of financial security in an evaporated welfare state. The current capitalist logic of differential accumulation and financial expropriation has created perpetually indebted citizens for whom debt needs to be understood as a social power and as a class relation of domination and exploitation between creditors and debtors. Many consumers who experience unmanageable debt often turn to the bankruptcy process to find financial relief.

Drawing upon a critical sociological framework informed by both Marxist economics and conceptualizations of disciplinary power espoused by Michel Foucault, the purpose of this Article is to examine the role that the modern consumer Bankruptcy Code plays in the neoliberal state. I argue that the consumer Bankruptcy Code is a significant component of financialized capitalism and a statute intentionally constructed to advance the interests of the creditor class to the detriment of debtors. More specifically, my primary argument is that the consumer bankruptcy system embodies a legislative technology of disciplinary power molded to the ideals of the creditor class under neoliberalism and is but another step on the perpetual treadmill of living indebtedness as a form of quotidian existence for households across the nation. Seen through this theoretical perspective, the modern consumer Bankruptcy Code is a statutory mechanism for socially controlling the lower and middle classes by imposing discipline and inculcating a spirit of self-regulation where future debts can be managed and timely repaid as required by the neoliberal state.

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INTRODUCTION

"The ruling ideas of each age have ever been the ideas of its ruling class."

Karl Marx & Friedrich Engels, The Communist Manifesto[1]

At the time of writing this article, the economic news is inundated with stories of forty-year-high inflation rates,[2] the prospect of another economic recession,[3] the harbinger of a colder labor market,[4] Americans struggling to keep up with daily personal expenses,[5] and the disappearance of middle-class, white-

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[1] KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 241 (Gareth Stedman Jones ed., Samuel Moore trans., Penguin Classics 2002) (1848).

[2] *E.g.*, *It's Not Just Inflation: Protectionism Risks Hobbling America and Its Allies*, ECONOMIST, Oct. 29–Nov. 4, 2022, at 11.

[3] *E.g.*, Christiaan Hetzner, *The Fed Risks Plunging U.S. Economy Back into a 1930s-Style Great Depression, Warns Cathie Wood*, FORTUNE (Nov. 14, 2022, 11:52 AM), https://fortune.com/2022/11/14/economy-federal-reeserve-cathie-wood-ark-great-depression-roaring-twenties/; Megan Henney, *Brace for a Recession in 2023 as Job Losses Top 2 Million, Citi Says*, FOX BUS. (Dec. 9, 2022, 4:24 PM), https://www.foxbusiness.com/economy/brace-recession-2023-job-losses-top-two-million-citi-says; George Glover, *Expect a US Recession That Will Ravage Markets and Could Send Stocks Spiraling Down 24% Next Year, Bank of America Says*, BUS. INSIDER: MKTS. INSIDER (Nov. 30, 2022, 10:26 AM), https://markets.businessinsider.com/news/stocks/recession-threat-stock-market-crash-bank-of-america-2023-outlook-2022-11.

[4] *E.g.*, Reade Pickert, *The Labor Market Is Cooling Off and That's Great News for Jerome Powell and the Fed*, FORTUNE (Nov. 30, 2022, 10:49 AM), https://fortune.com/2022/11/30/job-openings-fall-october-fed-cooling-economy/.

[5] *E.g.*, Jessica Dickler, *Credit Card Balances Jump 15%, Highest Annual Leap in over 20 Years, as Americans Fall Deeper in Debt*, CNBC: PERSONAL FIN. (Nov. 16, 2022, 10:44 AM),

collar jobs.[6] Whether all this economic doom and gloom will come to pass remains an elusive crystal ball prognostication. And while consumer bankruptcy rates remain lower at present than most professionals expected, current economic conditions nevertheless present an opportune time to critically examine and question the role of the Bankruptcy Code and its place in our financialized stage of late capitalism under hegemonic neoliberalism.[7]

This contribution to the literature on consumer bankruptcy may prove unorthodox to many readers because it unapologetically adopts a critical sociological lens to understand one way in which power operates in modern society by examining the role of the modern consumer bankruptcy laws in the neoliberal state.[8] In investigating pockets of social life, critical sociologists are interested in "looking beyond appearances, understanding root causes, and asking who benefits."[9] In doing so, dynamics of power, domination, and exploitation are of paramount concern. Critical sociologists study how the

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https://www.cnbc.com/2022/11/16/credit-card-balances-jump-15percent-as-americans-fall-deeper-in-debt.html.

6 *E.g.*, Trey Williams, *The Jobs That Built America's Middle Class Are Disappearing, Intensifying Its Downfall*, FORTUNE (Nov. 9, 2022, 3:21 PM), https://fortune.com/2022/11/09/american-middle-class-jobs-disappearing/.

7 It has been argued that the most salient feature of neoliberalism is the rise of financialization, namely, the intensive expropriation of interest-bearing capital. Ben Fine & Alfredo Saad-Filho, *Thirteen Things You Need to Know About Neoliberalism*, 43 CRITICAL SOCIO. 685, 687 (2017). "The term financialization, then, encapsulates the increasing role of globalized finance in ever more areas of economic and social life." *Id.* at 687. In turn, neoliberalism has been defined in a variety of ways by various scholars. David Harvey summarizes the concept firstly as a "theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade." DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005). Additionally, neoliberalism is also a hegemonic mode of discourse which has "pervasive effects on ways of thought to the point where it has become incorporated into the common-sense way many of us interpret, live in, and understand the world." *Id.* at 3.

8 Critical sociology has its roots in the works of Karl Marx regarding production and capitalism, and its tradition has been carried on more recently by social theorists such as Michel Foucault. *See* Scott Reeves et al., *Why Use Theories in Qualitative Research*?, 337 BRIT. MED. J. 631, 633 (2008). Given this perspectival lens, I recognize overtly that in the social sciences there are a range of interpretive frameworks, each one taking a slightly different approach to studying a topic and then relating it to the rest of the social world. Theoretical frameworks are partial, and no single framework can explain all the busyness of social life, such as our nation's complicated and swiftly changing bankruptcy laws. Rather, theoretical frameworks are roadmaps or analytical structures through which researchers study complicated problems, social issues, and make sense of the world. *Id.* at 631; *see also* Gabriel Abend, *The Meaning of "Theory*,*"* 26 SOCIO. THEORY 173, 180–81 (2008) (describing a theoretical framework as a "scheme, grid, map, net, plan" that offers a way of "looking at . . . or . . . talking about" the social world).

9 STEVEN M. BUECHLER, CRITICAL SOCIOLOGY 12 (2d ed. 2014).

organization of power through institutional policies and practices "can lead to the subjugation or oppression of particular individuals [or] groups."[10]

A critical sociological approach is therefore not value neutral.[11] For many critical sociologists, "capitalism is the dominant force in the modern world."[12] Capitalism interpenetrates all aspects of social life and forces certain conditions of existence upon populations. Though there are many ways to define capitalism itself, it is safe to presume that in everyday understandings capitalism is most associated with a "free" market economy with minimal intervention and regulation by the state.[13] A fine interpretation for some, but inadequate for those critical sociologists who are influenced by Marxian economics along with a poststructuralist conceptualization of power espoused by Michel Foucault.[14] For these thinkers, capitalism in its neoliberal flavor operates as a superordinate force in modern society, characterized by a particular class structure of

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10 Reeves et al., *supra* note 8, at 633.

11 *See* Steven M. Buechler, *What Is Critical About Sociology?*, 36 TEACHING SOCIO. 318, 328 (2008).

12 BUECHLER, *supra* note 9, at 55.

13 ERIK OLIN WRIGHT, HOW TO BE AN ANTI-CAPITALIST IN THE 21ST CENTURY 4 (2021).

14 Michel Foucault was a social theorist and is most prominently associated with the poststructuralist movement. Briefly, poststructuralism arose in the second half of the twentieth century through an assemblage of French intellectuals as a challenge to the dominant social theory of the first half of the twentieth century, namely, structuralism. SCOTT APPELROUTH & LAURA DESFOR EDLES, CLASSICAL & CONTEMP. SOCIO. THEORY 642 (3d ed. 2016). Due to the closeness in analyzing power between poststructuralism and critical sociology, Foucault has been embraced by the critical sociology movement. Buechler, *supra* note 11, at 327 (identifying Foucault's body of work as an example of critical sociology); *see also* Charles Lemert & Garth Gillan, *The New Alternative in Critical Sociology: Foucault's Discursive Analysis*, 4 CULTURAL HERMENEUTICS 309, 314 (1977) (arguing that Foucault's concept of "discourse" contributes to the critical sociology agenda).

exploitation[15] and inculcated by a logic of differential accumulation[16] and financial expropriation, whereby financial and corporate profits are extracted from the personal incomes, savings, and retirement accounts of individuals and families.[17]

For Marx, this was famously the class division between laborers and industrial capitalists in the nineteenth century where the former did not own the means of production.[18] But as Gilles Deleuze has observed, during the late twentieth century capitalism moved away from factories and wage relations towards a society organized around capital markets and relationships connected through states of indebtedness.[19] Consequently, in our current era of American financialized neoliberalism,[20] the economy is deliberately structured upon a

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15 WRIGHT, *supra* note 13, at 25 (noting that exploitation is a fundamental condition upon which capitalism operates). Marx colorfully described this system of exploitation in relation to industrial capitalism in the following manner:

> The great beauty of capitalist production consists in this—that it not only constantly reproduces the wage-worker as wage-worker, but produces always, in production to the accumulation of capital, a relative surplus-population of wage-workers. Thus the law of supply and demand of labour is kept in the right rut, the oscillation of wages is penned within limits satisfactory to capitalist exploitation, and lastly, the social dependence of the labourer on the capitalist, that indispensable requisite, is secured; an unmistakable relation of dependence, which the smug political economist, at home in the mother-country, can transmogrify into one of free contract between buyer and seller, between equally independent owners of commodities, the owner of the commodity capital and the owner of the commodity labour.

1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 539 (Samuel Moore & Edward Aveling trans., Wordsworth 2013) (1867). Drawing upon this theme of class exploitation, modern scholars such as David Harvey argue that neoliberal capitalism results in "greater social inequality and the restoration of economic power to the upper class." HARVEY, *supra* note 7, at 26.

16 TIM DI MUZIO & RICHARD H. ROBBINS, DEBT AS POWER 24 (2016); *see also* HARVEY, *supra* note 7, at 19 (arguing that neoliberalism is a "*political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites" (emphasis in original)).

17 Costas Lapavitsas, *Financialised Capitalism: Crisis and Financial Expropriation*, 17 HIST. MATERIALISM 114, 115 (2009).

18 1 MARX, *supra* note 15, at 113.

19 Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3, 5–6 (1992) ("But, in the present situation, capitalism is no longer involved in production, which it often relegates to the Third World, even for the complex forms of textiles, metallurgy, or oil production. It's a capitalism of higher-order production. It no longer buys raw materials and no longer sells the finished products . . . . What it wants to sell is services and what it wants to buy is stocks . . . .").

20 Though there is no single agreed-upon definition of financialization, it is frequently understood to mean "a pattern of accumulation in which profits accrue primarily through financial channels rather than through trade and commodity production." Greta R. Krippner, *The Financialization of the American Economy*, 3 SOCIO-ECON. REV. 173, 174 (2005); *see also* Josh Bowsher, *Credit/Debt and Human Capital: Financialized Neoliberalism*

debt-based system of social relations.[21] Going into heavy debt is a necessity for millions of families as a strategy for avoiding economic marginalization, where credit is needed to inflate otherwise stagnant wages so as to eke out an existence in the vanishing middle class. For the middle class, "[c]redit has replaced earnings as the major sources of middle class purchasing power."[22] But the highly leveraged balance sheets of today's families do not stem from frivolous consumption, but rather from essential needs for social and economic security, such as homes, cars, healthcare, childcare, education, and daily living expenses.[23] Consumer debt is now "the defining facet of how modern capitalism functions today."[24] Not only is living and grappling with debt a quotidian struggle for individuals and families,[25] but debt more broadly is best understood as a social power and a class relation of domination and exploitation between creditors and debtors.[26] As a result of what neoliberalism has wrought for most

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and the Production of Subjectivity, 22 EUR. J. SOC. THEORY 513, 516–17 (2018) (noting that financialization can be broadly understood as the "increasing power and presence of financial capital in economic, social and cultural practices, which . . . have slowly taken shape since the 1970s").

[21] As Besteman and Gusterson ably describe:

> Debt is an essential feature of neoliberal society. It greases the wheels of consumerism by enabling Americans to stretch to the edge of their means; it is also an apparatus for transferring wealth, via foreclosures and interest payments, from those who need money to those who already have more; and by squeezing more work out of the indebted it enforces social discipline.

Catherine Besteman & Hugh Gusterson, *Introduction*, *in* THE INSECURE AMERICAN: HOW WE GOT HERE AND WHAT WE SHOULD DO ABOUT IT 7 (Hugh Gusterson & Catherine Besteman eds., 2010); *see also* MICHAEL ROWBOTHAM, THE GRIP OF DEATH: A STUDY OF MODERN MONEY, DEBT SLAVERY AND DESTRUCTIVE ECONOMICS 16 (1998) ("Since economic activity depends upon money, and money is almost entirely created as a debt, this means that economic activity comes to depend upon debt—either consumer debt, industrial debt or government debt. And more and more the burden of debt is being placed on the consumer.").

[22] KEVIN T. LEICHT & SCOTT T. FITZGERALD, POSTINDUSTRIAL PEASANTS: THE ILLUSION OF MIDDLE-CLASS PROSPERITY 11 (2007).

[23] *See* Johnna Montgomerie, *The Pursuit of (Past) Happiness? Middle-Class Indebtedness and American Financialisation*, 14 NEW POL. ECON. 1, 16–18 (2009).

[24] PETER FLEMING, THE DEATH OF HOMO ECONOMICUS: WORK, DEBT AND THE MYTH OF ENDLESS ACCUMULATION 26 (2017).

[25] *See, e.g.*, Joe Deville and Gregory J. Seigworth, *Everyday Debt and Credit*, 29 CULTURAL STUD. 615, 618 (2015) ("Credit and debt, in all their myriad forms and formattings, have woven themselves through and around daily existence so thoroughly that they have become part of the atmosphere of the present, filtering into so many aspects of what we assume to be the normal state of affairs that the rhythms of our ever-roiling financial humdrum become a kind of collectively resigned ho-hum.").

[26] Adrienne Roberts & Susanne Soederberg, *Politicizing Debt and Denaturalizing the "New Normal,"* 40 CRITICAL SOCIO. 657, 662 (2014); *see also* Justin Sean Myers, *Neoliberalism, Debt and Class Power*, *in* CLASS: THE ANTHOLOGY 337 (Stanley Aronowitz & Michael J. Roberts eds., 2018) ("[Debt] does not exist in a vacuum outside of social power. It is not simply a monetary relation. Debt is a class relation.").

Americans—stagnant incomes, rising taxes, job instability, privatization, a weakened welfare state, globalization, the pocketing of productivity gains by the corporate elite, and a surplus of readily-available credit—Americans have been characterized as "post-industrial peasants": people who are "so in debt that those to whom they owe money (and the employers and economic elites who provide the investment and consumption capital for the system) control them."[27]

As Marx taught us about the relations of production ages ago, "whatever form they may have taken, one fact is common to all past ages, viz., the exploitation of one part of society by the other."[28] In this vein, the financialized economy under neoliberalism has created various conditions of existence for differing segments of the population: "prisonfare" for marginalized classes;[29] "workfare" for the poor or near-poor;[30] and "debtfare"[31] for everyone else, save for the few truly wealthy individuals among us. And dealing with debt in daily life under neoliberal capitalism represents metaphorically wearing a heavy chain around one's neck.[32] For the "honest but unfortunate debtors"[33] who cannot fully repay their obligations, they are often forced to subject themselves to the bankruptcy system to shed their weighty debts.

The conceptualization of creditors and debtors as occupying an unequal social and legal relationship—and one dominated by a unidirectional form of power—reaches back throughout human history.[34] Shackled to this relation of

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27 LEICHT & FITZGERALD, *supra* note 22, at 11.

28 MARX & ENGELS, *supra* note 1, at 242.

29 Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 SOCIO. FORUM 197, 199 (2010).

30 JAMIE PECK, WORKFARE STATES 84 (2001).

31 SUSANNE SOEDERBERG, DEBTFARE STATES AND THE POVERTY INDUSTRY: MONEY, DISCIPLINE AND THE SURPLUS POPULATION 60 (2014) [hereinafter SOEDERBERG, DEBTFARE STATES].

32 Here, I am intentionally playing with the famous quote at the end of the *Communist Manifesto*: "The proletarians have nothing to lose but their chains. They have a world to win." MARX & ENGELS, *supra* note 1, at 258; *see also* FLEMING, *supra* note 24, at 14 ("Personal debt hangs around one's neck like some medieval torture device.").

33 Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.").

34 DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 8 (2011) ("Arguments about debt have been going on for at least five thousand years. For most of human history—at least, the history of states and empires—most human beings have been told that they are debtors."); *see also* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 46 (Douglas Smith trans., Oxford 2008) (1887) ("The equivalence is established by the fact that, instead of a direct compensation for the damage done (i.e., instead of money, land, possessions of whatever sort), a sort

power is the concept of "economic morality."[35] Western history reveals the severe treatment of defaulting debtors,[36] along with an accompanying moralizing discourse regarding the evils of individuals failing to repay their debt obligations. Indeed, in *On the Genealogy of Morals*, Nietzsche argued that human notions of morality emerged precisely from the relationship between creditor and debtor, famously articulating that the emotion of guilt ("Schuld") originated from the material concept of debt ("Schulden").[37] The failure to repay one's debts and the subsequent turn to the bankruptcy process to assuage such indebtedness have been labeled as deviant behavior for ages.[38] Importantly, this discourse of economic morality is one aimed at individuals for discharging their personal debts,[39] and is simply not applied to assess corporate entities that rely upon the bankruptcy process as a "business strategy."[40] There exists a vastly different social construction between the business and consumer bankruptcy debtor.[41] For the former, filing for bankruptcy protection is an anticipated and inevitable response to the ebb and flow of business cycles, but for the latter it represents a moral failure, a stigmatizing event, and an act of deviancy. As a consequence of this economic moralizing, individuals and families are pathologized as "abusing" the bankruptcy process, but our macroeconomic system is not called into question and corporate entities are not held ethically

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of *pleasure* is conceded to the creditor as a form of repayment and recompense—the pleasure of being able to vent his power without a second thought on someone who is powerless . . . ." (emphasis in original)).

35 MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES 59 (W.D. Halls trans., W.W. Norton 1990) (1950).

36 Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435, 448–50 (2013) [hereinafter Sousa, *Bankruptcy Stigma*].

37 NIETZSCHE, *supra* note 34, at 51.

38 Sousa, *Bankruptcy Stigma*, *supra* note 36, at 445–48.

39 *See, e.g.*, PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607–1900, at 272 (1999) (arguing that a national bankruptcy statute aimed at consumers was slow in developing "because most Americans considered discharging debtors to be immoral and against public policy").

40 One bankruptcy law scholar has characterized this phenomenon in the following way:

> [I]f the creditor-debtor relationship is founded in morality, surely the creditor as well as the debtor must consider the moral consequences of insisting upon payment. Is it not immoral for the creditor to enforce payment though he or it knows (and on moral grounds should inquire) that the debtor's family will suffer thereby?

Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy*," 21 UCLA L. REV. 403, 435 (1973).

41 Iain Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 J. CONSUMER POL'Y 269, 274 (1997).

responsible for their own actions in causing the financial precarity that millions of people face in the United States today.

Scholars and commentators of consumer bankruptcy law have traditionally characterized the system as promoting a careful balance between providing relief to overburdened debtors while enabling creditors to realize some return on their outstanding obligations.[42] These legal debates are traditionally fixated on the optimal balance between debtor and creditor interests,[43] though quite often reduce to a moral evaluation of individual debtor motivations and behaviors.[44]

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42 *See*, *e.g.*, John Boyajian, *The Trustee in Bankruptcy and the Federal Truth-in-Lending Act*, 51 AM. BANKR. L.J. 63, 63 (1977) ("The Bankruptcy Act seeks both to provide relief to overburdened debtors and to distribute their assets ratably among their creditors."); DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 16 (2001) ("The basic parameters of bankruptcy reflect a compromise between organized creditor groups and the countervailing pressures of populism and other prodebtor movements."); THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 4 (1986) ("Bankruptcy Law historically has done two things: allowed for some sort of a financial fresh start for individuals and provided creditors with a compulsory and collective forum to sort out their relative entitlements to a debtor's assets."); Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918) (arguing that the policy behind any bankruptcy statute is to "secure an equitable division of the insolvent debtor's property among all his creditors" along with the "protection of the honest debtor from his creditors").

43 *See*, *e.g.*, John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473, 473 (2004) ("Consumer bankruptcy is appropriately a contentious subject as it involves competing interests of creditors who have extended credit, voluntarily or otherwise, and who properly expect repayment. It also often involves oppositional interests of debtors who, for whatever reasons, cannot repay all or part of their debts.").

44 By way of a single example, during a panel debate about proposed changes to the Bankruptcy Code following the report of the 1994 Bankruptcy Review Commission, Judge Edith Jones of the Fifth Circuit Court of Appeals commented as follows:

> I would like to inject the moral issue here because I do think that it is a very important matter of personal integrity and honor not to take on obligations beyond one's means and if one has been caught in a bind to make every effort to pay them back . . . .
>
> We have to remember . . . that we are dealing with a system that purports to dispense justice throughout society, and there are two components to that. In bankruptcy, not only do you have to look at what is happening to the person who has chosen to break their contracts and default on all of their obligations, . . . but also you have to look at the people who have taken the high road. The latter are people who . . . are in not that different a position from the ones who defaulted. They, however, are paying back their debts, struggling to make ends meet, putting their children to work to share the expenses or the costs of going to school, and so on.
>
> Every time someone goes bankrupt, those other people are paying more on their debts. If too many people go bankrupt, those people are not going to have access to credit at all anymore. Is that fair? Is that just? Is that moral? I do think, at bottom, you've got to look at it that way.

These important debates often ignore larger macro politico-economic developments that impinge upon consumer debtors and their everyday existences, such as the liberalization of credit markets,[45] the effects of financial deregulation on individual households, and the destructive capacity of global financialization.[46] To this end, consumer debtors in the twenty-first century are pawns in the macro-economic system of financialized capitalism and, as this Article argues, are also moralized and disciplined at the microlevel by tenets of neoliberal ideology that bleed into the legislative history and practices of the modern consumer Bankruptcy Code. We must also recognize that bankruptcy reform reflects a power structure in Congress, which has been ever-increasingly beholden to the creditor class and specialized interest groups since the enactment of the Bankruptcy Reform Act in 1978. What has been left largely out of the scholarly discussions over consumer bankruptcy laws is the role that power plays in the disciplining and moralizing of individual debtors who are desperate enough to file for bankruptcy protection to relieve themselves and their families from the subjectifying processes associated with unmanageable debt.[47]

The purpose of this Article is to advance the contention that the modern consumer Bankruptcy Code is a significant component of financialized capitalism,[48] a statute constructed intentionally through state intervention and

Panel Discussion: Consumer Bankruptcy, 67 FORDHAM L. REV. 1315, 1347 (1999). Admittedly with the benefit of hindsight, these comments appear even more erroneous and tired in light of the violence perpetuated by capital markets leading up to the Great Recession of 2008–2009.

[45] PAUL LANGLEY, THE EVERYDAY LIFE OF GLOBAL FINANCE: SAVING AND BORROWING IN ANGLO-AMERICA 162–83 (2008).

[46] By way of example, Astrid A. Dick and Andreas Lehnert found that between 1980 and 1994, the deregulation of interstate banking and the resulting competition among lenders together with the expanded availability of credit to individual households "explains between 10% and 16% of the increase" in personal bankruptcies during this fourteen-year period. Astrid A. Dick & Andreas Lehnert, *Personal Bankruptcy and Credit Market Competition*, 65 J. FIN. 655, 684 (2010).

[47] In recent years, bankruptcy scholar Linda Coco has applied the concept of debt as a form of power to the bankruptcy laws. *See, e.g.*, Linda E. Coco, *Disciplining the Financial Failure: An Exploration of Bankruptcy Law as an Active Discourse in Market Capitalism*, 15 WYO. L. REV. 107, 118–22 (2015) [hereinafter Coco, *Disciplining the Financial Failure*] (applying Foucault's understanding of disciplinary power to the bankruptcy laws); Linda E. Coco, *The Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Fiscal Identities and Financial Failure*, 40 CRITICAL SOCIO. 711, 719 (2014) [hereinafter Coco, *The Cultural Logics*] (arguing that "BAPCPA is part of the disciplining practices of the neoliberal state").

[48] ROBERT B. REICH, THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT 47 (2020) ("Bankruptcy is part of the free market, but, like all other aspects of the market, its rules are determined through politics, and over the last four decades Wall Street has become far more politically powerful than Main Street. That's why the biggest banks got bailed out and didn't have to use bankruptcy, while homeowners did not get bailed out and were not allowed to use bankruptcy.").

furthering the interests of economic class exploitation[49] while only providing temporary, palliative relief to individual debtors and their families. In making this overarching argument, I draw upon an assemblage of theoretical insights: a Marxist class-based framework, a conceptual understanding of debt as a form of power and its resulting conditions of subjection,[50] and a Foucauldian understanding of how disciplinary power operates.[51] My primary argument is that the modern Bankruptcy Code embodies a legislative technology of power[52] and technique of discipline molded to the ideals of the financialized creditor class under neoliberalism and is but another step on the treadmill of living indebtedness as a form of existence for households across the nation. From this theoretical vantage point, I am most invested in analyzing the nature of the consumer Bankruptcy Code by looking at it as another form of social domination and class division anchored in the exercise of power leading ultimately to the subjectification of the many hundreds of thousands of individuals and families who file for bankruptcy protection every year.[53]

In making these claims, the Article proceeds in the following manner. Part I offers the reader an overview of the theoretical framework for thinking about debt as a form of disciplinary power. Part II provides an abridged economic history of the United States through the twentieth century to flesh out the movement from Keynesian economics to the rise of neoliberalism in the early 1970s to help support my claim that the consumer bankruptcy laws should be viewed as another tool to advance the interests of financial capitalism. Part III offers readers a description of the consumer bankruptcy laws and, most

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[49] As Chomsky and Waterhouse maintain, the state "plays a role in securing the conditions necessary for capitalism to flourish." NOAM CHOMSKY & MARV WATERHOUSE, CONSEQUENCES OF CAPITALISM: MANUFACTURING DISCONTENT AND RESISTANCE 68 (2021).

[50] *See* DI MUZIO & ROBBINS, *supra* note 16, at 10 (theorizing that "debt is not simply money owed but a "technology of differential power over others rooted in private ownership"); *see also* MAURIZIO LAZZARATO, THE MAKING OF THE INDEBTED MAN: AN ESSAY ON THE NEOLIBERAL CONDITION 29 (Joshua David Jordan trans., 2012) [hereinafter LAZZARATO, THE INDEBTED MAN] (arguing that debt "functions as a mechanism for the production and 'government' of collective and individual subjectivities").

[51] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH].

[52] In Foucauldian terms, a "technology" is taken to mean an embedded practice or "manner of doing something connected to a form of rationality or logic and mobilized by definite social forces." DI MUZIO & ROBBINS, *supra* note 16, at 7.

[53] Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 575 (2022) (noting that just between 2009 and 2018, over eleven million individuals filed for personal bankruptcy).

importantly, an overview of the fresh start which rests at the heart of these laws. Part IV then takes the reader on a journey through the consumer developments of the Bankruptcy Code from 1978 to 2005, demonstrating the major ways in which the bankruptcy laws have been reformed to align with the interests of the financial creditor class. Part V then reassesses the present Bankruptcy Code through a critical Marxist/Foucauldian framework. Finally, I conclude with with some quixotic recommendations for reform.

I. DEBT AS POWER AND DISCIPLINE

In *Capital Volume I*, Marx maintained that the creation of surplus value for the industrial capitalist came about by exploiting labor power, effectively by paying only subsistence wages.[54] In *Capital Volume III*, Marx turned to an examination of money itself as its own commodity form, creating a surplus for lenders by valorizing itself and increasing in value through interest-bearing capital, or as he characterized it, "money breeding money."[55] For Marx, this circulation of money as a commodity bred a new relationship under capitalism, namely, that of debtor and creditor.[56] Marx termed this circulation of interest-bearing capital as "fictitious capital," not because it is not real, but because "it is distinct from the circulation or performance of the capital it represents."[57]

The possibility of fictitious capital and its tremendous profitability transformed national economics and the process by which money is created in modern society. Today the creation and supply of money is primarily left in the domain of banks and financial institutions rather than the state.[58] Rowbotham summarizes the state of capitalist economies in the current manner:

> Money loaned by a bank is not a loan of pre-existent money; money loaned by a bank is *additional* money created. The stream of money generated by people, businesses and governments constantly borrowing from banks and other lending institutions *is relied upon to supply the economy as a whole*. Thus[,] the supply of money depends upon people going into debt, and the level of debt within an economy

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[54] *See* MARX, *supra* note 15, at 150–51.

[55] 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 466 (David Fernbach trans., Penguin Classics 1991) (1894).

[56] *Id.* at 525.

[57] Ben Fine, *Financialization from a Marxist Perspective*, 42 INT'L J. POL. ECON. 47, 50 (2014).

[58] ROWBOTHAM, *supra* note 21, at 4 (1998).

> is no more than a measure of the amount of money that has been created.[59]

It is precisely upon this macroeconomic reliance upon debt, and here consumer debt, that transforms the relationship between creditor and debtor into one dominated by power. Usually taking their lineage from Marx's arguments related to capital accumulation and class division, social theorists have maintained that in modern society, debt is the predominant economic and social relationship.[60] As Maurizio Lazzarato convincingly claimed, the transition to the debt-based economy has transformed consumers into perpetually indebted subjects under neoliberal capitalism where the credit/debt dyad becomes the effective instrument for exploitation, with debt serving as the basis for a universal, asymmetrical relationship of power.[61] And it is within this relation of power that the "indebted man" becomes the "subjective figure of modern-day capitalism."[62] But beyond simply forcing individuals and families into a perpetual state of consumptive indebtedness, Di Muzio and Robbins maintain that debt as a social relation premised upon power acts through a logic of differential accumulation that exploits debtors and results in the vast redistribution of wealth, dividing the population "into those who are net debtors and the privileged few who are net creditors."[63] This, of course, has led to the widening economic inequality we have witnessed in the United States since the 1970s.[64]

Conceptualizing debt as a form of power leads us to the work of Michel Foucault. There is a rich tradition of scholars who rely upon the works and theoretical contributions of Foucault in exploring modern society and the regulation of social life. One enduring conceptual theme and object of research

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59 *Id.* (emphases in original).

60 *See, e.g.*, MIRANDA JOSEPH, DEBT TO SOCIETY: ACCOUNTING FOR LIFE UNDER CAPITALISM, at ix (2014).

61 LAZZARATO, THE INDEBTED MAN, *supra* note 50, at 32–33.

62 *Id.* at 38.

63 DI MUZIO & ROBBINS, *supra* note 16, at 113 (noting also that this division "may be more or equally relevant than the standard division between capitalists and laborers").

64 REICH, *supra* note 48, at 15 (noting that "[b]etween 1980 and 2019, the share of the nation's total household income going to the richest 1 percent more than doubled, while the earnings of the bottom 90 percent barely rose") *see also* BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY 327 (2019) ("Between World War II and the 1970s, economic growth in the United States lifted all boats at roughly the same rate. Since the 1970s, growth has been erratic, and the benefits have gone mostly to the people who own the yachts. In 1971, the top 10 percent of households earned 31 percent of total income. By 2016, the top 10 percent took 48 percent.").

for Foucault throughout his body of work is the notion of "power."[65] Foucault's conceptualization of power notably evolved over the course of his scholarly career.[66] In his earlier work Foucault adopted a juridical/sovereign understanding of power, one "which lays down the law, which prohibits, which refuses, and which has a whole range of negative effects: exclusion, rejection, denial, obstruction, [and] occultation."[67]

In moving beyond a juridical sovereignty as the single form of power, Foucault refashioned an understanding of power from a "general state of domination" exerted by the sovereign state to a "multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization."[68] In this radically new account of power,[69] Foucault importantly articulated that power is not something that is possessed or acquired as a thing in itself,[70] but rather "power" is a force that is exercised in relationships between partners.[71] While power remains an omnipresent force for Foucault, it exists only when it is put into action, famously describing this process for exercising power "as a mode of action upon the action of others."[72] At the same time, Foucault explicitly maintained that "the individual is not a pre-given entity which is seized on by the exercise of power. The individual, with his identity and characteristics, is the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces."[73] In this way, Foucault argued that the exercise of

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65 *See generally* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1990) (1976) [hereinafter FOUCAULT, HISTORY OF SEXUALITY]; FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 51; MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972–1977 (Colin Gordon ed., Colin Gordon et al. trans., Vintage Books 1980) [hereinafter FOUCAULT, POWER/KNOWLEDGE]; MICHEL FOUCAULT, THE PUNITIVE SOCIETY: LECTURES AT THE COLLÈGE DE FRANCE 1972–1973 (Bernard E. Harcourt ed., Graham Burchell trans., Picador 2013); MICHEL FOUCAULT, PENAL THEORIES AND INSTITUTIONS: LECTURES AT THE COLLÈGE DE FRANCE 1971–1972 (Bernard E. Harcourt ed., Graham Burchell trans., Picador 2019).

66 More specifically, Foucault conceptualized three forms of power available to the modern state: sovereign power, biopower, and disciplinary power. Benjamin Scher, *Biopower, Disciplinary Power and Surveillance: An Ethnographic Analysis of the Lived Experience of People Who Use Drugs in Vancouver's Downtown Eastside*, 47 CONTEMP. DRUG PROBS. 286, 290 (2020).

67 FOUCAULT, POWER/KNOWLEDGE, *supra* note 65, at 183.

68 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 65, at 92.

69 ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 14 (1994) ("Foucault proposes a radically new account of power.").

70 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 65, at 94.

71 Michel Foucault, *The Subject and Power*, 6 CRITICAL INQUIRY 777, 786 (1982).

72 *Id.* at 790.

73 FOUCAULT, POWER/KNOWLEDGE, *supra* note 65, at 73–74.

power creates certain subjectivities.[74] The process of subjectification is characterized "by the fact that an individual is turned into a subject by the active work of norms."[75]

In his middle-stage work, Foucault turned to a form of institutional power that he characterized as "disciplinary power." Foucault's ideas of technologies of power as a form of discipline is best demonstrated in *Discipline and Punish: The Birth of the Prison*.[76] In *Discipline and Punish*, Foucault "traces historically how power began to be disseminated in diffuse and multiple ways, easily normalized into all areas of life as a means of regulating and reproducing subjects."[77] In this historical diffusion of power, Foucault principally argues that modern forms of punishment have largely moved beyond the focus on the tortured body. In its place, the state has adopted a corpus of techniques for practicing the power of punishment. Institutions operate by employing "micro-physics" of power upon individual bodies across various domains, which Foucault labels as "tiny theatres of punishment."[78]

More specifically, Foucault's theorization of disciplinary power is comprised of a triad of interlocking components: hierarchical observation; normalizing judgment; and the examination.[79] The hierarchical observation of bodies in such institutions as military camps, hospitals, educational reformatories, and prisons serve as "apertures for continuous surveillance"[80] which function as "microscope[s] of conduct"[81] in the transformation of individual behavior. Second, as the term "normalizing judgment" implies, disciplinary power is corrective and orchestrated through various techniques aimed at training the body, oftentimes accomplished through the dissemination

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[74] *Id.* at 98 ("Well, rather than worry about the problem of the central spirit, I believe that we must attempt to study the myriad of bodies which are constituted as peripheral *subjects* as a result of the effects of power." (emphasis in original)).

[75] Guillaume le Blanc, *Becoming a Subject in Relation to Norms*, *in* FOUCAULT AND THE MAKING OF SUBJECTS 133 (Laura Cremonesi et al. eds., 2016).

[76] FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 51.

[77] Jennifer K. Wesely, *Negotiating Gender: Bodybuilding and the Natural/Unnatural Continuum*, 18 SOCIO. SPORT J. 162, 165 (2001).

[78] FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 51, at 113.

[79] *Id.* at 170–94.

[80] *Id.* at 172.

[81] *Id.* at 173.

of privileges and sanctions.[82] Normalizing individual bodies around a central moral compass is at the same time both homogenizing and individualizing for Foucault, because while the "power of normalization imposes homogeneity,"[83] it too individualizes "by making possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by fitting them one to another."[84] The third component of Foucault's disciplinary power triad is the examination, which combines the techniques of hierarchical observation and normalizing judgments.[85] It is through the examination that institutions pin down each individual body to their own particularity. In conjunction with the first two elements of the disciplinary triad, Foucault argued that the examination formed a "new modality of power"[86] in which each body becomes a measurable and marked case which results in their own individual subjectivity.

Thus, taken together, disciplinary power results in a process of objectivization and subjectivation.[87] The result of these processes is the creation of what Foucault describes as a "docile body," one that "may be subjected, used, transformed and improved."[88] This reformative effort is inculcated to correspond and to conform to the generally prevailing norms of society.[89] The exercise of power in a Foucauldian sense does not necessarily need to have purely negative effects, but rather can produce positive consequences largely

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82 *Id.* at 180 ("In discipline, punishment is only one element of a double system: gratification-punishment. And it is this system that operates in the process of training and correction.").

83 *Id.* at 184.

84 *Id.* Foucault explains how institutions go about the business of effectuating desired behavioral corrections:

> As for the instruments used, these are no longer complexes of representation, reinforced and circulated, but forms of coercion, schemata of constraint, applied and repeated. Exercises, not signs: time-tables, compulsory movements, regular activities, solitary meditation, work in common, silence, application, respect, good habits. And, ultimately, what one is trying to restore in this technique of correction is not so much the juridical subject, who is caught up in the fundamental interests of the social pact, but the obedient subject, the individual subjected to habits, rules, orders, an authority that is exercised continually around [them] and upon [them], and which [they] must allow to function automatically in [them].

Id. at 128.

85 *Id.* at 184.

86 *Id.* at 192.

87 *See* Pirkko Markula, *The Technologies of the Self: Sport, Feminism, and Foucault*, 20 SOCIO. SPORT J. 87, 90 (2003).

88 FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 51, at 136.

89 *Id.* at 242.

through normalization and by the internalization of acceptable behavioral norms.[90]

Applying the theoretical insights of Foucault and modern forms of power to the credit/debt dyad is not new. Scholars in the past have called for a Foucauldian understanding of disciplinary power in examining the social and legal relationships between creditors and debtors.[91] More particularly, Linda Coco has specifically linked Foucault's theoretical framework of disciplinary power to our bankruptcy system, arguing aptly that "the process of rendering the fiscal failure into a debtor in the bankruptcy field assumes disciplining experiences and processes analogous to those Foucault attributes to the penal process."[92] In this Article, I too draw upon the work of Foucault in examining the disciplining processes for debtors embodied through the Bankruptcy Code of 1978 and its major amendments since then to create docile bodies of responsibilized consumers who will return to a reliance upon credit once their sojourns through the bankruptcy process end. Before doing so, however, it is necessary to first provide some context for how we now find ourselves in a financialized economy dominated by the tenets of neoliberal ideology.

II. FROM KEYNESIANISM TO NEOLIBERAL CAPITALISM AND THE RISE OF *HOMO ECONOMICUS* AS A MODEL OF CONSUMER BEHAVIOR

There exists an incredibly robust literature on the economic history of the United States during the twentieth century leading to the development of neoliberal capitalism in the late twentieth century and continuing to the present day.[93] Accounting for such is the subject of hundreds of books and scholarly

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90 Isaak Dore, *Foucault on Power*, 78 UMKC L. REV. 737, 748 (2010).

91 *See, e.g.*, Ramsay, *supra* note 41, at 273 ("Foucault's analysis was applied primarily to the role of institutions such as prisons, schools, factories, and hospitals, but it illuminates aspects of the consumer credit system."); MAURIZIO LAZZARATO, GOVERNING BY DEBT 182–86 (Joshua David Jordan trans., 2015) [hereinafter LAZZARATO, GOVERNING BY DEBT] (arguing that Foucault's understanding of subjectivation explains the governance of debt relations); Tayyab Mahmud, *Debt and Discipline*, 64 AM. Q. 469, 469 (2012) (using the insights of Foucault to "unpack the connection between debt and discipline"); Mitchell Dean, *Foucault, Ewald, Neoliberalism, and the Left*, *in* FOUCAULT AND NEOLIBERALISM 107 (Daniel Zamora & Michael C. Behrent eds., 2016) (arguing in Foucauldian terms that debt is a form of governmentality).

92 Coco, *Disciplining the Financial Failure*, *supra* note 47, at 120.

93 *See, e.g.*, J. BRADFORD DELONG, SLOUCHING TOWARDS UTOPIA: AN ECONOMIC HISTORY OF THE TWENTIETH CENTURY (2022); GARY GERSTLE, THE RISE AND FALL OF NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022); DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISIS OF

treatments, and thus beyond the scope of this Article. What appears here is simply a very truncated "through line" for tracking these economic and political changes for purposes of making my ultimate claims.

Following the ravages of the Great Depression, Keynesian economics dominated the American economy in the twenty-five years between 1945 to 1970.[94] Keynesian economics offered a solution to the problem of economic downturns by developing proposals for countercyclical public spending measures, promoting full employment, and increasing wages along with productivity.[95] It is often articulated that Keynesian economics produced the American social welfare state,[96] and during this period of time the national economy intentionally regulated and contained the impulses of capitalism. In addition, social safety nets were established in terms of unemployment, health, and retirement. Combined with this "Fordist" period in which corporations "accepted a compromise with workers based on wages high enough to buy a continually increasing amount"[97] of consumer goods, American capitalism experienced the longest boom in history, described as the "golden age of capitalism."[98]

CAPITALISM (2010); APPELBAUM, *supra* note 64; KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Beacon Press 2d ed. 2001) (1944).

94 Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, *in* NEOLIBERALISM: A CRITICAL READER 21 (Alfredo Saad-Filho & Deborah Johnson eds., 2004).

95 DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 3 (2012). Keynesianism is premised upon the idea that "capitalism is a flawed system whose development, if not constrained, will lead to periodic deep depressions and the perpetuation of poverty." Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1, 10 (2012) (internal citation omitted).

96 Asa Briggs defines the welfare state in the following terms:

> A welfare state is a state in which organized power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three directions—first, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or their property; second, by narrowing the extent of insecurity by enabling individuals and families to meet certain "social contingencies" (for example, sickness, old age and unemployment) which lead otherwise to individual and family crises; and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services.

Asa Briggs, *The Welfare State in Historical Perspective*, *in* THE WELFARE STATE READER 16 (Christopher Pierson & Francis Castle eds., 2d ed. 2006).

97 CHRIS HARMON, ZOMBIE CAPITALISM: GLOBAL CRISIS AND THE RELEVANCE OF MARX 164 (Haymarket Books 2010) (2009).

98 *Id.* at 161.

Despite the economic successes of reduced inequality, higher wages, and better material conditions of living for swaths of Americans under Keynesianism, "there remained a deep conservative opposition within the United States that provided a base from which to launch a neoliberal revival."[99] While I fully grasp that the historical rise of modern American neoliberalism is much richer and expansive in historical and economic breadth, examining this in depth is equally beyond the scope of this Article.[100] For present purposes it suffices to attribute the rise of modern neoliberal economics to one of the most influential works of the twentieth century, namely, Milton Friedman's *Capitalism and Freedom*.[101] In *Capitalism and Freedom*, Friedman argued for the need to sever the close Keynesian relationship between political power and the national economy in order to preserve individual freedoms.[102] In advocating for a free market economy, Friedman maintained that the role of government should be limited to a few essential functions: the protection of the country from foreign and domestic threats, the preservation of "law and order," the ability to enforce voluntary private contracts, and the need to foster a competitive marketplace, mainly through enforcing anti-monopoly laws.[103] The major theoretical thread underlying *Capitalism and Freedom* is that a political economy of "competitive capitalism"[104] must be organized "through private enterprise operating in a free market" as a "system of economic freedom" which would then serve as the "necessary condition for political freedom."[105] While Friedman himself did not use the term "neoliberalism," he effectively advocated for a return to a 19th century Benthamite definition of liberalism as a reaction to what he perceived as overreaching, problematic statism.[106]

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99 Palley, *supra* note 94, at 21.

100 For works that deeply expand upon the economic, political, and historical developments leading to American neoliberalism, *see generally* MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978–1979 (Michael Senellart ed., Picador Books 2008); STEDMAN JONES, *supra* note 95; JESSICA WHYTE, THE MORALS OF THE MARKET: HUMAN RIGHTS AND THE RISE OF NEOLIBERALISM (2019); PIERRE DARDOT & CHRISTIAN LAVAL, THE NEW WAY OF THE WORLD: ON NEOLIBERAL SOCIETY (2017); DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM (2017); DAMIEN CAHILL & MARTIJN KONINGS, NEOLIBERALISM (2017).

101 MILTON FRIEDMAN, CAPITALISM AND FREEDOM (Univ. of Chi. Press 2002) (1962).

102 *Id.* at 3–4.

103 *Id.* at 4.

104 Friedman defined "competitive capitalism" as a "free private enterprise exchange economy." *Id.* at 17.

105 *Id.* at 6.

106 *Id.* at 14–15.

Importantly for us, in addition to the prescription for how the macroeconomy should operate, *Capitalism and Freedom* is littered with arguments concentrated upon the atomization of individuals and families as components of the larger economy who are responsible for their own destinies.[107] He frequently comments on "individual responsibilities,"[108] describes independent households as economic units operating like a "collection of Robinson Crusoes,"[109] argues that freedom is the objective "only for responsible individuals,"[110] and advocates for looking at people as bits of human capital as "analogous to [the] investment in machinery, buildings, and other forms of nonhuman capital."[111] According to Friedman, the notion of human capital serves "to raise the economic productivity of the human being."[112] In reality, however, this means that individuals and families must generally shoulder all of the costs of developing their human capital, most prominently through self-funded job training efforts or through incurring non-subsidized student loans for vocational training, college education, and professional schooling.[113] As Friedman plainly remarked, "the liberal takes the individual, not the nation or citizen of a particular nation, as his unit."[114]

This "methodical individualism"[115] of human life serves three interrelated purposes in conceptualizing the modern consumer bankruptcy laws as disciplining and subjectifying processes under late capitalism. First, it provided the theoretical underpinning for the reemergence of a distinctive brand of neoclassical economics at the University of Chicago (the "Chicago School") led by key neoliberal intellectuals such as Friedman, George Stigler, Aaron Director, Frank Knight, and reaching its "intellectual apogee" through the work of Gary Becker.[116] Second, and relatedly, the theory of human capital is a normative framework for determining—and judging—what rational behavior

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[107] *Id.* at 3. ("To the free man, the country is the collection of individuals who compose it, not something over and above them.").

[108] *Id.* at 3.

[109] *Id.* at 17.

[110] *Id.* at 40.

[111] *Id.* at 120.

[112] *Id.*

[113] *Id.* at 117–28.

[114] *Id.* at 156.

[115] MARK FISHER, CAPITALIST REALISM: IS THERE NO ALTERNATIVE? 77 (2009).

[116] CAHILL & KONINGS, *supra* note 100, at 30–31 (2017).

should entail.[117] Third, by atomizing human behavior, it enabled a revival of the Nietzschean notion of "economic morality" to creep into our national discourse and to attribute financial calamity to individual fault and irresponsible behavior, rather than seeing it largely as a response to greater economic forces under financialized neoliberalism.

Influenced by Friedman's ideological vision of human capital,[118] the revival of neoclassical economics in the late twentieth century is best attributed to the works of Gary Becker, who took the foundational principles of neoclassical economics—rational, self-interested, utility-maximizing individuals who possess stable preferences—and applied them to all areas of the economy,[119] but most notably for us, to the behavior of individuals across all strata of social existence, including consumptive behavior.[120] This economic theory of consumer choice is premised upon this notion of rationality, namely, that individuals make decisions that optimize their well-being given certain constraints, such as income and knowledge.[121] Consumers "are assumed to make choices that yield them the highest level of well-being subject to the constraints they face. Underlying this model of choice is the idea that consumers have well-defined preferences over their array of choices."[122] In turn, these preferences are indicated by a utility function "that allows consumers to rank the various bundles of goods and services that are available to them."[123] The grand assumptions behind Becker's divination of *homo economicus* are that people are maximizers of self-interest and make consistent choices armed with stable preferences.[124] However, the idea of *homo economicus* as applied to the behavior of flesh-and-blood individuals, detached from assumptive mathematical models, has been highly criticized and rejected by scholars across disciplines, including

117 Alexandre Truc, *Forty Years of Behavioral Economics* 29 EUR. J. HIST. ECON. THOUGHT 393, 400 (2022).

118 The basic presumption of human capital is that individuals will invest in gaining the requisite skills, education, and training in order to maximize future income. Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9, 9 (1962).

119 GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 5 (1976).

120 *See, e.g.*, Gary S. Becker, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675, 691 (1988) (applying the rational actor model to the behavior of drug addicts); Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813, 816 (1973) (explaining marriage decisions through a utility maximizing model); BECKER, *supra* note 119, at 171–93 (applying maximizing behavior to decisions over fertility).

121 THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 16 (2004).

122 *Id.*

123 *Id.*

124 JEFFREY L. HARRISON & JULES THEEUWES, LAW AND ECONOMICS 514–15 (2008).

economics.[125] *Homo economicus* as a working model for human behavior—including decisions related to credit, debt, and bankruptcy—is nothing more than a fiction created by economists to support assumptions underlying their econometric models.[126]

Nonetheless, the emergence of Friedman and Becker's brand of neoclassical economics and the conceptualization of *homo economicus* as the standard-bearer for microeconomics proved highly influential in both the legal academy and the judiciary.[127] Perhaps no area of the legal field went untouched by the law and economics movement after the publication of *The Problem of Social Cost* by Ronald Coase in 1960[128] and the *Economic Analysis of Law* by Richard Posner in 1973,[129] including bankruptcy law. Posner has described Becker as one of the law and economics movement's most "illustrious progenitors."[130]

While a law and economics approach as applied to bankruptcy law may be digestible when addressing concerns over corporate reorganizations,[131]

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[125] DANIEL COHEN, HOMO ECONOMICUS: THE (LOST) PROPHET OF MODERN TIMES 15 (2012) ("Who is Homo Economicus? Originally he was a fiction invented by economists."); *see also* FLEMING, *supra* note 24, at 5 (describing the project of *homo economicus* as a "complete failure, of course, because it could only exist in the realm of fantasy"); ROBERT SKIDELSKY, WHAT'S WRONG WITH ECONOMICS? A PRIMER FOR THE PERPLEXED 4 (2020) ("Economists are seduced by the thought that, because humans are part of nature, their code can be cracked just like that of physical objects."); YANNIS PAPADOGIANNIS, THE RISE AND FALL OF HOMO ECONOMICUS: THE MYTH OF THE RATIONAL HUMAN AND THE CHAOTIC REALITY 38 (2014) ("Although the concept of *Homo economicus* was nonexistent in reality, it enjoyed an unequaled advantage: It could be perfectly aligned with the economists' sophisticated mathematical models leading to certain solutions and equilibrium.").

[126] Ole Rogeberg, *Taking Absurd Theories Seriously: Economics and the Case of Rational Addiction Theories*, 71 PHIL. SCI. 263, 265 (2003) (arguing that mathematical models are questionable when applying them to individual decision-making).

[127] The law and economics movement was born after the forming of the triad intellectual relationship in the late 1960s between Aaron Director, George Stigler, and Richard Posner. George Stigler was a conservative economist and friend of Milton Friedman. Aaron Director, Friedman's brother-in-law, became the first economist to teach at an American law school. Richard Posner, Director, and Stigler formed a relationship at Stanford University before Posner returned to teach at the University of Chicago Law School. APPELBAUM, *supra* note 64, at 144–45.

[128] *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[129] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1st ed. 1973).

[130] Richard A. Posner, *The Law and Economics Movement: From Bentham to Becker*, *in* THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 328 (Francisco Parisi & Charles K. Rowley eds. 2005).

[131] There is a robust literature on the application of economic principles to corporate reorganizations. *See, e.g.*, Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988) (offering a new method for allocating assets among interested stakeholders in a chapter 11 bankruptcy); POSNER, *supra* note 129, at 421 (applying the free-rider problem to explain why creditors will not ordinarily consent to a

comparing the expected utility maximizing behavior of corporations to the ex-ante borrowing decisions and ex-post behaviors of individuals and families after incurring troublesome debt is untenable and problematic.[132] Further, one cannot escape the dog-whistle moralizing about consumer debtors even in the self-referential "objectivity" of the science of law and economics.[133] For example, in his highly influential text, Posner defines voluntary consumer bankruptcy debtors as "consumers who go overboard buying goods on credit,"[134] recounts the "dubiety about voluntary nonbusiness bankruptcies,"[135] and claims that the availability of the discharge creates an attractive moral hazard for debtors who can, of course, "consume all sorts of nice things on credit and then default."[136] Such morally-laced propositions undergirding the *homo economicus* interpretation of debtors' intentions and behaviors ignore the mountain range of empirical data—originally attributed to the efforts of Sullivan, Warren, and Westbrook—demonstrating quite ably that individuals and families are not maximally-rationalizing credit and debt consumers, but people who fall into debt

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voluntary reorganization); Douglas G. Baird, *Revisiting Auctions in Chapter 11*, 36 J.L. & ECON. 633, 635 (1993) (arguing that auctions of publicly traded companies should take place shortly after the filing of the bankruptcy petition).

[132] As Sullivan, Warren, and Westbrook argued in 1989 stemming from the Consumer Bankruptcy Project:

> The economic model presumes that a decision to file bankruptcy is made by a rational maximizer coolly calculating the gain from bankruptcy against the loss of nonexempt assets based on an informed understanding of the bankruptcy laws. Our own experiences and the reports of those intimately involved in the bankruptcy process tell us that the reality is very different.

TERESA A. SULLIVAN, ELIZABETH WARREN, AND JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 243 (Beard Books 1999) (1989) [hereinafter SULLIVAN, WARREN & WESTBROOK, AS WE FORGIVE OUR DEBTORS]. One scholar has tested the rational actor model and found it provided a "limited understanding of human behavior in the bankruptcy arena." Chrystin Ondersma, *Are Debtors Rational Actors? An Experiment*, 13 LEWIS & CLARK L. REV. 279, 279 (2009).

[133] The creditor class is aware that a rational actor model does not adequately describe consumer behavior. *See* Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided 'Reform' of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1564 (2006) ("Notwithstanding its intuitive appeal, strategic incentive analysis should not dictate consumer bankruptcy policymaking. The conclusion that individuals strategically act on incentives follows from a school of law and economics that views all market participants as rational actors who weigh the cost of compliance against the benefits of a breach of contract. This view of 'law as price' may have merit in some commercial contexts, but it is particularly strained when used to describe the economic actions of consumers.").

[134] POSNER, *supra* note 129, at 419.

[135] *Id.* at 419–20.

[136] *Id.* at 420.

overwhelmingly due to socioeconomic circumstances far beyond their control.[137]

Further, according to the law and economics approach to personal bankruptcy, perhaps the most important function of consumer bankruptcy is the availability of the discharge, which encourages enterprise by otherwise risk-adverse individuals.[138] Without the discharge, however, individuals would "otherwise have to hazard [their] entire earning capacity on [their] business ventures."[139] This approach to bankruptcy law too readily equates the filings of corporations to those of individual families, claiming in part that "[l]imited liability is to corporate entrepreneurs what the right to declare personal bankruptcy is to individual entrepreneurs."[140] And this is precisely the problem. The majority of consumer debtors are not individual enterprises; rather, they are wage earners surviving in the face of an unequal economy, job precarity, and wages that do not keep pace with rates of efficient production. Additionally, the law and economics approach ignores embodied forms of suffering—such as stress, anxiety, depression, and suicidal ideation—that often accompany attempts to live under unmanageable debt and financial distress.[141]

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137 SULLIVAN, WARREN & WESTBROOK, AS WE FORGIVE OUR DEBTORS, *supra* note 132, at 331–33; *see also* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 3 (2020 ed. 2000) [hereinafter SULLIVAN, WARREN & WESTBROOK, THE FRAGILE MIDDLE CLASS] ("The dynamics of capitalism, combined with a thin social safety net, guarantee that some families will always fail.").

138 POSNER, *supra* note 129, at 418.

139 *Id.*

140 *Id.*

141 A growing body of research has documented the effects dealing with debt has on people's health and psychology. *See, e.g.*, Elizabeth Sweet et al., *The High Price of Debt: Household Financial Debt and its Impact on Mental and Physical Health*, 91 SOC. SCI & MED. 94, 98 (2013) (finding that high relative debt was associated with higher stress, increased depression, and worse self-reported general health); Patricia Drentea & John R. Reynolds, *Neither a Borrower nor a Lender Be: The Relative Important of Debt and SES for Mental Health Among Older Adults*, 24 J. AGING & HEALTH 673, 685 (2012) (finding that indebtedness increases symptoms of depression, anxiety, and anger); H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 PSYCH. MED. 771, 776 (2010) (finding a strong association between debt and suicidal ideation); Judi Kidger et al., *The Association Between Bankruptcy and Hospital-Presenting Attempted Suicide: A Record Linkage Study*, 41 SUICIDE & LIFE-THREATENING BEHAV. 676, 683 (2011) (demonstrating an association between suicide attempts and dealing with debt preceding a bankruptcy filing); Sarah Brown et al., *Debt and Distress: Evaluating the Psychological Cost of Credit*, 26 J. ECON. PSYCH. 642, 645 (2005) (finding that those with high amounts of debt are significantly less likely to report psychological well-being); Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. HEALTH ECON. 388, 389 (2010) (finding a relationship between debt problems and adverse psychological well-being); Patricia Drentea, *Age, Debt and Anxiety*, 41 J. HEALTH & SOC. BEHAV. 437, 445 (2000) (finding a relationship between higher credit card debt and increased anxiety).

My arguments here are not intended to dismiss microeconomics and the law and economics movement, but rather to demonstrate the dangers of adopting the model of *homo economicus* under neoclassical economics to explain and judge human behavior. Neoclassical economics largely ignores the role of power in society, both at the institutional and ideological level.[142] Moreover, neoclassical economics often bleeds into its own form of ideological thought. On this front, Nitzan and Bichler stridently contend as follows:

> [T]he neoclassical branch of political economy . . . is not an objective reality. In fact, for the most part it is not even a scientific inquiry into objective reality. Instead, neoclassical political economy is largely an *ideology in the service of the powerful*. It is the language in which the capitalist ruling class conceives and shapes society. Simultaneously, it is also the tools with which this class conceals its own power and the means with which it persuades others to accept that power.[143]

Indeed, it is precisely this "ideology in the service of the powerful" that took root in all the policy debates surrounding bankruptcy reform since 1978. In the past Sullivan, Warren, and Westbrook have recognized that bankruptcy policy debates have been deeply influenced by the law and economics movement,[144] particularly by coopting Congress to modify the bankruptcy laws to deliberately make them harsher and more stigmatizing over the past forty years despite the breadth of evidence demonstrating the financial precarity of millions of Americans under neoliberal capitalism.[145] Equally as important, the law and economics mindset that perceives consumer debtors as perfectly rational

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142 SKIDELSKY, *supra* note 125, at 125.

143 JONATHAN NITZAN & SHIMSHON BICHLER, CAPITAL AS POWER: A STUDY OF ORDER AND "CREORDER" 2–3 (2009).

144 SULLIVAN, WARREN & WESTBROOK, AS WE FORGIVE OUR DEBTORS, *supra* note 132, at 234 ("Yet it represents a specific set of predictions about how debtors will behave both in filing for bankruptcy and in selecting a chapter in which to file. These predictions have powerfully influenced both the course of the bankruptcy policy debates and subsequent changes in the bankruptcy laws. In that sense, it has been widely accepted as a model and therein is found its political power."); *see also* Rafael Efrat, *The Moral Appeal of Bankruptcy*, 20 WHITTIER L. REV. 141, 145–46 (1998) (noting that the neoclassical model of the rational actor "has been widely used in formulating bankruptcy policy").

145 *See*, *e.g.*, LEICHT & FITZGERALD, *supra* note 22, at 11 ("Stagnant incomes, rising taxes, the pocketing of productivity gains by the corporate elite, a surplus of available credit, globalization, privatization, and labor market changes have altered what it means to be part of the American middle class."); MARK ROBERT RANK ET AL., CHASING THE AMERICAN DREAM: UNDERSTANDING WHAT SHAPES OUR FORTUNES 49–50 (2016) (finding that economic security to be elusive across the life course due to the proliferation of low-wage work, stagnant wages, unstable jobs, and a weakened social safety net).

actors[146] manifests itself as a moralizing discourse of judgment, blaming consumer debtors for abusing our bankruptcy laws and for having lost their sense of stigma and shame about filing for bankruptcy relief in the first place.[147]

Keynesian economics lost its influence on the United States economy by the early 1970s through a coalescence of sustained stagflation, oil price shocks, the costs associated with the Vietnam War, and the end of the Bretton Woods international monetary system.[148] This created a political vacuum in American society which was quickly filled by Friedman and Becker's brand of neoclassical economics, leading to the rise of American neoliberalism.[149] Much like the economic history of the United States in the twentieth century, there are forests full of scholarly books and articles exploring the rise of neoliberalism in American society. For present purposes, an abridged summary will be sufficient to demonstrate why Americans have lived precarious financial lives since the 1980s and how the financialized society under neoliberalism establishes the "conditions of appropriation"[150] for the corporate elite to enrich themselves at the expense of individuals and families.[151]

Neoliberalism has been described as a "political project to reengineer the state"[152] through practices aimed at promoting the interests of finance capital[153] to the detriment of individuals and families alongside a dominant ideology of personal responsibility. The emergence of neoliberalism has occasioned the

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146 *See, e.g.*, William H. Meckling, *Financial Markets, Default, and Bankruptcy: The Role of the State*, 41 L. & CONTEMP. PROBS. 13, 25 (1977) ("An individual debtor's decision to resort to bankruptcy is a function of the costs and benefits to him of alternative courses of action."); William J. Woodward, Jr. & Richard S. Woodward, *Exemptions as an Incentive to Voluntary Bankruptcy: An Empirical Study*, 57 AM. BANKR. L.J. 53, 54 (1983) ("[I]f the provisions of the bankruptcy law are made more attractive to debtors, more of them will select that option as a solution to their financial problems. A corollary of this idea is commonly used to deal with rising bankruptcy rates: make the law less attractive to debtors and less of them will choose bankruptcy.").

147 *See, e.g.*, Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1108–10 (2005).

148 STEDMAN JONES, *supra* note 95, at 215.

149 *Id.*

150 MARX & ENGELS, *supra* note 1, at 232.

151 As touched upon *supra* note 16, David Harvey characterizes the emergence of neoliberalism as "a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites." HARVEY, *supra* note 7, at 19 (emphasis in original).

152 Johanna Bockman, *The Political Projects of Neoliberalism*, 20 SOC. ANTHROPOLOGY 310, 310 (2012).

153 The term "finance capital" is roughly described as an "increasing concentration and centralization of capital in large corporations, cartels, trusts, and banks." Richard Peet, *Contradictions of Finance Capitalism*, 63 MONTHLY REV.: INDEP. SOCIALIST MAG. 18, 18 (2011).

"great risk shift" which has caused a massive transfer of economic risks from corporations and state and federal governments onto the fragile balance sheets of American families.[154] In this way, and in the spirit of neoclassical economics, individuals and families under neoliberal rule are expected to be entrepreneurs of themselves who are fundamentally responsible for their own financial security.[155]

As noted above, neoliberalism is associated with policies of limited government, deindustrialization, regressive taxation, industrial deregulation, welfare state retrenchment, flexible labor markets, free globalized trade, monetarism, privatization, free market principles, and the neutering of organized labor.[156] Neoliberalism is also characterized by a moral project (rooted in Friedman and Becker) clothed in the "trope of individual responsibility" as a motivating discourse, which serves as the glue that pastes the various components of state activity—or inactivity—together.[157] David Harvey has described this form of hegemonic ideology in the following way:

> While personal and individual freedom in the marketplace is guaranteed, each individual is held responsible and accountable for his or her own actions and well-being. This principle extends into the realms of welfare, education, health care, and even pensions . . . . Individual success or failure are interpreted in terms of entrepreneurial virtues or personal failings (such as not investing significantly enough in one's own human capital through education) rather than being attributed to any systemic property (such as the class exclusions usually attributed to capitalism).[158]

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154 JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM 6 (2006).

155 Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 694 (2006) (arguing that neoliberalism is devoted to producing "citizens as individual entrepreneurs and consumers whose moral autonomy is measured by their capacity for 'self-care'—their ability to provide for their own needs and service their own ambitions, whether as welfare recipients, medical patients, consumers of pharmaceuticals, university students, or workers in ephemeral occupations").

156 Stephanie Lee Mudge, *What is Neo-Liberalism?*, 6 SOCIO-ECON. REV. 703, 705–07 (2008).

157 Loïc Wacquant, *Three Steps to a Historical Anthropology of Actually Existing Neoliberalism*, 20 SOC. ANTHROPOLOGY 66, 72 (2012).

158 HARVEY, *supra* note 7, at 65–66.

But it is perhaps neoliberalism's financialization of the economy,[159] deregulation of financial markets, development of securitization,[160] and predatory democratization of credit[161] that have proven so disastrous for the economic health of individuals and families over the past forty years. These phenomena were, of course, assisted along the way by such events as the move to floating exchange rates[162] and the Supreme Court's 1978 decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*,[163] which effectively legalized usury in the United States.[164] This deregulation of interest rates made it increasingly profitable for the creditor class to solicit credit from individuals and families across all strata of the economy. Furthermore, the marketing and accompanying securitization of such "commodities" like home mortgages, credit cards, higher education, healthcare, automobiles, and pensions exposes consumers to the volatility of the marketplace in an exploitative

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[159] I employ the term "financialization" to generally account for the dynamic of financial processes asserting structural dominance over the economy in the neoliberal era. CAHILL & KONINGS, *supra* note 100, at 66. For a robust discussion of how financialization has overtaken daily life, see generally RANDY MARTIN, THE FINANCIALIZATION OF DAILY LIFE (2002).

[160] Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOYOLA U. CHI. L.J. 557, 596 (2009) (arguing that the rise of securitization has led to a stark increase in the volume of loan originations, coupled with concerted efforts both to expand the consumer borrowing base and to increase consumer borrowing).

[161] Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217, 1253–57 (2004) (describing some economic harms related to the expansion of credit into the subprime market).

[162] GRAEBER, *supra* note 34, at 361; *see also* CHERYL PAYER, THE DEBT TRAP: THE INTERNATIONAL MONETARY FUND AND THE THIRD WORLD 208–09 (1974) ("Between 1971 and 1973 the United States, and with it the other major capitalist powers, abandoned the Bretton Woods 'par value' system of exchange rates and now all currencies are floating.").

[163] 439 U.S. 299, 309 (1978). According to Mary Eschelbach Hansen and Bradley A. Hansen, the *Marquette* decision resulted in the following: (i) "cards issued from banks in states with high or no usury limits appeared all across the country, including among the debts of the bankrupt"; (ii) "the bankruptcy rate increased everywhere"; and (iii) "the bankruptcy rate in states with usury limits converged to the rate in states without usury limits. Taken together, these three things suggest that the deregulation of credit card interest rates increased consumer indebtedness, especially on the extensive margin." MARY ESCHELBACH HANSEN & BRADLEY A. HANSEN, BANKRUPT IN AMERICA: A HISTORY OF DEBTORS, THEIR CREDITORS, AND THE LAW IN THE TWENTIETH CENTURY 135 (2020).

[164] Dillon Wamsley, *Neoliberalism, Mass Incarceration, and the US Debt-Criminal Justice Complex*, 39 CRITICAL SOC. POL'Y 248, 256–57 (2019). Susanne Soederberg has described the effect of *Marquette* in the following manner: it "served to undermine usury protection, which was a vital step in the growth of cannibalistic capitalism because high interest rates, with the application of risk-based pricing, allowed for not only a dramatic expansion in the scope and scale of consumer credit but also to higher levels of personal bankruptcies." Susanne Soederberg, *The US Debtfare State and the Credit Card Industry: Forging Spaces of Dispossession*, 45 ANTIPODE 493, 501 (2013) [hereinafter Soederberg, *US Debtfare State*].

political-economic environment under neoliberalism, which necessitates the reliance upon credit to fund such things in the first place.[165] And when unexpected calamities happen in life, as they almost always do, Americans are left to largely fend for themselves or to incur more debt as a coping mechanism.[166]

Contrary to Friedman's claims of fostering an economic free market, the market is "not the spontaneous or anthropological expression of the tendency of humans beings to exchange."[167] Rather, as Peter Berger and Thomas Luckmann have famously argued, the prevailing social order is not derived from the laws of nature, but rather "exists *only* as a product of human activity"[168] which is mediated to the citizenry throughout society "by the significant others who have charge of him."[169] In other words, all facets of human activity are socially constructed,[170] and this is also the case for the United States economy. Economic rules, laws, and policies, like the modern consumer Bankruptcy Code, do not

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165 *See, e.g.*, Dick Bryan & Mike Rafferty, *Political Economy and Housing in the Twenty-First Century—From Mobile Homes to Liquid Housing?*, 31 HOUS., THEORY & SOC'Y. 404, 407 (2014) ("We see the rapid growth of markets and financial products to facilitate this financialization of housing: a development we ironically have dubbed households as an emerging 'asset class.'"); Montgomerie, *supra* note 23, at 7 ("Widespread use of securitization made issuers of consumer credit dependent on reliable and predictable streams of future interest payments. Without reliable interest streams lenders cannot issue or reissue an ABS [asset-backed security], and as a result there can be no further re-capitalisation of the loan pool."); Richard Peet, *supra* note 153, at 26 ("[F]inance capitalism intensifies old methods or invents new methods of exploitation, and new modes of discipline, that pass mainly through the sphere of reproduction rather than the sphere of production: credit cards and bank loans; inflated house prices; high commodity prices due to commodity futures trading; and a long list of similar mechanisms thought up by sharp financial agent minds."); Alan Walks, *Bailing out the Wealthy: Responses to the Financial Crisis, Ponzi Neoliberalism, and the City*, 3 HUM. GEOGRAPHY 54, 58–59 (2010) ("By reducing welfare state supports and services, while simultaneously liberating the financial sector, neoliberal governments compelled vulnerable low-income families, as well as university students and many others in the middle-class, to rely on credit to offset the relative fall in their standard of living.").

166 Peet, *supra* note 153, at 26–27 ("This intensified exploitation which functions through the medium of debt peonage, price gouging, and other, similar devices, is the economic and cultural basis for the worst excesses of finance capitalism.").

167 Maurizio Lazzarato, *Neoliberalism in Action: Inequality, Insecurity and the Reconstitution of the Social*, 26 THEORY, CULTURE & SOC'Y 109, 116 (2009).

168 PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 52 (1966) (emphasis in original).

169 *Id.* at 48.

170 Constructionism represents an ontological position which "challenges the suggestion that categories such as organization and culture are pre-given and therefore confront social actors as external realities that they have no role in influencing." ALAN BRYMAN, SOCIAL RESEARCH METHODS 30 (5th ed. 2016).

exist in a state of nature operating under the invisible hand of Adam Smith.[171] Rather, they are all human creations and socially constructed, most often to benefit the wealthy and power elite.[172] "Governments don't intrude on free markets. Governments organize and maintain markets."[173]

The role of the state in advancing the interests of the capitalist class through the enactment of laws is not a novel concept, but a dynamic even Marx observed in the evolution from primitive accumulation to capitalist accumulation.[174] Consequently, the theoretical position that market economics should be freed from state involvement is an absolute ruse.[175] In reality, financial elites and the creditor class experience government-backed socialism while ordinary Americans face "harsh capitalism."[176] Returning once more to Marx, he argued perhaps quite presciently that "[p]olitical power, properly so called, is merely the organized power of one class for oppressing another."[177]

In making these claims, one need only consider our economic ideology of monetarism,[178] the regressive federal tax code, the federal government bailout of financial institutions during the 2007–2009 Great Recession—a time when individuals and families were left to bear the brunt of the economic disaster

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171 As Eleanor Courtemanche argues, Adam Smith's famous metaphor "dissolves away, when you try to analyze it, into a surprisingly fragile and self-contradictory set of perspectival viewpoints." ELEANOR COURTEMANCHE, THE "INVISIBLE HAND" AND BRITISH FICTION, 1818–1860: ADAM SMITH, POLITICAL ECONOMY, AND THE GENRE OF REALISM 1 (2011).

172 As Tim Di Muzio and Richard H. Robbins argue, "[c]apitalist markets were socially constructed by the powerful in the quest for differential power and accumulation in an increasingly monetized world order of near constant warfare." DI MUZIO & ROBBINS, *supra* note 16, at 51. Karl Marx had a similar observation in 1867:

> One thing, however, is clear—[n]ature does not produce on the one side owners of money or commodities, and on the other men possessing nothing but their own labour power. This relation has no natural basis, neither is its social basis one that is common to all historical periods. It is clearly the result of a past theoretical development, the product of many economic revolutions, of the extinction of a whole series of older forms of social production.

MARX, *supra* note 15, at 114.

173 REICH, *supra* note 48, at 93.

174 MARX, *supra* note 15, at 516 ("The bourgeoisie, at its rise, wants and uses the power of the state to 'regulate' wages, i.e., to force them within the limits suitable for surplus-value making, to lengthen the working-day and to keep the labourer himself in the normal degree of dependence.").

175 *See, e.g.*, NITZAN & BICHLER, *supra* note 143, at 8 (noting that "[l]iberal ideology likes to present capital and state as hostile" to one another).

176 REICH, *supra* note 48, at 43.

177 MARX & ENGELS, *supra* note 1, at 244.

178 *See* ROWBOTHAM, *supra* note 21, at 27–28 (describing monetarism as the management of the national money supply through the federal government controlling interest rates).

created by global finance[179]—and the federal deregulation of finance, labor, and the environment as easily identifiable examples of how late capitalism is deeply embedded with and dependent upon state intervention. As previously recognized by Tayyab Mahmud,[180] we have witnessed, in contravention of the fundamental principles of neoclassical economics, a slew of legislative enactments that have paved the way for the emergence of neoliberal financialization since the late 1970s,[181] including: (i) the Community Reinvestment Act of 1977 (directing financial institutions to expand their market base);[182] (ii) the addition of the 401(k) provision to the Tax Code (fostering the channeling of savings into pension plans);[183] (iii) the Depository Institutions Deregulation and Monetary Control Act of 1980 (limiting interest rate caps);[184] (iv) the Garn-St. Germain Depository Institutions Act of 1982 (allowing savings and loans to engage in commercial lending);[185] (v) the Secondary Mortgage Market Enhancement Act of 1984 (permitting investment banks to buy, pool, and resell mortgages;[186] (vi) the Tax Reform Act of 1986 (making mortgage-backed securities more attractive as investment vehicles);[187] (vii) the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (rearranging government-sponsored mortgage facilitating entities);[188] (viii) the Interstate Banking and Branching Act of 1994 (enabling banks to operate across state lines);[189] (ix) the Private Securities

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[179] JOHNNA MONTGOMERIE, SHOULD WE ABOLISH HOUSEHOLD DEBTS? 2 (2019) ("Abolishing household debts is the most direct way of ending the financial crisis that has held households for more than a decade in its grip, since this crisis is caused by their having to continue to pay their debts while absorbing the shock of economic downturn and the costs of austerity. Meanwhile the lenders and the entire financial sector received bailouts first, then direct financing from the central banks.").

[180] This paragraph draws heavily from Mahmud's contribution in his article *Debt and Discipline*. Mahmud, *supra* note 91, at 475.

[181] *Id.* ("Mythologies of neoliberal deregulation notwithstanding, elaborate new regulations were fashioned to pave the way for the ascendency of finance capital. After over three decades of the neoliberal era, the United States still has a regulatory regime with over one hundred authorities overseeing different segments of the financial market.").

[182] Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 1147 (1977).

[183] Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763.

[184] Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132.

[185] Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

[186] Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98-440, 98 Stat. 1689.

[187] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

[188] Financial Institutions Reform, Recovery, and Enhancement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

[189] Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338.

Litigation Reform Act of 1995 (making it more difficult for plaintiffs to plead securities fraud);[190] (x) the Financial Services Modernization Act of 1999 (allowing for the commingling of commercial and investment banking by repealing the 1933 Glass-Steagall Act and the 1956 Bank Holding Company Act);[191] and (xi) the Commodities Futures Modernization Act of 2000 (leaving derivatives out of regulatory oversight).[192] And, as argued at the outset, the modern Bankruptcy Code is also an important component of the financialized neoliberal state.[193]

Armed with this rich political and economic background, this Article now turns to a discussion of the consumer bankruptcy system.

III. CONSUMER BANKRUPTCY LAWS

Empirical consumer bankruptcy law scholarship from the 1970s to the present has generally divided into two camps: those steeped in a more sociolegal vantage point—principally spearheaded by the works of Sullivan, Warren, and Westbrook[194] (along with those who continue to do research in this tradition through subsequent iterations of the Consumer Bankruptcy Project)—and those that apply law and economics principles to the consumer bankruptcy system and the behaviors of debtors.[195] These camps have also vigorously debated whether the stigma surrounding filing for bankruptcy relief had waned or evaporated as consumer bankruptcy filings increased from the 1980s through the 2000s.[196] In

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190 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

191 Also known as the Gramm-Leach-Bliley Act. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338.

192 Commodities Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763.

193 Linda Coco has similarly made this claim in the past. *See* Coco, *The Cultural Logics*, *supra* note 47, at 711 ("The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act . . . marks a transformation in bankruptcy law and policy that is representative of larger shifts in dominant economic and political models from 'embedded' liberalism to free market 'neoliberalism.'").

194 *See generally* SULLIVAN, WARREN & WESTBROOK, AS WE FORGIVE OUR DEBTORS, *supra* note 132; SULLIVAN, WARREN & WESTBROOK, THE FRAGILE MIDDLE CLASS *supra* note 137.

195 *See generally* JACKSON, *supra* note 42; POSNER, *supra* note 129; Barry Adler, Ben Polak & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585 (2000); Scott Fay et al., *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706 (2002).

196 The declining stigma hypothesis was primarily promoted by Edith Jones and Todd Zywicki. *See generally* Todd J. Zywicki, *supra* note 147; Edith H. Jones, *The Bankruptcy Galaxy*, 50 S.C. L. REV. 269 (1998); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177 (1999). *But see generally* David B. Gross & Nicholas Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN. STUD. 319 (2002). Conversely, for those contending that stigma remains an important element in the

my own empirical research efforts and as prior research has well-demonstrated, individuals and families largely file for bankruptcy due to oppressive indebtedness associated with job loss, underemployment, medical debt, inadequate health insurance, family breakup, and illness,[197] rather than individuals deciding to maximize their own utilities by responding to incentives such as the discharge and allowable exemptions and safeguarding their human capital as a prelude to filing for bankruptcy relief.[198] Moreover, the stigma that attaches when filing for bankruptcy remains robust,[199] particularly as the hegemonic, neoliberal discourse of personal responsibility has seeped into our collective consciousness.

Article I of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States."[200] The constitutional inclusion of bankruptcy as a subject of federal law had

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bankruptcy process, *see generally* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increases in Bankruptcy Filings*, 59 STAN. L. REV. 213 (2006); Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 AM. BANKR. INST. L. REV. 217 (2018) [hereinafter Sousa, *Persistence of Bankruptcy Stigma*]; Michael D. Sousa, *Debt Stigma and Social Class*, 41 SEATTLE U. L. REV. 965 (2018); Sousa, *Bankruptcy Stigma*, *supra* note 36; Alycia Chin, Taya R. Cohen & Mark R. Lindblad, *Consumer Bankruptcy Stigma: Understanding Relationships with Familiarity and Perceived Control*, 53 J. CONSUMER AFFS. 600 (2019); Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365 (2006).

197 Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 25 (Katherine Porter ed. 2012); *see also* Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOCIO. INQUIRY 681, 694–95 (2020) (finding that older Americans tend to file bankruptcy as a result of declining income, medical expenses, and aggressive creditor collection tactics); Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 411 (2003) (finding that people attribute their bankruptcy filings to job losses, family break-ups, and medical problems); Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 245 (2018) [hereinafter Foohey et al., *Sweatbox*] (finding that debtors struggle with mortgage payments and foreclosures, divorce, and medical debt prior to bankruptcy); Laura McCloud & Rachel E. Dwyer, *The Fragile American: Hardship and Financial Troubles in the 21st Century*, 52 SOCIO. Q. 13, 15 (2011) (listing indicators of bankruptcy vulnerability as health problems, job loss, family dissolution, and income disruption); Brook E. Gotberg & Michael D. Sousa, *Moving Beyond Medical Debt*, 27 AM. BANKR. INST. L. REV. 93, 125 (2019) (finding that an interruption in health insurance is predictive of filing for bankruptcy).

198 The concept of human capital has been applied to individuals who file for personal bankruptcy. *See, e.g.*, JACKSON, *supra* note 42, 227 ("Our bankruptcy statutes have always taken discharge to mean, essentially, that an individual's human capital (as manifested in future earnings) as well as his future inheritances and gifts are freed of liabilities he incurred in the past.").

199 Sousa, *Persistence of Bankruptcy Stigma*, *supra* note 196, at 238 (finding that the stigma surrounding filing for personal bankruptcy has increased from 1978 to 2016).

200 U.S. CONST. art. 1, § 8, cl. 4.

nothing to do with unburdening individuals and families from unwieldy debts—debtors were largely at the time conceived of as criminals and frauds and treated rather harshly[201]—but rather to create a uniform vehicle for merchant creditors to more easily collect debts in an increasingly mobile and interconnected country where varying and discriminatory state laws oftentimes impeded such efforts.[202] The United States had sporadic bankruptcy laws throughout the nineteenth century until the Bankruptcy Act of 1898,[203] which lasted until its repeal by the Bankruptcy Reform Act of 1978.[204] All of the various bankruptcy acts prior to the 1978 Bankruptcy Reform Act were enacted in response to a major financial crisis.[205] Curiously, this was not the case with the Bankruptcy Reform Act of 1978. Rather, with the benefit of some hindsight, the headwinds of a debt-based economy and a shift towards financialization had already commenced in the

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201 In Federalist Paper No. 42, James Madison described the purpose of the constitutional bankruptcy clause in the following way:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.

THE FEDERALIST NO. 42 (James Madison); *see also* Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 223–24 (1957) (noting the practice of imprisoning insolvent debtors); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995) (noting that debtors were viewed as criminals at the time of the Bankruptcy Act of 1800); Richard M. Hynes & Nathaniel Pattison, *A Modern Poor Debtor's Oath*, 108 VA. L. REV. 915, 923 (2022) ("Early American law treated insolvent debtors harshly. In addition to debtor's prison, some states allowed creditors to force their debtors into involuntary servitude."); COLEMAN, *supra* note 39, at 249–68 (describing the practice of imprisoning debtors); Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 190 (1938) ("Discharge from debts, voluntary bankruptcy, enforcement of majority-determined compositions, moratoria, reorganization facilities—all these are now to be found in a law that began with a brief statute directed at the pursuit and punishment of a narrow class of fraudulent debtors.").

202 CHARLES JORDAN TABB, LAW OF BANKRUPTCY 36 (5th ed. 2020) [hereinafter TABB, LAW OF BANKRUPTCY]; *cf.* Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160, 167 (1991) ("The converse argument presented by the advocates for a federal bankruptcy law were [sic] steeped in the need to shed old debt in order for impoverished traders to resume business discharged from the onus of paying off old debts.").

203 For a historical treatment of the early bankruptcy laws, see generally Tabb, *supra* note 201; F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW (1919); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); SKEEL, *supra* note 42. For a historical portrait of creditor-debtor relations prior to the Bankruptcy Act of 1800, see generally BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002).

204 In 1938 Congress passed the Chandler Act in response to the ravages of the Great Depression in the early 1930s. Most prominently, the Chandler Act provided for wage earners' plans under chapter XIII. TABB, LAW OF BANKRUPTCY, *supra* note 202, at 40.

205 *Id.* at 37.

early 1970s, and the Bankruptcy Reform Act of 1978 was the beginning of a deliberate effort to advance the interests of the financial elite.[206] After the Bankruptcy Reform Act of 1978, the Bankruptcy Code underwent major amendments in 1984 and 1994, culminating in 2005 with the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[207]

The fresh start policy is the heart of the consumer bankruptcy laws.[208] The fresh start is effectuated by the Bankruptcy Code through the discharge of personal debts and by allowing the individual debtor to exempt certain property from the distribution to creditors.[209] The general movement of our national consumer bankruptcy laws from one invested predominantly with the distributive process for the benefit of the creditor class to one inclusive of a rehabilitation for the individual debtor through a voluntary discharge and accompanying fresh start[210] "did not come primarily from a pious attitude of

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[206] The legislative history to the Bankruptcy Reform Act of 1978 does not delineate with any precision as to why Congress decided to overhaul the bankruptcy laws. Professor Frank Kennedy, who served as Executive Director of the Commission on the Bankruptcy Laws of the United States, *see infra* text accompanying notes 239–53, later offered three explanatory forces for doing so: (i) the National Bankruptcy Conference's ongoing work to revise bankruptcy courts and jurisdiction; (ii) referees in bankruptcy who were interested in elevating their own status in the administration of the bankruptcy system, and to improve the quality of the fresh start for individual debtors; and (iii) a task force established by the Brookings Institution in 1965 to study the operations of the national bankruptcy laws. Frank R. Kennedy, *Foreword: A Brief History of the Bankruptcy Reform Act*, 58 N.C. L. REV. 667, 668–70 (1980); *see also* Kenneth Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275, 282 (1980) (noting that the independence of bankruptcy courts and the status of bankruptcy judges dominated the legislative debates prior to the enactment of the Bankruptcy Reform Act of 1978).

[207] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[208] Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 70 (1986).

[209] *Id.* at 62.

[210] The social utility of providing individual debtors with a fresh start is deeply rooted in American bankruptcy law. Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 KAN. L. REV. 553, 566 (2010). In perhaps the most well-known recitation of the fresh start principle, the Supreme Court of the United States stated as follows in *Local Loan Co. v. Hunt*:

> One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (internal citations omitted).

forgiveness."[211] Rather, it was largely a practical response to the rise of a credit-based American economy in the mid-twentieth century, which had the consequential effect of leaving an ever-increasing volume of individuals and families dealing with troublesome personal indebtedness in its wake.[212]

Perhaps more than ever, the ability to obtain a discharge of indebtedness and receive a fresh start in life remain the hallmarks of the consumer bankruptcy system.[213] Since 1978, scholars have offered various explanations for why the discharge and correlative fresh start exist in our consumer bankruptcy system, including: (i) a "debtor cooperation" theory in which the discharge is "a carrot dangled in front of debtors to induce them to cooperate with the trustee and the creditors" in the turning over of assets;[214] (ii) the need to paternalistically protect debtors from their own "impulse control" problems and "incomplete heuristics" in making credit decisions;[215] (iii) a humanitarian theory premised upon notions that forgiveness of indebtedness and a demonstration of mercy towards individuals inundated with debt serves a restorative function;[216] and (iv) an economic measure allocating risks between creditors and debtors.[217] However, since the twentieth century, reform debates concerning the bankruptcy discharge

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[211] G. Stanley Joslin, *The Philosophy of Bankruptcy—A Re-Examination* 17 U. FLA. L. REV. 189, 191 (1964).

[212] For historical treatments on the rise of consumer credit and a consumerist culture in the United States during the twentieth century, see generally DONNCHA MARRON, CONSUMER CREDIT IN THE UNITED STATES: A SOCIOLOGICAL PERSPECTIVE FROM THE 19TH CENTURY TO THE PRESENT (2009); DAWN BURTON, CREDIT AND CONSUMER SOCIETY (2008); ZYGMUNT BAUMAN, CONSUMING LIFE (2007); LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT (1999).

[213] Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 515 (1991) ("The essence of our consumer bankruptcy law is the discharge.") (citation omitted); *see also* Jay L. Zagorsky & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances*: *Struggle, Stasis, or Fresh Start?*, 16 AM. BANKR. INST. L. REV. 283, 283 (2008) ("Bankruptcy's central theoretical objective, from the perspective of the individual debtor, is to afford debtors the opportunity for a 'fresh start.'"); Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68 (2006) ("The principal theory of consumer bankruptcy in America is that it provides a 'fresh start' to debtors.").

[214] Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 90 (1990).

[215] Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1405–06 (1985).

[216] KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 93 (1997); Flint, *supra* note 213, at 521 (discussing the justifications for the fresh start as humanitarian response to the financially downtrodden).

[217] Charles G. Hallinan, *The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 99 (1986).

no longer focus on increasing its utility, but on limiting its reach.[218] And the scope of the discharge has indeed been limited during the era of neoliberal capitalism.[219]

Under the present Bankruptcy Code, consumer debtors filing for bankruptcy can file under chapter 7, chapter 13, or chapter 11.[220] Around 60% of all consumer bankruptcy cases fall under chapter 7 of the Bankruptcy Code.[221] Approximately 95% of these chapter 7 filings are considered "no-asset" filings with no monetary distribution to unsecured creditors.[222] The majority of debtors receive a discharge of their personal debts.[223] Moreover, just 5.7% of chapter 7 consumer bankruptcies distribute anything to either general unsecured creditors or priority unsecured claims.[224] Given these statistics, it has been estimated that over the past decade alone consumer debtors spent more than $11 billion on court filing costs and attorney's fees that distributed little, if anything, to unsecured creditors.[225]

Instead of pursuing a chapter 7 liquidation, consumer debtors can file under chapter 13 of the Bankruptcy Code[226] which enables them to keep their assets in exchange for committing their future disposable income to a court-approved

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[218] John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L. REV. 393, 431 (2000).

[219] Coco, *The Cultural Logics*, *supra* note 47, at 722 (arguing that provisions of BAPCPA "destroy the spirit of the 1978 Bankruptcy Code by severely limiting the debtor's fresh start").

[220] The use of chapter 11 by individuals has historically been an infrequent event.

[221] From September 2021 to September 2022, approximately 220,000 of the over 370,000 nonbusiness bankruptcy cases filed were chapter 7 cases. *Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code*, U.S. CTS. (Sept. 30, 2022), https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0930.2022.pdf

[222] Hynes & Pattison, *supra* note 201, at 920; *see also* Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) (finding that 93% of chapter 7 individual debtors "did not have any unencumbered non-exempt assets that could be distributed to unsecured creditors").

[223] Hynes & Pattison, *supra* note 201, at 942 (claiming that around 95% of chapter 7 debtors receive a discharge); *see also* Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1089 (2017) ("Chapter 7 cases nearly always end in a discharge, and it is typically received within four to six months of filing."). There are limitations to this; for example, section 523 of the Bankruptcy Code carves out certain debts for non-dischargeability. *See* 11 U.S.C. § 523(a).

[224] Hynes & Pattison, *supra* note 201, at 932.

[225] *Id.* at 939.

[226] This is the case so long as debtors meet the eligibility requirements contained within section 109(e). *See* 11 U.S.C. § 109(e).

plan to repay their creditors over a three-to-five-year period.[227] Chapter 13 bankruptcies generally account for approximately 30% of all consumer filings.[228] Historically, researchers have repeatedly found that approximately two-thirds of chapter 13 plans fail,[229] leaving debtors without a discharge of personal debts outside of bankruptcy or a conversion to a chapter 7 liquidation proceeding. That is, if all chapter 13 plan payments are not made, the debtor will not receive a discharge.[230] Despite the repeated empirical demonstrations of the many failures of chapter 13 repayment plans, since the 1960s Congress has done all that it can to encourage consumer debtors to pursue chapter 13 as opposed to experiencing more immediate relief under chapter 7.[231]

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227 Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQ. L. REV. 391, 402 (2013) [hereinafter Sousa, *Bankruptcy Ticket*]; *see also* McDonald v. Burgie (*In re* Burgie), 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999) ("In place of liquidating non-exempt assets to pay creditors under chapter 7 of the Bankruptcy Code, Congress gave individuals with regular income the option of adjusting their debts pursuant to a plan under Chapter 13. The Chapter 13 deal permits a debtor to retain all prepetition property, including earnings, assets, money in the bank and real estate. In exchange for keeping all of these assets, the debtor must commit all postpetition disposable income to the payment of creditors under a Chapter 13 plan for a period of three to five years.").

228 Hynes & Pattison, *supra* note 201, at 940.

229 *Id.*; *see also* Greene et al., *supra* note 223, at 1032 (finding that "two out of three consumers dropout before the end of the repayment plan"); Foohey et al., *Sweatbox*, *supra* note 197, at 227 ("Extensive data show that, historically, only about one-third of chapter 13 cases make it to a discharge."); Scott F. Nordberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 476 (2006) (finding that only 33% of chapter 13 plans resulted in a discharge); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 155 (2011) ("The hard fact is that every single study of the consumer bankruptcy system has concluded that repayment bankruptcies fail to deliver on their promises.").

230 Greene et al., *supra* note 223, at 1089; *see also* 11 U.S.C. § 1328(a) (noting that a discharge under a chapter 13 plan may be entered "as soon as practicable after completion by the debtor of all payments under the plan"). Section 1328(b) enables the bankruptcy court to provide the debtor with a "hardship discharge" if certain pre-conditions are satisfied, but it is suspected that this is a rare event. *See* 11 U.S.C. § 1328(b).

231 For example, in the legislative history to the 1994 amendments to the Bankruptcy Code, House Representative Hamilton Fish, Jr. remarked, "We encourage greater reliance on Chapter 13 of the Bankruptcy Code—an alternative to liquidation—by making a broader range of debtors eligible to file under that chapter and contribute income under a repayment plan." 140 CONG. REC. H10,772 (daily ed. Oct. 4, 1994) (statement of Rep. Hamilton Fish), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 9(b) (16th ed. 2023). In this vein Philip Shuchman described the difference between chapter 7 and chapter 13 in the following way as it relates to the morally just decision to file for chapter 13:

> Straight bankruptcy is degrading or at least tends to reduce the bankrupt's self-esteem or harm his conception of himself. The fact of bankruptcy is said to be a stigma, presumably due to others' disapproval of the bankrupt as well as deriving from his own shame. Quite another view, however, is expressed on the Chapter XIII wage earner's plan which provides a legal mechanism whereby the insolvent or merely distressed debtor can pay off his debts over a period of up to three years under court supervision (and protection). That process is claimed to lead to financial and personal

With this truncated description of how the consumer bankruptcy system operates, this Article now turns to examining how our national consumer bankruptcy laws advance the interests of the creditor class and exploit individuals and families who enter the bankruptcy system.

IV. THE MODERN BANKRUPTCY CODE AS A FORM OF DISCIPLINARY POWER ADVANCING THE INTERESTS OF THE CREDITOR CLASS

For many American consumers, Keynesian economics made good on its promises of material prosperity. These boom times permitted the consumer industry to commence an intentional—and successful—campaign to market credit in the post-World War II era. From 1945 to 1970, outstanding indebtedness on installment consumer credit grew by leaps and bounds.[232] In 1945, the amount equaled $2.5 billion;[233] in 1955 it reached $29 billion.[234] This figure soared to $66 billion in 1965 and by 1970 it reached $100 billion.[235] But with the macroeconomic growth of the consumer credit society came a darker side, namely, overextended individuals and families subjected to harsh efforts by creditors to collect their debts through such legal mechanisms as wage garnishment, repossession, harassing behaviors, and other formal and informal

> "rehabilitation" and to be conducive to preservation of "self-respect" and avoidance of the stigma of bankruptcy.

Shuchman, *supra* note 40, at 416; *see also* Greene et al., *supra* note 223, at 1097 ("Chapter 13 is in the bedrock of consumer bankruptcy, with Congress acting in each amendment after the enactment in 1978 of the Bankruptcy Code to further increase chapter 13 use over chapter 7.").

232 In their influential study of the bankruptcy system from 1971, David T. Stanley and Marjorie Girth described this development in the following manner:

> It is plain enough why the bankruptcy rate declined sharply during the last several years of World War II and rose after the war ended. Many goods that were ordinarily bought on credit were scarce during the war (automobiles are a prime example); consumers were encouraged to save a large part of their incomes, and tight credit controls were put into effect. As a result the aggregate indebtedness of consumers declined sharply early in the war and remained low while personal income was rising, causing the bankruptcy rate to fall. Once the war was over and economic conditions returned to normal, consumers began adding to their indebtedness at a rapid rate, and the bankruptcy rate started rising. The steady increase in aggregate personal indebtedness during the next twenty years probably explains most of the concurrent increase in personal bankruptcies.

DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 24 (1971).

233 DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 1 (1974).

234 *Id.*

235 *Id.*

processes.[236] The exponential growth of consumer credit in the post-World War II era and this darker side of "debt entanglement" is suggestive of the rise in consumer bankruptcy filings[237]: between 1946 and 1967 consumer bankruptcies increased from roughly 8,566 per year to more than 191,000 per year.[238]

In 1968, Congress commenced hearings on proposed reforms to the Bankruptcy Act of 1898.[239] Congress's chief concern was the exponential growth in consumer bankruptcy filings from 1950 to 1970.[240] According to legislative history, five observations prompted Congress in 1970 to create the Commission on the Bankruptcy Laws of the United States (the "Commission") to "study, analyze, evaluate, and recommend changes"[241] to the Bankruptcy Act: (i) the "rising tide"[242] of consumer bankruptcies in the post-World War II era; (ii) the reported costs, delays, and inefficiencies created by the bankruptcy court system;[243] (iii) the inadequacy of relief for both creditors and debtors;[244] (iv) the lack of uniformity in the practices of bankruptcy courts across judicial districts;[245] and (v) various other problematic concerns with the operations of the bankruptcy system, for example, utilizing "expensive legal talent" to perform administrative tasks.[246] Nevertheless, Congress's and the Commission's fixation with consumer bankruptcy was evident. Quoting the legislation that created the Commission, the Commission report noted: "'[w]hereas the number of bankruptcies in the United States has increased more than 1,000 percentum annually in the last 20 years' . . . [t]he increase has mainly been in the number of nonbusiness (or 'consumer') bankruptcies."[247] This concern, however, was grandly overblown as the Commission specifically reported to Congress that

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236 *See generally id.* at 177–246 (describing the various collection efforts utilized by creditors).

237 *Id.* at 2.

238 *Id.*; *see also* FRANK R. KENNEDY ET AL., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 33 (1973), *reprinted in* B COLLIER ON BANKRUPTCY app. pt. 4(c) (16th ed. 2023) [hereinafter KENNEDY ET AL., REPORT OF THE COMMISSION] (noting that nonbusiness filings went from 8,566 in 1946 to 191,729 in 1967).

239 KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 2.

240 *See id.* at 33.

241 *Id.* at 1.

242 *Id.* at 2.

243 *Id.* at 3.

244 *Id.*

245 *Id.* at 4.

246 *Id.* at 5.

247 *Id.* at 33 (quoting S.J. Res. 88 (1970)). The observation that the lion's share of that increase attaches to consumer bankruptcy is the Commission's.

consumer bankruptcy filings have little impact upon the national economy.[248] But even by 1973 standards the debt-to-income ratios[249] of consumers were out of hand, with many possessing ratios of 100% or higher.[250]

The Commission completed its work in 1973 and submitted its report to Congress, along with a draft of a proposed new bankruptcy code.[251] The Brookings Institution study published by David T. Stanley and Marjorie Girth in 1971 (the "Brookings Report") proved influential in the Commission's subsequent report to Congress.[252] As it related to consumer bankruptcies, the Commission noted that despite the problematic "rising tide" of consumer bankruptcies in the post-World War II consumer credit society, it did not have any reason to believe that the number of petitions was too high or should be intentionally reduced. As shown by the published Brookings Report, "increase in bankruptcy filings is a natural if not inevitable result of the expanded availability of consumer credit."[253] In other words, increased bankruptcies track economic trends.

By this time, the neoclassical rational actor model had already bubbled to the bankruptcy surface and entered the debate prior to 1973 as the Commission reported that "[t]here is evidence that the decision of whether or not to seek bankruptcy relief is not made in a rational way."[254] Relying on empirical findings from the Brookings Report, the Commission underscored "that for the great majority of people the decision to go bankrupt can scarcely be a decision that is the outcome of rational judgment."[255] The Commission report also challenged claims made by third parties that consumer debtors were "incompeten[t]" (i.e., at fault or blameworthy)[256] or dishonest in deciding to seek

[248] *Id.* at 34 ("However traumatic for the individuals involved, cases under the Act have little impact on the economy, and society as a whole.").

[249] Debt-to-income ratios express the percentage of annual income represented by total personal debt. *Id.* at 40.

[250] *Id.* at 44.

[251] The complete report stemming from the 1970 Commission is reprinted in full at B COLLIER ON BANKRUPTCY app. pt. 4(c) (16th ed. 2023).

[252] *See, e.g.*, KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 3–4.

[253] *Id.* at 9.

[254] *Id.* at 47. Indeed, as David Skeel has observed, "[b]y the time the 1978 Code was enacted, the 'law-and-economics' movement had already begun to transform legal scholarship." SKEEL, *supra* note 42, at 199.

[255] KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 48.

[256] *Id.* at 53.

bankruptcy protection.[257] Rather, the Commission concluded in 1973, prior to the fully-blossomed "risk shift" and the rise of brutish neoliberalism under the Reagan administration, that

> most studies of nonbusiness bankrupts show that debts incurred were for necessities or near-necessities for family living. A fair picture of consumer bankrupts appears to be one of living close to the edge, i.e., of personal economies in which all earnings must be devoted to immediate needs and the payment of installment debts, without savings or uncommitted income reserved for contingencies of health expenses not covered by insurance, of reductions in income through loss of overtime or a second job, or of the added expense of household disruption through divorce, separation, or other family strife.[258]

The study performed by Stanley and Girth over fifty years ago resulted in empirical findings about the consumer bankruptcy process and the general characteristics of consumer debtors that appear eerily similar to research findings from the present day. Stanley and Girth found that: (i) little rehabilitation actually took place under chapter XIII, and a majority of repayment plans ended in either dismissal or conversion;[259] (ii) extensions of credit were readily offered to consumers after their bankruptcy cases terminated;[260] (iii) creditors received little, if any, distribution from the bankruptcy process;[261] (iv) bankruptcy in general did not have a substantial effect upon the economy;[262] (v) more than 70% of all bankruptcies had no assets left after exempt property was set aside and administrative costs were paid;[263] (vi) debtors attributed their bankruptcy filings to exogenous events such as disruptions in employment, health issues, and sharp collection efforts by creditors;[264] and (vii) debtors found the relief afforded by bankruptcy "to have been very short-lived": 70% of debtor participants had made "major purchases" on credit after bankruptcy and 41% had borrowed money.[265]

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[257] *Id.* at 53–54 ("The Commission has found little empirical substantiation that dishonest conduct is a cause of bankruptcy in a significant number of cases").

[258] *Id.* at 55.

[259] STANLEY & GIRTH, *supra* note 232, at 3.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* at 3–4.

[264] *Id.* at 47.

[265] *Id.* at 62–63.

Yet it is in chapter three of the Commission's report that we see the influence of a neoclassical perspective seeping into bankruptcy policy.[266] Understandably, the Commission's report needfully recognized the inter-linkage between the bankruptcy laws and the macroeconomy.[267] But in justifying a philosophical underpinning for the bankruptcy system in America itself (including consumer bankruptcy reform), the Commission discusses "value exchanges,"[268] the "creation and allocation of wealth,"[269] achieving "wealth values,"[270] characterizes consumers as "economic units,"[271] accepts that consumers "conduct themselves as informed, able contractors' in arms' length transactions,"[272] and unabashedly valorizes the "open credit economy."[273] Friedman and Becker would indeed be proud. But this last point cannot be overstated: the Commission's report contextualizes the fresh start in terms of allowing consumers to be better enabled to participate in the credit economy.[274] In other words, while the Commission recognized the need for an available discharge to deal with the dynamics of an open credit economy,[275] it also situated the discharge as *the* legal mechanism to promote and to foster the smooth operations of the open credit society.[276] As the Commission noted, in addition to providing a "sanctuary from the jungle of creditors' pursuits of their individualistic collection efforts,"[277] the fresh start is geared towards rehabilitating debtors for "continued and more value-productive

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266 *See generally* KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 61–84.
267 *Id.* at 67.
268 *Id.*
269 *Id.*
270 *Id.* at 71.
271 *Id.* at 70.
272 *Id.*
273 *Id.* at 68; *see also id.* at 71 ("The bankruptcy process contributes positively to the open credit economy and, with changes, should be continued. The functions performed by the bankruptcy process are essential to the success of the open credit economy and the achievement of wealth values through its processes.").

274 *Id.* at 67–68 ("For example, the bankruptcy process accepts as a resource the authority of creditors' rights laws of external systems, and goal values produced by the bankruptcy process are resources in other processes: *e.g.*, debtors with 'fresh starts' are better enabled to participate in the credit economy.").

275 *Id.* at 72 ("Thus in the 'pure' market economy, the bankruptcy process provides for the orderly death (or corrective surgery) of units which succumb to acute indebtedness.").

276 *Id.* at 71 ("The bankruptcy process presently accommodates the bulk of the values of the open credit economy. For example, it enforces state debtors' and creditors' rights laws. It is also a resource; it provides a forum for resolving conflicts among creditors and between creditors and insolvent debtors and thus smooths the flow of credit transactions.").

277 *Id.*

participation"[278] in the open credit economy.[279] Stated more bluntly, even prior to the official enactment of the Bankruptcy Reform Act of 1978, policymakers, pundits, and commissioners knew that post-bankruptcy individuals and families would be once again unleashed into the ever-waiting arms of the creditor class to offer new rounds of "rehabilitative" credit.

Moreover, a discourse of morality and personal responsibility did not escape the Commission's report. The Commission articulated that the bankruptcy process also needed to support the values on which an open credit economy depended, namely, "orderliness, morality and respect, and skill and knowledge."[280] These principles were aimed at individual debtors. Feeling some need to raise the specter of Max Weber, the report provided the following:

> It may even be said that the individual's participation in the economy as an income-producer and consumer is one of the chief ways for the creation and use of these values [i.e., morality and respect]. In the conventional wisdom often identified as the "Protestant work ethic" the person who drives a hard bargain, lives up to his word, and satisfies his obligations is held out as the paragon of social responsibility. It may also be ventured that as more and more consumer transactions are entered on an installment credit basis, the acquisition of more and more values, including the value of skill and knowledge obtained through training that is time-financed, is dependent on the facilities of the open credit economy.[281]

The Commission's report, however, advocated for the following protectionary measures for consumer debtors: (i) allowing individuals to file *in forma pauperis* petitions;[282] (ii) making waivers of allowable exemptions unenforceable in bankruptcy;[283] (iii) allowing debtors to redeem collateral by

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[278] *Id.*

[279] Chapter 3 of the Commission report is punctuated with notions of the relationship between the discharge and participation in the open credit economy. *See, e.g.*, *id.* at 73–74 ("Consequently, to abolish the consumer's amenability to discharge and arrangement relief would be indefensible. The realization of these goals of the bankruptcy process does not threaten the continued achievement of the goals of the open credit economy. Instead they reinforce them, by furnishing a 'fresh start' to debtors too weighed down to enter into new credit transactions."); *see also* Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 726 (1980) (noting that one of the benefits of the fresh start is that "[c]rippled, debt-laden consumers can be cured or rehabilitated to consume again").

[280] KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 70.

[281] *Id.*

[282] *Id.* at 11.

[283] *Id.*

paying its appraised value rather than the full amount of indebtedness;[284] (iv) affording individuals with "regular income" the option to file under chapter 13 and removing that chapter's restriction to "wage earners" (a more limited definition);[285] and (v) permitting debtors to cure defaults and maintain regular payments on debts secured by liens against a personal residence.[286] Moreover, the Commission considered, but ultimately rejected, proposals from the creditor class to require individual debtors filing for bankruptcy relief to first attempt a chapter XIII reorganization, noting that "forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system."[287]

The resulting statute enabled debtors to discharge student loans after five years from the date on which the first installment became due if repaying the student loan proved to be an undue burden for the debtors. These restrictions placed upon student loan dischargeability under the Bankruptcy Reform Act of 1978 appear agreeable today to individuals plagued by student loans. However, prior to the mid-1970s, student loans were not excepted from discharge either by the Bankruptcy Act of 1898 or by the Higher Education Act of 1965.[288] The House of Representatives Judiciary Committee Report to accompany the Bankruptcy Reform Act of 1978 predominantly agreed to keep educational loans freely dischargeable, unwilling to treat college students as "suspected frauds and felons" by including student loans as an exception to discharge.[289] The exception to discharge was primarily pushed by private lenders extending educational loans to students irrespective of the Guaranteed Student Loan program. But even in the face of data offered by the General Accounting Office demonstrating that (at the time) only one-half to three-quarters of 1% of all matured educational

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[284] *Id.* at 11–12.
[285] *Id.* at 13.
[286] *Id.*
[287] Matejkovic & Rucinski, *supra* note 43, at 482 (quoting KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 159); *see also* Lex A. Coleman, *Individual Consumer "Chapter 20" Cases After Johnson: An Introduction to Nonbusiness Serial Filings Under Chapter 7 and Chapter 13 of the Bankruptcy Code*, 9 [EMORY] BANKR. DEV. J. 357, 389 (1992) ("[T]he new chapter 13 remained completely voluntary because Congress felt that a mandatory chapter 13, by forcing an individual to work for his creditors, would violate the prohibition against involuntary servitude in the Thirteenth Amendment.").
[288] George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L.J. 325, 387 (1997) ("Prior to 1977, there was no provision in the bankruptcy laws regarding the dischargeability of educational loans.").
[289] H.R. REP. NO. 59-595, at 133 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6094.

loans were discharged in bankruptcy,[290] out of concern for a potential moral hazard problem, a perceived scandal of rising abuses,[291] and an individual protecting their own human capital and keeping it out of the reach from creditors by filing bankruptcy, Congress nonetheless enacted section 523(a)(8).[292] And we should not forget that under the Bankruptcy Reform Act of 1978, only educational loans owed to a governmental entity or an institution of higher education were deemed non-dischargeable (including those owed to private lenders if insured or guaranteed by a governmental unit); purely private educational loans were freely dischargeable at the time.[293]

Section 523(a)(8) severely limited the ability of student loan borrowers to discharge their obligations through the chapter 7 process. The possibility still existed, however, for some dischargeability of student loan debt under chapter 13 of the Bankruptcy Code until 1990,[294] when Congress felt it a "wise" move to make section 523(a)(8) applicable to the chapter 13 process as well.[295] We should also be clear in this: while the availability of student loans assists students in accessing higher education, the Guaranteed Student Loan Program is a benefit to private capital. Making student loans non-dischargeable in bankruptcy protects private lenders in the first instance who are incentivized to extend credit by the federal government's minimization of their collective financial risks.[296] And while Congress espouses the goal of making higher education available to more young Americans,[297] rather than treating this interest as a net benefit to society and accordingly subsidizing most of the costs of higher education (e.g.,

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290 *Id.*

291 H.R. REP. NO. 59-595, at 148, *as reprinted in* 1978 U.S.C.C.A.N. at 6109 ("But to assert that a practice involving less than one student borrower out of two hundred is a 'large and growing scandal' seems a little disproportionate.").

292 H.R. REP. NO. 59-595, at 134, 136–37, *as reprinted in* 1978 U.S.C.C.A.N. at 6095, 6097–98.

293 Marc S. Cohen & Kenneth N. Klee, *Caveat Creditor: The Consumer Debtor Under the Bankruptcy Code*, 58 N.C. L. REV. 681, 712 (1980).

294 *See, e.g.*, Phx. Inst. of Tech. v. Klein (*In re* Klein), 57 B.R. 818 (B.A.P. 9th Cir. 1985) (upholding the confirmation of a chapter 13 plan which proposed a repayment of twenty-two percent to the National Direct Student Loan lender); *In re* Winthurst, 97 B.R. 457 (Bankr. C.D. Ill. 1989) (confirming a chapter 13 plan that proposed a nominal repayment of one percent to the State Scholarship Commission).

295 *See* Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, sec. 3007, 104 Stat. 1388 at 1388-28 to -29; *see also* 11 U.S.C. § 1328(a)(2) (excepting from discharge obligations that fall within section 523(a)(8)).

296 Timothy D. Naegele, *The Guaranteed Student Loan Program: Do Lenders' Risks Exceed Their Rewards?*, 34 HASTINGS L.J. 599, 605–07 (1983).

297 *See, e.g.*, Erica L. Green, *House Democrats Unveil Plan to Make College More Affordable*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/house-democrats-higher-education.html.

through grants or by drastically lowering tuition for public universities) or by considering it to be a public right (and consequently offering it at little cost), Congress has decided to allow the financial sector to treat student loans as interest-bearing money capital through expropriating students' future incomes. In doing so, students have become a modern iteration of Marx's understandings of surplus labor.[298] As Andrew Ross has sagely critiqued, "[p]assing on the costs of financing education to indebted students typifies the transfer of fiscal responsibility from the state to the private individual that is the chief hallmark of neoliberalism."[299] By making these debts nondischargeable, the Bankruptcy Code becomes an arm of financialized neoliberalism.

The Bankruptcy Reform Act of 1978 was a victory for creditors along two fronts. First, the inclusion of section 523(a)(8) limited the discharge of student loans under chapter 7. Second, it made chapter 13 repayment plans more attractive to debtors—and increased expected returns to the creditor class. How? By creating a "superdischarge" that allowed for the forgiveness of some debts, like fraud or old tax debts, that could not be discharged under chapter 7. The reforms further allowed residential mortgage debt to be incorporated into chapter 13 plans, and also opened up the chapter 13 process to "any individual with regular income" as opposed to just "wage earners."[300]

Nonetheless, most scholars and commentators view the Bankruptcy Reform Act of 1978 as a debtor-friendly revision of the nation's bankruptcy laws.[301] History shows us that the amendments to the Bankruptcy Code after 1978, however, "were designed by creditors, for creditors,"[302] and since then Congress has complicitly gone along with the creditor class's inexhaustible and unrelenting efforts to make consumer bankruptcy laws tougher and more punitive for individuals and families struggling with debt.[303] Almost immediately after the effective date of the Bankruptcy Reform Act of 1978, the

298 *See* SOEDERBERG, DEBTFARE STATES, *supra* note 31, at 108 (characterizing student debtors as surplus labor).
299 ANDREW ROSS, CREDITOCRACY AND THE CASE FOR DEBT REFUSAL 107 (2013).
300 HANSEN & HANSEN, *supra* note 163, at 137–38.
301 *See, e.g.*, *id.* at 128.
302 *Id.* at 137.
303 Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1438 (2020) (observing that "[o]ver time, the Bankruptcy Code has become harsher and more punitive in its treatment of debt and debtors"). For a more robust discussion of the creditor class's efforts to amend the bankruptcy laws in their favor, see SKEEL, *supra* note 42, at 187–211.

financial sector commenced a decades-long campaign of seeking to deny chapter 7 relief to individuals who presented some ability to pay a portion of their indebtedness out of future income streams, claiming that the bankruptcy laws were now too generous.[304] The efforts by the creditor class to tighten the consumer bankruptcy laws after 1978 were buoyed by the increase in filing rates from 1979 to 1980; during this brief period of time, consumer filings rose from 196,976 to 314,886.[305] In fact, the creditor class pointed to the Bankruptcy Reform Act of 1978 itself as the cause of the spike in bankruptcy filings in the immediate aftermath of the statute taking effect.[306] This lobbying effort only intensified as personal bankruptcy rates doubled once again prior to the 1984 amendments, and then doubled again during the 1990s.[307]

The creditor class took their complaints about the bankruptcy laws to Congress in the early 1980s, armed principally with a study conducted by Purdue University's Credit Research Center. The Purdue study concluded that a large proportion of chapter 7 debtors could have repaid a significant amount of their debts through the chapter 13 process.[308] In short, the "study"—which has since been roundly debunked and criticized[309]—concluded that $1.1 billion in debt

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[304] William T. Vukovich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1129 (1983) ("Stunned by an unprecedented increase in the number of consumer bankruptcies since the new Act's effective date in October 1979, the credit industry wants Congress to amend the Bankruptcy Reform Act to deny consumer debtors the traditional discharge of debt under chapter 7 of the Act if the debtors have what has come to be called 'affordable debt.'").

[305] SKEEL, *supra* note 42, at 187–88; *see also* Tabb, *supra* note 201, at 37 (noting that "the credit industry, unhappy with increased bankruptcy filings and mounting bad debt losses, has steadily lobbied for amendments providing for harsher treatment of debtors").

[306] Vukovich, *supra* note 304, at 1130–31.

[307] HANSEN & HANSEN, *supra* note 163, at 140.

[308] SKEEL, *supra* note 42, at 190–91. The credit industry also commissioned studies from Ernst & Young and WEFA Group Planning Services to support their claims to Congress to tighten the bankruptcy laws during the 1980s. Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 20 (2002).

[309] On this topic, see generally Warren, *supra* note 308. In a prior article, Sullivan, Warren, and Westbrook described the Purdue Study in the following way:

> The Study lacks crucial expertise, is designed incorrectly, asks a series of inartful questions, gathers its data improperly, misanalyses the statistical data and draws erroneous and biased inferences from the data analysis. Moreover, error after error increases the count of the debtor who "can pay" and the amount of the debt that could be recovered.

Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1145 (1983).

was being discharged annually through the bankruptcy system.[310] Despite this contention, credit card profits were sky-high and the democratization of finance had begun. Nevertheless, the creditor class "launched its public relations campaign to amend the bankruptcy laws with a blizzard of press releases and advertisements that purported to show that bankruptcy costs every American family $400 each year."[311] Moreover, the creditor class's attempts to revamp the consumer bankruptcy laws were also fueled by adopting the powerful neoliberal discourse of personal responsibility and accountability, arguing that individuals and debtors had lost all sense of "credit morality" and were thus glibly filing for bankruptcy protection to avoid paying their just obligations.[312] The creditor class was poised to strike after the United States Supreme Court declared the bankruptcy system unconstitutional in 1982 in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[313]

In response to the *Marathon* decision, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA").[314] While the primary areas of focus related to the structure of bankruptcy courts, the status of bankruptcy judges, and a response to the *National Relations Labor Board v. Bildisco & Bildisco* decision,[315] the consumer credit industry seized the opportunity to obtain desired changes to the Bankruptcy Code.[316] Indeed, financial lending institutions had continued the tired narrative of abusive debtors shirking their financial responsibilities to the detriment of the creditor class.[317] Although Congress rejected the calls by the creditor class to insert a threshold

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310 Warren, *supra* note 308, at 8.

311 *Id.* at 13.

312 SKEEL, *supra* note 42, at 191. Consumer creditors have argued for centuries that debtors have lost a sense of stigma by turning to the bankruptcy system to address their burdensome debts. Matejkovic & Rucinski, *supra* note 43, at 497.

313 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

314 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. During the eighteen-month interregnum between the *Marathon* decision and the enactment of BAFJA, the bankruptcy courts operated under an emergency rule crafted by the Judicial Conference of the United States. Tabb, *supra* note 201, at 38.

315 Nat'l Lab. Rels. Bd. v. Bildisco & Bildisco, 465 U.S. 513, 521–22 (1984) (holding that a collective bargaining agreement is an executory contract susceptible to rejection under section 365 of the Bankruptcy Code).

316 Tabb, *supra* note 201, at 39.

317 Matejkovic & Rucinski, *supra* note 43, at 485 ("Following years of argument in which representatives of the Consumer Finance Industry alleged that a number of debtors were avoiding their financial obligations, and using the bankruptcy system (particularly chapter 7) to escape their financial liabilities, Congress adopted the "substantial abuse" language.").

income test for consumer debtors,[318] the statute incorporated thirty new substantive amendments to "curb abuses of the bankruptcy code and make its use truly a last resort"[319] so as to ensure "that a 'fresh start' does not become a 'head start.'"[320] Believing that consumer debtors were still abusing the bankruptcy laws,[321] BAFJA turned the screws tighter on individual debtors. The BAFJA amendments to the consumer bankruptcy laws at the behest of creditors has been colorfully described as "the coup of 1984."[322] The conference reports and floor statements undergirding BAFJA demonstrate a clear preference for individual debtors to select chapter 13 as a form of relief rather than chapter 7 as a mechanism for protecting "good faith creditors seeking recovery upon their claims in consumer bankruptcy cases."[323]

Perhaps unsurprisingly absent in the legislative history to the 1984 Amendments regarding consumer bankruptcy are mentions or considerations of the after-effects of the two recessions between 1980 to 1982[324] along with the determination by Paul Volcker—a Milton Friedman devotee—to embrace monetarism as an economic policy by controlling the money supply through interest rate manipulation. [325] These resulted in painful unemployment and mass layoffs.[326] The Volcker shock proved incredibly profitable for the financial industry and formally ushered in the era of financial capitalism.[327] Through the era of low inflation which began in the early 1980s, wealth concentrated in the hands of the elite and economic inequality skyrocketed through the adoption of

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[318] *See* 130 CONG. REC. H7,489 (daily ed. June 29, 1984) (Statement of Rep. Peter Rodino), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 6(c) (16th ed. 2023).

[319] *Id.* at S8,894 (Statement of Sen. Orrin Hatch).

[320] *Id.*

[321] As Charles Jordan Tabb recounts, "[m]uch of the fuel for the consumer credit industry's fire was provided by a study financed by the industry itself," germinating from the Krannert Graduate School of Management at Purdue University. Tabb, *supra* note 201, at 39 n.286. "The Purdue Study [erroneously] concluded that at least a third of consumer debtors could repay a significant portion of their debts." *Id.*

[322] *Id.* at 40.

[323] 130 CONG. REC. S8,889 (daily ed. June 29, 1984) (Statement of Sen. Howell Heflin), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 6(c) (16th ed. 2023).

[324] *See* Dave Roos, *How the U.S. Got Out of 13 Economic Recessions Since World War II*, HISTORY.COM, https://www.history.com/news/us-economic-recessions-timeline (last updated June 22, 2022).

[325] The principle of monetarism "is the ideology which completely dominates modern economic thought." ROWBOTHAM, *supra* note 21, at 27. Simply stated, monetarism is a method to manage the money supply by either speeding up or slowing down the creation of money through the manipulation of interest rates. *Id.*

[326] APPLEBAUM, *supra* note 64, at 75–82.

[327] *Id.* at 83.

an intentional plan to punish workers and reward lenders.[328] But rather than recognize that ordinary Americans were beginning to feel the distress of a turn towards "harsh capitalism,"[329] the legislative history to BAFJA is steeped in a neoliberal brand of moralizing discourse that paints consumer chapter 7 bankruptcy as a process that "allows the debtor to turn his back on his creditors and walk away scot-free" and "curbs incentives for debt-ridden consumers to go on credit card spending sprees shortly before filing for bankruptcy."[330] These characterizations represented nothing more than illegitimate propaganda. Ironically, commentators have suggested that the pro-creditor amendments in 1984 may have resulted in increased consumer bankruptcy filings by encouraging the creditor class to expand lending, principally to lower-income households.[331]

In kowtowing to the financial interests of the creditor class, BAFJA furthered the project of making bankruptcy more arduous for individuals and families.[332] Section 109(g) was amended to install a barrier to the bankruptcy court itself for any individual debtor who had had a case dismissed within the previous 180 days for the willful failure to abide by court orders or for not appearing in court to prosecute the case.[333] This barrier also took effect if the debtor had a prior

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328 *Id.* at 93.

329 REICH, *supra* note 48, at 8.

330 *See* 130 CONG. REC. H7,499 (daily ed. June 29, 1984) (Statement of Rep. Orrin Hatch), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 6(c) (16th ed. 2023). In reaching these conclusions, the conference report to BAFJA relies upon a discredited GAO report suggesting

> that 40 percent of those who file for chapter 7 relief have income, assets and debts comparable to those seeking chapter 13 relief. These improper chapter 7 filings may cost the lending industry as much as $1.25 billion annually in lost revenues. And as with anything else, these losses are passed along to consumers in the form of higher interest rates, credit fees, and increased prices for goods and services.

Id.

331 David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. INST. L. REV. 311, 348 (1999); *see also* Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 372.

332 In making this argument, I am certainly aware that several provisions of BAFJA can be construed as benefitting debtors' interests, including enabling judicial oversight regarding reaffirmation agreements (though economists would consider these as paternalistic limitations of individual debtor's "free choice" and a limitation of maximizing utility) and protecting debtors from discrimination as a consequence of filing for bankruptcy relief. *See* Bankruptcy Amendments and Federal Judiciary Act of 1984, Pub. L. No. 98-353, sec. 308, 98 Stat. 333, 354.

333 Section 109(g) currently provides as follows:

case filed within the previous 180 days and the debtor voluntarily dismissed the case after a creditor filed a motion for stay relief pursuant to section 362(a).[334] While there may be a very small faction of consumer debtors that do try to manipulate the bankruptcy system, the great majority do not. Policing this behavior is not a bad thing in itself, but Congress intentionally failed to place the same behavioral restrictions upon corporate entities, thus signaling once again that the moralistic discourse about indebtedness and bankruptcy is not equally shared among individuals and businesses.

BAFJA also added additional duties upon individual debtors pursuant to section 521(a)(2) of the Bankruptcy Code.[335] In a provision aimed at protecting the interests of secured creditors and forcing debtors to make quick decisions in the bankruptcy case, section 521(a)(2) requires chapter 7 debtors to file a statement of intention[336] declaring whether the debtor chooses to retain, surrender, redeem, or reaffirm the property subject to the security interest.[337] Section 521(a)(2)(A) has several salutary benefits for secured creditors. Rather than being "captive" to an individual debtor and not realizing the time value of

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> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—
>
>> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>>
>> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. § 109(g).

334 *Id.*

335 11 U.S.C. § 521(a)(2).

336 The statement of intention must be filed within thirty days of filing a chapter 7 petition or before the date set for the section 341 meeting of creditors, whichever is earlier. *Id.*

337 Section 521(a)(2)(A) currently provides that

> (2) If an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
>
>> (A) [that debtor shall,] within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

11 U.S.C. § 521(a)(2)(A).

money on their secured debts due to the imposition of the automatic stay, section 521(a)(2)(B) provides that the debtor must "perform his intention" of surrendering, redeeming, or reaffirming the debt within thirty days after the first date for the meeting of creditors.[338] This additional pressure to make a quick choice, which does not confront business entities with any meaningful bite or individual debtors under chapter 13, may have resulted in a pronounced bump in individual debtors and their families reaffirming debts on secured claims when it was not or is not in their financial best interests to do so.

Several other BAFJA amendments are worth mentioning as examples of the further disciplining of consumer debtors under the Bankruptcy Code. In the mistaken belief that hordes of individual debtors were in fact going on wild spending sprees shortly before filing for bankruptcy and thus walking away "scot-free,"[339] Congress added section 523(a)(2) to BAFJA, preventing debtors from discharging consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor within forty days before the bankruptcy petition or cash advances aggregating more than $1,000 under an open-ended credit plan (i.e., credit card) obtained within twenty days of the petition date.[340] In the proposed language to section 523(a)(2)(C) in 1984, Congress defined the term "luxury goods and services" to exclude "goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor."[341] This definition of "luxury goods and services" subsequently changed to exclude "goods or services reasonably *necessary* for the support or maintenance of the debtor or a dependent of the

338 11 U.S.C. § 521(a)(2)(B).

339 98 CONG. REC. H7,499 (daily ed. June 29, 1984), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 6(c) (16th ed. 2023). In reaching these conclusions, the conference report to BAFJA relies upon a discredited GAO report suggesting

> that 40 percent of those who file for chapter 7 relief have income, assets and debts comparable to those seeking chapter 13 relief. These improper chapter 7 filings may cost the lending industry as much as $1.25 billion annually in lost revenues. And as with anything else, these losses are passed along to consumers in the form of higher interest rates, credit fees, and increased prices for goods and services.

Id.

340 This was the provision as originally proposed in 1984 under BAFJA. *See* Bankruptcy Amendments and Federal Judiciary Act of 1984, Pub. L. No. 98-353, sec. 307, 98 Stat. 333, 353. The present iteration of section 523(a)(2)(C) contains different amounts due to periodic adjustments to the Bankruptcy Code, and the forty and twenty-day limitations are now ninety days and seventy days, respectively. *See* 11 U.S.C. § 523(a)(2)(C).

341 *See* Bankruptcy Amendments and Federal Judiciary Act sec. 307, 98 Stat. at 353.

debtor."[342] Section 523(a)(2)(C)(II) exemplifies the policing of consumer behavior in the crucial months before the filing of a bankruptcy petition. Cash advances of more than $1,000—the cost of a full set of new car tires or a few trips to the grocery store for a small family—are presumptively non-dischargeable. Additionally, the determination of "luxury goods or services" enables a bankruptcy trustee and judge to instill their own subjective values for what is "reasonably necessary" for a debtor and their family to live. All this serves to cast judgment upon the choices made by debtors three months before a bankruptcy petition is even filed with the court.

BAFJA also inserted section 707(b)(2) into the Bankruptcy Code (later amended in 2005 through BAPCPA) enabling a court to dismiss a chapter 7 case filed by an individual debtor (again, no such policing for corporate entities) whose debts are primarily consumer debts if the court finds that the granting of relief would constitute a "substantial abuse" of the chapter 7 process.[343] While the then-existing section 707(b)(2) expressly favored granting debtors relief under chapter 7, this legislative inclusion added yet another instance whereby trustees and judges across the nation could inject their own subjective senses of personal responsibility, financial prudence, and bias into a system where the exercise of this section 707(b)(2) legal power of dismissal had serious consequences for thousands of individuals and families.[344] The insertion of the "substantial abuse" test in BAFJA stemmed from a comprise made between Congress and the consumer credit industry. Rather than creating means-testing for consumer debtors—which inevitably happened under BAPCPA—Congress adopted the "substantial abuse" test to enable courts to root out "abusive" and "immoral debtors." In short, the addition of section 707(b) to the Bankruptcy Code in 1984 was a first attempt at preventing "can-pay" debtors "from short-changing their creditors by way of a Chapter 7 liquidation."[345]

Finally, BAFJA amended the chapter 13 process to enable a *single* unsecured creditor to exercise a high degree of power over a debtor and their family and to

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342 *See* 11 U.S.C. § 523(a)(2)(C) (emphasis added).

343 *See* Bankruptcy Amendments and Federal Judiciary Act sec. 312, 98 Stat. at 355. It has been suggested that the inclusion of the "substantial abuse" test originated with the desire to reinforce "local legal culture" on a debtor's choice to select either chapter 7 or chapter 13. SKEEL, *supra* note 42, at 197.

344 The ability to dismiss chapter 7 consumer petitions for "abuse" now resides in section 707(b)(3). 11 U.S.C. § 707(b)(3).

345 Leif M. Clark, *The Responsible Borrower Protection Bankruptcy Act: A Not-So-Responsible Effort at Protecting Borrowers*, 28 U. MEM. L. REV. 741, 752 (1998).

frustrate the plan confirmation process by simply raising an objection with the court.[346] Under the then-adopted section 1325(b)(1), a court could not approve the plan unless "the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim" or "the plan provides that *all* of the debtor's projected disposable income" will be applied to make payments under the plan for a period of three years.[347] "Disposable income" was defined as income received by the debtor and "which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor."[348] In the present chapter 13 regime, what constitutes "disposable income" and "reasonably necessary" expenses depends upon whether the debtor and their family fall above or below the current applicable monthly income as determined by section 707(b)(2)(A).[349] But the judicial oversight and determination of whether the debtor is devoting all of their "disposable" income to fund the chapter 13 plan above a minimal standard of living reeks of the exploitation of laborers at the hands of industrial capitalists so richly described by Marx in *Capital Volume I*.[350]

In *Capital Volume I*, Marx painstakingly describes how the industrial capitalist exploits the laborer to create a surplus-value in the production of new commodities for eventual sale in the marketplace.[351] In this Marxian social division of labor, the capitalist pays the laborer in wages equal to the "means of *subsistence necessary* for his conservation or continued reproduction."[352] In other words, the creation of surplus-value for the industrial capitalist depends upon paying the bare minimum necessary in the form of wages to ensure the continued existence of the laborer and their family. After all, physical labor must happen, and healthy bodies are needed! The analogy to the chapter 13 disposable

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[346] *See* Bankruptcy Amendments and Federal Judiciary Act, sec. 317, 98 Stat. at 356.
[347] *See id.* (emphasis added).
[348] *See id.* (emphasis added). This "reasonably necessary" standard still exists in section 1325(b)(2) for below-median debtors. *See* 11 U.S.C. § 1325(b)(3).
[349] *See* 11 U.S.C. § 1325(b)(1)–(3).
[350] MARX, *supra* note 15.
[351] As Marx writes:

> During the second period of the labour-process, that in which his labour is no longer necessary labour, the workman, it is true, labours, expends labour power; but his labour, being no longer necessary labour, he creates no value for himself. He creates surplus-value which, for the capitalist, has all the charms of a creation out of nothing.

Id. at 150–51.
[352] *Id.* at 150 (emphasis added).

income test should be apparent. At present, if the debtor is above the median-income in their respective state (taking into consideration family size), then what is considered "disposable income" to be committed under a plan following a single unsecured creditor's objection is tied to the disposable income calculation contained within section 707(b)(2)(A)(i) of the Bankruptcy Code.[353] If a debtor currently has a measly "disposable" income of between $151.25 and $252.50 each month after deducting for allowable expenses, this amount must be contributed to the plan to pay down unsecured creditors. After all, debts need to be honored and repaid!

The use by Marx of the term "subsistence necessary" in critiquing the dynamics underpinning industrial capitalism and the phrase "reasonably necessary" utilized by the modern Bankruptcy Code are frighteningly alike. Both represent the capitalistic exploitation of industrial laborers and consumer debtors, respectively. Forcing debtors and their families to structure a plan to provide minimal subsistence is a modern-day form of exploitation under financialized neoliberalism and a disciplinary power favoring creditors over debtors. As Marx argued in *Capital Volume I*, "[t]he rate of surplus-value is therefore an exact expression for the degree of exploitation of labour power by capital, or of the labourer by the capitalist."[354] I submit that extracting even the barest amount of extra income from the quotidian livelihoods of chapter 13 debtors and their families to fund a repayment plan for years equally represents the exploitation of downtrodden debtors by finance capitalists.

A critical sociological lens provides a grounded explanation for why so many chapter 13 plans eventually fail. This theoretical proposition is bolstered by the empirical studies related to the chapter 13 process.[355] Providing "incentives" for

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[353] 11 U.S.C. § 1325(b)(3).

[354] MARX, *supra* note 15, at 151.

[355] But even prior to these studies empirically demonstrating the dismal outcomes for chapter 13 debtors, the 1970 Commission foreshadowed that most plans were likely destined for failure. In its 1973 report to Congress, the Commission commented as follows:

> Unless the debtor can pay his indebtedness in full plus the costs of administration within a three-year period, there is a general disinclination to attempt a plan under Chapter XIII. For many debtors, an attempt, however well-intentioned, to assume the obligation to pay off all debts within three years is impracticable. A considerable number of plans are proposed and confirmed, contemplating a full payment over a three-year span, that are predestined to fail. Thus the mortality rate of Chapter XIII plans is high.

debtors to "choose" chapter 13 is a technology of power backed by the force of law to impose a sense of morality and financial behavioral discipline upon individuals and families, while couched in a limp attempt to expropriate more returns for unsecured creditors. While debtors often select chapter 13 to keep homes and automobiles,[356] debtors are forced to live on incredibly tight budgets while making plan payments.[357] Chapter 13 plan budgets are so constricting that there is oftentimes no financial wiggle-room for the debtor to respond to unexpected life events over the three to five-year period of the plan.[358]

The association between enforced budgetary discipline and chapter 13 "success" cannot be overstated. Roughly 66% of chapter 13 plans fail, resulting in outright dismissal or conversion to chapter 7.[359] "Most debtors in bankruptcy can, at best, just make ends meet, much less pay off old debts."[360] Seen as a Foucauldian technology of power, a dismissed chapter 13 plan is a perfect result for creditors. No discharge of unsecured debt results, and some secured and priority debts are pared down in some capacity during the interim of the bankruptcy case.[361] Contrary to the propaganda spewed by unsecured credit lenders, the predominant beneficiaries of chapter 13 are not unsecured creditors,[362] but rather secured creditors and those with administrative expenses or priority debts such as taxes and domestic support obligations.[363] Moreover, evidence demonstrates that roughly 89% of individuals who file under chapter 13 find themselves refiling for bankruptcy protection within four years of the

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KENNEDY ET AL., REPORT OF THE COMMISSION, *supra* note 238, at 12. Moreover, recall that the Brookings Institution report from 1971 found that the majority of chapter XII repayment plans ended in failure. STANLEY & GIRTH, *supra* note 232, at 3.

356 Chapter 13 also enables debtors to cure arrearages on their mortgages through the life of the plan. 11 U.S.C. § 1322(b)(3).

357 Foohey et al., *supra* note 53, at 593.

358 Greene et al., *supra* note 223, at 1054 ("The added burden of a chapter 13 plan payment as a fixed expense only increases the dollars that are earmarked in a family's budget and so unavailable to meet varying expenses.").

359 Nordberg & Velkey, *supra* note 229, at 476.

360 Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 417 (2001).

361 Data exist suggesting that the mean distribution to unsecured creditors in chapter 13 cases hovers around 26% of claims. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 84 (2012).

362 Nordberg & Velkey, *supra* note 229, at 535 (finding that "[n]o more than 30% of trustee distributions are to general unsecured creditors").

363 *Id.* at 534 ("Secured creditors are by far the primary creditor beneficiaries of the Chapter 13 system.").

dispositions of their cases.[364] While detractors may holler that debtors are nothing other than abusive repeat filers, that suspends reality for the great majority of people who still suffer from the indignities of debt after their first crack at financial relief. In truth, "most of the debtors who drop out of chapter 13 almost immediately start struggling with the same financial problems they had before filing for bankruptcy, often within just weeks of the dismissal."[365] Moreover, prior studies have found that filing for chapter 13 to protect a home—one of its fundamental benefits to individuals and families—"predisposes a debtor to exiting bankruptcy without a discharge of unsecured debt."[366] Another study found that after an unsuccessful sojourn in chapter 13, 59% of respondents reported struggling with paying and managing bills within a few months after the bankruptcy cases ended.[367] This failure to rehabilitate debtors through the chapter 13 process has thus been characterized as a "pretend solution."[368] And while the period in which an individual or family resides in chapter 13 may provide some palliative relief from stress and hounding collection efforts, the historically dismal outcomes for chapter 13 repayment plans begs a question: what then is the point of all this wasted expense, effort, and struggle for individuals and families?

Despite the successes financial creditors achieved through BAFJA in 1984, they were not satisfied and remained vigilant over the next decade in lobbying for even tighter restrictions upon consumer debtors.[369] The next major amendments to the Bankruptcy Code occurred through the Bankruptcy Reform Act of 1994.[370] Importantly, the Bankruptcy Reform Act of 1994 created a second National Bankruptcy Review Commission to study the Bankruptcy Code and to recommend proposed reforms to Congress, even though the latter made clear that it was "generally satisfied with the basic framework"[371] of the existing

[364] *Id.* at 502.
[365] Greene et al., *supra* note 223, at 1032–33.
[366] *Id.* at 1037.
[367] Porter, *supra* note 229, at 149.
[368] *Id.* at 113.
[369] Tabb, *supra* note 201, at 40 ("Not fully satisfied with [BAFJA's] changes, the consumer credit industry has continued to lobby vigorously for more amendments, but has not yet repeated the coup of 1984.").
[370] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. The majority of changes in the Bankruptcy Reform Act of 1994 responded to several bankruptcy court decisions and clarified specific issues that had arisen in the prior ten-year period after the passage of BAFJA. Tabb, *supra* note 201, at 42.
[371] 140 CONG. REC. H10,771 (daily ed. Oct. 4, 1994), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 9(b) (16th ed. 2023).

laws and directed the National Bankruptcy Review Commission to suggest improvements to the system "in ways which do not disturb the fundamental tenets and balance of current law."[372] As a matter of politics and financial self-interest in reaping higher profits off the backs of individual debtors through interest-bearing capital, financial institutions and the consumer credit industry "used the advent of the second Review Commission as an opportunity to lobby for a fundamental rethinking and retrenchment of the rights of individual consumer debtors."[373] The legislative debates leading to the 1994 amendments were deeply ideological, particularly after the Republican party regained Congress[374] and the creditor class now had an even more sympathetic ear to embrace the agenda of disciplining morally bankrupt debtors through further reforms to the consumer bankruptcy laws.

The consumer bankruptcy amendments to the Bankruptcy Reform Act of 1994 were not one-sidedly negative to the detriment of debtors. Indeed, several newly-added provisions can be viewed as a positive from the debtors' perspective. First, Congress added section 1322(c)(2) to the chapter 13 process to permit debtors to modify the terms of a mortgage on a principal residence if the last payment on the contractual payment schedule is due before the final date of the plan,[375] though even this may only be a pyrrhic and symbolic victory because this situation may arise infrequently and even if so, it means that the debtor had been regularly paying their mortgage for a long time. Second, Congress added section 362(b)(2) to the Bankruptcy Code to allow proceedings in domestic relation actions (e.g., alimony, maintenance, paternity) to not be halted by the imposition of the automatic stay,[376] and relatedly made such debts priority claims under section 507(a).[377] Third, Congress added section 525(c)(1) to the Bankruptcy Code prohibiting the discrimination against students by governmental units in the making of student loans by otherwise denying them access to higher education loans based upon the act of filing bankruptcy.[378] But the intentions behind this too are questionable given the incredible reliance finance capitalism and universities place upon the primacy of more students

[372] *Id.*
[373] TABB, LAW OF BANKRUPTCY, *supra* note 202, at 46.
[374] SKEEL, *supra* note 42, at 189.
[375] 11 U.S.C. § 1322(c)(2).
[376] 11 U.S.C. § 362(b)(2).
[377] 11 U.S.C. § 507(a)(1)(A).
[378] 11 U.S.C. § 525(c)(1).

taking out student loan debt to obtain an education and given the value of these income streams for global capitalism.

I contend that three provisions directly continued the trend of disciplining debtors and making filing for consumer bankruptcy an intentionally more difficult and expensive process. First, Congress enacted section 110 to the Bankruptcy Code[379] to severely curtail and to neuter the ways in which bankruptcy petition preparers could assist individuals in filing for bankruptcy relief if they could not otherwise afford an attorney or could not navigate the complex bankruptcy process pro se.[380] Section 110 was an effort to regulate the professional activities of bankruptcy petition preparers and to prevent the reported abuses of both debtors and the bankruptcy system committed by a segment of the industry.[381] While there were no doubt instances of abusive practices by bankruptcy petition preparers in parts of the country, as I have argued elsewhere the practical thrust of section 110 was to protect consumer bankruptcy attorneys from financial competition and to deprive individuals of access to justice in the bankruptcy courthouse by necessitating higher costs in the form of attorney's fees, which are much higher than the few hundred dollars traditionally charged by bankruptcy petition preparers.[382]

Second, in addition to the limitations of section 110 in accessing the bankruptcy system, Congress added section 152 to Title 18 of the United States Code, making it a crime punishable by up to five years' imprisonment (in addition to monetary fines) for any person who "knowingly and fraudulently" conceals assets from the estate, makes a false oath in relation to a bankruptcy case, or makes a false declaration or statement under penalty of perjury in a bankruptcy case or proceeding.[383] My intention here is not to suggest that rooting out intentionally fraudulent behavior committed by consumer debtors should not be prevented—it still should—but rather to challenge how such conduct is punitively criminalized, with the possibility of up to five years' imprisonment.

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379 11 U.S.C. § 110.

380 *See, e.g.*, *In re* Guttierez, 248 B.R. 287, 297–98 (Bankr. W.D. Tex. 2000) ("Section 110 itself proscribes virtually all conduct falling into the category of guidance or advice, effectively restricting 'petition preparers' to rendering only 'scrivener/typing' services.").

381 Michael D. Sousa, *Legitimizing Bankruptcy Petition Preparer: A Sociolegal Prescription for Change*, 89 AM. BANKR. L.J. 269, 274 (2015).

382 *Id.* at 272–78.

383 18 U.S.C. § 152. Certain conduct committed by bankruptcy petition preparers is also criminalized under section 156 of Title 18. *See, e.g.*, 18 U.S.C. § 152(7).

In delving into the legislative history to this revision, two things are additionally striking. Because a violation of section 152 requires proof beyond a reasonable doubt, the Department of Justice specifically alerted Congress prior to its enactment that any alleged violations "are unlikely to be prosecutable under this new law or any other statute."[384] Further, as also indicated by the Department of Justice to Congress when contemplating the legislative amendment, during 1993 there were over 875,000 bankruptcy cases filed (both business and consumer) yet there were only 183 bankruptcy fraud prosecutions during the same year.[385] While I fully appreciate why these 183 cases may not reflect empirical reality (e.g., how many criminal acts occurred measured against how many were found and then chosen to be prosecuted), the point is illustrative. Taken simply at face value, these two figures tend to demonstrate that prosecuted bankruptcy crimes only represented 0.021% of total bankruptcy filings in 1994, a trivial amount. The argument is simply this: criminalizing bankruptcy in this way is not slated towards addressing an actual widespread problem, but instead serves a symbolic purpose: for Congress to appear tough on consumer debtors—much like criminal offenders—and punish economically-related bad acts. This in turn syncs wonderfully with the grander neoliberal project of expanding the carceral state.[386]

Third, Congress amended section 1328(a)(3) by making criminal fines non-dischargeable through the chapter 13 plan process.[387] Debts in the form of criminal restitution were already nondischargeable pursuant to sections 523(a)(7) and 523(a)(13).[388] The non-dischargeability of criminal fines and ordered restitution links to the larger neoliberal agenda of governing marginalized populations and represents another expansion of "the shadow

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384 140 CONG. REC. S14,464 (daily ed. Oct. 6, 1994) (statement of Sen. Howell Heflin, incorporating a letter from Assistant Att'y Gen. Sheila F. Anthony), *reprinted in* E-1 COLLIER ON BANKRUPTCY app. pt. 9(b) (16th ed. 2023).

385 *Id.*

386 *See* Beth E. Richie & Kayla M. Martensen, *Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice*, 35 AFFILIA: J. WOMEN & SOC. WORK 12, 12 (2019) (defining the "carceral state" as "the ways that ideology, economic policy, and legal/legislative initiatives have supported the growth of legal apparatuses associated with punishment"); *see also* Marie Gottschalk, *Democracy and the Carceral State in America*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 288, 289 (2014) (describing the carceral state as including "not only the country's vast archipelago of jails and prisons but also the far-reaching and growing range of penal punishments and controls that lie in the never-never land between the gate of the prison and full citizenship").

387 11 U.S.C. § 1328(a)(3).

388 *See* 11 U.S.C. § 523(a)(7), (13).

carceral state."[389] In their work, Katherine Beckett and Naomi Murakawa define "the shadow carceral state" as making use of "legally liminal authority" through which the expansion of "punitive power occurs through the blending of civil, administrative, and criminal legal authority. In institutional terms, the shadow carceral state includes *institutional annexation* of sites and actors beyond what is legally recognized as part of the criminal justice system."[390] In this manner, the prohibition on the non-dischargeability of criminal debts under the Bankruptcy Code is another example of the "institutional annexation" committed by the broader criminal justice system in which criminal debt has become yet another problematic collateral consequence for offenders.[391] A burgeoning array of sociological and criminological studies have demonstrated convincingly that legal financial obligations can have a crippling impact upon offenders' reentry into society,[392] and these economic punishments are

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389 Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012).

390 *Id.* (emphasis in original).

391 Collateral consequences have been described as a panoply of "invisible punishments" that offenders can face, including barriers to employment and housing, limitations on civic participation, and prohibitions on procuring educational loans. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1875 (2015).

392 *See, e.g.*, ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 3 (2016) ("As a result of the rise in monetary sanctions—also called legal financial obligations (LFOs)—indigent defendants, who comprise the vast majority of criminal defendants in the United States, remain under criminal justice supervision, paying per-payment and collection costs and interest on the initial sentence for the remainder of their lives."); Annie Harper et al., *Debt, Incarceration, and Re-entry: A Scoping Review*, 46 AM. J. CRIM. JUST. 250, 251 (2021) ("Debt may play a significant role in contributing to the financial hardship experienced by people who have been incarcerated. One form of debt they may be burdened by arises from the significant costs incurred as a direct result of criminal justice . . . system involvement."); Kathleen Powell, *Who Pays? Measuring Differences in the Process of Repayment of Legal Financial Obligations*, 10 SOC. SCIS. 1, 1 (2021) (arguing that "[i]nvolvement with the criminal justice system can come at steep social and economic costs through ensuing collateral consequences . . . and, increasingly, financial debt"); Ilya Slavinski & Kimberly Spencer-Suarez, *The Price of Poverty: Policy Implications of the Unequal Effects of Monetary Sanctions on the Poor*, 37 J. CONTEMP. CRIM. JUST. 45, 47 (2020) (noting that legal financial obligations "are yet another element in this mosaic of punitive resource extraction from institutional subjects and their support networks"); Sarah Shannon et al., *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 UCLA CRIM. JUST. L. REV. 269, 271 (2020) (noting that "for individuals who do not have the financial means to comply with financial sanctions, LFOs can widen the net and intensify the entanglements with the criminal justice system"); Breanne Pleggenkuhle et al., *Twice Punished: Perceived Fairness and Legitimacy of Monetary Sanctions*, 37 J. CONTEMP. CRIM. JUST. 88, 90 (2020) ("Individuals who are unable to comply with LFOs face additional consequences. Legal debt can damage credit reports, hindering employment and housing prospects, and can preclude obtaining public assistance, and educational and employment licensing. Legal debts can contribute to deeper economic marginalization of justice-involved persons and cement the identity of 'offender.'") (internal citations omitted).

aggravated by their non-dischargeable status under the Bankruptcy Code. The interrelationship between punitive legal financial obligations and the criminal justice system has been aptly described as a "debt-criminal justice complex."[393]

The second National Bankruptcy Review Commission issued its report to Congress in 1997.[394] In the twenty-year span between 1978 and 1997, consumer debt increased by 700% while the rates of consumer bankruptcies increased sevenfold,[395] once again crudely demonstrating the association between the national bankruptcy filing rate and the ratio of revolving consumer credit to a share of disposable income.[396] Revolving consumer credit increased from $61 billion in 1981 to $670 billion in 2001.[397] Nonetheless, the 1997 Commission Report expressed perplexity that consumer bankruptcy filing rates had grown exponentially during the 1990s "coming at a time of economic prosperity with low unemployment and low inflation."[398] This dynamic led the Commission to claim that it had "brought new attention and new controversy to the consumer bankruptcy system."[399] Empirical data, however, demonstrated at the time that bankruptcy debtors as a group were in quite rough financial shape in the very early 1990s, with stagnated or serious drops in income, fewer assets, higher debt-to-income ratios, and crippling amounts of short-term debt.[400]

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393 Wamsley, *supra* note 164, at 248.

394 For a complete and detailed discussion of the Commission's history and process, see generally 1 BRADY C. WILLIAMS ET AL., NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT 47–75 (1997), *available at* https://govinfo.library.unt.edu/nbrc/reportcont.html, *and reprinted in* G COLLIER ON BANKRUPTCY app. pt. 44 (16th ed. 2023) [hereinafter WILLIAMS ET AL., NBRC FINAL REPORT].

395 *Id.* at ii.

396 Dick & Lehnert, *supra* note 46, at 659.

397 Susan Block-Lieb et al., *Lessons from the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503, 505 (2001).

398 WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at ii.

399 *Id.* The Commission Report did, however, recognize in passing some of the larger macroeconomic changes in the credit economy from 1978 to 1997:

> There has been a revolution in the last 20 years in the way American families borrow and use credit . . . . The result, over time, has been sustained economic expansion and, for families, unprecedented access to credit to purchase more consumer goods and services. Businesses constantly search for new and creative sources of capital—to help meet the growing demand for those consumer goods and services.

Id.

400 Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 AM. BANKR. L.J. 121, 127–39 (1994); *see also* Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1080 (1997) ("The simple explanation is that

The controversy surrounding the great uptick in the number of consumer bankruptcy filings at a time when the economy was humming along—at least to the benefit of the financial elite—bled into the work of the Commission itself. In closely reading the Review Commission's report, one is struck by just how severe an ideological division existed between the nine-member committee, largely divided along discernable class interests between creditors and debtors.[401] Five of the nine members participated in the overall final report issued to Congress—with balanced, but generally favorable recommendations for debtors—while the other four members of the Commission issued their own "dissenting" report overtly parroting both the legal interests and the agenda of moralizing discourse spewed by the creditor class and so eagerly adopted by the Republican controlled Congress.[402] The dissenters repeatedly accused the five-member majority of engaging in a "social-engineering agenda."[403] As addressed below, the dissenters' recommendations demonstrate the ever-growing efforts to discipline debtors who dare file for consumer bankruptcy relief. This significant divide cannot be overstated, as many of the dissenters' recommendations subsequently became actualized in BAPCPA.[404] Furthermore, David A. Skeel, Jr. has also situated the ideological divide during this time in the intellectual and scholarly battles between the creditor-oriented law and economics scholarship on bankruptcy that stood in opposition to the work of

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consumer bankruptcies are rising because consumers' debts are rising faster than their incomes. More debt means more families are in trouble or are vulnerable to trouble.").

401 As one example among several, the dissenting report characterized the five-member's recommended "framework" in the following terms:

> One basic defect in the Framework is philosophical. The Framework is based upon two major assumptions: first, the debtors are financially disadvantaged through no fault of their own; and second, that debtors are inadequately represented in the bankruptcy process. From these two assumptions come the Framework's inevitable conclusion: that as a matter of social justice, it is necessary to level the playing field by insuring [sic] that debtors are treated better under the reformed Code than they were before. As a result, much of the Framework can be characterized as social engineering designed to redistribute wealth, rather than bankruptcy reform.

WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at 1115–16.

402 SKEEL, *supra* note 42, at 201 ("The Republicans have tended to take a similar view, at least for consumer bankruptcy, echoing creditors' complain that debtors have become too quick to discharge their obligations.").

403 WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at 1060.

404 SKEEL, *supra* note 42, at 199 (noting that the Commission's report served as a foil for the legislative debates subsequent to the 1994 amendments to the Bankruptcy Code).

progressive bankruptcy scholars such as Elizabeth Warren and Vern Countryman.[405]

In concert with Congress's expression of general contentment with the existing Bankruptcy Code, the Commission did not adopt any radical changes to the bankruptcy laws, but made individual recommendations to Congress for amending the consumer bankruptcy laws.[406] While aiming to create a self-described balance between the interests of creditors and debtors[407] it only could accomplish this task by overtly rejecting the "anti-debtor views pushed by the credit industry"[408] throughout the entire process of public meetings, hearings, and data gathering leading to the final report.

The Commission made impactful, favorable recommendations for reforming the consumer bankruptcy laws,[409] such as: (i) increasing the potential homestead exemption up to $100,000;[410] (ii) adding a "wild-card" exemption for debtors up to $20,000 (and $35,000 if no homestead exemption was claimed);[411] (iii) exempting rights to receive future payments such as life insurance and social security benefits from the bankruptcy process;[412] (iv) permitting reaffirmation agreements only if the amount of the debt that the debtor sought to reaffirm did not exceed the allowed secured claim (and prohibiting the addition of attorney's fees or expenses to the principal amount of the reaffirmed debt;[413] (v) repealing of section 523(a)(8);[414] and (vi) determining payments to be made on unsecured debt in a chapter 13 plan through guidelines based on a graduated percentage of the debtor's income (with any deviation from the guidelines determined by the court as appropriate "in light of all the circumstances").[415]

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405 *Id.* at 200. According to Skeel, the law and economics influence was muted in the contemplated reforms during the work of the Review Commission due to the presence of Elizabeth Warren. *Id.* at 201.

406 *See* WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at iv.

407 *See id.* at v.

408 TABB, LAW OF BANKRUPTCY, *supra* note 202, at 46–47.

409 For the complete recommendations made to Congress by the majority of the Bankruptcy Review Commission, see WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at 1–46.

410 *Id.* at 2.

411 *Id.* at 2–3.

412 *Id.* at 3.

413 *Id.* at 3–4.

414 *Id.* at 6.

415 *Id.* at 7.

Importantly, the Commission rejected proposals to insert a means test for chapter 7 debtors. With respect to the proposition to make student loans dischargeable under section 523(a)(8), the Commission report recognized that

> young people are induced to indenture themselves by a system that ignores the capacity of the debtor to bear the burden. This system is, moreover, exploited by proprietary schools, colleges, and universities, as well as by bankers and other lenders, through contracts of adhesion that most students must accept lest they give up the idea of learning.[416]

The recommendation to make student loans dischargeable was premised primarily upon findings by the Commission that: (i) abuses were not occurring, based upon new studies submitted by the General Accounting Office; (ii) the case law interpreting the "undue burden" standard evolved to require extraordinary circumstances beyond a financial inability to repay; (iii) difficulties in repaying student loans often centered on low-income or unemployed borrowers; and (iv) making loans dischargeable would not alter a non-bankruptcy defaulter's inability to repay the loans.[417]

While the Commission's majority report reads as a well-balanced attempt at seriously considering the competing interests of both debtors and creditors and is substantiated by voluminous scholarly commentaries and studies of the consumer bankruptcy system, the dissenting report (led by Judge Edith H. Jones) is the written embodiment of the neoliberal discourse aimed at imposing responsibility and self-discipline upon wayward individual debtors which the creditor class weaponizes as a hegemonic mode of practicing power. The dissenting report energized the creditor class to continue their lobbying efforts which became the political scaffolding for BAPCPA once Republicans regained governmental power after the 2004 elections.[418] The theme for the dissenting report is set forth in the second paragraph, which contends as follows:

> [T]here is growing perception that bankruptcy has become a first resort rather than a last measure for people who cannot keep up with their

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[416] *Id.* at 207–08.

[417] *Id.* at 212–17.

[418] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 484, 486 (2005) ("The establishment of the National Bankruptcy Review Commission in 1994 either intentionally or unintentionally galvanized the consumer creditor community and ultimately became the impetus for BAPCPA.").

> bills. Lenders everywhere are reporting an increase in the number of bankruptcy petitions filed by people who were current on their debt payments. This phenomenon implies that bankruptcy relief is too easy to obtain, that the moral stigma once attached to bankruptcy has eroded, and that debtors are insufficiently counseled both about personal financial management and about the use of bankruptcy.[419]

The dissenting report disagreed with the majority Commission report insofar as the latter: (i) did not go far enough to penalize and to deter abuse of the system; (ii) granted excessively generous exemptions; (iii) discouraged chapter 13 repayment plans and favored chapter 7; (iv) imposed undue restrictions on lenders with respect to reaffirmations and credit card debt; and (v) did not meaningfully restrict abusive or serial filings.[420] To correct for these perceived abuses, the dissenting report recommended (among others) the following amendments: (i) limiting consumer debtors' ability to file amended schedules and statements of financial affairs; (ii) requiring debtors to submit copies of filed tax returns for the three years prior to the petition date; (iii) mandating debtor education for both chapter 7 and chapter 13 debtors; (iv) retracting limitations on reaffirmation agreements; (v) applying a higher rate of interest in a chapter 13 cramdown plan (i.e., a forced loan approach); (vi) declaring a default in a chapter 13 plan if the debtor missed two consecutive payments and failed to catch up within fifteen days of the due date for the second payment; (vii) codifying five-year chapter 13 plans; and (viii) refusing to repeal section 523(a)(8).[421]

The dissenting report drips of moralism. "Debtors need to better understand how to manage their finances."[422] Debtors should get a fresh start, not a "head

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419 WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at 1044. The argument about a vanishing moral stigma related to personal bankruptcy has long been a trope pushed by Judge Edith Jones and Professor Todd Zywicki. *See, e.g.*, Jones & Zywicki, *supra* note 196, at 180 ("In our view, the evidence now available tends to suggest that the recent rise in personal bankruptcies has been significantly influenced by a decline in the personal shame and social stigma traditionally accompanying bankruptcy, and by changes in the law and legal practice that have facilitated filing bankruptcy. On the other hand, the most prominent counter-explanation—rising consumer credit card debt—is based on faulty data and faulty arguments."); Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393, 405 (2000) ("It is generally accepted that one of the factors driving the upward trend in bankruptcy filing rates in recent decades has been a general decline in the social stigma associated with filing bankruptcy.").

420 WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at 1045–46.

421 *Id.* at 1050–56.

422 *Id.* at 1065.

start."[423] Liberal exemptions will "translate into the filing of more Chapter 7 liquidation cases, as debtors with the ability to repay some part of their debts will find it expedient instead to shelter more assets in Chapter 7."[424] Inserting enhanced reaffirmation protections in the Bankruptcy Code is "ludicrous" because "individuals are failing to take responsibility for their actions."[425] Amending section 109 to police for abusive filings is "designed to impose financial responsibility and integrity upon individuals."[426] "Bankruptcy relief is becoming merely another form of financial planning for some and a tool to defeat creditors' collection efforts for others."[427] "Too many hard-working individuals are paying more for credit as a direct result of the easy choice many take to file for bankruptcy relief."[428] On this last point, the dissenting report, much like some law and economics scholarship on consumer bankruptcy, argued that keeping a generous consumer bankruptcy system would result in gross externalities; namely, creditors as a whole would simply pass off financial losses to future borrowers in terms of increased interest rates and restricted access to credit.[429]

I have read quite a bit on economics, financial capitalism, and of course, consumer bankruptcy law. I cannot recall ever reading a news report, scholarly article, or empirical study where the creditor class passes along their savings to borrowers when bankruptcy rates abate. It is funny how this dynamic only apparently flows in one direction.

The dissenting report also attacked the Commission in ways that have not aged well since the Great Recession of 2007–2009:

> [The Commission's report] reflects the well-intentioned aspirations of individuals who live in ivy-covered towers who have no real day-to-day experience with the law they are seeking to reform. The sum of

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[423] *Id.* at 1070.

[424] *Id.* at 1070–71.

[425] *Id.* at 1074. The dissenting opinion also adopted a stance against greater protections for reaffirmations because doing so "strikes at the very heart of individuals' freedom to contract." *Id.* at 1078.

[426] *Id.* at 1096.

[427] *Id.*

[428] *Id.* at 1097.

[429] *Id.* ("Too many hard-working individuals are paying more for credit as a direct result of the easy choice many take to file for bankruptcy relief"). *Contra* William Waller, *Kickin'em While They're Down: Consumer Bankruptcy Reform*, 35 J. ECON. ISSUES 871, 883 (2001) ("The profitability of these companies combined with the incredibly wide range of interest rates offered on unsecured debt do not support the hypothesis that increased resort to bankruptcy over the last decade has pushed up interest rates.").

> their knowledge of consumer bankruptcy is the incomplete raw data . . . from which they draw "undisputable" conclusions and make recommendations . . . .
>
> [M]uch of [the Commission's report] can be characterized as social engineering designed to redistribute wealth, rather than bankruptcy reform. The [report] . . . ignores the external economic consequences of bankruptcy filings . . . . But the impact upon the general economy and non-bankrupt citizens cannot be denied. If the [report] does nothing to stem the flood of increasing bankruptcy petitions during prosperous times, then a cataclysm of filings, whose damage we cannot foresee, will ensue with the next recession.[430]

And in foreshadowing this future economic calamity if the consumer bankruptcy laws were not tightened, the dissenting report cited to none other than the repeatedly discredited Purdue University consumer credit study proselytizing that consumer bankruptcy filings cost each American family $400 each year.[431]

What happened next is well-known. Despite vigorous attempts by academicians and practitioners to sway Congress otherwise,[432] the creditor class and its intensive lobbying efforts successfully persuaded Congress to enact what would become the draconian 2005 amendments in BAPCPA,[433] reforms that have been characterized as the most significant alterations to the Bankruptcy

[430] WILLIAMS ET AL., NBRC FINAL REPORT, *supra* note 394, at 1116.

[431] *Id.* at 1116 n.121; *see also* Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 981 (2006) ("As the debate over the $400 'bankruptcy tax' illustrated, the credit industry uses data to advocate for their desired bankruptcy policies.").

[432] *See, e.g.*, Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 [EMORY] BANKR. DEV. J. 1, 5 (2001) [hereinafter Tabb, *The Death of Consumer Bankruptcy*] (claiming that the "Reform Bill would reshape radically the contours of the United States consumer bankruptcy laws in favor of financial institutions and to the detriment of needed individual debtors"). Practically every bankruptcy law scholar has criticized BAPCPA in one form or another. *See, e.g.*, Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 349 (2008) (referring to BAPCPA as a "defectively designed and poorly drafted mess"); Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U. L.J. 451, 451 ("My purpose is to talk about the 2005 Amendments and how things are going with the new provisions. But where do you start, with a bad law?").

[433] Charles Jordan Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 9 (2007) ("[T]he enactment of BAPCPA marked the successful culmination of over two score years of intense, fervent, and well-funded lobbying by the consumer credit industry."). For a very rich discussion of the legislative history to BAPCPA, see generally Jensen, *supra* note 418, at 484. That said, there were amendments to BAPCPA that may be viewed as beneficial to debtors, particularly the exclusions from property of the estate for contributions to educational retirement accounts and contributions to ERISA-qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans. *See* 11 U.S.C. § 541(b)(6), (7).

Code since 1978.[434] In concert with the howling from the creditor class, the grand purpose of BAPCPA was to curtail the perceived abuses of the consumer bankruptcy system committed by immoral and opportunistic well-off individuals and families who were unfairly taking advantage of the "kindness" and the "generosity" of creditors by turning to the bankruptcy process.[435] Indeed, some have charged that BAPCPA itself was premised upon the neoclassical rational actor model.[436] To effectuate this neoliberal ideological project, Congress made access to the consumer bankruptcy system more difficult, onerous, expensive, punitive, and paternalistic, if not attempting to outright close the doors to the bankruptcy courts for many struggling Americans.[437] These "necessary" changes were nonetheless adopted in the face of a twenty-five year trend showing the deteriorating state of consumer debtors' finances under neoliberal capitalism.[438]

Of all the changes to the consumer bankruptcy laws in 2005, the imposition of the means test represents "the Holy Grail sought by the consumer credit industry for over a third of a century."[439] Means testing was primarily premised upon the increased bankruptcy filings during the 1990s, attributed not to empirical data, but to the believed loss of stigma regarding bankruptcy.[440] The

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[434] Robert J. Landry, III, *Ten Years After Consumer Bankruptcy Reform in the United States: A Decade of Diminishing Hope and Fairness*, 65 CATH. U. L. REV. 693, 699 (2016).

[435] According to the House of Representatives' report accompanying BAPCPA, the avowed purpose of the bill was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. REP. NO. 109-31, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89; *see also* Clark, *supra* note 345, at 777 (arguing that the premise for BAPCPA assumed that "a massive number of relatively well-off persons file bankruptcy for convenience").

[436] Ondersma, *supra* note 132, at 291.

[437] *See, e.g.*, Stephen J. Spurr & Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy*, 87 AM. BANKR. L.J. 27, 28 (2013) (arguing the BAPCPA's sponsors intended to make it more difficult for consumer debtors to obtain bankruptcy relief, particularly under chapter 7). The scholarly treatment of the BAPCPA amendments is voluminous, so this part will only summarize the changes most detrimental to consumer debtors. For a detailed discussion of the 2005 consumer bankruptcy amendments, see generally Gary Neustadter, *2005: A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225 (2005); Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005).

[438] *Cf.* Robert M. Lawless, Angela K. Littwin, Katherine Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 373 (2008) (suggesting from data that consumer debtors in 2007 were much worse off financially than debtors in 1981, 1991, and 2001).

[439] Tabb, *The Death of Consumer Bankruptcy*, *supra* note 432, at 18.

[440] For example, as United States Representative George W. Gekas commented in the introduction to the bill that would ultimately morph into BAPCPA: "The so-called bankruptcy of convenience is a new

philosophical premise of the means test is to root out the group of high-income individuals and families who are glibly filing chapter 7 to keep assets while minimizing payments to their unsecured creditors, instead of responsibly and compliantly filing for chapter 13 and making payments over three to five years.[441] As is well-understood, the means test serves as a gatekeeping device for consumer debtors in chapter 7. According to a strictly-applied formula, if a debtor fails the means test and demonstrates some ability to repay creditors out of future income, then the debtor must either voluntarily convert the case to chapter 13 or have the bankruptcy court dismiss the case.[442] In this way, the means test in chapter 7 was intended to push more debtors into chapter 13.[443] Nevertheless, Congress incorporated a means test for both chapter 7 as well as chapter 13 debtors (at least for those above median family income thresholds).[444] The means test imposes a "bread and water" standard of living[445] on a debtor where any income exceeding the given minimal allowance alerts both trustees and creditors that the debtor is capable of paying back unsecured creditors. By "failing" the means test, a debtor "is forced 'to pay for' the transgression of acquiring debt in a society that thrives on debt accumulation."[446] Empirical

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phenomenon, borne out of the loss of stigma the word bankruptcy once, but no longer carrie[s]. It used to be a sense of responsibility, or perhaps more appropriately, a sense of disgrace and embarrassment that discouraged Americans from declaring bankruptcy." Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 5 (1998) [hereinafter Braucher, *Increasing Uniformity*] (citing statements made by Representative Gekas).

441 James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 868 (2006) (arguing that unsecured creditors "have the most to gain from an aggressive application of BAPCPA" and noting that because of this, credit card issuers "built the fire under Congress that passed the reform"). Commentators have also suggested that BAPCPA would indirectly drive some debtors' attorneys out of business. Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 330 (2005).

442 TABB, LAW OF BANKRUPTCY, *supra* note 202, at 48.

443 Braucher, *Increasing Uniformity*, *supra* note 440, at 11; Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 681 (2005).

444 *See* 11 U.S.C. §§ 707(b)(2), 1325(b)(3). For a detailed discussion of how the means test works, see Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31, 46–54. In 2019, Congress enacted the Honoring American Veterans in Extreme Need Act (the "Haven Act") and the National Guard and Reservists Debt Relief and Extension Act, which offer a potential escape for the application of the means test to these two groups. *See* Haven Act, Pub. L. No. 116-52, 133 Stat. 1076 (2019); National Guard and Reservists Debt Relief and Extension Act, Pub. L. No. 116-53, 133 Stat. 1078 (2019).

445 Linda E. Coco, *Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1, 39 (2012) [hereinafter Coco, *Debtor's Prison*].

446 *Id.*

studies subsequent to the BAPCPA amendments fail to show any actual abuse of the consumer bankruptcy system by individuals and families.[447] And it is beyond all comprehension to even think that the creditor class was ignorant of this in pushing for changes. The much more plausible explanation for the means test is that it serves as a delay mechanism in filing for bankruptcy relief—if only for a brief few weeks or months—where payments of compounded interest, default interest rates, and penalties and late fees would be expropriated from the incomes of struggling families and paid to lenders.[448]

In addition to the policing means test, BAPCPA intentionally buries and burdens debtors—and their attorneys—in providing paperwork to the bankruptcy trustee.[449] Debtors must now provide pay stubs for the sixty days prior to the bankruptcy filing;[450] submit a statement of monthly net income;[451] provide a statement of any reasonably anticipated *increases* in income or expenditures over the twelve month period following the petition date;[452] hand over tax returns for the three years prior to the bankruptcy case;[453] and receive a written notice describing the available services from credit counseling agencies together with the general purpose, benefits, and costs associated with chapter 7 and chapter 13. This last written notice also contains a warning for the consumer debtor that anyone who knowingly and fraudulently makes false oaths or conceals assets "shall be subject to fine, imprisonment, or both."[454] The failure

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[447] *See, e.g.*, Lawless et al., *supra* note 438, at 359–63 (suggesting from data that consumer debtors in 2007 were much worse off financially than debtors in 1981, 1991, and 2001).

[448] The principal proponent of this theory is Professor Ronald Mann. *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 379 ("I argue that empirical studies of the finances of bankruptcy filers show that credit card issuers could not have expected that the new law would return enough in increased bankruptcy payouts to justify the lobbying expenditures and campaign contributions that led to its enactment. Rather, I suggest, the most important effect will be to slow the time of inevitable filings by the deeply distressed, allowing issuers to earn more revenues from these individuals before they file."); *see also* Lawless et al., *supra* note 438, at 381 ("The increase in the length of time that people postpone filing for bankruptcy is consistent with creditor efforts to trap debtors longer in the sweat box, regardless of whether they eventually end up in bankruptcy.").

[449] Sommer, *supra* note 437, at 204–18 (addressing the increased workload upon attorneys and the enhanced disclosure requirements for debtors).

[450] 11 U.S.C. § 521(a)(1)(B)(iv).

[451] 11 U.S.C. § 521(a)(1)(B)(v).

[452] 11 U.S.C. § 521(a)(1)(B)(vi).

[453] 11 U.S.C. § 521(f)(2).

[454] 11 U.S.C. § 342 (b)(1).

to submit the required paperwork results in the swift, automatic dismissal of the bankruptcy case.[455]

Congress also believed that consumer debtors needed to be paternalistically educated about their finances. To this end, Congress added section 109(h) to require consumer debtors, as a condition precedent to entering the bankruptcy system, to undergo a pre-filing credit counseling course through an approved credit counseling agency within six months of filing.[456] In addition, sections 727(a)(11) and 1328(g)(1) require an individual chapter 7 or chapter 13 debtor to participate in a post-filing financial management course as a condition precedent to receiving the discharge.[457] The House report accompanying BAPCPA claimed that the education requirements were to serve as a protectionary mechanism for consumer debtors so that they would "make an informed choice about bankruptcy, its alternatives, and consequences."[458] The underlying congressional goal was evident: to deter individuals and families from filing for bankruptcy relief entirely or to keep debtors in a suspended state of animated debt repayment for just a little longer while debtors decided how best to deal with their deleterious financial problems.[459] With respect to the post-filing financial management course, Congress wanted debtors who utilized the bankruptcy system to learn effective financial management techniques to employ after the closing of their bankruptcy cases, such as utilizing a budget and using credit wisely.[460] My past empirical study on the educational requirements under BAPCPA demonstrates that while a small number of debtors find some benefit to the post-filing education course, most debtors report that the educational requirements in general are a "complete waste of time" and "a joke";[461] other scholars have made similar observations.[462]

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[455] 11 U.S.C. § 521(i)(1).

[456] 11 U.S.C. § 109(h).

[457] 11 U.S.C. §§ 727(a)(11), 1328(g)(1).

[458] H. REP. NO. 109-31, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 ("[BAPCPA] also includes various consumer protection reforms . . . . It requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences.").

[459] Sousa, *Bankruptcy Ticket*, *supra* note 227, at 398.

[460] *Id.*

[461] *Id.* at 449–56.

[462] *See* Richard L. Stehl, *The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 AM. BANKR. INST. L. REV. 134 (1999) (questioning whether imposed debtor education requirements will have any effect upon bankruptcy debtors); Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Credit Counseling and*

Several other major changes demonstrate the ways in which the creditor class—through the capitulation of Congress—made the consumer bankruptcy laws in 2005 more violent against individuals and families. In sum, BAPCPA significantly increased court filing fees[463] as well as attorney's fees for individuals and families seeking to enter the bankruptcy system,[464] and fees for participating in the mandatory educational requirements. BAPCPA also lengthened the time intervals between discharges. Prior to BAPCPA, a debtor was prohibited from receiving a discharge in a chapter 7 case if they had received a prior discharge during the preceding six years.[465] The amendments increased the time interval between chapter 7 discharges to once every eight years.[466] In the chapter 13 context, BAPCPA introduced a prohibition on receiving a discharge in a subsequent chapter 13 case if the debtor had received either a chapter 7 discharge during the preceding four-year period or a chapter 13 discharge in the preceding two years.[467] Congress amended section 523(a)(8) to make both governmental as well as private educational loans presumptively non-dischargeable.[468] Section 362 was also amended to police against serial filings for individual debtors (no analogous restrictions were newly placed upon corporate debtors, of course)[469] and in like fashion section 523(a)(2)(C) expanded the presumption of non-dischargeability for fraud through the use of

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Post-Petition Financial Management Education, 13 AM. BANKR. INST. L. REV. 549, 561–63 (2005) (questioning the design and goals for the credit educational requirements); Nathalie Martin & Ocean Tama y Sweet, *Mind Games: Rethinking BAPCPA's Debtor Education Provisions*, 31 S. ILL. U. L.J. 517, 519 (2006) (describing the pre-bankruptcy credit counseling course as serving "no useful function" and the post-filing financial management course as serving "no useful purpose").

463 Christian E. Weller et al., *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate*, 84 AM. BANKR. L.J. 327, 330 (2010) ("Prior to BAPCPA, a debtor paid a filing fee of $209 for a Chapter 7 bankruptcy and $194 for a Chapter 13 bankruptcy. In 2006, these fees increased to $299 for Chapter 7 and $274 for Chapter 13.").

464 Lupica, *supra* note 361, at 30 (finding that the national mean attorney's fee increased 30% for chapter 7 asset cases and 48% in chapter 7 no-asset cases; attorney's fees increased 66% for chapter 13 cases); *see also* Landry, *supra* note 434, at 706 (noting that attorney's fees in no-asset chapter 7 cases had increased 48% because of BAPCPA).

465 *See* 11 U.S.C. § 727(a)(8) (providing that the court shall grant the debtor a discharge unless "the debtor has been granted a discharge . . . in a case commenced within six years before the date of the filing of the petition").

466 *See id.* (stating that the court shall grant the debtor a discharge unless "the debtor has been granted a discharge in a case commenced within 8 years before the date of the filing of the petition").

467 *See* 11 U.S.C. § 1328(f).

468 *See* 11 U.S.C. § 523(a)(8).

469 *See* 11 U.S.C. § 362(c)(3), (4).

credit cards.[470] At the behest of lenders in the automobile finance industry, BAPCPA added the "hanging paragraph," preventing debtors from cramming down automobiles driven for personal use if secured by a purchase money security interest with the debt having been incurred within 910 days (two and a half years) before the petition date.[471] And finally, BAPCPA eliminated the "superdischarge" for chapter 13 debtors.[472]

V. DECONSTRUCTING THE BANKRUPTCY CODE THROUGH A MARXIST/FOUCAULDIAN FRAMEWORK

Neoliberal policies reestablished[473] the conditions of capital accumulation in the 1970s which has resulted in the transfer of wealth and resources to the financial elite.[474] In this way neoliberalism represents a Marxist class-based project through which the members of the capital class enrich themselves at the expense of the living standards of the poor, the working class, and the middle class.[475] In conjunction with the project of capital accumulation, neoliberal policies also have intentionally shrunken the social welfare state, caused the deindustrialization of segments of the labor force, and created economic insecurity for millions of Americans. In accomplishing these tasks, the financial elite "sought a transformative reorganization of all social relations, away from a society of discipline founded on the factory and the wage-relation toward a society of control organized around the stock market and the debt-relation."[476]

In realizing this transformation, neoliberalism moved away from commodity production and manufacturing as the primary methods of capital accumulation and replaced it with the practice of accumulation by dispossession, primarily

[470] *See* 11 U.S.C. § 523(a)(2)(C). This was accomplished by reducing the value of "luxury goods" from $1,225 to $500, reducing the value of cash advances from $1,225 to $750, and increasing the lookback window for these transactions—from sixty to ninety days for luxury goods, and from sixty to seventy days for cash advances. *Id.*

[471] *See* 11 U.S.C. § 1325(a).

[472] *See* 11 U.S.C. § 1328(a). Prior to BAPCPA, chapter 13 debtors could potentially discharge debts for past taxes, fraud, willful and malicious injuries, unscheduled claims, and misconduct while acting as a fiduciary.

[473] *See* Part III, *supra.*

[474] Neil Davidson, *Neoliberalism as a Class-Based Project*, *in* THE SAGE HANDBOOK OF NEOLIBERALISM 64 (Damien Cahill et al. eds. 2018).

[475] *Id.*

[476] Myers, *supra* note 26, at 337.

through a strategy of debt-based consumption.[477] As Justin Myers recounts, "[t]he massive financialization of daily life since the 1970s—home, education, medical care, clothing, food, car—signaled the movement of credit from the background to the foreground, from a supplement of wage-income to the primary mechanism maintaining accumulation."[478] The strategy of debt-based accumulation therefore is a social relationship undergirded by power and materializing as a form of social control where the creditor class has the debtor class under the former's metaphorical thumb. As I maintained earlier, living with debt is now a part of everyday existence. Not only does neoliberalism necessitate Americans going into steep states of indebtedness to obtain homes, educations, automobiles, and health care, but the strategy of inundating individuals and families with debt to obtain such things forces them to be perpetually working so as to only have their future incomes appropriated towards repaying the creditor class.[479] Indebtedness has now become the sole way for the middle and working classes to escape economic and social relegation in our current economy.[480] But through debt, there is exploitative power.[481] As Lazzarato has recounted for us, the achievements of neoliberalism "have plunged us into the existential condition of the indebted man, at once responsible and guilty for his particular fate."[482]

This everyday life of debt under neoliberalism creates a certain kind of subjectivity whereby individuals and families act as docile bodies who continually need credit and incur debt, too often "unaware of the networked relationships that have come to bind their borrowing performances with the

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[477] *Id.* at 343. The concept of accumulation by dispossession has been described as a project through which "wealth and power are accumulated by a few in the act of dispossessing—that is, stealing from—the population at large." JULIE A. WILSON, NEOLIBERALISM 69 (2018); *see also* DAVID HARVEY, MARX, CAPITAL, AND THE MADNESS OF ECONOMIC REASON 70–71 (2018) ("The economics of expropriation and accumulation by dispossession enters into the picture in disruptive ways, orchestrated through the debt and credit system, only to be heightened as the difficulties of conventional paths to capital accumulation mount, as they have since the 1970s.").

[478] Myers, *supra* note 26, at 344.

[479] LAZZARATO, THE INDEBTED MAN, *supra* note 50, at 46–47.

[480] COHEN, *supra* note 125, at 77.

[481] *See, e.g.*, MICHAEL HARDT & ANTONIO NEGRI, DECLARATION 12 (2012) ("The capitalist accumulates wealth primarily through rent, not profit—this rent most often takes a financial form and is guaranteed through financial instruments. This is where debt enters the picture, as a weapon to maintain and control the relationship of production and exploitation."); MONTGOMERIE, *supra* note 179, at 34 ("Debt is a social force acting upon people.").

[482] LAZZARATO, THE INDEBTED MAN, *supra* note 50, at 8–9.

capital markets."[483] And it is unlikely that we can escape this condition any time soon. As Rowbotham argues, even if families

> went on an economy drive, and tried to buy only what they could afford, paying off their mortgages and eating baked beans, apart from the fact that much industry would collapse, prices and incomes would have to adjust to the point at which sufficient people were forced back into debt to continue the money supply. This is the true meaning and day to day operation of debt finance. No matter how much they try, no matter how thrifty consumers might be, overall, they *must* go into debt. Sufficient debt must be undertaken. The money supply demands it.[484]

Given this, and contrary to the assertions made by neoliberalists and neoclassical economists, the state plays a pivotal role in creating the institutional conditions for the accumulation by dispossession in our debt-based economy. The state is both inseparable from, and subordinate to, the interests of capital.[485] Much like a host of other legislative enactments, the Bankruptcy Code exemplifies a part of the grander neoliberal agenda. The individuals and families who file for personal bankruptcy must emerge from the system as recovered "economic units" who will once again needfully return to the treadmill of debt-based consumption.[486] Understood in this way, it is easy to contextualize the consumer Bankruptcy Code as the handmaiden of neoliberal capitalism.

Other scholars have connected BAPCPA to financialization under neoliberal capitalism, arguing that BAPCPA marks "a transformation in bankruptcy law and policy that is representative of larger shifts in dominant economic and political models from 'embedded liberalism' to free market 'neoliberalism.'"[487]

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483 LANGLEY, *supra* note 45, at 186; *see also* Mahmud, *supra* note 91, at 486 ("Neoliberal rationalities procreated constructs of individual responsibility and human capital and facilitated [an] assemblage of subjects who were coaxed to engage the financialized economy as risk-taking entrepreneurs.").

484 ROWBOTHAM, *supra* note 21, at 72. Di Muzio and Robbins make a similar point: "An economy operating with debt-money, and, therefore, one that requires perpetual and exponential growth, requires also the creation of evermore [sic] debt. But more debt, in turn, requires more growth to produce the required interest or dividend, and so the cycle continues." DI MUZIO & ROBBINS, *supra* note 16, at 99.

485 LAZZARATO, GOVERNING BY DEBT, *supra* note 91, at 101 ("[With the rise of American neoliberalism,] [t]he process of integrating and subordinating the state to economic logic would accelerate. The state would completely assume its new genesis in the market, to which it would abandon entire spheres of its former sovereignty.").

486 Waller, *supra* note 429, at 873 ("The consumer must emerge from the bankruptcy process as a viable consumer in a credit-based system.").

487 Coco, *The Cultural Logics*, *supra* note 47, at 711 (2014); *see also* Serena Laws, *What Kind of Relief? Consumer Bankruptcy and Private Administration in the Neoliberal American Welfare State*, 42 NEW POL. SCI.

I argue that the neoliberal transformation of the consumer bankruptcy laws occurred almost thirty years earlier when Congress promulgated the Bankruptcy Reform Act of 1978. Consequently, the entire modern era of consumer bankruptcy laws in the United States has played to the interests of the creditor class. In making this assertion, I am most aware that chapter 7 does indeed provide debt relief to millions of people and a good number of individuals and families complete their chapter 13 plans and thereby save their homes and automobiles from the reach of creditors. But by taking a step back, we need to question what this bankruptcy process is truly about: it is an institutionalized form of debt-based financial expropriation and social control.

The law is a technology of power which provides creditors with mechanisms to extract repayment from debtors. Lawsuits, judgment liens, wage garnishments, repossessing personal property, and foreclosing on homes are the violent expropriation of assets and future earnings through coercive means. In Foucauldian terms, creditors rely upon these tools as micro-physics of power which causes individuals and families to adaptively engage in all sorts of unintended behaviors to live life with these pressures, such as juggling debts from month to month,[488] ignoring debt payments entirely,[489] foregoing needed medical treatment,[490] going without food,[491] pawning property,[492] procuring second jobs, cancelling costly health insurance,[493] avoiding picking up the phone, and allowing unopened mail to pile up. Having had the neoliberal ideology of personal responsibility and accountability in one's financial affairs ingrained in them, as well as the existing cultural stigma surrounding bankruptcy, many families do not turn to bankruptcy as an option at all.[494] Consequently, the moralizing economic discourse peddled by neoliberal ideology serves its intended purpose as a form of social control by keeping many

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333, 339 (2020) (arguing that the consumer bankruptcy system "fits squarely in the larger neoliberal policy environment"); Soederberg, *US Debtfare State*, *supra* note 164, at 506 (arguing that BAPCPA is an expression of the debtfare state and cannibalistic capitalism).

488 Laura M. Tach & Sara Sternberg Greene, *"Robbing Peter to Pay Paul": Economic and Cultural Explanations for How Lower-Income Families Manage Debt*, 61 SOC. FORCES 1, 12 (2014).

489 *Id.* at 13.

490 Lucie Kalousova & Sarah A. Burgard, *Debt and Foregone Medical Care*, 54 J. HEALTH & SOC. BEHAV. 204, 207 (2013).

491 Foohey et al., *Sweatbox*, *supra* note 197, at 221.

492 *Id.* at 242.

493 Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 38 (1998).

494 Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 298, 290 (2010).

people from filing for bankruptcy who could otherwise benefit from doing so.[495] Further, and contrary to the misleading proclamations of the creditor class, individuals and families do not resort to the bankruptcy process as a strategy of first resort, but instead struggle with their debts for months or years before ultimately filing for bankruptcy protection as the last form of relief available.[496]

As I demonstrated, the modern Bankruptcy Code is largely undergirded by the neoliberal rhetoric of personal responsibility, where the individuals and families who do end up in the system are blamed for their financial failings and held accountable by the system in myriad ways that advance the interests of the creditor class. When they do file for bankruptcy protection, debtors are immediately confronted by the disciplinary power of the Bankruptcy Code, and it is both prior to and during this process when our consumer bankruptcy laws embody a tiny theater of punishment where debtors are observed, normalized, and examined as theoretically conceptualized by Foucault.

Before access to bankruptcy can even be gained, however, debtors face barriers of access, most prominently in the form of high attorney's fees and court filing fees.[497] The sticker shock for entry into the bankruptcy system often results in debtors ironically needing to save money to declare themselves bankrupt in the economic game of financial life.[498] During this time, some will continue paying late fees or compounded interest if for no other reason than to find some emotional and psychological respite from the tormenting practices of their creditors.[499] Once the bankruptcy case is commenced, all debtors must sit for a section 341 examination[500] which enables a trustee to investigate the debtor's financial circumstances, and perhaps more importantly, to subjectively test the

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[495] SULLIVAN, WARREN & WESTBROOK, AS WE FORGIVE OUR DEBTORS, *supra* note 132, at 337 ("Whatever changes may have occurred in moral values, we do not doubt that moral conviction continues to play an important part in keeping many people out of bankruptcy. Some shared moral conviction is essential to the functioning of any society and certainly to systems of borrowing and lending.").

[496] Foohey et al., *Sweatbox*, *supra* note 197, at 221; *see also* Mann & Porter, *supra* note 494, at 318 ("Most bankruptcies occur only after consumers have endured a lengthy period of collection pressure and finally come to a realization of the dire state of their financial affairs.").

[497] Coco, *Debtor's Prison*, *supra* note 445, at 8 (noting that the barriers of increased fees often preclude individuals from accessing the bankruptcy system).

[498] Mann & Porter, *supra* note 494, at 292 (noting that the primary factor affecting the date on which people file for bankruptcy "is their ability to save up the money to pay their attorneys and filing fees").

[499] *See id.* at 315–16 (describing the emotional toll debtors undergo in dealing with their creditors prior to bankruptcy).

[500] 11 U.S.C. § 341.

debtor's "goodness" as a person seeking shelter through the bankruptcy process.[501] While these section 341 meetings are perfunctory and swift in practice, the system begins to induce compliance and subjugation by oftentimes inducing immense anxiety and fear into the minds of debtors. The "hierarchical observation" of debtors occurs throughout the entire bankruptcy process as the pre-bankruptcy behaviors of debtors are scrutinized and policed through various statutory techniques of power such as: the burdensome section 521 reporting requirements; the section 523(a)(2) non-dischargeability for certain credit card usage; the section 707(b)(3) abuse standard[502] for dismissing cases if the "totality of the circumstances" convinces a judge that the debtor before them does not merit bankruptcy relief; and of course the section 707(b)(2) means test, aimed at capturing abusive debtors and forcing them into exploitative chapter 13 plans.

The relational form of Foucauldian disciplinary power continues during the bankruptcy process through the "normalizing judgment" directed at correcting debtors behaviorally and training them in the desired arts of becoming a rationally acting, continually productive member of the debt-based economy who can responsibly borrow, but this time repay their debts according to schedule with a crippling rate of compounded interest. Chapter 13 plans are principally aimed at reaping any "extra" income from a debtor's budget to further line the pockets of the creditor class while at the same time forcing individuals and families into a responsibilized financial existence through living a spartan lifestyle for three to five years, which is often completely unrealistic and detrimental to the well-being of debtors and their families, as previous empirical studies have demonstrated. Further, the paternalistic and largely unhelpful educational requirements created by BAPCPA advances the financial interests of the creditor class. First, on the front end, by playing to the neoliberal discourse of responsibility in one's financial affairs and signaling to debtors that they should explore debt management plans as a preferable alternative to bankruptcy, which is more likely to lead to creditor losses through the bankruptcy discharge. Any debt management plan that a debtor enters into in lieu of filing for bankruptcy protection is a victory for the creditor class.

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[501] *See* Coco, *Disciplining the Financial Failure*, *supra* note 47, at 129 (arguing that the § 341 meeting is a Foucauldian disciplinary process).

[502] 11 U.S.C. § 707(b)(3).

The pre-filing credit class and the trappings of the means test are manipulations made at the behest of the creditor class to continue exploiting individuals and families so as to maximize returns. Second, the post-filing credit management course is yet another opportunity for creditors to inculcate financial responsibility through the use of future budgets and teaching debtors to understand "wants versus needs." What is not discussed, of course, is why debtors will likely need to rely upon debt in the future to maintain an existence within the middle class. Most destructively, the non-dischargeability of both private and governmental student loans and the inability to cramdown newly purchased automobiles serves the creditor class in a fundamental way: it maintains income streams on securitized assets to benefit the investment portfolios of the creditor class and financial elite.[503] Particularly with respect to student loans, their non-dischargeability causes millions of individuals to be reduced to a form of debt peonage, where their existences are largely devoted to repaying their student loans while they are financially punished for deciding to "maximize" their human capital by educating themselves in the hopes of finding financial security and a decent wage.[504]

The relationship between creditor and debtor is one of power and subjectivity. Debtors are forced into a mode of existence which is constraining and debilitating while they attempt to repay their financial obligations. And though the consumer bankruptcy system offers debtors a refuge from unmanageable debt, in its current form we must still critically examine the overarching purpose for its existence. From the Bankruptcy Reform Act of 1978 through BAPCPA, we have witnessed a gradual limitation on the dischargeability of consumer debts (most problematically student loans); a paternalistic attitude towards individual debtors; punitive measures seeking to deter entry into the system and then to police against any perceived abuse; a symbolic criminalizing of consumer bankruptcy; processes that regulate debt repayment and advance the interests of the creditor class; and an economic morality that shames debtors for their overindebtedness. The current chapter 13

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503 *See generally* Susanne Soederberg, *Student Loans, Debtfare and the Commodification of Debt: The Politics of Securitization and the Displacement of Risk*, 40 CRITICAL SOCIO. 689 (2014) (describing the centrality of student loan debt in the neoliberal financialized economy).

504 Linda E. Coco, *Mortgaging Human Potential: Student Indebtedness and the Practices of the Neoliberal State*, 42 SW. L. REV. 565, 566 (2013) ("Neoliberal discourse persuades state and federal governments to disinvest in institutions of higher education. The benefits of education become calculated on individual economic terms. Students are told to treat education as an investment and the degree as a commodity.").

process very often results in failure, forcing debtors into a liquidation or, worse, casting them out into the non-bankruptcy wilderness, where they will receive no discharge and no legal protections from their ravenous creditors. Regarding chapter 7, empirical studies demonstrate that consumer debtors often do not experience the lauded fresh start in economic reality,[505] only possibly financially catching up to their non-bankruptcy peers after many years—or more than a decade—of effort.[506] Unless debtors significantly increase income or decrease expenses, they will likely find themselves back in a debt trap shortly after the bankruptcy process ends.[507] While some debtors decide not to enter into new credit relationships in the immediate aftermath of their bankruptcy cases,[508] over time I hypothesize that many, perhaps most, will needfully return to utilizing credit and incurring debt, whether they voluntarily wish to do so or not. Moreover, filing for bankruptcy may additionally result in cumulative disadvantages in both labor and credit markets, resulting in reproductions in inequality over time.[509]

So, what is the point of consumer bankruptcy laws from the perspective of the creditor class and the financial elite under neoliberal capitalism? Permitting the discharge of routine unsecured debt is not a benevolent act bestowed upon struggling individuals and families. Rather, it is a class-based institutionalized process that enables individuals and families to emerge from the system responsibilized and capable of turning once again to our debt-based form of neoliberal capitalism. Seen from this perspective, the modern consumer bankruptcy system is a statute advancing the interests of the creditor class and a mechanism of socially controlling the lower and middles classes by imposing discipline through technologies of legal power and inculcating a spirit of self-

505 *See, e.g.*, Porter & Thorne, *supra* note 213, at 84.

506 Zagorsky & Lupica, *supra* note 213, at 314 (finding that while consumer bankruptcy debtors may eventually experience the "fresh start" promised by the Bankruptcy Code, it takes "many, many years to restore financial well-being").

507 Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1089 (2004) ("[I]f the underlying cause of bankruptcy was too little income to cover current expenses, bankruptcy alone will not get the debtor out of financial trouble.").

508 Katherine Porter, *Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors*, 18 AM. BANKR. INST. L. REV. 1, 9 (2010).

509 Michelle Maroto, *The Scarring Effects of Bankruptcy: Cumulative Disadvantage Across Credit and Labor Markets*, 91 SOC. FORCES 99, 110 (2012) ("As expected, bankruptcy negatively affected respondents' later labor market statuses, net of their previous earnings and employment situations. On average, individuals who declared bankruptcy faced earnings penalties and spent less time working than persons who had never declared bankruptcy in that time period.").

regulation where debtors can manage and timely repay future debts—like the good, productive economic citizens the that neoliberal financialized state intends them and needs them to be. Thus, the modern Bankruptcy Code reestablishes the conditions of capital accumulation and financial expropriation for the creditor class. And when debtors do exit the bankruptcy system with their purported fresh starts, the creditor class waits eagerly with open arms to offer new opportunities for them to receive both unsecured and secured credit,[510] and to ultimately experience the weight of indebtedness once again.

CONCLUSION

A commentator on bankruptcy law remarked in 1941 that a societal "attitude toward insolvency can be determined [by] the dominant economic policy of a nation."[511] In this fashion, from the very outset of rethinking consumer bankruptcy laws in the late 1960s, reforms to the modern Bankruptcy Code have historically been a highly politicized process,[512] infested with creditor class interests, influenced by morally suspect and judgmental normative principles, and oftentimes backed by the influence of the "science" of neoclassical economics.[513] For decades the creditor class pressured Congress to enact consumer bankruptcy laws favorable to their interests, resulting in the disciplining of debtors in the tiny theater of punishment that is our national bankruptcy system. We should be honest with ourselves in this regard: the ruling elite have won the economic war and class struggle. We live in an era which Mark Fisher describes as "capitalist realism," a sense that not only is neoliberal

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[510] Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1373 (2008) (finding that "creditors repeatedly solicit debtors to borrow after bankruptcy").

[511] Ferdinand Fairfax Stone, *A Primer on Bankruptcy*, 16 TUL. L. REV. 339, 341 (1941).

[512] Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 267 (1991) (acknowledging that politics "pervades the entire legislative process, like a persistent buzzing that frustrates ordered thought").

[513] As Robert Skidelsky argues:

> Economists suffer from "physics envy" because they believe that their material —human beings— being rooted in nature, are only more complicated versions of natural objects. Like the technologists, they believe that with enough data and computing power they can "crack the code" of human behavior. This quest—and the envy which inspires it—is misplaced. It drives economists further away from the "real" world of humans whose behavior they are trying to understand.

SKIDELSKY, *supra* note 125, at 6.

capitalism "the only viable political and economic system, but also that it is now impossible even to *imagine* a coherent alternative to it."[514]

We will hopefully see neoliberalism kicked to the dustbin of economic history. But until that happens, it is now time to end the preposterous moralizing discourse about individuals and families short-changing their "benevolent" creditors and to enable ordinary Americans to have their turn at recieving *both* a fresh start and a head start when they needfully file for bankruptcy relief. Class power must be ripped from the steely hands of financial elites and returned to the 99%, who are the ones driving our economy through the continual accumulation of debt.[515] In the face of a skeletal social welfare state where major financial risks are cast upon individuals and families, perhaps the only place to seek refuge from economic expropriation—other than the political voting process—is to discharge debts more freely through the declaration of bankruptcy.

Legal scholars have for approximately four decades argued for pro-debtor policy reforms to the Bankruptcy Code, particularly after BAPCPA. By and large, these voices have largely fallen on deaf congressional ears. And given our current polarized political climate, I do not believe reforms are forthcoming in the future. Nevertheless, if and when that time comes and a new Bankruptcy Review Commission is created to examine our national bankruptcy laws, I would join in the past chorus of scholars in advocating for the following pro-debtor consumer bankruptcy reforms as a good place to start: abolishing the means test for both chapter 7 and chapter 13; stripping the ability of a single unsecured creditor to slit a debtor's financial throat by necessitating all disposable income be committed to repaying debts long written off or sold in the profitable secondary market; dispensing with the paternalizing and unhelpful pre-filing credit counseling course as an unnecessary hurdle and expense for individuals on the cusp of bankruptcy; repealing section 523(a)(8) of the Bankruptcy Code; creating and mandating a schedule of generous federal exemptions with no "opt-out" possibility; lowering the costs of filing for

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514 FISHER, *supra* note 115, at 2 (emphasis in original).

515 Johnna Montgomerie has called for the abolishment of household debts to "create something new: an economy where the risks, rewards, wealth and harms are evenly shared between lenders and borrowers." MONTGOMERIE, *supra* note 179, at 14–15; *see also* TIM DI MUZIO, THE 1% AND THE REST OF US: A POLITICAL ECONOMY OF DOMINANT OWNERSHIP 205–19 (2015) (setting forth ten agenda items for wresting economic control from the financial elite).

bankruptcy and making any outstanding chapter 7 attorney's fees payable even after the case is commenced; making the chapter 7 process streamlined and administrative in nature (and easier to navigate pro se);[516] providing for the bifurcation of all automobile loans; turning towards realistic budgets for chapter 13 plans that afford individuals and families with some space to account for unexpected future financial events; reducing the time periods between chapter 7 discharges; and allowing for the stripdown of second mortgages on principal residences. Making certain that specific consumer debtors are not truly abusing the bankruptcy laws can still be accomplished through the section 341 examination process and by sections 707(b)(3) and 727.[517]

In an idyllic world, finance capitalism would be redirected towards the benefit of people and the environment, rather than solely focused on the extraction of profit from both. Political passivity among the population enables the state to promote private accumulation through legislative enactments, administrative policies, and judicial rulings. In considering our foreseeable future where the national bankruptcy laws remain unchanged and beholden to the creditor class, then perhaps more drastic measures are needed to redraw class lines—such as debt refusal,[518] abolishing household debts in a measured way,[519] and making interest-bearing capital a common good subject to democratic participation.[520] Whether through amending the consumer bankruptcy laws or sterilizing the power of finance capital more generally, one thing is certain: indebted subjects under neoliberalism must cast off their chains, for "[we] have a world to win."[521]

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516 Calls for simplifying the consumer bankruptcy process or changing it to a predominantly administrative process have been made for more than fifty years. *See, e.g.*, STANLEY & GIRTH, *supra* note 232, at 4 (suggesting that all consumer bankruptcy cases should "be handled by a newly established administrative agency"); Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1298 (2005) (arguing for simplifying consumer bankruptcy by having a "single portal").

517 11 U.S.C. §§ 707(b)(3), 727.

518 *See generally* ROSS, *supra* note 299 (arguing for a mass debt refusal and the cancellation of household debts).

519 MONTGOMERIE, *supra* note 179, at 9–15 (advocating for a comprehensive package of debt cancellation for individuals and households to provide needed relief).

520 HARDT & NEGRI, *supra* note 481, at 64 (2012) (arguing that "money should be banned as an instrument of accumulation. Money that creates money is the ancient definition of usury, and today such speculative financial practices should be equally reviled").

521 MARX & ENGELS, *supra* note 1, at 258 ("The proletarians have nothing to lose but their chains. They have a world to win.").