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Emory Bankruptcy Developments Journal

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Volume 39 | Issue 2

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2023

## Reconceptualizing Bankruptcy Education Requirements for Incarcerated Debtors

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### Recommended Citation

Sydney Calas, *Reconceptualizing Bankruptcy Education Requirements for Incarcerated Debtors*, 39 EMORY BANKR. DEV. J. 329 (2023).

Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol39/iss2/3>

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## **RECONCEPTUALIZING BANKRUPTCY EDUCATION REQUIREMENTS FOR INCARCERATED DEBTORS**

### **ABSTRACT**

*In the eighteen years since Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), bankruptcy scholars and professionals have launched countless critiques against two of the Act's more drastic amendments: (1) mandatory pre-filing credit counseling and (2) a mandatory post-filing financial management course. Without completing the pre-filing requirement, one cannot qualify as a debtor under the Code and is thus barred from filing for bankruptcy. Without completing the post-filing requirement, one cannot receive a discharge. Notwithstanding the volume and breadth of valid criticisms, the specific harm of BAPCPA's education requirements has been largely ignored for one population: incarcerated debtors. People in prison have debt; they enter prison with debt, they incur debt while in prison, and they leave prison with debt, along with a whole slew of financial hurdles to overcome.*

*As they currently stand, BAPCPA's education requirements present an additional, empty hurdle that incarcerated debtors must overcome. A hurdle, because incarcerated persons face liberty constraints that make it exceptionally difficult to obtain the required courses. Empty, because the one-size-fits-all courses are ineffective as educational programs. Bankruptcy education is not a hopeless endeavor, but the system is in need of an overhaul.*

*This Comment proposes a two-pronged solution. First, the education courses should be made more accessible through implementation of in-prison programming. Second, the requirements for program approval should be altered to incorporate the educational theory of differentiation and impose specific guidelines to address the unique needs of incarcerated debtors.*

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## INTRODUCTION

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).<sup>1</sup> BAPCPA contained significant amendments to the Bankruptcy Code,<sup>2</sup> and constituted the most drastic alterations to individual consumer bankruptcy procedure since the passage of the 1978 Bankruptcy Code.<sup>3</sup> Among the changes were two new requirements for prospective debtors: the completion of (1) pre-filing credit counseling and (2) a post-petition financial management course.<sup>4</sup> First, the Code mandates that any individual debtor seeking to file for bankruptcy obtain budget and credit counseling from an

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<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

<sup>2</sup> *Id.*

<sup>3</sup> Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31.

<sup>4</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, sec. 106, 119 Stat. at 37–38 (codified as amended at 11 U.S.C. §§ 109(h), 727(a)(11), 1328(g)(1)).

approved nonprofit credit counseling agency within the 180-day period preceding a bankruptcy filing.<sup>5</sup> Subject to narrow exceptions,<sup>6</sup> an individual who does not meet the credit counseling requirement may not be a debtor,<sup>7</sup> and is thus barred from filing.<sup>8</sup> Second, the Code provides that the court shall not grant a discharge to bankruptcy debtors who fail to complete an instructional course concerning personal financial management after filing a petition under chapter 7 or chapter 13.<sup>9</sup> Therefore, even individuals who are able to meet the pre-filing requirements will not achieve the fundamental goal of consumer bankruptcy—the discharge—unless, subject to narrow exceptions,<sup>10</sup> they complete an approved post-filing financial management course.

BAPCPA was intended “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.”<sup>11</sup> The education requirements were intended to help individual debtors “make an informed choice about bankruptcy, its alternatives, and consequences” by obtaining pre-filing counseling and “avoid future financial distress” by participating in post-filing financial management courses.<sup>12</sup> Despite such hopeful intentions, bankruptcy scholars, practitioners, and judges alike agree the education requirements present more of a burden than a benefit to bankruptcy filers.<sup>13</sup>

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<sup>5</sup> 11 U.S.C. § 109(h).

<sup>6</sup> Exceptions apply where (1) approved counseling agencies are not reasonably able to provide adequate services, (2) exigent circumstances merit temporary waiver, and (3) incapacity, disability, or active military duty merit permanent waiver. 11 U.S.C. § 109(h)(2)–(4).

<sup>7</sup> 11 U.S.C. § 109(h)(1) (specifying that “an individual may not be a debtor under this title unless” that individual has satisfied the pre-filing credit counseling requirement, subject to certain exceptions).

<sup>8</sup> 11 U.S.C. § 301(a) (“A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter *by an entity that may be a debtor* under such chapter.” (emphasis added)).

<sup>9</sup> 11 U.S.C. § 727(a)(11) (“The court *shall grant the debtor a discharge, unless . . .* after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111 . . . .” (emphasis added)); 11 U.S.C. § 1328(g)(1) (“*The court shall not grant a discharge under this section to a debtor unless* after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.” (emphasis added)).

<sup>10</sup> 11 U.S.C. §§ 727(a)(11), 1328(g)(2).

<sup>11</sup> H.R. REP. NO. 109-31, pt. I, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89.

<sup>12</sup> *Id.* at 2–3.

<sup>13</sup> See Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 194, 196–97 (2016) (“[D]ata also support the proposition that the real harm BAPCPA caused was through the procedural barriers it created, especially the additional work it imposed on consumer bankruptcy attorneys and clients . . . . Credit counseling and the post-filing financial management course were . . . dominant procedural barriers . . . .”); 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, 213 (2005) (“Obviously, the requirement to obtain such counseling is yet another barrier, financial and otherwise, to bankruptcy relief.”); DEANNE LOONIN ET AL., NAT’L CONSUMER L. CTR., NEW BURDENS BUT FEW BENEFITS: AN EXAMINATION OF THE BANKRUPTCY

Notwithstanding the volume and breadth of valid criticisms of BAPCPA's education requirements, the specific harm of these education requirements has been largely ignored for one population: incarcerated debtors. The Code does not exclude incarcerated individuals from filing for bankruptcy, and there is no evidence that Congress intended any such exclusion.<sup>14</sup> Indeed, both before and since BAPCPA's enactment, incarcerated debtors have accessed the bankruptcy system.<sup>15</sup> The vast majority of incarcerated debtors are likely to file under chapter 7, largely due to a lack of the regular income required for chapter 13 bankruptcy.<sup>16</sup> This is especially true considering the disproportionate representation of low-income persons within the incarcerated population.<sup>17</sup> And though it may be argued that relatively few incarcerated debtors file for bankruptcy each year,<sup>18</sup> absence of evidence does not imply evidence of absence. People in prison have debt; they enter prison with debt, they incur debt while in prison, and they leave prison with debt.<sup>19</sup> Bankruptcy provides a vehicle for individuals to secure a discharge of their debts, enabling the "fresh start" so

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COUNSELING AND EDUCATION REQUIREMENTS IN MASSACHUSETTS 1 (2007); *In re Elmendorf*, 345 B.R. 486, 490 (Bankr. S.D.N.Y. 2006) (describing the pre-petition counseling requirement as "the most outrageous fleecing of . . . debtors in this Court's memory [and] a perfunctory exercise with little or no substance . . .").

<sup>14</sup> See 11 U.S.C. § 109(e) (outlining the requirements for who may be a debtor but making no mention of incarcerated status as a factor).

<sup>15</sup> See, e.g., *In re Michael*, 285 B.R. 553 (Bankr. S.D. Ga. 2002); *In re Looper*, 334 B.R. 596 (Bankr. E.D. Tenn. 2005) (applying the prison mailbox rule to incarcerated debtor who filed prior to BAPCPA's enactment but whose petition reached the clerk's office after BAPCPA's enactment); *In re Solomon*, 436 B.R. 451 (Bankr. W.D. Mich. 2010).

<sup>16</sup> See 11 U.S.C. § 109(e) ("Only an individual with regular income . . . may be a debtor under chapter 13 of this title."). The average hourly wage for prisoners working non-industry prison jobs ranges from \$0.14 to \$0.63; for prisoners working state-sponsored prison jobs, the average hourly wages are slightly higher, ranging from \$0.33 to \$1.41; in Georgia and two other states, prisoners may not earn any wages for in-prison work. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

<sup>17</sup> See John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, 44 HUMAN RIGHTS, no. 3, 2019, at 6.

<sup>18</sup> This argument could be implied from the relatively minimal case law and academic material covering issues regarding incarcerated debtors.

<sup>19</sup> *Why Do People Leave Prison with So Much Debt?*, GA. CTR. FOR OPPORTUNITY (Apr. 15, 2015), <https://georgiaopportunity.org/what-causes-offenders-to-have-debt/> ("It is common for people who are incarcerated to carry some level of consumer debt into prison . . . from outstanding mortgages, car loans, school loans, or credit cards. Missed payments . . . result in back interest, fees, and fines accumulating over the course of a person's incarceration. The end result can be the offender accumulating an unmanageable amount of debt by the time he or she is released . . ."); see Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191 (2010) (noting multiple studies surveying prison releasees which demonstrate that incarcerated persons anticipate and experience difficulties with debt); Kevin Bliss, *Repairing Credit After Release from Prison*, PRISON LEGAL NEWS 51 (May 1, 2021), <https://www.prisonlegalnews.org/news/2021/may/1/repairing-credit-after-release-prison/> ("Time spent in prison cannot directly affect your credit score, but it can indirectly . . . [C]redit ratings are maintained by constant and consistent use . . . [but, w]hile in prison, this is simply not possible.").

essential to the bankruptcy system's central purpose.<sup>20</sup> Logically, then, one would expect many bankruptcy filings from incarcerated persons in debt. But issues of access—including the barriers presented by the education requirements—may help explain why more incarcerated persons are not filing for bankruptcy.

Though the Code does not explicitly bar incarcerated individuals from filing, it presents heightened barriers to their participation in the bankruptcy process. Fulfilling the copious requirements imposed by the code the Code presents increased difficulties for the incarcerated debtor, whose personal autonomy is vastly limited by his incarcerated status.<sup>21</sup> The education requirements are no exception. From the confines of prison, the incarcerated debtor can only complete credit counseling and financial management courses over the telephone or internet.<sup>22</sup> Prison policies across jurisdictions severely limit prisoners' telephone and internet usage.<sup>23</sup> Even where prisoners are permitted to use telephones and the internet, such usage can be prohibitively costly.<sup>24</sup> Despite perfunctory attempts by the Code's drafters to increase accessibility for debtors in general—by making credit counseling and financial management courses available via telephone and internet<sup>25</sup> and by requiring that services be provided

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<sup>20</sup> *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) (“The federal system of bankruptcy is designed . . . to aid the unfortunate debtor by giving him a fresh start in life, free from debts.”); *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (“[T]o [enable the fresh start], the Bankruptcy Code contains broad provisions for the discharge of debts.”).

<sup>21</sup> See Laura B. Bartell, *From Debtors' Prisons to Prisoner Debtors: Credit Counseling for the Incarcerated*, 24 EMORY BANKR. DEV. J. 15, 15 (2008) (“In some cases, prisoners have been completely denied access to bankruptcy, despite the absence of any indication that Congress intended such a result.”); Lewandoski, *supra* note 19, at 201–02 (noting that the Code “does not permit courts to waive the debtor’s initial [section 341] meeting with the trustee and creditors, although some courts will permit a telephone appearance or an appearance by a representative of the debtor,” and that “not all courts consider incarceration an excuse for missing deadlines, failing to file motions properly, or similar errors”).

<sup>22</sup> 11 U.S.C. §§ 109(h)(1), 111(d)(1)(C) (allowing for credit counseling and financial management instructional courses over the phone or via the internet).

<sup>23</sup> See discussion *infra* Section I.C.1.

<sup>24</sup> See Pete Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL’Y INITIATIVE (Feb. 11, 2019), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html) (“At a time when the cost of a typical phone call is approaching zero, people behind bars in the U.S. are often forced to pay astronomical rates to call their loved ones or lawyers.”); Clint Smith, *While Prisoners Struggle to Afford Calls to Their Families, States Are Making a Profit. This Must Stop Now*, TIME (May 24, 2019), <https://time.com/5595475/prison-phone-calls-connecticut-law/>.

<sup>25</sup> 11 U.S.C. § 109(h) (providing that credit counseling may be received “by telephone or on the Internet”); 11 U.S.C. § 111(d)(1)(C) (providing that “such facilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective”).

regardless of ability to pay<sup>26</sup>—there is zero sensitivity in the statutory framework to prisoners in need of bankruptcy relief.<sup>27</sup>

This Comment asserts that, as applied to the incarcerated debtor population, the education requirements set forth in BAPCPA are ineffective and thus create hollow barriers to entry into the bankruptcy system, such that the existing framework governing these requirements should be realigned to better achieve BAPCPA's purported goals. Accordingly, this Comment proposes a two-fold path towards realignment: the U.S. Trustee Program, the federal agency tasked with enforcement powers in the bankruptcy system,<sup>28</sup> should leverage its broad, delegated authority to both (1) require education programs be made accessible to incarcerated debtors through the implementation of in-prison programming and (2) overhaul the current requirements for program approval to reflect current educational pedagogy and impose specific guidelines to address the needs of incarcerated debtors. Through these changes, the overall efficacy of the education programs for incarcerated debtors could be improved and BAPCPA's educational requirements could be realigned to better achieve the Act's original aims.

This Comment does not assert that debtor education is an unworthy objective, not for the debtor population at large and not for the incarcerated debtor population. Rather, this Comment asserts that, in the eighteen years since BAPCPA was passed, the education requirements have not achieved their objective, and thus must be reoriented towards this compelling goal.

First, this Comment explores the relevant portions of the Code governing the education requirements. Then, it reviews the legislative history of BAPCPA's education requirements and how the requirements have diverged significantly from the purpose Congress intended, resulting in ineffective, burdensome provisions. This Comment then outlines the specific harm the education requirements impose on the incarcerated debtor population. Finally, this

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<sup>26</sup> 11 U.S.C. § 111(c)(2)(B) (“To be approved by the United States trustee (or the bankruptcy administrator, if any), a nonprofit budget and credit counseling agency shall, at a minimum[,] . . . if a fee is charged for counseling services, charge a reasonable fee, and provide services without regard to ability to pay the fee.”); 11 U.S.C. § 111(d)(1)(E) (“[T]he [instructional course concerning financial management] shall[,] . . . if a fee is charged for the instructional course, charge a reasonable fee, and provide services without regard to ability to pay the fee.”).

<sup>27</sup> There is no explicit mention of prisoners anywhere in the Code.

<sup>28</sup> In Alabama and North Carolina, where the U.S. Trustee Program does not operate, the Bankruptcy Administrator Program has parallel enforcement authority. Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 394–97 (2012).

Comment proposes one potential solution to rectify the issues the education requirements, as they currently stand, present for incarcerated debtors.

## I. BACKGROUND

### A. *Statutory Framework*

The education requirements present two separate statutory issues for an incarcerated debtor filing for bankruptcy: (1) qualifying as a “debtor” who is eligible to file a bankruptcy petition, and (2) meeting the necessary requirements to receive a discharge of debts. Accordingly, the Code sections governing these issues require close reading.

#### 1. *The Pre-Filing Credit Counseling Requirement*

A voluntary bankruptcy case is commenced “by the filing with the bankruptcy court of a petition . . . by an entity that may be a debtor.”<sup>29</sup> In order to qualify as a debtor, an individual must satisfy certain requirements.<sup>30</sup> The pre-filing requirement mandates that potential debtors obtain counseling from a nonprofit budget and credit counseling agency within the 180-day period preceding a bankruptcy filing.<sup>31</sup> If an individual fails to obtain counseling (whether in person or virtually by telephone or internet), and does not fall within one of three exceptions, that individual will not qualify as a “debtor” and be barred from obtaining bankruptcy relief.<sup>32</sup> Further, if a court dismisses the case for failure to meet the pre-filing credit counseling requirement, and the debtor subsequently obtains counseling and returns to court, the returning debtor faces a presumption of bad faith. That presumption guts the automatic stay—a self-executing injunction automatically imposed at the time of filing that prevents creditors from collecting or contacting the debtor<sup>33</sup>—by providing that it will

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<sup>29</sup> 11 U.S.C. § 301(a).

<sup>30</sup> 11 U.S.C. § 109.

<sup>31</sup> 11 U.S.C. § 109(h)(1) (“[A]n individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.”).

<sup>32</sup> 11 U.S.C. § 109(h).

<sup>33</sup> The automatic stay is a critical protection for debtors. See Joseph Satorius, *Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement*, 75 *FORDHAM L. REV.* 2231, 2239 (2007) (“The automatic stay is ‘one of the most powerful weapons known to the law’ as it protects the debtor from collection actions by both secured and unsecured creditors.” (quoting *In re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1998))); Geoff Williams, *What Is an Automatic Stay?*, U.S. NEWS (Sept. 1, 2021, 10:33 AM),



terminate after thirty days unless the debtor can rebut the presumption of bad faith.<sup>34</sup>

There are three narrow exceptions to the pre-filing credit counseling requirement.<sup>35</sup> First, a debtor is excused from the counseling requirement if the debtor “resides in a district for which the United States trustee . . . determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services . . . .”<sup>36</sup> The Code does not elaborate on the meaning of the phrase “reasonably able to provide adequate services,” though at least one court has granted an exemption under circumstances where no approved counseling agencies were available in the debtor’s native (and only) language.<sup>37</sup> Today, there are dozens of approved budget and credit counseling agencies available in each state across many languages.<sup>38</sup>

Second, a debtor can obtain a temporary waiver exempting them from the pre-filing counseling requirement if the debtor submits certification to the court that: (1) “describes exigent circumstances that merit a waiver,” (2) “states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services” within seven days of making the request; and (3) “is satisfactory to the court.”<sup>39</sup> The Code does not elaborate on the meaning of “exigent circumstances,” though case law provides some additional guidance.<sup>40</sup> Even if a debtor does manage to meet the certification requirements, this provision is temporary: the debtor is allowed only an additional thirty days after filing to obtain the mandatory credit

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<https://money.usnews.com/money/personal-finance/debt/articles/what-is-an-automatic-stay> (“[A]n automatic stay gives people in a bankruptcy a lot of relief from debt problems, right at the time they most need it.”).

<sup>34</sup> 11 U.S.C. § 362(c)(3); *see also* Satorius, *supra* note 33, at 2239.

<sup>35</sup> *See* 11 U.S.C. § 109(h)(2)–(4).

<sup>36</sup> 11 U.S.C. § 109(h)(2).

<sup>37</sup> *See In re Petit-Louis*, 344 B.R. 696, 700–01 (Bankr. S.D. Fla. 2006) (granting section 109(h)(2) waiver where no approved services were offered in Creole, the only language debtor spoke and understood).

<sup>38</sup> *See List of Credit Counseling Agencies Approved Pursuant to 11 U.S.C. § 111*, U.S. DEP’T OF JUST., <https://www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111> (last visited Feb. 11, 2023); *see also Credit Counseling and Debtor Education Courses*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/credit-counseling-and-debtor-education-courses> (last visited Feb. 11, 2023).

<sup>39</sup> 11 U.S.C. § 109(h)(3)(A).

<sup>40</sup> Some courts have sought guidance from dictionary definitions. *See, e.g., In re Valdez*, 335 B.R. 801, 802–03 (Bankr. S.D. Fla. 2005) (citing *Exigent*, BLACK’S LAW DICTIONARY (8th ed. 2004), which defines “exigent” as “[a] situation that demands unusual or immediate action”); *In re Giambone*, 365 B.R. 386, 389–90 (Bankr. W.D.N.Y. 2007) (“Leading dictionaries agree that the word ‘exigent’ refers to something that is ‘urgent’ or that requires ‘immediate action or aid.’”).

counseling unless the court finds cause to extend the waiver for an additional fifteen days.<sup>41</sup>

Third, a debtor is permanently exempted from the pre-filing credit counseling requirement if the court determines, after notice and hearing, that the debtor is unable to complete counseling due to (1) “incapacity,” (2) “disability,” or (3) “active military duty in a military combat zone.”<sup>42</sup> The Code further elaborates on the definitions of “incapacity” and “disability” for purposes of the statute: “incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities,” and “disability means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under [the Code].”<sup>43</sup> The active military duty exception is self-explanatory.

Notably, there is no statutory exception for incarcerated individuals and courts have consistently refused to apply any of the statutory exclusions to incarcerated debtors who fail to meet the credit counseling requirement. In *In re Hubel*, the bankruptcy court held that one debtor’s incarceration did not entitle him to an exception under the Code because incarceration is not an exigent circumstance within the meaning of the statute.<sup>44</sup> While at least one court has found the exigent circumstances exception to apply to an incarcerated individual,<sup>45</sup> the court in *Hubel* noted that the temporary nature of the exception renders it useless to most prisoners—unless a prisoner’s sentence is ending within the thirty day waiver period, a temporary extension does not ameliorate the situation, it merely defers it.<sup>46</sup> The incarcerated debtor in *Hubel* also argued he was eligible for an exception because his incarceration constituted a disability under the statute.<sup>47</sup> Again, though at least one court has applied the disability exception to an incarcerated debtor,<sup>48</sup> the *Hubel* court sided with the majority of courts and held that “an incarcerated debtor is not, solely by virtue of his

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<sup>41</sup> 11 U.S.C. § 109(h)(3)(B).

<sup>42</sup> 11 U.S.C. § 109(h)(4).

<sup>43</sup> 11 U.S.C. § 109(h)(4).

<sup>44</sup> *In re Hubel*, 395 B.R. 823 (N.D.N.Y. 2008).

<sup>45</sup> *See In re Walton*, No. 07-41086-293, 2007 WL 980430, at \*1-4 (Bankr. E.D. Mo. Mar. 5, 2007).

<sup>46</sup> *Hubel*, 395 B.R. at 825 (citing *In re Rendler*, 368 B.R. 1, 4 (Bankr. D. Minn. 2007) (“Given counsel’s statement that the conditions of the Debtor’s incarceration leave ‘no way’ for him to participate in credit counseling via telephone or the Internet, the grant of an ‘exemption’ for the remaining bit of the 30-day period would do him no good, either.”)).

<sup>47</sup> *See id.* at 825-26.

<sup>48</sup> *See In re Lee*, No. 08-30355, 2008 WL 696591, at \*2-5 (Bankr. W.D. Tex. Mar. 12, 2008) (holding that an incarcerated debtor is physically impaired within the statutory meaning of disability).

imprisonment, rendered disabled and therefore exempt from credit counseling.”<sup>49</sup> Courts have gone further, specifically holding that an incarcerated debtor’s alleged lack of access to the internet or to conventional phone usage does not constitute a “disability” under the statute.<sup>50</sup> Similarly, incarcerated debtors asking courts to apply the incapacity exception have failed.<sup>51</sup> Finally, in cases where incarcerated debtors raise a potential exception for lack of approved agencies able to provide adequate services, courts easily dismiss the claim by simply noting that the U.S. trustee (or bankruptcy administrator) has not made a determination that the approved credit counseling agencies in that district are inadequate.<sup>52</sup> Overwhelmingly, courts have strictly construed the pre-filing credit counseling requirement and its narrow exceptions.<sup>53</sup>

## 2. *The Post-Petition Financial Management Course Requirement*

The fundamental goal of individual bankruptcy is to receive a discharge of one’s debts—the discharge fuels the debtor’s “fresh start” and allows the debtor to get back on their feet financially.<sup>54</sup> Under chapter 7 of the Code,<sup>55</sup> the debtor

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<sup>49</sup> *Hubel*, 395 B.R. at 825–26 (“[D]isability’ is commonly used to refer to an impairment that is inherent to the person, not one which is imposed by external conditions the alleviation of which would relieve the disability . . . . the [statutory] definition is notable for what it does not include: any explicit reference to incarceration.”); see also *In re Rendler*, 368 B.R. 1, 4 (Bankr. D. Minn. 2007); *In re Star*, 341 B.R. 830, 831 (Bankr. E.D. Va. 2006); *In re McBride*, 354 B.R. 95, 99 (Bankr. D.S.C. 2006); *In re Bindus*, No. 08-62456, 2008 WL 2902567, at \*5 (Bankr. N.D. Ohio July 28, 2008); *In re Johnson*, No. 07-00465, 2007 WL 2990563, at \*4 (Bankr. D.D.C. Oct. 11, 2007); *In re Cox*, No. 07-10787, 2007 WL 4355254, at \*5–6 (Bankr. M.D. Ga. Nov. 29, 2007); *In re Anderson*, 397 B.R. 363, 366–67 (B.A.P. 6th Cir. 2008); *In re Solomon*, 436 B.R. 451, 452 (Bankr. W.D. Mich. 2010).

<sup>50</sup> See, e.g., *Star*, 341 B.R. at 831.

<sup>51</sup> See, e.g., *Bristol v. Ackerman (In re Bristol)*, No. 08-CV-2209, 2009 WL 238002, at \*7 (E.D.N.Y. Feb. 2, 2009) (“[B]ecause the plain language of the statutory definition of ‘incapacity’ is limited to impairments ‘by reason of mental illness or mental deficiency,’ incarceration clearly does fit within that statutory definition.”).

<sup>52</sup> See, e.g., *In re Vollmer*, 361 B.R. 811, 813 (Bankr. E.D. Va. 2007).

<sup>53</sup> See, e.g., *In re Hedquist*, 342 B.R. 295, 301 (B.A.P. 8th Cir. 2006) (“[T]he new requirements in section 109(h) can, in some circumstances, create harsh results. But because those requirements are mandatory, bankruptcy courts have no discretion but to dismiss the case when the debtor fails to file a certification in compliance with its provisions.”); *In re Carey*, 341 B.R. 798, 803 (Bankr. M.D. Fla. 2006) (“[T]he requirements of § 109(h) are explicit and leave no room for a court to exercise discretion.”).

<sup>54</sup> *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (“To [enable the fresh start], the Bankruptcy Code contains broad provisions for the discharge of debts.”).

<sup>55</sup> This Comment focuses on chapter 7 bankruptcy because incarcerated debtors are more likely to file under chapter 7. First, individual debtors predominantly seek relief in chapter 7. Geoff Williams, *What to Know About Chapter 7 vs. Chapter 13 Bankruptcy*, U.S. NEWS (Aug. 30, 2021, 10:24 AM), <https://money.usnews.com/money/personal-finance/debt/articles/bankruptcy-chapter-7-vs-chapter-13>.

Moreover, chapter 13 requires regular income. 11 U.S.C. § 109(e) (“Only an individual with regular income . . . may be a debtor under chapter 13 of this title.”). Incarcerated debtors are less likely than non-incarcerated debtors to have the requisite income level. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the*

shall be granted a discharge unless “after filing the petition, the debtor failed to complete an instructional course concerning personal financial management.”<sup>56</sup> If the debtor does not complete the post-petition educational requirement and does not fall within one of the statutory exceptions, the court will administratively close the bankruptcy case without the entry of a discharge.<sup>57</sup>

Under the Code, financial management instructional courses must provide, at minimum, (1) “trained personnel with adequate experience and training in providing effective instruction and services,” (2) “learning materials and teaching methodologies designed to assist debtors in understanding personal financial management and that are consistent with stated objectives directly related to the goals of such instructional course,” (3) “adequate facilities situated in reasonably convenient locations at which such instructional course is offered, except that such facilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective,” (4) for “preparation and retention of reasonable records (which shall include the debtor’s bankruptcy case number) to permit evaluation of the effectiveness of such instructional course, including any evaluation of satisfaction of instructional course requirements for each debtor attending such instructional course,” and, if any fee is charged for the course, (5) for “a reasonable fee” and “services without regard to ability to pay the fee.”<sup>58</sup>

Unlike the pre-petition education requirement, the post-filing education requirement does not provide its own exceptions; instead, it incorporates two exceptions from the pre-petition requirement.<sup>59</sup> First, the post-petition financial management course requirement does not apply to debtors who satisfy the exception for incapacity, disability, or active military service.<sup>60</sup> Second, the post-petition requirement does not apply to a debtor “who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such

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*Pre-Incarceration Incomes of the Imprisoned*, PRISON POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

<sup>56</sup> 11 U.S.C. § 727(a)(11).

<sup>57</sup> FED. R. BANKR. P. 4004(c)(1)(H) (“In a chapter 7 case . . . the court shall not grant the discharge if . . . the debtor has not filed with the court a statement of completion of a course concerning personal financial management.”); see also *In re Denger*, 417 B.R. 485, 486–87 (Bankr. N.D. Ohio 2009).

<sup>58</sup> 11 U.S.C. § 111(d)(1)(A)–(E).

<sup>59</sup> 11 U.S.C. § 727(a)(11).

<sup>60</sup> *Id.* (“[T]his paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4).”).

instructional courses under this section.”<sup>61</sup> This Code section does not provide for a temporary waiver for exigent circumstances.

As with the pre-filing requirement, the Code contains no statutory exception to the post-filing requirement for incarcerated individuals. And courts have similarly refused to apply any of the relevant exceptions to incarcerated debtors who fail to meet the financial management course requirement.<sup>62</sup> In *In re Cox*, for example, the court denied the incarcerated debtor’s motion to waive the post-petition education requirement because the U.S. trustee did not make a determination that approved courses were inadequate in the district where the debtor was incarcerated and because none of the grounds for permanent exemption applied to the debtor.<sup>63</sup> In refusing to apply an exception for “disability” under the Code, the court noted that “an incarcerated debtor is prevented from obtaining a financial management course by his personal circumstances; not by a physical disability. [The debtor’s] restrictions are imposed by the state, not by some physical impairment and, therefore, cannot be the basis of exemption from the financial management course.”<sup>64</sup>

### 3. *The Standards for Approving Budget and Credit Counseling Agencies and Financial Management Instructional Courses*

The Code also lays forth the standards and processes for approving budget and credit counseling agencies and for approving financial management instructional courses.<sup>65</sup> Under the Code, the bankruptcy court clerk must maintain a public list of approved credit counseling agencies and approved instructional courses concerning financial management.<sup>66</sup> The U.S. trustee (or bankruptcy administrator) is responsible for approving an agency or instructional course for a six-month probationary period.<sup>67</sup> At the conclusion of the probationary period, the U.S. trustee may approve an agency or instructional course for one additional year, and thereafter for successive one-year periods, if

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<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., *Denger*, 417 B.R. at 489 (holding that none of the possible grounds for exception under section 109(h)(4) apply for incarcerated debtor who failed to complete post-petition financial management course); *In re Cox*, No. 07-10787, 2007 WL 4355254, at \*2 (Bankr. M.D. Ga. Nov. 29, 2007).

<sup>63</sup> *Cox*, 2007 WL 4355254, at \*1–2.

<sup>64</sup> *Id.*

<sup>65</sup> 11 U.S.C. § 111.

<sup>66</sup> 11 U.S.C. § 111(a).

<sup>67</sup> 11 U.S.C. § 111(b)(3) (providing for a probationary period unless the agency or course was on the approved list prior to BAPCPA’s enactment).

the agency or course (1) has met the standards during the probationary period and (2) can satisfy those standards in the future.<sup>68</sup>

A nonprofit budget and credit counseling agency will be approved only if it, at minimum, (1) has an impartial board of directors,<sup>69</sup> (2) charges a reasonable fee and provides services regardless of ability to pay,<sup>70</sup> (3) safely manages client funds,<sup>71</sup> (4) provides full disclosures to clients,<sup>72</sup> (5) provides adequate counseling to clients “that includes an analysis of such client’s current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortization of debt,”<sup>73</sup> (6) provides adequately trained and experienced counselors,<sup>74</sup> (7) demonstrates adequate experience in providing counseling,<sup>75</sup> and (8) has adequate financial resources to continue providing services.<sup>76</sup> The Code does not elaborate on the meaning of “adequate.”

A personal financial management instructional course will be approved only if, during the probationary period, it provides, at minimum, (1) adequately experienced and trained personnel,<sup>77</sup> (2) “learning materials and teaching methodologies designed to assist debtors in understanding personal financial management . . . consistent with stated objectives directly related to the goals of such instructional course,<sup>78</sup> (3) “adequate facilities situated in reasonably convenient locations . . . [which] may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective,”<sup>79</sup> (4) record preparation and retention “to permit evaluation of the effectiveness of such instructional course, including any evaluation of satisfaction of instructional course requirements for each debtor attending such

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<sup>68</sup> 11 U.S.C. § 111(b)(4).

<sup>69</sup> 11 U.S.C. § 111(c)(2)(A) (“[T]he majority of which . . . (i) are not employed by such agency; and (ii) will not directly or indirectly benefit financially from the outcome of the counseling services provided by such agency.”).

<sup>70</sup> 11 U.S.C. § 111(c)(2)(B).

<sup>71</sup> 11 U.S.C. § 111(c)(2)(C).

<sup>72</sup> 11 U.S.C. § 111(c)(2)(D) (noting that such disclosures must “includ[e] funding sources, counselor qualifications, possible impact on credit reports, and any costs of such program that will be paid by such client and how such costs will be paid”).

<sup>73</sup> 11 U.S.C. § 111(c)(2)(E).

<sup>74</sup> 11 U.S.C. § 111(c)(2)(F) (noting also that these counselors are to “receive no commissions or bonuses based on the outcome of the counseling services provided by such agency.”).

<sup>75</sup> 11 U.S.C. § 111(c)(2)(G).

<sup>76</sup> 11 U.S.C. § 111(c)(2)(H).

<sup>77</sup> 11 U.S.C. § 111(d)(1)(A).

<sup>78</sup> 11 U.S.C. § 111(d)(1)(B).

<sup>79</sup> 11 U.S.C. § 111(d)(1)(C).

instructional course,”<sup>80</sup> and (5) a reasonable fee and provision of services regardless of ability to pay such fee.<sup>81</sup> After the probationary period, the course will be approved for an additional one-year period so long as it (1) met the standards for the probationary period,<sup>82</sup> (2) “has been effective in assisting a substantial number of debtors to understand personal financial management,”<sup>83</sup> and (3) “is otherwise likely to increase substantially the debtor’s understanding of personal financial management.”<sup>84</sup> The Code does not elaborate on the meaning of “effective” or “substantial.”

Finally, the Code provides that district courts may, at any time, investigate credit counseling agencies to ensure integrity and effectiveness, but there is no parallel provision for investigation of post-petition instructional courses.<sup>85</sup>

Once more, this statutory scheme is void of any consideration for the incarcerated debtor. In fact, the Code does not demonstrate sensitivity towards any specific debtor population beyond its assurance that pre-petition counseling and post-petition courses be made available regardless of ability to pay.<sup>86</sup> Even so, the Code does not set a standard for fee waivers, leaving room for educational service providers to set inconsistent or unclear fee waiver policies.<sup>87</sup> The statute outlines vague,<sup>88</sup> minimal requirements for approval, but Congress nowhere specifies the meaning of key words such as “effective” or “substantially improved” which may help clarify those requirements. As a consequence of this ambiguity, Congress effectively shifts the task of operationalizing the credit counseling and financial management course requirements to the courts and the U.S. Trustee Program’s discretion.<sup>89</sup>

### B. Legislative History

The broad theory underlying all of BAPCPA 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

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<sup>80</sup> 11 U.S.C. § 111(d)(1)(D).

<sup>81</sup> 11 U.S.C. § 111(d)(1)(E).

<sup>82</sup> 11 U.S.C. § 111(d)(2).

<sup>83</sup> 11 U.S.C. § 111(d)(2)(A).

<sup>84</sup> 11 U.S.C. § 111(d)(2)(B).

<sup>85</sup> 11 U.S.C. § 111(e).

<sup>86</sup> 11 U.S.C. § 111(c)(2)(B), (d)(1)(E).

<sup>87</sup> See LOONIN, *supra* note 13, at 2.

<sup>88</sup> See 2 COLLIER ON BANKRUPTCY ¶ 111.02[1] (16th ed. 2022).

<sup>89</sup> See Pardo & Watts, *supra* note 28, at 394–401 (describing the unique structure of the bankruptcy system by which the courts promulgate core bankruptcy policy, leaving only limited areas for administrative agency authority and identifying the approval of education course providers as one such area).

creditors.”<sup>90</sup> In the “Purpose and Summary” section of the House Judiciary Committee’s report anticipating BAPCA’s enactment, Congress clearly and specifically stated its intent in inserting the two education requirements: the bill requires individuals to obtain pre-filing credit counseling “*so that they will make an informed choice about bankruptcy, its alternatives, and consequences,*” and the bill requires individuals to participate in post-filing financial management courses “*so they can hopefully avoid future financial distress.*”<sup>91</sup>

Digging beneath the surface, the legislative history regarding the education requirements suggests a different inception story, one that sought to help debtors through education rather than blame them for “lack of personal responsibility and integrity.” Initially, the education requirements were conceptualized under a far less cynical theory: debtors enter the bankruptcy process without a fundamental understanding of their rights and responsibilities and, after they leave, often become marginalized economically.<sup>92</sup> Years before BAPCPA was enacted, bankruptcy experts implored Congress that the fresh start, on its own, is not enough and that educational programming was necessary to properly equip debtors with the tools they would need to re-enter the economy after the bankruptcy process.<sup>93</sup> The educational program was envisioned as one that would be driven by consensus, with input from all stakeholders in the bankruptcy process.<sup>94</sup> Voluntary participation in educational programming was

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<sup>90</sup> H.R. REP. NO. 109-31, pt. I, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89.

<sup>91</sup> *Id.* at 2–3, 2005 U.S.C.C.A.N. at 89.

<sup>92</sup> *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998: Before the H. Subcomm. on Com. & Admin. L.* 105th Cong. 205–19 (1998) (Statement of Karen Gross, Professor, New York University School of Law), *reprinted in* 52 CONSUMER FIN. L.Q. REP. 180 (1998) [hereinafter *Gross Statement*].

<sup>93</sup> Susan Block-Lieb, Karen Gross & Richard L. White, *Lessons from the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503, 510 (2002) (“Financial education can equip consumers with the fundamental knowledge required to choose among the myriad of products and providers in the financial services industry. It can also help to inculcate individuals with the financial knowledge necessary to create household budgets, initiate savings plans, and make strategic investment decisions. Such financial planning can help families meet near-term obligations and maximize their longer-term well-being and is especially valuable for populations that have traditionally been underserved by our financial system.” (quoting Alan Greenspan, Chairman, Fed. Rsv., Remarks at the Ninth Annual Economic Development Summit (Jan. 10, 2002), *available at* <https://www.federalreserve.gov/boarddocs/speeches/2002/20020110/default.htm>)); *Gross Statement*, *supra* note 92, at 181.

<sup>94</sup> *Gross Statement*, *supra* note 92, at 181 (“A debtor education program designed with insights from debtor representatives, creditor representatives, legal and non-legal academics, judges, psychologists, empiricists, credit reporting representatives and government officials is more likely to succeed than one designed from one particular, partisan perspective . . . development of a program through consensus is essential.”).



avored, as opt-in programming tends to foster empowerment and responsibility.<sup>95</sup>

The legislative history also reveals strong opposition from bankruptcy professionals, who expressed concern that the proposed education requirements would have disastrous effects for bankruptcy filers: when Congress tried to enact the 1988 proposed bankruptcy reforms (many of which eventually made their way into BAPCPA) attorneys and judges rallied to thwart Congress's efforts.<sup>96</sup> Many bankruptcy professionals theorized that the requirements—like so many of BAPCPA's proposed amendments—were the result of creditor lobbyists putting pressure on Congress.<sup>97</sup> If true, this presents a major concern: common sense dictates that educational programs should be designed by impartial education professionals with comprehensive knowledge of both bankruptcy law and educational best practices, not self-interested creditors.

### *1. Divergence from Congressional Purpose*

In the eighteen years since its enactment, BAPCPA has been criticized for failing to live up to its name as a consumer protection act,<sup>98</sup> focusing its efforts on the abuse prevention portion of its title.<sup>99</sup> Unsurprisingly, BAPCPA's two education requirements have been criticized for having practical effects that do

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<sup>95</sup> *Id.* (“[Voluntary programming] empowers debtors to learn because they want to, not because they have to; it fosters responsibility; it is more economic and practical.”).

<sup>96</sup> 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. 133, 146 (1999) (“[F]ailure to enact the [1988] proposed bankruptcy reforms gave rise to a collective sigh of relief among the many bankruptcy professionals, including practitioners, academics and bankruptcy judges.”).

<sup>97</sup> See Allen Mattison, *Can the New Bankruptcy Law Benefit Debtors, Too? Interpreting the 2005 Bankruptcy Act to Clean Up the Credit-Counseling Industry and Save Debtors from Chronic Poverty*, 13 GEO. J. ON POVERTY L. & POL'Y 513, 520 (2006); Sommer, *supra* note 13, at 191–92 (“[M]any of the consumer provisions of the 2005 legislation were largely drafted by lobbyists with limited knowledge of real-life consumer bankruptcy practice.”); Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQ. L. REV. 391, 396–97 (2013) (“[L]argely through the lobbying efforts of the consumer credit industry[,] . . . Congress was led to believe that debtors turned too easily to bankruptcy without exploring other avenues to address their financial situations and that many debtors who could in fact pay back a significant portion of their debts were abusing the bankruptcy system.”).

<sup>98</sup> Sommer, *supra* note 13, at 191 (calling the Act's “Orwellian title . . . an example of deceptive advertising if ever there was one”).

<sup>99</sup> Sousa, *supra* note 97, at 404 (“[The] consumer credit industry . . . engaged in a relentless campaign to move Congress to amend the Bankruptcy Code in order to prevent debtors from abusing the credit industry's perceived liberality of the consumer bankruptcy provisions . . . Indeed, debtor abuse of the nation's bankruptcy laws became the mantra for those pushing to amend the Bankruptcy Code.”); see also Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1306 (2006).

nothing to protect consumers or further congressional intent.<sup>100</sup> Rather than provide a vehicle for financial literacy to meet the complex and varied needs of individual debtors, BAPCPA produced rigid educational mandates that have been broadly scrutinized for being inflexible and costly, especially considering individuals seeking bankruptcy relief are already in dire economic circumstances.<sup>101</sup> The requirements have also been deemed particularly unfair to certain populations, including low-income individuals and women.<sup>102</sup>

## 2. (In)Effectiveness of the Education Requirements

Notably, the education requirements have been criticized for being ineffective. Perhaps doomed from the get-go, the requirements were formulated without any empirical support, despite recommendations that they should be.<sup>103</sup> Indeed, studies conducted prior to BAPCPA forewarned,<sup>104</sup> and studies have since confirmed, that BAPCPA's education requirements are qualitatively ineffective, just as so many bankruptcy professionals anticipated.<sup>105</sup> Several areas of inefficacy have been identified.

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<sup>100</sup> See Andrew S. Erickson, *Pre-Petition Credit Counseling Re-Evaluation and Standardization Needed*, AM. BANKR. INST. J., Jan. 2020, at 42 (“Congress should re-evaluate the pre-petition course requirement in light of the findings of several detailed studies . . . which show that the . . . requirement does nothing to further congressional intent.”); 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, 711 (2016) (“Despite the constant claims of abuse . . . by consumers, there has not been an empirical showing that this perceived abuse occurred prior to the Reform Act or thereafter. In fact, there has been little indication that the bankruptcy system has been improved or enhanced by the Reform Act.”); Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 550 (2005) (“[W]hat emerged as part of the . . . Act . . . is something radically different from what we had imagined and considered.”); Katherine A. Jeter-Boldt, Note, *Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA’s Credit Counseling Requirement*, 71 MO. L. REV. 1101, 1101 (2006).

<sup>101</sup> See Satorius, *supra* note 33, at 2232 (“The inflexibility of this requirement locks many good faith debtors . . . out of the bankruptcy court and leaves them frozen outside in a financial storm.”); Lois R. Lupica, *The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases*, 18 AM. BANKR. INST. L. REV. 43, 49, 54–55 (2010); Landry, *supra* note 100, at 707 (“It adds not only a procedural hurdle, but also an additional cost to already cash-strapped individuals.”).

<sup>102</sup> See Landry, *supra* note 100, at 706–07; Emma Caterine, *A Fresh Start for a Women’s Economy: Beyond Punitive Consumer Bankruptcy*, 33 BERKELEY J. GENDER L. & JUST. 1, 30–31 (2018).

<sup>103</sup> Gross & Block-Lieb, *supra* note 100, at 549–50 (“[W]e did not know—empirically—whether consumer debtors would benefit from financial management instruction, particularly when they were already experiencing considerable stress. At that time, we had no way of knowing what would improve their knowledge, attitudes and behavior with respect to money and spending.” (emphasis added)).

<sup>104</sup> Block-Lieb et al., *supra* note 93, at 522 (2002).

<sup>105</sup> Sousa, *supra* note 97, at 466 (“[T]his qualitative study serves to substantiate the major findings of the six prior empirical studies of the BAPCPA debtor education requirements, and the more than ten years’ worth of arguments by bankruptcy law scholars over the potential inadequacy of the debtor education requirements as constituted in the Bankruptcy Code.”).

First and foremost, the education requirements have been deemed ineffective for failing to meet Congress's stated purposes of (1) helping debtors "make an informed choice about bankruptcy, its alternatives, and consequences," through the pre-filing counseling requirement, or (2) helping debtors "avoid future financial distress" through the post-petition financial management instructional courses. As to the pre-filing education requirement, one study revealed less than four percent of debtors actually entered into a debt-management plan, one of the few viable alternatives to bankruptcy.<sup>106</sup> Moreover, even if agencies do adequately present viable alternatives to bankruptcy, such counseling is of no use to debtors on the brink of financial crisis, as most are in the months preceding a bankruptcy filing.<sup>107</sup> As to the post-petition financial management courses, less than seven percent of debtors' financial behavior is affected by the current education courses,<sup>108</sup> a number that does not suggest these courses are achieving the purpose Congress allegedly aimed for. Former debtors interviewed for a 2013 study described the education courses together as "a complete waste of time."<sup>109</sup>

Second, the education requirements are ineffective because they do not account for differences among individual debtors. One size does not fit all: data highlights categorical differences among debtors that should be accounted for in the design of the education requirements.<sup>110</sup> For example, debtors exhibit vast differences in income, employment, education levels, marital status, and personal control over financial affairs.<sup>111</sup> A 2013 study interviewing former debtors revealed that debtors themselves complained of the lack of individualization.<sup>112</sup> Another study revealed that some of the approved educational courses were actually generic financial literacy courses, not specifically geared towards individuals filing for bankruptcy.<sup>113</sup> These general courses might be beneficial, but they do not address specific bankruptcy

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<sup>106</sup> LOONIN, *supra* note 13, at 3.

<sup>107</sup> *Id.* ("One consistently reported result is that nearly all consumers seeking pre-filing counseling are in very serious financial distress and very few consumers are choosing options other than bankruptcy."); Sheryl Jean, *Key Aspects of Bankruptcy Law Not Working Out as Envisioned*, BILLINGS GAZETTE, July 16, 2006 ("[M]ost of the pre-bankruptcy counseling is not especially useful because it's only occurring for people right before they go into bankruptcy[,] . . . when [they] have little option."); Erickson, *supra* note 100, at 42.

<sup>108</sup> Sousa, *supra* note 97, at 466.

<sup>109</sup> *Id.* at 442.

<sup>110</sup> See Richard L. Wiener et al., *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 454 (2005) ("[N]othing in BAPCPA directs that the counseling or education should be tailored to fit the needs or desires of particular debtors, the statute suggests . . . that all individual debtors should receive roughly the same training.").

<sup>111</sup> *Id.*

<sup>112</sup> Sousa, *supra* note 97, at 443.

<sup>113</sup> LOONIN, *supra* note 13, at 35.

concerns, such as the negative effect filing for bankruptcy may have on an individual's credit score.<sup>114</sup>

Third, scholars have identified the lack of standardization within Code provisions governing the education requirements as another source of inefficacy.<sup>115</sup> For example, there are no established standards as to what qualifies an individual debtor for a fee waiver or fee reduction.<sup>116</sup> Additionally, there are no clear standards for evaluating and approving credit counseling agencies and financial management instructional courses.<sup>117</sup> Instructions for approval of agencies and courses indicate both courses should be subject to participant evaluations.<sup>118</sup> However, the student evaluations that have been administered are “a notoriously poor way of determining programmatic success.”<sup>119</sup> Other areas that have been regarded as irregular and in need of standardization are the various philosophies, biases, and levels of rigor of the educational courses.<sup>120</sup>

Fourth, some pre- and post-filing courses have been found to provide inaccurate information to debtors.<sup>121</sup> One study found information provided by credit counseling agencies and financial management courses was at times erroneous, out-of-date, inconsistent, or, in some cases, too abbreviated such that it overlooked critical information.<sup>122</sup> Inaccurate information included, but was not limited to, the costs of filing, filing deadlines, and the length of time negative information remains on credit reports.<sup>123</sup>

Finally, social analytic jurisprudence suggests relevant factors absent from BAPCPA's provisions must be considered in order for the education courses to

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<sup>114</sup> See *id.* at 36.

<sup>115</sup> Erickson, *supra* note 100, at 42.

<sup>116</sup> *Id.* at 72; see LOONIN, *supra* note 13, at 2–3 (“We found considerable variation in fee waiver policies among the agencies and education providers surveyed . . . Information about waivers is often not readily available.”).

<sup>117</sup> See LOONIN, *supra* note 13, at 20 (“First, the [Executive Office for U.S. Trustees] is evaluating agencies based only on the specific criteria required by the bankruptcy code . . . [which is] by no means a general endorsement of quality. Second, the extent of EOUST follow-up and enforcement activity is unclear.”).

<sup>118</sup> 11 U.S.C. § 111.

<sup>119</sup> Gross & Block-Lieb, *supra* note 100, at 551 (effectiveness of the educational courses has been evaluated mainly by notoriously ineffective “smile sheet” evaluations that participants fill out after completing the course).

<sup>120</sup> See LOONIN, *supra* note 13, at 5.

<sup>121</sup> See *id.* at 22–23, 37.

<sup>122</sup> See *id.* at 22–23.

<sup>123</sup> See *id.* at 22–23, 37.

be effective.<sup>124</sup> For example, psychosocial factors—such as spending, saving, and credit use—are relevant and should inform educational programming.<sup>125</sup>

### 3. *Specific Harm to Incarcerated Debtors*

Legislative history, statutory language, and common sense indicate efficacy was and should be the central goal of the educational programs instituted by BAPCPA. Despite the expansive body of academic literature dedicated to criticizing BAPCPA's education requirements, both generally and for specific debtor populations, little attention has been paid to whether these requirements properly function as applied to incarcerated debtors.

Facially, the Code does not discriminate on the basis of carceral status.<sup>126</sup> However, there are material differences between incarcerated and non-incarcerated debtors that the Code does not account for. Due to the nature of penal confinement, incarcerated individuals face vast restrictions on their rights and liberties that would seem intolerable to the non-incarcerated individual. These restrictions, established legally and without recourse, are attributable to the underlying policies and rationales of the American carceral system.<sup>127</sup> Indeed, the Supreme Court has consistently upheld that “[I]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”<sup>128</sup>

While the education requirements are burdensome for any debtor population, key differences in accessibility and demographics present heightened challenges for the incarcerated debtor population that the average non-incarcerated debtor will not face.

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<sup>124</sup> Wiener, *supra* note 110, at 473–74 (“[T]he goals of [the education requirements] cannot be simply to improve debtors’ knowledge . . . and terminology. Counseling and education should also strive to help consumer debtors to understand more fully their psychological motivations for spending and credit use.”).

<sup>125</sup> *Id.* at 473.

<sup>126</sup> See 11 U.S.C. § 109 (delineating criteria for eligibility to be a debtor but not including carceral status among the criteria); 11 U.S.C. § 727 (outlining requirements to receive a discharge but not including carceral status among the criteria for satisfying those eligibility requirements).

<sup>127</sup> See Paul Clark, *Restorative Justice and ADR: Opportunities and Challenges*, 44 *ADVOC. IDAHO* 13, 44 (2001) (“‘Justice’ in the Anglo-American system has long meant retribution. Criminal courts mete out punishments. Organized society, in a sense, avenges a crime on the person of the criminal. This model of justice has dominated our thinking for several centuries.”); Andrew Cohen, *American Exceptionalism, Crime-and-Punishment Edition*, *ATLANTIC* (Feb. 24, 2014), <https://www.theatlantic.com/national/archive/2014/02/american-exceptionalism-crime-and-punishment-edition/284021/> (“With a few notable recent exceptions . . . we are a nation that seeks to punish, not rehabilitate, our prisoners.”).

<sup>128</sup> *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 125 (1977) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

*a. Accessibility Considerations*

The drafters of BAPCPA seemingly considered and even attempted to address problems of accessibility. At first glance, financial accessibility does not appear to be an issue: the Code requires credit counseling agencies and financial management instructional courses to set a reasonable fee and to provide services regardless of ability to pay,<sup>129</sup> though what constitutes a reasonable fee and the standards for providing and obtaining fee waivers is undefined. Physical accessibility also appears to present no barrier: the Code broadens access by permitting pre-filing counseling and post-petition financial management instruction to be conducted over the telephone or on the internet.<sup>130</sup> While these provisions may increase accessibility for the average debtor, they do not adequately address the specific accessibility challenges incarcerated debtors face.

While there is no constitutional right to bankruptcy,<sup>131</sup> prisoners do retain certain constitutional rights,<sup>132</sup> including the First Amendment rights to free speech and free association.<sup>133</sup> However, under the *Turner* test—the Supreme Court’s four-part test for evaluating prisoners’ First Amendment claims—prisons are able to severely restrict those rights in light of the government’s interests in prison security and administrative ease.<sup>134</sup> Indeed, courts have held that an incarcerated individual has no per se right to unlimited telephone use and that any such access is “subject to rational limitations in the face of legitimate security interests of the penal institution.”<sup>135</sup> Courts have likewise held that

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<sup>129</sup> 11 U.S.C. § 111(c)(2)(B) (“To be approved by the United States trustee . . . , a nonprofit budget and credit counseling agency shall, at a minimum[,] . . . if a fee is charged for counseling services, charge a reasonable fee, and provide services without regard to ability to pay the fee.”); 11 U.S.C. § 111(d)(1)(E) (“The United States trustee (or the bankruptcy administrator, if any) shall only approve an instructional course concerning personal financial management[,] . . . if a fee is charged for the instructional course, charge a reasonable fee, and provide services without regard to ability to pay the fee.”).

<sup>130</sup> 11 U.S.C. § 111(d)(1)(C) (“[F]acilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective.”). There is no parallel provision for internet and telephone accessibility for the pre-filing counseling requirement in section 111. However, section 109 provides that such briefings can be conducted by telephone or internet. 11 U.S.C. § 109(h)(1).

<sup>131</sup> See *U.S. v. Kras*, 409 U.S. 434, 445–46 (1973).

<sup>132</sup> See CTR. FOR CONST. RTS., *THE JAILHOUSE LAWYER’S HANDBOOK* 15–72 (6th ed. 2021) (outlining several constitutional rights retained by prisoners).

<sup>133</sup> See *id.* at 15–16.

<sup>134</sup> See *id.* (“[I]n prison those rights are restricted because of the prison’s need for security and administrative ease. Because of this, it is often very hard for a prisoner to win a First Amendment case.”); see also Titia A. Holtz, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 *BROOK. L. REV.* 855, 870–71 (2002); *Turner v. Safley*, 482 U.S. 78, 79–80 (1987).

<sup>135</sup> *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986); see also *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir. 1989); *United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000).

incarcerated persons do not possess a right to computers or internet access.<sup>136</sup> In accordance with this consensus from the courts, prison policies severely restrict communications for incarcerated individuals. In both federal and state prisons, communications are restricted in three major ways: (1) cost limitations, (2) time limitations, and (3) privilege revocations.

Despite regulations in recent years by the Federal Communications Commission capping the costs of telephone calls made from prison,<sup>137</sup> these costs remain burdensome when compared to the average cost of a phone call today.<sup>138</sup> This is especially true where incarcerated individuals earn negligible wages.<sup>139</sup> The average cost of a fifteen-minute phone call from a state prison facility ranges from fourteen cents in Illinois to four dollars and eighty cents in Arkansas.<sup>140</sup> Federally, the cost of a fifteen-minute call averages three dollars and seventy-five cents.<sup>141</sup> Federal inmates are responsible for covering the costs of their calls, though the warden can provide one free call per month to an indigent inmate.<sup>142</sup>

Time restrictions on phone calls for incarcerated individuals limit both the number of calls an individual is allowed during a given time period as well as the time allowed per individual phone call. Federally, inmates are allowed up to

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<sup>136</sup> THE JAILHOUSE LAWYER'S HANDBOOK, *supra* note 132, at 21; *see* Carmony v. Cnty. of Sacramento, No. CIV S-05-1679, 2008 U.S. Dist. LEXIS 11137, at \*48 (E.D. Cal. Feb. 14, 2008); Darby v. Schmalenberger, No. 1:12-cv-033, 2012 U.S. Dist. LEXIS 160858, at \*19–20 (D.N.D. May 7, 2012) (holding that incarcerated persons do not have a right to access the internet because the government has a “legitimate penological interest in restricting inmates’ internet access”); *see also* Clement v. Cal. Dep’t of Corr., 364 F.3d 1148, 1151 (9th Cir. 2004) (“Prisoners are not allowed to access the internet directly . . .”).

<sup>137</sup> *See* FED. COMM’N COMM’N, FCC SEEKS TO REDUCE RATES AND CHARGES FOR INMATE CALLING SERVICES (2020), available at <https://www.fcc.gov/document/fcc-seeks-reduce-rates-and-charges-inmate-calling-services-0>; *see also* Pete Wagner, *FCC Passes Order to Regulate Prison and Jail Telephone Industry*, PRISON POL’Y INITIATIVE (Oct. 22, 2015), <https://www.prisonpolicy.org/blog/2015/10/22/fcc-order/>; Chuck Sharman, *FCC Takes Further Action on Prison and Jail Phone Rates*, PRISON LEGAL NEWS (Sept. 1, 2021), <https://www.prisonlegalnews.org/news/2021/sep/1/fcc-takes-further-action-prison-and-jail-phone-rates/>.

<sup>138</sup> *See* Wagner & Jones, *supra* note 24 (“At a time when the cost of a typical phone call is approaching zero, people behind bars in the U.S. are often forced to pay astronomical rates to call their loved ones or lawyers.”); Smith, *supra* note 24 (“Over the past few decades, the prison phone business has grown into a financial behemoth, an estimated \$1.2 billion industry largely dominated by two companies, Global Tel Link and Securus Technologies, which pay both the state and municipalities for doing business.”).

<sup>139</sup> The average hourly wage for prisoners working non-industry prison jobs ranges from \$0.14 to \$0.63. For prisoners working state-sponsored prison jobs, the average hourly wages are slightly higher, ranging from \$0.33 to \$1.41. Sawyer, *supra* note 16. In Georgia and two other states, prisoners may not earn any wages for in-prison work. *Id.*

<sup>140</sup> Wagner & Jones, *supra* note 24.

<sup>141</sup> *Federal Bureau of Prisons Phone Rates and Kickbacks*, PRISON PHONE JUSTICE, <https://www.prisonphonejustice.org/state/BOP/> (last visited Feb. 11, 2023) (“Federal Bureau of Prisons ranks 44th in the nation for the affordability of a 15-minute call.”).

<sup>142</sup> *See* 28 C.F.R. § 540.105.

300 minutes per month, though they may be permitted additional minutes “for good cause.”<sup>143</sup> Individuals in federal prisons are allowed, at minimum, three minutes per call provided they have sufficient funds, though maximum time limits are subject to the warden’s discretion.<sup>144</sup> Generally, calls are limited to a maximum of fifteen minutes.<sup>145</sup> Calls are also subject to minimum time frames between completed calls and limits on the number of incomplete call attempts permitted per day.<sup>146</sup> State prisons policies are similar. In Georgia, for example, the maximum time allowed for a call is fifteen minutes.<sup>147</sup> In New York, the maximum is thirty minutes, though a ten-minute limit can be imposed if others are waiting to make calls.<sup>148</sup> As of 2021, in California, incarcerated persons are allotted fifteen minutes of free telephone calls every two weeks.<sup>149</sup>

In addition to the financial and temporal constraints, prison policies maintain that telephone usage is not a right but a tenuous privilege, subject to broad and often ambiguous conditions and restrictions.<sup>150</sup> Under the Code of Federal Regulations, the Bureau of Prisons extends telephone privileges “as part of its overall correctional management,” but may limit those privileges “to ensure [they] are consistent with other aspects of the Bureau’s correctional management responsibilities.”<sup>151</sup> The Code of Federal Regulations vaguely specifies that “telephone use is subject to those limitations *which the Warden determines are necessary* to ensure the security or good order, including discipline, of the institution or to protect the public . . . [or] as a disciplinary sanction.”<sup>152</sup> Thus, the statute entrusts broad discretion in federal prison wardens to limit an incarcerated person’s telephone usage so long as those limitations are made in the face of the “legitimate security interests of the penal institution.”<sup>153</sup> Even

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<sup>143</sup> FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., P5264.08, PROGRAM STATEMENT 9 (2008) [hereinafter BOP PROGRAM STATEMENT].

<sup>144</sup> 28 C.F.R. § 540.101(d) (“The Warden may limit the maximum length of telephone calling based on the situation at that institution (e.g., institution population or usage demand).”).

<sup>145</sup> BOP PROGRAM STATEMENT, *supra* note 143, at 9.

<sup>146</sup> *Id.* at 4.

<sup>147</sup> GA. DEPT. OF CORR., INMATE TELEPHONE SERVICE PROVIDER: SECURUS TECHNOLOGIES 1 (2021).

<sup>148</sup> N.Y. STATE DEP’T. OF CORR. & CMTY. SUPERVISION, TELEPHONE CALLS, *available at* <https://doccs.ny.gov/telephone-calls> (last visited Feb. 11, 2023).

<sup>149</sup> News Release, Cal. Dep’t of Corr. & Rehab., California Department of Corrections and Rehabilitation Announces Reduced Cost of Telephone Calls for Incarcerated Population (Mar. 1, 2021), <https://www.cdcr.ca.gov/news/2021/03/01/california-department-of-corrections-and-rehabilitation-announces-reduced-cost-of-telephone-calls-for-incarcerated-population/>.

<sup>150</sup> See MICH. DEP’T. OF CORR., 05.03.130, POLICY DIRECTIVE: PRISONER TELEPHONE USE 1 (Dec. 20, 2021), *available at* [https://www.michigan.gov/documents/corrections/PD122021\\_05\\_03\\_130\\_743950\\_7.pdf](https://www.michigan.gov/documents/corrections/PD122021_05_03_130_743950_7.pdf) [hereinafter PRISONER TELEPHONE USE] (“Use of telephones by prisoners is a privilege . . .”).

<sup>151</sup> 28 C.F.R. § 540.100(a).

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986).



when there is no specific disciplinary sanction, the warden still maintains discretion to limit an inmate's telephone usage—in such instances, “the Warden shall permit an inmate . . . to make at least one telephone call each month.”<sup>154</sup>

Pursuant to these restrictive telephone policies, incarcerated debtors face several issues. First, it would be difficult, if not impossible, for an incarcerated debtor to complete an educational requirement in one session. The average length of credit counseling is sixty to ninety minutes.<sup>155</sup> The average length of a financial management instructional course is 120 minutes.<sup>156</sup> If the average time allowed per phone call is fifteen minutes, completion of the educational courses may need to be spread out over a significant period of time. Divided into fifteen- or even thirty-minute segments across the span of several months, delivery of the educational courses is likely to become disjointed, if not entirely ineffective.

Second, limited phone time necessitates a zero-sum choice. If a prisoner is only allowed one brief phone call per month, they may theoretically be forced to choose between completing a small fraction of their required bankruptcy educational course, calling their lawyer to assist with their case, and calling a friend or loved one. This is a choice not likely to weigh in favor of fulfilling tedious, ineffective bankruptcy requirements.

Case law demonstrates that these difficulties are not purely theoretical. For example, in *In re Walton*, the incarcerated debtor was only allowed one thirty-minute phone conversation per month.<sup>157</sup> When the debtor opted to use his one monthly call to obtain credit counseling, he was put on hold by the credit counseling agency for twenty-five minutes, leaving only five minutes, an insufficient time for the counseling.<sup>158</sup> Similarly, in *Cox*, the court noted the fact that “due to his incarceration, [the debtor] was unable to complete the [financial management] course. Although the course is available by telephone, his calls must go through a call center, and the calls—even toll-free calls—must be made collect.” The court therefore implies that the legislatures' attempts to increase

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<sup>154</sup> 28 C.F.R. § 540.100(b); *see also* *Almahdi v. Ashcroft*, 310 F. App'x 519, 521 (3d Cir. 2009) (upholding a federal prison warden's decision to enforce the one-call-per-month limitation as constitutional where the prisoner was under investigation for telephone abuse and had already committed two telephone-related infractions).

<sup>155</sup> *See* LOONIN, *supra* note 13, at 21.

<sup>156</sup> Andrea Wimmer, *Bankruptcy Credit Counseling & Financial Management Courses*, UPSOLVE (updated Jan. 5, 2021), <https://upsolve.org/learn/bankruptcy-counseling-courses/>.

<sup>157</sup> *In re Walton*, No. 07-41086-293, 2007 WL 980430, at \*1 (Bankr. E.D. Mo. Mar. 5, 2007).

<sup>158</sup> *Id.* at \*2.

accessibility by making the educational courses available over the phone do not necessarily guarantee accessibility for the incarcerated debtor.<sup>159</sup>

In addition to the three major categories of limitations outlined above, prison telephone policies also present several less visible communication barriers. To begin, both federal and state prison policies require inmates to enter phone numbers onto an approved call list.<sup>160</sup> Call lists are limited to a small number of contacts.<sup>161</sup> Changes to call lists may only be made in a limited capacity pursuant to prison-specific processes.<sup>162</sup> While this process is as simple as adding a new name to the list in some jurisdictions, others require more tedious or complicated processes.<sup>163</sup> An additional hurdle arises from the fact that individuals outside of prison are unable to call or to return missed calls from persons in prison.<sup>164</sup> If an incarcerated debtor goes through the correct process to have an approved credit counseling agency added to their call list, and that agency does not answer the phone, the debtor is left empty-handed. While the non-incarcerated debtor might be able to call the same agency again in five minutes, quickly look up another approved agency and call them, or leave a message letting the agency know when to call back, the incarcerated debtor is more restricted, not to mention discouraged. Finally, lack of privacy is a potential deterrent: across jurisdictions, prison calls are monitored unless the call is made to a “legitimate legal service organization.”<sup>165</sup>

Whereas telephone use is severely regulated, but generally available to some extent, internet use is generally *unavailable*—most jurisdictions ban use

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<sup>159</sup> *In re Cox*, No. 07-10787, 2007 WL 4355254, at \*1 (Bankr. M.D. Ga. Nov. 29, 2007).

<sup>160</sup> *See, e.g.*, 28 C.F.R. § 540.101(a) (“An inmate telephone call shall ordinarily be made to a number identified on the inmate’s official telephone list.”); *Telephone Calls with Prisoners—The Complete Guide*, MICH. DEP’T. OF CORR., <https://www.michigan.gov/corrections/services/family-information/telephone-calls-with-prisoners-the-complete-guide> (last visited Feb. 11, 2023).

<sup>161</sup> *See, e.g.*, 28 C.F.R. § 540.101(a) (“[An inmate telephone] list ordinarily may contain up to 30 numbers.”).

<sup>162</sup> *See, e.g.*, 28 C.F.R. § 540.101(b) (“Each Warden shall establish procedures to allow an inmate the opportunity to submit telephone list changes on at least a quarterly basis.”).

<sup>163</sup> *See, e.g., Telephone Calls with Prisoners, supra* note 160 (“[P]risoners can call 20 personal telephone numbers, which becomes his/her Personal Allowed Numbers (PAN) list. PAN’s will automatically reset each quarter . . . which allows each prisoner an opportunity to update his/her calling list.”).

<sup>164</sup> *See, e.g., Individual in Custody Phone Services*, ILL. DEP’T. OF CORR., <https://www2.illinois.gov/idoc/communityresources/Pages/InmatePhoneServices.aspx> (last visited Feb. 11, 2023) (“Individuals in custody cannot receive telephone calls, but can make collect calls to those on their approved calling list.”).

<sup>165</sup> *See, e.g., PRISONER TELEPHONE USE, supra* note 150, at 1 (“All telephone, TTY, CapTel, Videophone, and VRS calls made from telephones/devices designated for prisoner use shall be monitored, except for calls to the following: . . . legitimate legal service organizations . . .”).

outright.<sup>166</sup> Some bans are decisions set forth by prison administrators, while others are mandated by state statute.<sup>167</sup> According to a 2009 survey, only four jurisdictions allow internet access.<sup>168</sup> While most jurisdictions utilize computers to employ in-prison educational programming, such use does not involve internet access;<sup>169</sup> further, BAPCPA's education requirements are not currently part of any existing in-prison education programs. A minority of jurisdictions do allow incarcerated individuals to access the internet for certain approved educational purposes.<sup>170</sup> However, such use is subject to restrictive limitations and supervision.<sup>171</sup>

As with telephone restrictions, internet bans and restrictions create issues for incarcerated debtors. For example, while the internet is where most debtors would look to find approved credit counseling agencies or financial literacy course providers in the area, incarcerated debtors must find another way to access this list. Even phoning a family member to ask for a copy of the list may be impossible: courts are divided on whether prisons can ban indirect internet use, such as posting on social media on behalf of prisoners or mailing physical

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<sup>166</sup> Holtz, *supra* note 134, at 859 (“[E]very state bans inmates from direct access to the Internet to some extent . . . .”); COLUM. HUM. RTS. L. REV., *Your Right to Communicate with the Outside World, in A JAILHOUSE LAWYER’S MANUAL* 519 (9th ed. 2011) (“Most, if not all, states ban prisoners from direct, unsupervised access to the Internet.”).

<sup>167</sup> Stephen Rahe, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POL’Y INITIATIVE (Jan. 21, 2016), <https://www.prisonpolicy.org/messaging/report.html>; Holtz, *supra* note 134, at 864–65.

<sup>168</sup> AM. CORR. ASS’N, INC., *Computer Use for/by Inmates*, 34 CORR. COMPENDIUM 24, 25 (2009) (“Connecticut allows it at the Job Center; Kansas permits it in the law library; use is allowed when highly supervised in Hawaii; and inmates within 45 days of release in Louisiana may use it to access job opportunities.”).

<sup>169</sup> *Id.* (distinguishing data sets for states that allow computer access to education programs from states that allow internet access).

<sup>170</sup> *See, e.g.*, OHIO REV. CODE ANN. § 753.32(C) (“No prisoner in a municipal correctional facility under the control of a municipal corporation shall access the internet through the use of a computer, computer network, computer system, computer services, telecommunications service, or information service unless both of the following apply: (a) The prisoner is participating in an approved educational program with direct supervision that requires the use of the internet for *training or research* purposes . . . (b) The provision of and access to the internet is in accordance with rules promulgated by the department of rehabilitation and correction pursuant to section 5120.62 of the Revised Code.” (emphasis added)).

<sup>171</sup> *See, e.g.*, OHIO REV. CODE ANN. § 5120.62 (2021) (“The director of rehabilitation and correction shall adopt rules . . . that govern the establishment and operation of a system that provides limited and monitored access to the internet for prisoners solely for a use or purpose approved by the managing officer of that prisoner’s institution or by the managing officer’s designee. The rules shall include . . . : (A) Criteria by which inmates may be screened and approved for access or training involving the internet; (B) Designation of the authority to approve internet sites for authorized use; (C) A requirement that only pre-approved sites will be accessible; (D) A process for the periodic review of the operation of the system, including users of the system and the sites accessed by the system; (E) Sanctions that must be imposed against prisoners and staff members who violate department rules governing prisoner access to the internet.”).

printouts of internet pages to prisoners, without violating the Constitution.<sup>172</sup> Additionally, if an individual is incarcerated in a jurisdiction where internet use is permitted for specifically approved educational purposes, they must go through the process of getting the bankruptcy education programs approved. As with telephone access, such procedural hurdles may thwart or discourage incarcerated persons from completing or even attempting to begin the bankruptcy courses. If internet use is completely banned, incarcerated debtors seeking to complete the BAPCPA education courses are effectively restricted to telephone access which, as previously outlined, is not much use.

It is possible that, standing alone, no single barrier appears particularly egregious. Nevertheless, when viewed in the aggregate, the barriers to prisoner communications paint a more burdensome picture: tasks as menial as researching, contacting, or following up with an education service provider can become daunting for an incarcerated person.

Moreover, even if incarcerated debtors manage to successfully complete the education requirements via telephone or internet, these methods of instruction may be even less effective than in-person instruction. In one study, former (non-incarcerated) debtors noted that the addition of alternative delivery platforms for the educational courses was futile, as “nothing effective in this regard can be accomplished online or over the telephone.”<sup>173</sup> While non-incarcerated debtors have the freedom to make an informed choice about which delivery method to pursue to get the most out of the education courses, incarcerated debtors have no such choice. So long as there is no in-person educational programming provided in prisons, incarcerated debtors are limited to virtual delivery methods.

*b. Demographic Considerations*

Beyond issues of access, there are demographic discrepancies between the non-incarcerated and incarcerated debtor populations that suggest the average incarcerated debtor may encounter unique challenges in taking the debtor education courses that non-incarcerated debtor populations may not face. Demographics have been found to be an important indicator of debtor interaction with the educational courses mandated by BAPCPA.<sup>174</sup> Demographic markers such as gender, race or ethnicity, income level, and education level are relevant because they impact the attitudes and beliefs individuals have about saving,

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<sup>172</sup> THE JAILHOUSE LAWYER’S HANDBOOK, *supra* note 132, at 15, 21.

<sup>173</sup> Sousa, *supra* note 97, at 442.

<sup>174</sup> Wiener, *supra* note 110, at 463–71.

spending, and debt.<sup>175</sup> For example, one study that examined differences between low-income and high-income debtor populations found significant differences “in light of their attitudes toward buying, the influence of third parties on these attitudes, and their perception of self-control.”<sup>176</sup>

Statistically, low-income individuals are disproportionately represented in the incarcerated population.<sup>177</sup> A 2015 report by the Prison Policy Initiative revealed that incarcerated people had a median annual income of under \$20,000 prior to their incarceration, more than forty percent less than their non-incarcerated counterparts of similar ages and racial or ethnic backgrounds.<sup>178</sup> Incarcerated individuals are “dramatically concentrated at the lowest ends of the national income distribution.”<sup>179</sup> Incarcerated persons also possess lower average levels of completed formal education than their non-incarcerated counterparts.<sup>180</sup> According to a 2021 Bureau of Justice Statistics report, federal prisoners averaged less than eleven years of education prior to incarceration; more than half had not received a high school diploma.<sup>181</sup> For state prisoners, almost two-thirds had not completed high school.<sup>182</sup> Besides income level and education level, there are notable differences between the incarcerated population and the non-incarcerated population regarding marital status, citizenship, race or ethnicity, housing characteristics, and other demographic markers.<sup>183</sup>

Such demographic differences could create specific harm for incarcerated debtors seeking to complete the education requirements—not because individuals with lower income or education levels are any less capable of completing the required educational courses, but because the one-size-fits-all nature of the current education programs will not provide these individuals with an equitable financial education. Certain demographic groups face greater

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<sup>175</sup> See *id.* at 454.

<sup>176</sup> *Id.* at 470–71.

<sup>177</sup> Rabuy & Kopf, *supra* note 55 (“The American prison system is bursting at the seams with people who have been shut out of the economy and who had neither a quality education nor access to good jobs.”).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Stephanie Ewert & Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS 1* (U.S. Census Bureau, Working Paper No. SEHSD-WP2011-08, 2011), available at <https://paa2011.princeton.edu/papers/111587> (“[P]risoners have lower levels of educational attainment than the general population and are more likely to have GEDs.”); Rabuy & Kopf, *supra* note 55 (“While the typical non-incarcerated person has at least a high school diploma, the typical incarcerated person does not.”).

<sup>181</sup> LAUREN G. BEATTY & TRACY L. SNELL, BUREAU OF JUST. STAT., 255037, PROFILE OF PRISON INMATES, 2016, at 6 (2021), available at <https://bjs.ojp.gov/library/publications/profile-prison-inmates-2016>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 2–3, 6, 19–21.

financial obstacles and have less opportunity to overcome them, and are thus more vulnerable to financial distress.<sup>184</sup> Addressing differences in financial capability and knowledge is therefore essential to any successful financial education program.<sup>185</sup> Where educational programs are not tailored to the specific needs of individual debtors, incarcerated debtors with lower income levels, lower education levels, or any learning need specific to the incarcerated population are unlikely to receive effective credit counseling or financial education. And, while the data reflect characteristics of the average incarcerated debtor, not all incarcerated debtors are alike—like any population, their needs are varied.

At this point, one might be left wondering why, if completing the bankruptcy education requirements from prison presents so many obstacles, the incarcerated individual should not simply wait to file until their release. The answer is that timing is everything. Consider the following hypothetical: Person A, who is incarcerated, owes X amount of money in dischargeable debts and Y amount in non-dischargeable debts. Person B is also incarcerated and owes the exact same amount, but Person B must wait to file until he is released from prison. First, if Person B owns any property (e.g., a car) his creditors could possess and sell it while he waits to file, whereas Person A's property would be protected by the automatic stay.<sup>186</sup> This could be especially problematic for Person B if the property was intended as a source of income upon release (e.g., a car to drive for Uber).

Furthermore, paying off debts is a zero-sum game: debtors have finite resources and must prioritize which debts and creditors to address first. While Person B finishes out his sentence, his debt—both dischargeable and non-dischargeable—could accrue by nature of not being able to service the debt.<sup>187</sup> Person A would receive a discharge and, upon leaving prison and gaining employment, would have only his non-dischargeable debts to focus on. Person

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<sup>184</sup> JUDY T. LIN ET AL., FINRA INV. EDUC. FOUND., FINANCIAL CAPABILITY IN THE UNITED STATES 2016, at 34 (July 2016), <https://finrafoundation.org/sites/finrafoundation/files/NFCS-2015-Report-Natl-Findings.pdf> (“Many demographic groups—including African-Americans, Hispanics, members of the Millennial generation, and those without a college education—are at a disadvantage when it comes to making ends meet, planning ahead, managing financial products, and financial knowledge.”).

<sup>185</sup> *See id.* (“[A]ddressing the inequalities in financial capability requires . . . well-designed financial education programs.”).

<sup>186</sup> *See* 11 U.S.C. § 362(a); Satorius, *supra* note 33, at 2239; Williams, *supra* note 33.

<sup>187</sup> *See Why Do People Leave Prison with So Much Debt?*, *supra* note 19 (“Returning citizens often face a mountain of debt upon leaving prison that makes it more difficult to successfully reenter society . . . . This onerous amount of debt, combined with the lack of opportunity to earn or save money while in prison, cause many offenders to reenter society with little hope of being able to repay what they owe.”).

A could even start servicing his non-dischargeable debts, such as criminal restitution or domestic support claims,<sup>188</sup> while he finishes out his sentence, putting him in a healthier financial position upon release. Person B, on the other hand, would have to wait to file and receive a discharge. Person B would thus be unable to start servicing his non-dischargeable debts immediately upon release and would be forced to make difficult decisions about which debts to prioritize as he balances the many challenges of reintegration into society.

While there is plenty of literature and programming that could help Person B create a plan for getting back on his feet financially post-incarceration,<sup>189</sup> there is currently little Person B could do to deal with his debts from within prison. When Person B is freed, he will be at a financial disadvantage by nature of his carceral history: he will likely face additional financial challenges including securing housing,<sup>190</sup> obtaining employment,<sup>191</sup> and even repaying criminal justice financial obligations.<sup>192</sup> Timing is everything: if Person B wants the best chance of reintegration into society and financial recovery, it is important that he start working to rebuild his financial health *before* release.<sup>193</sup>

## II. PROPOSAL

BAPCPA's education requirements present a barrier for incarcerated debtors—failure to complete the requirements can keep incarcerated persons out of bankruptcy or deny them the discharge. Moreover, the requirements present

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<sup>188</sup> See 11 U.S.C. § 362(b); see also Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, NEW THINKING IN CMTY. CORR. BULL., Jan. 2017, at 2, available at <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

<sup>189</sup> See, e.g., *Moneysteps: Project Info*, MONEYSTEPS, <http://moneystepsproject.org/project-info> (last visited Feb. 11, 2023). Moneysteps is an example of a financial education program providing literature and videos to help individuals who have experienced incarceration get back on their feet financially.

<sup>190</sup> See Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> (discussing high rates of homelessness among the previously incarcerated, largely due to “[d]iscrimination by public housing authorities and private property owners,” and “affordable housing shortages”).

<sup>191</sup> See Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> (discussing high rates of unemployment among formerly incarcerated people who “want to work, but face structural barriers to securing employment, particularly within the period immediately following release”).

<sup>192</sup> See Martin, *supra* note 188, at 2 (explaining that fines, forfeiture of property, costs and fees, and restitution can “have long-term effects that significantly harm the efforts of formerly incarcerated people to rehabilitate and reintegrate”).

<sup>193</sup> *Why Do People Leave Prison with So Much Debt?*, *supra* note 19 (“Without having a realistic plan and payment options to pay off all of this debt, people returning from prison are less likely to pay anything at all, more likely to engage in the underground economy to avoid wage garnishment, and more likely to make bad decisions that may result in re-incarceration.”).

an *empty* barrier—successful completion of the educational courses, if achieved, is rendered futile because the courses lack substantive efficacy. Though it is seemingly possible to eliminate the barrier problem solely by increasing physical accessibility, this is not enough. If accessibility were the sole issue, then any debtor who successfully completed the two education courses would reap the credit counseling and financial literacy benefits. They do not.<sup>194</sup> While accessibility is a valid issue for incarcerated debtors, increasing accessibility is meaningless without addressing the underlying problem: substantive inefficacy. Inversely, an increase in effectiveness alone is unproductive if the courses remain inaccessible. Accordingly, the solution must be two-pronged: reform of BAPCPA’s education requirements must (1) increase accessibility, so incarcerated debtors are able to physically attend the required courses and (2) increase efficacy, so incarcerated debtors who complete the requirements gain relevant, meaningful financial knowledge.

This Section proceeds as follows. Section II.A begins by addressing previous proposals for solving the empty barrier problem and why a new solution is necessary. Section II.B then explores how and why a two-pronged solution of in-prison programming (to increase accessibility) and differentiation theory (to increase efficacy) should be implemented to solve the empty barrier problem. Finally, Section II.C outlines a viable method of implementation into the Code’s current bankruptcy education scheme.

#### A. *Previous Proposals*

In the nearly twenty years since BAPCPA’s enactment, critics have proffered various solutions to the problems the education requirements present to the debtor population writ large.<sup>195</sup> Comparatively few solutions have emerged to address the specific problems posed to the incarcerated debtor population. Previous solutions, which run the gamut from statutory amendments,<sup>196</sup> to

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<sup>194</sup> See *supra* Section I.B.2.

<sup>195</sup> See *supra* Section I.B.1.

<sup>196</sup> See, e.g., Erickson, *supra* note 100, at 72 (suggesting an amendment of the rigid waiver requirements set forth in section 109(h) to give courts more discretion in applying exceptions for “deserving debtors” that do not fall under one of the current exceptions); Victoria L. VanZandt, *The Exigent Circumstances Exception to the Pre-Petition Credit Counseling Requirement Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Exigent or Extreme?*, 6 DEPAUL BUS. & COM. L.J. 265, 266 (2008) (suggesting Congress enact additional guidelines to clarify the exception in section 109(h)(3)).



judicial and extrajudicial proposals,<sup>197</sup> to the purely theoretical,<sup>198</sup> comprise solid ideas rooted in logic, expertise, and data. Unfortunately, few solutions seem to have taken root.<sup>199</sup> Follow-up studies would help clarify the impact, if any, these solutions have had. In the meantime, the bankruptcy education programming remains inaccessible and ineffective for incarcerated debtors.<sup>200</sup> This should, at the very least, warrant consideration of a new approach.

A handful of scholars have contemplated total abolition of bankruptcy education programming.<sup>201</sup> Abolition may merit discussion but is not likely to capture the attention of government actors or bankruptcy professionals. As one scholar put it, “it is hard to be against debtor education—it would be like being against apple pie.”<sup>202</sup> Financial literacy education is a worthy endeavor. In the United States, there exists a serious and worsening gap in financial literacy knowledge.<sup>203</sup> According to a 2014 study, “a little over half of all adults are financially literate.”<sup>204</sup> This gap matters: to make sound financial decisions, individuals need to have both a basic level of financial knowledge and the ability to apply that knowledge to make positive financial decisions.<sup>205</sup>

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<sup>197</sup> See, e.g., Bartell, *supra* note 21, at 15 (suggesting a course of judicial action by which judges exercise their discretion and excuse section 109(h) noncompliance by striking rather than dismissing petitions from debtors who file without completing counseling); Satorius, *supra* note 33, at 2262 (suggesting petitions filed in violation of section 109(h) should be struck rather than dismissed).

<sup>198</sup> See, e.g., Wiener, *supra* note 110, at 473–74 (suggesting education programs should consider social analytic jurisprudence and try to help consumer debtors understand their individual psychological motivations and biases).

<sup>199</sup> See, e.g., Sousa, *supra* note 97, at 466 (“For the past decade, Congress has, for whatever reason, repeatedly ignored the admonitions of bankruptcy law scholars regarding the misguidedness of BAPCPA overall. Perhaps the ever-growing body of evidence over the ineffectiveness of the debtor education requirements will prompt Congress to finally act.”); Lewandoski, *supra* note 19, at 201–02 (explaining courts have been reluctant to treat incarceration as an excuse and waive bankruptcy requirements, including the credit counseling requirement).

<sup>200</sup> See *supra* Section I.B.2.

<sup>201</sup> Cf. LOONIN, *supra* note 13, at 39 (“As with counseling, it is difficult to quantify the value of financial education courses. One problem is the lack of an established causal connection between poor financial literacy and financial trouble.”). See generally Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415 (2009) (suggesting there is no data to support claims that financial literacy education programs are effective).

<sup>202</sup> Karen Gross, *Appendix G-3.a—Introducing a Debtor Education Program Into the U.S. Bankruptcy System: A Roadmap for Change 2*, in 2 BRADY C. WILLIAMS ET AL., NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT (1997), available at <https://govinfo.library.unt.edu/nbrcreportcont.html>.

<sup>203</sup> *Financial Capability in the United States*, FINRA INVEST. EDUC. FOUND. 1, 3, 28–34 (July 2016), <https://finrafoundation.org/sites/finrafoundation/files/NFCS-2015-Report-Natl-Findings.pdf> (in a survey of over 25,000 Americans presented with five basic financial literacy questions, only 14% of respondents answered all questions correctly; 37% gave correct answers to at least four questions); *About CARE*, CREDIT ABUSE RESISTANCE EDUC., <https://care4yourfuture.org/about> (last visited Feb. 11, 2023).

<sup>204</sup> *About CARE*, *supra* note 203.

<sup>205</sup> *Financial Capability in the United States*, *supra* note 203, at 28.

The state of financial literacy knowledge in the U.S. also weakens any argument that Congress should amend the Code to exempt incarcerated debtors from the two education requirements, as it does for those who are incapacitated, disabled, or on active military duty.<sup>206</sup> Beyond the likelihood of statutory amendment being extremely low,<sup>207</sup> such a proposal dismisses debtor education as a worthy goal. If the accessibility and effectiveness of the education programs are improved, incarcerated debtors would actually benefit from completing the requirements. Theoretically, if the education requirements become accessible and effective, there is no reason to preclude any debtor population from bankruptcy education.

Finally, some bankruptcy professionals have focused on supplementation rather than reform. Programs are emerging across the country that attempt to deliver financial literacy education outside the Code's framework.<sup>208</sup> As Section II.B discusses, there is plenty to learn and borrow from these existing programs; however, supplementation should not be necessary if accessible, effective programming can be incorporated into the existing framework.

## B. *A Solution in Two Parts*

### 1. *Increase Accessibility*

The first prong of the solution makes the required pre-filing credit counseling and post-petition financial management courses more accessible for incarcerated

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<sup>206</sup> 11 U.S.C. §§ 109(h)(4), 727(a)(11).

<sup>207</sup> Congress has failed to act in the face of recent calls to amend the Code. *See, e.g.*, Amanda Robert, "Undue Hardship" Is Too Strict a Standard to Discharge Student Loans in Bankruptcy, *ABA Argues*, AM. BAR ASSOC. (Aug. 10, 2021, 1:44 PM), <https://www.abajournal.com/news/article/resolution-512-aba-house-advocates-for-discharge-of-student-loans-in-bankruptcy> (noting Congress's failure to act despite urgings from individual legislators and activists to amend the Code to allow borrowers to discharge student loans more easily); Adam S. Minsky, *Big Changes To Student Loan Bankruptcy Rules May Be Coming—But Questions Remain*, FORBES (Oct. 28, 2021, 3:47 PM), <https://www.forbes.com/sites/adamminsky/2021/10/28/big-changes-to-student-loan-bankruptcy-rules-may-be-coming—but-questions-remain/?sh=3daf105556eb> (describing a bipartisan bill that would make student loans more readily dischargeable but whose "fate is currently uncertain, as Congress is now focused on other pressing matters, including passage of President Biden's signature infrastructure and social spending bills"). When one considers the relatively weak voice of incarcerated debtors, it is doubtful that Congress would take action to institute bankruptcy protections for this population when it refuses to do so for the millions of (arguably more popular) student loan borrowers calling for change year after year.

<sup>208</sup> *See Taking Financial Literacy Into Prison*, U.S. CTS. (Mar. 7, 2013), <https://www.uscourts.gov/news/2013/03/07/taking-financial-literacy-prison> (discussing how a popular financial literacy program, Credit Abuse Resistance Education (CARE) could be implemented in prisons); *Moneysteps: Project Info*, *supra* note 189 (describing a program designed by Consumer and Education and Training Services ("CENTS") in partnership with the United States Probation and Pretrial Services to "help people who have experienced incarceration take control of their financial situation").

debtors. Currently, the Code allows the courses to be completed in person or over the telephone or internet.<sup>209</sup> However, restricted physical liberty and restrictive telephone and internet access policies combine to hinder incarcerated people in ways the Code does not account for.<sup>210</sup> The constrictive policies of every correctional department across the country should not be challenged in an attempt to ease access via telephone or internet. Instead, the education courses should be made available in person, inside prisons. There are several reasons to believe in-prison credit counseling and financial management courses could be provided.

First, in-prison education programs already exist.<sup>211</sup> The majority of adult correctional institutions provide educational programming, ranging from basic literacy programs to programs geared toward passing a GED exam, as well as vocational training, college courses, and special education programs.<sup>212</sup> In-prison education programming is effective, too: participation can help reduce recidivism rates by increasing cognitive skills that change behavior, increasing prisoners' employment prospects and thus their potential earning capacity post-release,<sup>213</sup> and, in turn, reducing crime.<sup>214</sup> Contrarily, failing to educate incarcerated people and equip them with the necessary skills and resources prior to release increases the likelihood they will revert to criminal behavior and end up back in prison.<sup>215</sup>

In-prison bankruptcy education programs could similarly be offered to help prisoners get back on their feet financially and become successful members of the economy upon release. In fact, in-prison financial literacy programs already exist across the country.<sup>216</sup> It would not be impractical, then, to provide BAPCPA-required bankruptcy courses in prisons, too.

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<sup>209</sup> 11 U.S.C. § 109(h)(1) (providing that credit counseling may be received “by telephone or on the Internet”); 11 U.S.C. § 111(d)(1)(C) (providing that “such facilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective . . .”).

<sup>210</sup> See *supra* Section I.C.1.

<sup>211</sup> See Ewert & Wildhagen, *supra* note 180.

<sup>212</sup> See *id.* at 5.

<sup>213</sup> See *id.* at 5–6.

<sup>214</sup> Audrey Bazos & Jessica Hausman, *Correctional Education as a Crime Control Program*, LINCS.ED.GOV (2004), <https://lincs.ed.gov/professional-development/resource-collections/profile-512>

(“Once correctional education participants are released, they are about 10 to 20 percent less likely to re-offend than the average released prisoner.”).

<sup>215</sup> Rabuy & Kopf, *supra* note 55 (“Correctional experts of all political persuasions have long understood that releasing incarcerated people to the streets without job training, an education, or money is the perfect formula for recidivism and re-incarceration.”).

<sup>216</sup> E.g., *Financial Literacy Course*, PROJECT 180, <https://www.project180reentry.org/portfolio-item/financial-literacy-course/> (last visited Feb. 11, 2023) (outlining financial literacy program in Florida prisons and jails, including instructions on establishing, repairing and improving one’s credit, borrowing and loans,

Instituting in-person programming may seem unnecessarily costly when virtual programming is already available. This critique is misguided for two reasons. First, in-prison education programs actually help reduce costs.<sup>217</sup> According to a 2013 report from the RAND Corporation, by helping reduce recidivism and improve job prospects, “a \$1 investment in prison education reduc[es] incarceration costs by \$4 to \$5 during the first three years post-release.”<sup>218</sup> In-person programming would also reduce costs for incarcerated debtors who would otherwise be forced to pay excessive call fees to complete the courses over the telephone. Second, if effective bankruptcy education is the goal, in-person programming is preferable to virtual programming.<sup>219</sup>

Though in-prison bankruptcy education programming would increase accessibility for incarcerated debtors and ultimately reduce costs, effectuating such a change will not necessarily be easy. The practical implementation of in-prison credit counseling and financial management courses is discussed in Section II.C of this section.

## 2. Increase Efficacy

The second and perhaps more critical prong of this two-part solution aims to make the education programs effective. In passing BAPCPA, Congress proclaimed that the credit counseling requirement should help debtors “make an informed choice about bankruptcy, its alternatives, and consequences,” while the financial management course requirement should help debtors “avoid future financial distress.”<sup>220</sup> To realign the education requirements with Congress’s purported goals, this Comment suggests borrowing a theory from the field of education: differentiation. Despite a few prior suggestions that have nodded

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budgeting, savings, etc.); *Life After Prison: Kewanee Life Skills Re-Entry Center*, WAND-TV (May 23, 2018), [https://www.wandtv.com/news/life-after-prison-kewanee-life-skills-re-entry-center/article\\_9bdbda4e-19d7-527a-82c4-e8a6f66b5339.html](https://www.wandtv.com/news/life-after-prison-kewanee-life-skills-re-entry-center/article_9bdbda4e-19d7-527a-82c4-e8a6f66b5339.html) (outlining Illinois program to help inmates reduce chances of recidivism through financial literacy and other programming); see *United States v. Harris*, No. CR 97-399-1, 2020 WL 7861325, at \*2 (E.D. Pa. Dec. 31, 2020) (“[Prisoner] is currently enrolled in courses on financial literacy and business mathematics.”).

<sup>217</sup> *Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook*, RAND CORP. (Aug. 22, 2013), <https://www.rand.org/news/press/2013/08/22.html> (“[F]indings, from the largest-ever meta-analysis of correctional educational studies, suggest that prison education programs are cost effective.”); Bazos & Hausman, *supra* note 214, at 3 (“Correctional education is almost twice as cost-effective as a crime control policy. Additionally, correctional education may actually create long-run net cost savings. Inmates who participate in education programs are less likely to return to prison.”).

<sup>218</sup> *Education and Vocational Training in Prisons Reduces Recidivism*, *supra* note 217.

<sup>219</sup> Sousa, *supra* note 97, at 442 (capturing former debtors’ reports that the bankruptcy education requirements could not be effectively accomplished online or over the telephone).

<sup>220</sup> H.R. REP. NO. 109-31, pt. I, at 2–3 (2005), as reprinted in 2005 U.S.C.A.N. 88, 89.

towards reform via theoretical approaches that have similarities to or approach differentiation,<sup>221</sup> there has been no explicit attempt thus far to apply the educational concept of differentiation to BAPCPA's education requirements. To understand how and why an educational philosophy would benefit incarcerated debtors, it is important to first understand the theory of differentiation—both what it is and what it is not. Each of these issues is addressed in turn.

Differentiation is a philosophy of teaching premised on the idea that differences among students are significant enough to deeply impact how students learn and the support they need to learn well.<sup>222</sup> At the end of the twentieth century, differentiated teaching grew as a response to the evolving composition of classrooms and the increasingly diverse needs of students.<sup>223</sup> The rise of differentiated instruction essentially symbolizes the recognition that teaching should adapt to students, not vice versa.<sup>224</sup> Differentiation thus theorizes that effective teaching should make connections between the material and students' personal experiences.<sup>225</sup> This increases student motivation, which in turn strengthens learning.<sup>226</sup> Additionally, differentiated teaching is based on a belief that learning is more effective when individual students feel significant and respected.<sup>227</sup> Students in a differentiated classroom should be met at the appropriate academic and developmental levels.<sup>228</sup>

Though it requires significant individualization, differentiated instruction is compatible with standardized learning.<sup>229</sup> While curriculum dictates *what* teachers should teach, differentiation specifies *how* teachers should teach.<sup>230</sup>

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<sup>221</sup> See Wiener, *supra* note 110, at 474 (2005) ("A financial literacy course should both anticipate and address a range of literacy levels present in the classroom."); *id.* at 463–71 (suggesting there are meaningful differences among debtors and that the educational courses should be tailored to these individual needs).

<sup>222</sup> See Carol Tomlinson, *Reconcilable Differences? Standards-Based Teaching and Differentiation*, 58 EDUC. LEADERSHIP 6 (2000).

<sup>223</sup> Pearl Subban, *Differentiated Instruction: A Research Basis*, 7 INT'L EDUC. J. 935, 938, 940 (2006) ("Current educational trends . . . reflect significant changes in student populations from two or three decades ago. The inclusion of students from non-English speaking backgrounds, students with disabilities, students from diverse cultural backgrounds . . . compel[s] educators to relook at their teaching and instructional practices.").

<sup>224</sup> Carol Tomlinson et al., *Differentiating Instruction in Response to Student Readiness, Interest, and Learning Profile in Academically Diverse Classrooms: A Review of Literature*, 27 J. FOR EDUC. GIFTED 119, 133 (2003) ("Effective differentiation is learner centered."); Tomlinson, *Reconcilable Differences?*, *supra* note 222, at 7 ("The central job of schools is to maximize the capacity of each student."); Subban, *supra* note 223, at 938 ("Contemporary classrooms should accept and build on the basis that learners are all essentially different.").

<sup>225</sup> Tomlinson, *Reconcilable Differences?*, *supra* note 222, at 7.

<sup>226</sup> See generally Amy D. Thelk et al., *Motivation Matters: Using the Student Opinion Scale to Make Valid Inferences About Student Performance*, 58 J. GEN. EDUC. 129 (2009).

<sup>227</sup> Tomlinson, *Reconcilable Differences?*, *supra* note 222, at 7.

<sup>228</sup> Subban, *supra* note 223, at 937–38.

<sup>229</sup> Tomlinson, *Reconcilable Differences?*, *supra* note 222, at 9.

<sup>230</sup> *Id.*

Teachers may use any combination of tools and strategies to differentiate instruction, from visual or kinesthetic aids, to worksheets that chunk information into smaller parts, to assignments that allow each student to connect the lesson to a problem they experience in their own lives. If properly employed, differentiation enables teachers to simultaneously help a range of learners achieve the same standardized learning goals. And differentiated instruction is effective.<sup>231</sup>

Differentiation is not a mathematic formula or “recipe for teaching” that can be blindly applied to achieve results in the classroom.<sup>232</sup> Such rigid formulation would be antithetical to the theory itself; differentiation honors and addresses learner variance, and thus “avoids the pitfalls of the one-size-fits-all curriculum.”<sup>233</sup>

Though the theory of differentiation is one that has traditionally been employed in the primary and secondary education context, it is readily adaptable to any education context, including adult bankruptcy education. Adults, like children, have varied learning needs. Adults filing for bankruptcy have unique cultural backgrounds and life experiences that affect their attitudes and beliefs about spending, saving, and credit usage.<sup>234</sup> Furthermore, just as a fifth-grade math course may have a set of standardized benchmarks that each student should meet by the end of the course, BAPCPA’s requirements purport to have standardized goals that each debtor should meet by the end of each required course. And, like the fifth-grade students who show up to math class with varied levels of experience with fractions, debtors file for bankruptcy with varied levels of experience with debt and financial management.

Implementing differentiated instruction could transform the currently ineffective, one-size-fits-all educational courses into effective, individualized programs for incarcerated debtors. While maintaining rigorous standards, each credit counseling or financial management course could be tailored to the unique needs of each individual debtor. For incarcerated debtors, differentiation would likely account for lower levels of education and income, marital status, citizenship, race, or ethnicity. Differentiated instruction would also consider the unique attitudes towards financial management and debt that an incarcerated person may hold, as well as any goals they may have or challenges they will face

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<sup>231</sup> Subban, *supra* note 223, at 942 (discussing several studies that have “shown positive outcomes from the use of differentiated instruction”).

<sup>232</sup> *Id.* at 940.

<sup>233</sup> *Id.*

<sup>234</sup> *See* Wiener, *supra* note 110, at 453.

post-release. Unlike classroom teachers, bankruptcy education providers would not need to differentiate for dozens of students simultaneously.

Moreover, educators have already begun exploring differentiated instruction in the financial literacy context. Findings from one study indicate that educators believe financial education should adapt to learners' beliefs, attitudes, and emotions about money, as well as recognize that these beliefs, attitudes, and emotions are related to the larger context of learners' lives.<sup>235</sup> Educators in this study reported drawing on learners' experiences, engaging in small group discussions, sharing aspects of the educators' own experiences, and including stories and examples featuring members of diverse groups.<sup>236</sup> Credit counseling agencies and financial management course providers could follow suit.

Like any reform, difficulties in implementation may arise; these issues are addressed in the following section. Nevertheless, if educators across the globe can agree to student-centered education, then bankruptcy professionals should be able to agree to debtor-centered education.

### C. Method of Implementation

In discussing the contours of a potential reform, it is critical to delineate a course of implementation. Without a means of implementation, good ideas remain just that: good ideas. Typically, Congress is the apparatus for statutory change. Unfortunately, Congress is unlikely to execute the overhaul the education requirements need. First, there is the simple fact that, despite the available data on inefficacy, Congress has done nothing to revamp the requirements.<sup>237</sup> Second, in recent years, it has become difficult for an increasingly polarized Congress to accomplish anything.<sup>238</sup>

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<sup>235</sup> Elizabeth J. Tisdell et al., *Community-Based Financial Literacy Education in a Cultural Context: A Study of Teacher Beliefs and Pedagogical Practice*, 63 ADULT EDUC. Q. 338, 339 (2013).

<sup>236</sup> *Id.* at 345–46.

<sup>237</sup> See Sousa, *supra* note 97, at 466 (“For the past decade, Congress has, for whatever reason, repeatedly ignored the admonitions of bankruptcy law scholars regarding the misguidedness of BAPCPA overall. Perhaps the ever-growing body of evidence over the ineffectiveness of the debtor education requirements will prompt Congress to finally act.”)

<sup>238</sup> See Samuel A. Marcossan, *Fixing Congress*, 33 BYU J. PUB. L. 227, 227–28 (2019) (arguing that Congress is “a broken, dysfunctional mess” due in part to “the inability of the House of Representatives to function because it has become an institutionalized reflection of America’s polarized politics”); Ezra Klein, *Congressional Dysfunction*, VOX (May 15, 2015, 6:18 PM), <https://www.vox.com/2015/1/2/18089154/congressional-dysfunction> (explaining that “Congress, despite its vast authority, seems paralyzed in the face of the nation’s toughest problems” and this polarization is problematic because “the American political system typically requires bipartisan coalitions in order to get big things done, but during periods of intense political polarization, it is almost impossible for those coalitions to form.”).

Fortunately, the unique structural design of the bankruptcy system does not require congressional action to implement change. The Code is a statutory regime. Unlike most statutory systems in the United States, which are regulated by federal regulatory agencies, bankruptcy law is regulated almost entirely by the courts.<sup>239</sup> Nevertheless, two federal agencies play a significant role in the bankruptcy system: the United States Trustee Program and the Bankruptcy Administrator Program.<sup>240</sup> The U.S. Trustee Program, run by the Department of Justice, consists of twenty-one regional offices, each run by an individual trustee.<sup>241</sup> Under the Judicial Code, the Attorney General of the Department of Justice supervises the entire U.S. Trustee Program; however, the Attorney General has delegated this authority to the Executive Office for United States Trustees.<sup>242</sup> The Bankruptcy Administrator Program, which largely parallels the U.S. Trustee Program, operates only in the federal judicial districts in Alabama and North Carolina.<sup>243</sup> Both programs act as “bankruptcy watchdogs,” responsible for reporting and monitoring to ensure bankruptcy laws are enforced properly, and entrusted with the power to raise any issue and be heard in any bankruptcy proceeding.<sup>244</sup>

Under the Code, the United States Trustee and Bankruptcy Administrator Programs “enjoy significant authority to control. . . credit counseling and educational agencies.”<sup>245</sup> As previously explained, section 111 of the Code authorizes the U.S. trustee or bankruptcy administrator to approve credit counseling agencies and financial management education courses.<sup>246</sup> Under section 111, both programs possess delegated authority to promulgate guidelines for approving any credit counseling agencies and financial management education courses in their respective jurisdictions. Thus, the U.S. Trustee Program and the Bankruptcy Administrator Program should use this discretion to reformulate the standards for approval.

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<sup>239</sup> Pardo & Watts, *supra* note 28, at 386 (“Courts routinely engage in a lawmaking function by filling in the gaps in the Bankruptcy Code.”); Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 84 (2006).

<sup>240</sup> Pardo & Watts, *supra* note 28, at 394.

<sup>241</sup> *Id.* at 394–95.

<sup>242</sup> *Id.* at 395.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 397.

<sup>245</sup> *Id.* at 399; 11 U.S.C. § 111(b)–(d).

<sup>246</sup> 11 U.S.C. § 111(b)–(d); *see supra* Section I.A.3.



First, the U.S. Trustee Program (or Bankruptcy Administrator Program)<sup>247</sup> should impose standards which require any counseling agency or course provider to ensure an in-person method of delivery is available to any incarcerated person. Any currently approved agency or provider that refuses or fails to do so should not be reapproved when it comes time for annual evaluations. For credit counseling, the trustee in each district should allow the currently approved agencies to extend their counseling services to provide in-person counseling in prisons. If the credit counseling agency's resources are limited, in-prison services could consist of a monthly service where a counselor designates a schedule and incarcerated debtors sign up for time slots. Because in-prison financial literacy courses already exist, the U.S. trustee could evaluate those programs for approval as post-filing financial management courses. In addition, the trustee could search for new and existing programs that may be able to provide both credit counseling and financial management courses—the consistency of having the same provider for both education courses could be highly beneficial for debtors and providers alike.<sup>248</sup>

Second, the U.S. Trustee Program should impose new standards for the substantive delivery of programs. As previously noted, the Code utilizes vague terms such as “adequate,” “effective,” and “substantial” to describe the standards for approval without making any effort to elaborate on what exactly such standards should look like in practice.<sup>249</sup> Without changing a single word in the statute, the U.S. Trustee Program could clarify those standards. In doing so, the trustee in each district should require all credit counseling agencies and financial management instruction providers to implement differentiated instruction into their services. Specifically, the U.S. Trustee Program should offer training—preferably led by education experts familiar with differentiation—on what the specific needs of incarcerated debtors might be and how programs must be differentiated to accommodate their unique needs. The U.S. Trustee Program could even create online modules with tools and examples for education providers seeking approval. Again, this may be easier for existing in-prison education programs, which may be more willing and able to implement differentiated instruction. Alternatively, U.S. trustees could draw on the

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<sup>247</sup> Any course of action recommended for the U.S. Trustee Program is recommended for the Bankruptcy Administrator Program too.

<sup>248</sup> For debtors, this could help build trust throughout the bankruptcy education process, which would benefit learning outcomes. Providers could use this opportunity to dispatch one employee to a prison to provide credit counseling to one debtor and financial management instruction to another on the same day, saving time and resources. Additionally, this consistency would allow counselors/instructors to get to know debtors better, which would significantly improve their ability to differentiate instruction based on the debtor's unique needs.

<sup>249</sup> See *supra* Section I.A.3.

practices of outside financial literacy courses such as CARE,<sup>250</sup> Moneysteps,<sup>251</sup> or equivalent programs, as exemplars for helping any currently approved credit counseling agencies or financial management instruction providers meet the new guidelines.

There may be challenges to these new standards, particularly from credit counseling agencies or financial management course providers who are approved under the current regime and therefore resistant to new, more demanding guidelines. Due to the unique structure of the bankruptcy system, any challenges would ultimately be decided by the courts.<sup>252</sup> Because the U.S. trustee has clear authority to approve education course providers, as well as potential rulemaking powers,<sup>253</sup> bankruptcy courts may choose to defer—either formally or informally—to the trustee’s new guidelines.<sup>254</sup>

Finally, to properly measure the adequacy and effectiveness of any programs approved under this new regime, there will need to be a stronger, standardized system of feedback than currently exists under the Code.<sup>255</sup> Though it may prove difficult to measure whether differentiation is being applied, surveying incarcerated debtors who have completed the education requirements would be a great place to start.<sup>256</sup> It is important to note that the argument for a standardized feedback system does not preclude the argument that the educational courses should be differentiated to meet the varied needs of individual debtors. The content of courses and method of delivery need not be uniform to maintain a standardized education program. Rather, the processes for approving and measuring efficacy of programs should be standardized to promote equity. Standardized systems should help ensure the differentiated

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<sup>250</sup> See CARE, CREDIT ABUSE RESISTANCE EDUC., <https://care4yourfuture.org/> (last visited Feb. 11, 2023).

<sup>251</sup> See *Moneysteps: Project Info*, *supra* note 189.

<sup>252</sup> See Pardo & Watts, *supra* note 28, at 392–93 (“A bankruptcy court . . . has original and exclusive jurisdiction over a bankruptcy case, and original but nonexclusive jurisdiction over all civil proceedings ‘arising under’ the Code, or ‘arising in’ or ‘related to’ cases under the Code . . . . Proceedings ‘arising in’ a case under the Code are ‘primarily those administrative proceedings that, while not based on any right created by [the Code], nevertheless have no existence outside bankruptcy.’” (quoting *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 909 (B.A.P. 9th Cir. 1999))).

<sup>253</sup> See *id.* at 436 n.335 (suggesting rulemaking powers could be inferred from language in the Code).

<sup>254</sup> See *id.* at 399 (“Even though Congress has created some space for agency involvement and enforcement of the statutory regime, the courts maintain the ultimate authority to set substantive bankruptcy policy.”); see also *In re Jack Kline Co., Inc.*, 440 B.R. 712, 753 (Bankr. S.D. Tex. 2010) (deferring to guidelines promulgated by the U.S. Trustee Program which prohibit fee lumping in reasoning that, where the chapter 7 trustee’s law firm violated these guidelines, a fee reduction for the firm was appropriate.)

<sup>255</sup> See *supra* Section I.A.3.

<sup>256</sup> Empirical data could be collected through surveys of former debtors, both incarcerated and non-incarcerated, to see if the courses were differentiated.

programs help debtors address their specific financial problems and reach their specific financial goals.

It may take some time for these changes to take root, whether existing programs take the necessary steps to conform with the new standards or new programs undertake the approval process. However, this does not mean the bankruptcy system must come to a halt. Rather, one of the existing statutory exceptions could come into play. Under the Code, a debtor is exempt from both the pre-filing credit counseling and post-filing financial management course requirements if the debtor “resides in a district for which the United States trustee . . . determines that the approved nonprofit budget and credit counseling agencies [or financial management course providers] for such district are not reasonably able to provide adequate services.”<sup>257</sup> Therefore, incarcerated debtors could continue to file for bankruptcy while the U.S. Trustee Program works to approve adequate credit counseling agencies and financial management course providers under the new guidelines.

#### CONCLUSION

BAPCPA’s education requirements are inaccessible and ineffective for incarcerated debtors. Under the current scheme, the credit counseling and financial management courses are empty hurdles—but they need not be. Robust, accessible education programs, narrowly tailored to the unique needs of individual debtors, could have immense impact for incarcerated debtors, who face serious challenges to financial success before, during, and after their incarceration. Through the implementation of in-prison programming and differentiated instruction, the education requirements could achieve what Congress hoped they would: useful financial literacy education that equips incarcerated debtors with the tools they need to reach their bankruptcy goals and get back on their feet financially upon release.

Despite its intended benevolence, Congress failed to create a productive bankruptcy education system. And though Congress manufactured the problem, the solution need not hinge on congressional action. By leveraging the authority delegated to the U.S. Trustee and Bankruptcy Administrator Programs to set new guidelines for approval of agencies and course providers, nothing in the Code needs to be altered.

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<sup>257</sup> 11 U.S.C. § 109(h)(2).

This solution may place a heavy responsibility on credit counseling agencies and financial management course providers. Improving the education requirements alone may not suffice to clear the path to bankruptcy for incarcerated debtors; other steps in the bankruptcy process remain difficult to achieve from the confines of prison. However, incarcerated debtors currently carry the sole burden of overcoming the barriers the education requirements present. Any effort to alleviate that burden—and make bankruptcy more achievable and meaningful in the process—is worthwhile.

Educating incarcerated debtors is a valuable endeavor, and one that should not be abandoned in the name of convenience. Increasing the accessibility and efficacy of the education programs would doubtless benefit the debtor population writ large, with their diverse bankruptcy needs, too. Incorporating a theory from the field of education to address this bankruptcy issue may be an unconventional strategy. However, in the eighteen years since BAPCPA, no other solution has found success. After all, an education problem requires an education solution.

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\* Notes & Comments Editor, *Emory Bankruptcy Developments Journal*; J.D., Emory University School of Law (2023); B.A., Cognitive Science, Brown University (2017). My deepest gratitude to everyone who helped bring this Comment to life. To my advisor, Professor Rafael Pardo, for his thoughtful guidance and intellectual enthusiasm throughout the writing process. To the entire *EBDJ* board for their tireless work and endless patience throughout the publication process. And, of course, to my family and loved ones, for enduring and embracing the many highs and lows of my law school journey.