

**SWORDS, SHIELDS, AND SHACKLES:
HUMAN AND CORPORATE “PERSONS”
UNDER THE BANKRUPTCY ABUSE
PREVENTION AND CONSUMER
PROTECTION ACT OF 2005**

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* Associate Professor of Law, Barry University. The author thanks Laura Nader, G. Ray Warner, Dean Leticia Diaz, Elizabeth Megale, Carlo Pedrioli, Anthony G. Matricciani, M.K. Matricciani, Robert Ruiz, and Louis Rosen. The idea for this Article results from four years of qualitative ethnographic fieldwork on bankruptcy in the United States. When I mentioned the topic of corporate person preferential treatment under the Bankruptcy Code to a lifelong federal bankruptcy law clerk he responded, “Yeah, just read it.” This Article is dedicated to Ralph Nader, a man of boundless vision and indefatigable dedication to truth and fairness.

INTRODUCTION

In September 2009, a lending division of American International Group (“AIG”) obtained a warrant for the arrest of Jeffrey Stearns for failing to appear in court to defend a *civil* lawsuit seeking payment for the remainder of the money owed after AIG repossessed Stearns’ pick-up truck.¹ Stearns was handcuffed in front of his four children and spent two nights in jail until he agreed to pay AIG \$1,500—the deficiency owed after the auction of the vehicle.²

Just a year prior, in 2008, AIG received amnesty when American taxpayers provided the funds to pay AIG’s outstanding debts.³ Neither federal courts nor state courts issued warrants for the arrests of AIG’s chairman of the board or any of AIG’s executives for failing to pay AIG’s debts in a timely fashion.⁴ No members of the corporation experienced the humiliation of being placed in handcuffs or sitting in jail until AIG paid its debts. Instead, AIG executives received million dollar bonus packages.⁵

In the United States, despite the impossibility of corporate existence without human agency, corporate and human persons are regarded differently, and most importantly they are held to dramatically different moral and ethical standards.⁶ Corporate

¹ Jessica Silver-Greenberg, *Welcome to Debtors’ Prison, 2011 Edition*, WALL ST. J., Mar. 17, 2011, available at <http://online.wsj.com/article/SB10001424052748704396504576204553811636610.html>.

² *Id.*

³ *The Federal Bailout of AIG: Hearing Before the H. Comm. On Oversight and Gov’t Reform*, 111th Cong. 2 (2010) (“On September 16, 2008, the Wall Street giant AIG faced immediate bankruptcy. AIG was saved from collapse when the American people came to the rescue with an \$85 billion bailout. Less than 2 months later, the American taxpayer was again forced to pay the bill when the Federal Reserve directed AIG to hand out billions of dollars to counterparties that included the biggest names on Wall Street.”). See also NEIL BAROFSKY, *BAILOUT: AN INSIDE ACCOUNT OF HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET 175-191* (2012); MAURICE R. GREENBERG, *THE AIG STORY* (2013).

⁴ BAROFSKY, *supra* note 3, at 175 (“When providing the largest financial institutions with bailout money, Treasury made almost no effort to hold them accountable, and the bounteous terms delivered by the government seemed to border on being corrupt. . . . Meanwhile, an entirely different set of rules applied for home owners and businesses that were most assuredly small enough to fail.”).

⁵ *Id.* at 181-82.

⁶ Shahien Nasiripour, *Don’t Look Back: Major Players Continue To ‘Walk Away’ From Poor Mortgages*, HUFFINGTON POST (Mar. 27, 2010, 6:12 AM), http://www.huffingtonpost.com/2010/01/25/dont-look-back-major-play_n_435965.html.

persons are not expected to live by Calvinist virtues—specifically, responsibility for their fiscal promises. A human person’s financial behavior, on the other hand, is infused with notions of personal responsibility and Christianity. A human person’s loan repayment behavior is a reflection of individual character, while a corporate person’s loan repayment is a purely financial decision made within the simplistically constructed context of changes in economic conditions, available credit, and investor expectations. A corporate person’s failure is viewed as resulting from larger aggregate economic factors, and the decision not to pay creditors is often approved as “just good business” and “good economic sense.”⁷

This difference is exemplified by media statements concerning corporate and human persons’ conduct during the mortgage crisis. Individual homeowners with underwater mortgages were counseled differently from similarly situated corporate persons.⁸ Former Secretary of the Treasury (and former chairman of the board of Goldman Sachs) Hank Paulson said that “any homeowner who can afford his mortgage payment but chooses to walk away from an underwater property is simply a speculator—and one who is not honoring his obligations.”⁹ In other words, the individual who walks away from an unprofitable deal is reprimanded for the moral failing of not honoring his or her obligations even though it might “make good economic sense.” And yet, this reprimand is not applied to corporate persons. Investment firms Morgan Stanley and Tishman Speyer Properties walked away from properties in San Francisco and New York City that were billions of dollars underwater rather than continuing to pay untenable mortgages because “it is better for the viability of the entity and the profits for their shareholders.”¹⁰ Mr. Paulson

⁷ Bob Adelman, *Donald Trump: The Art of Bankruptcy*, THE NEW AM. (Apr. 22, 2011, 5:59 PM), <http://www.thenewamerican.com/usnews/politics/item/5764-donald-trump-the-art-of-bankruptcy> (Donald Trump explained to George Stephanopoulos, “I’ve used the laws of this country to pare debt. . . . We’ll have the company [that’s in financial trouble] . . . we’ll throw it into a chapter [11 bankruptcy]. We’ll negotiate with the banks. We’ll make a fantastic deal. You know, it’s like on *The Apprentice*: It’s not personal. It’s just business.”). See also Nasiripour, *supra* note 6.

⁸ Nasiripour, *supra* note 6.

⁹ *Id.*

¹⁰ *Id.*

neither rebuked the investment firms nor disparaged the moral character of their corporate officers and management team.

This Article considers the theory of disciplinary neo-liberalism and how it is applied through manifestations of new constitutionalism found in the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹¹ (“BAPCPA”) amending the 1978 Bankruptcy Code.¹² The second Part discusses the category of “person” from competing perspectives found in Enlightenment thought and Roman law then analyzes the unequal treatment of persons under the recent amendments and Bankruptcy Code depending on whether it is a human person or a fictive corporate person. Next, this Article describes the imbalance in treatment of human and corporate persons evident in the recent amendments. Specifically, BAPCPA introduced the means test for only human debtors as a form of financial shackles.¹³ Additionally, when a second petition is filed by a human debtor within the same year, BAPCPA lifts the automatic stay—the bankruptcy shield—protecting human debtors from their creditors’ collection activities. Finally, human debtors are stripped of protections and powers under BAPCPA, whereas corporate debtors are not subject to these new amendments and are granted new statutory powers.

I. DISCIPLINING NEOLIBERALISM, NEW CONSTITUTIONALISM, AND THE BANKRUPTCY CODE

In the U.S., the concept of corporate personhood has evolved over the last forty years to encompass increased legal rights and protections for corporate persons.¹⁴ During the same time, the rights and protections for human persons have been attacked on

¹¹ Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C. (2006)). Most provisions of the Act became effective Oct. 17, 2005.

¹² Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Referred to as the “1978 Bankruptcy Code.”

¹³ 11 U.S.C. § 707(b)(2) (2006). *See also* 11 U.S.C. app. B22A, B22C.

¹⁴ *See generally* THOM HARTMANN, UNEQUAL PROTECTION: HOW CORPORATIONS BECAME “PEOPLE”—AND HOW YOU CAN FIGHT BACK (2d ed. 2010); JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT (2012). The development of the fictive person is discussed in Part II of this paper.

several fronts,¹⁵ including that of debt relations. This change reflects the larger shift in structures and processes of capitalism toward neoliberal policies and practices.¹⁶ These policies and practices are premised on a market fundamentalism discourse.¹⁷

¹⁵ Robert Weissman, *Corporate Rights in South Africa*, MULTINATIONAL MONITOR, (Nov. 1996), available at <http://www.multinationalmonitor.org/hyper/mm1196.03.html> (“The extension to corporations of freedom of political expression, negative free speech rights and rights of privacy has undermined the constitutional rights of natural persons to freedom of expression, freedom of association in organs of civil society, access to information, the rights to life, security of person and a safe environment.”).

¹⁶ “Neoliberal” and “neoliberalism” are used in this Article as tools applied to analyze a national trend in political and economic practices. This national trend has homologous international structures. Fashioned in Washington D.C. in 1989 as a set of policies and practices for Latin America, neoliberal notions find root in the “Washington Consensus” formulated by John Williamson. Initially, the policy and practices were drafted as “reforms” Latin America must adopt to escape the debt crisis. They include fiscal discipline, reordering public expenditure priorities, tax reform, liberalization of interest rates, competitive exchange rates, trade liberalization, liberalization of inward foreign investment, privatization, deregulation, and property rights. See Ravi Kanbur, *The Co-Evolution of the Washington Consensus and the Economic Development Discourse*, 24 MACALESTER INT’L 33, 35 (2009). For a theoretical understanding of “neoliberalism” see Dag Einar Thorsen, *The Neoliberal Challenge: What is Neoliberalism?*, 2(2) CONTEMP. READINGS IN L. & SOC. JUST. 188 (2010). Professor Thorsen clarifies the meaning of the term “neoliberalism” by explaining that it is similar to and yet different from traditional liberalism as a political ideology (as found in the works of John Locke, Adam Smith, Montesquieu, Thomas Jefferson, John Stuart Mills, and others). Liberalism, according to Thorsen, is broadly defined as a political ideology tending to favor constitutional changes that lean in the direction of freedom and democracy. Neoliberalism can be seen as a descendant or offshoot from liberalism, and yet, it is still very different from it. Neoliberalism aligns with economic liberalism or classic liberalism rather than with a social or modern liberalism. Neoliberalism, in the various forms identified by Thorsen, is a loosely demarcated set of political beliefs that hold the conviction that the only function of “the state is to safeguard individual liberty, understood as a sort of mercantile liberty for individuals and corporations.” *Id.* at 203. Within this, a system of unregulated free markets with free trade should be implemented. Unregulated markets with a finely tuned logic are thought to “set free the creative potential and the entrepreneurial spirit . . . and thereby lead to more individual liberty and well-being, a more efficient allocation of resources . . .” *Id.* at 204. See also Linda Coco, *Debtor’s Prison in the Neoliberal State: “Debtfare” and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1 (2012).

¹⁷ Stuart Hall, *Foucault: Power, Knowledge and Discourse*, in DISCOURSE THEORY AND PRACTICE: A READER 72, 72 (Margaret Wetherell, Stephanie Taylor, & Simeon J. Yates eds., 2001) (“Discourse” is a word adopted from the work of Michel Foucault meaning, “a group of statements which provide a language for talking about—a way of representing the knowledge about—a particular topic at a particular historical moment. . . . Discourse is about the production of knowledge through language. But . . . since all social practices entail *meaning*, and meanings shape and influence what we

This discursive form includes notions and values such as: capitalism is economically efficient; accumulation of material and money is desirable; public “resources” should be privatized; self-regulating markets are necessary and government should protect that freedom; and concentration of wealth in the hands of a few elite classes is not problematic.¹⁸ The cost to human populations is not considered.

National and local governments work, therefore, in furtherance of neoliberal policies by ensuring market fundamentalism through “rule of law” frameworks that promote a market order of liberalization, encourage private sector investment, and protect large corporations as the primary agents of global and local governance.¹⁹ Rule of law frameworks contain juridical formations of “new-constitutionalism” that involve “intensified efforts to extend, deepen and lock-in neoliberal governance and with it greater legal guarantees for private property rights and the protection of the sanctity of contract against encroachment.”²⁰ Private property rights are held by a small number of individuals and institutions in society, and those rights impose related duties on other non-proprietary members of society.²¹ Members of civil society are disciplined by the processes of wealth accumulation. This creates a forum for disciplining neoliberalism, in that state agencies and powers are used to further implement a neoliberal agenda and worldview.

The concept of disciplining neoliberalism developed by political scientist Stephen Gill draws together the macro and micro levels of structural and behavioral power as the primary forces controlling populations within the United States’ and other

do—our conduct—all practices have a discursive aspect. . . . It is about language *and* practice. . . . It defines and produces the objects of our knowledge. It governs the way that a topic can be meaningfully talked about and reasoned about. It also influences how ideas are put into practice and used to regulate the conduct of others. Just as a discourse ‘rules in’ certain ways . . . to talk, write, or conduct oneself, so also, by definition, it ‘rules out’, limits and restricts other ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it.”).

¹⁸ STEPHEN GILL, POWER AND RESISTANCE IN THE NEW WORLD ORDER 123-49 (2008).

¹⁹ *Id.* at 161.

²⁰ *Id.*

²¹ *Id.*

Western countries' political and economic orders.²² Disciplining neo-liberalism, as Professor Gill describes, combines the “structural power of capital with ‘capillary power’ and ‘panopticism’” that are “bureaucratized and institutionalized . . . across a range of public and private spheres in various state and civil society complexes.”²³ These state practices create a frame of understanding constituting a “terrain of knowledge and a system of social and individual control.”²⁴

According to Stephen Gill and Isabella Bakker, the concepts of new constitutionalism and disciplining neoliberalism describe the process for implementing a worldwide revolution—neoliberal governance—by doing “nothing less than the reconfiguration of forms of state and power/production/social reproduction along largely liberal lines in ways designed to empower private property associated with capital”²⁵ The mechanisms of this new configuration include “new networks of laws, rules, [and] standards.”²⁶ These new networks of laws, rules, and standards are what constitute the market “enabling state” that is committed to locking in reforms for citizens.²⁷ Central to the security of capital is the state’s reformulations of new constitutionalism to lock in fiscal austerity for particular classes and corporate entities.²⁸

BAPCPA is an example of a legal mechanism of disciplining neo-liberalism. The amendments to the 1978 Code increase protections for the rights of private property holders and further ensure the sanctity of contracts between particular persons.²⁹ The Amendment’s impacts are uneven depending on debtor status as either a natural or a fictive person. For example, the 2005 act maintains and extends the protectionist provisions for corporate

²² *Id.* at 137.

²³ *Id.* at 137-38.

²⁴ *Id.* at 137.

²⁵ Isabella Bakker & Stephen Gill, *Ontology, Method, and Hypotheses*, in *POWER, PRODUCTION AND SOCIAL REPRODUCTION: HUMAN IN/SECURITY IN THE GLOBAL POLITICAL ECONOMY* 17, 29 (Isabella Bakker & Stephen Gill eds., (2003).

²⁶ *Id.* at 30.

²⁷ *Id.*

²⁸ *Id.* at 30-35.

²⁹ *See generally id.* at 31.

persons.³⁰ Human persons, on the other hand, experience heightened financial scrutiny.

Studied holistically, BAPCPA creates an asymmetric treatment of debtors depending on their categorization as human person or corporate person.³¹ The unequal treatment of categorically different debtors is strikingly apparent as new subsections are considered in relation to other provisions.³² A holistic reading with cross-referencing of words and phrases reveals a disproportionate and overly-broad detrimental impact on human debtors as compared with corporate debtors. In light of this unequal treatment of debtors under BAPCPA, scholars have reflected on whether such an impact is purposeful³³ or simply a result of haphazard and sloppy drafting.³⁴ Others have argued that such a disproportionate impact is by design.³⁵ Regardless of the position taken, these shifts manifest a disposition to protect private capital at the expense of individuals.³⁶

³⁰ Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C. (2006)). Most provisions of the Act became effective Oct. 17, 2005.

³¹ 11 U.S.C. § 101 (41) (2006) (“The term ‘person’ includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit . . .”).

³² See *infra* Part III.

³³ Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 377-79 (2007) (The new Act, rather than achieving its stated purpose of catching can pay debtors, actually works to benefit issuers of revolving credit loans with high interest rates by keeping individuals in need outside the bankruptcy system, in the sweat box.).

³⁴ Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code Section 362(c)(3)(A)*, 86 AM. BANKR. L.J. 407, 414-420. (2012) (The article provides ample citations for post-BAPCPA negative commentary.).

³⁵ See Linda Coco, *Debtor's Prison in the Neoliberal State: “Debtfare” and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1 (2012).

³⁶ DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 5-38 (2005); JEFF MADRICK, *AGE OF GREED: THE TRIUMPH OF FINANCE AND THE DECLINE OF AMERICA, 1970 TO THE PRESENT* 5 (2011) (This text discusses the social and political impacts of anti-New Deal activists who began to gain power in the 1970s. “The believers eventually found a unifying voice for their philosophy in the economic writings of Milton Friedman and the novels of Ayn Rand. They found their national political leadership in Ronald Reagan. They found powerful allies in big business, who were relative latecomers to their cause, learning in the 1970s to organize themselves politically for fear the progressive country was turning against them.”).

II. THE CATEGORY OF “PERSON”

Cultural notions such as beliefs, values, and ideals are predisposed to function as dominant notions or formative structures on the larger collectively-held cognitive map.³⁷ According to anthropologist Franz Boas, in order to understand a culture’s cognitive map and categories of thought, one must first examine its histories to contextualize its adaptability and meaning to cultural practices.³⁸ French social theorist Pierre Bourdieu has similarly theorized that, as a cultural notion, “persons” are culturally constructed and socially determined according to a particular cultural cognitive map or structure.³⁹ In Western culture and economy, “person,” human and corporate, is a socially salient category, and the dominant notions that shape the category of a person find root in the history and practices of the American free market capitalist system.⁴⁰ These culturally constructed categories of natural or corporate persons are then used in a cultural context and discourse.

In sociological scholarship, the notion of personhood often begins with a discussion of a “person” in society and within a social collective. In sociological and anthropological discourse, person and personhood are a distinct identity with discernible boundaries (i.e., an individual or entity). The person simultaneously exists in relation and reaction to the world while also being shaped by the social world. As Bourdieu writes, “[t]he idea of a separate individual is based . . . on the naïve apprehension of what . . . is perceived from outside. . . . Nothing is more familiar to us than the impression that man is an individual living being among others and that the skin is his boundary . . .

³⁷ PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 72 (Richard Nice trans., 1977).

³⁸ GEORGE STOCKING, THE SHAPING OF AMERICAN ANTHROPOLOGY 1883-1911 (George W. Stocking, Jr. ed., 1974).

³⁹ PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 106 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991); BOURDIEU, *supra* note 37 at 85-86.

⁴⁰ Leslie C. Aiello & James F. Brooks, *Corporate Lives: New Perspectives on the Social Life of the Corporate Form: Wenner-Gren Symposium Supplement* 3, 52 *Current Anthropology* S3 (2011); *See also* SUSANNE SOEDERBERG, CORPORATE POWER AND OWNERSHIP IN CONTEMPORARY CAPITALISM: THE POLITICS OF RESISTANCE AND DOMINATION 3 (2010).

.⁴¹ Bourdieu describes this vision of society as a form of personalism and a personalist belief in the unique person.⁴² Personhood, therefore, is socially constructed as a unique constitution or composition of attributes in one body.⁴³ These characteristics and beliefs create a separate body of *a person* distinct from the social collective body discernible according to the collectively held cultural cognitive map.⁴⁴

In Western society, the category of a distinct “person” and a notion of personhood primarily have philosophical and legal origins.⁴⁵ The notion of a person with innate human rights is largely a creation of Enlightenment thought found in the writings of John Locke⁴⁶ and Immanuel Kant.⁴⁷ These rights theorists were responding to the dominant ideas of Medieval times found in the theistic monarchies that legitimized social order through testaments of God’s will and the great chain of being. According to that dominant view, all individual humans were connected to the sovereign as subjects. Within this framework, a human person is part of the great chain of being and the biological human body did not constitute a separate social unit. In contrast to these Medieval notions, Locke proposed that the basic unit of society was a collection of individual humans, and not God, and that social order was created by agreement of those individuals.

Locke writes in *An Essay Concerning Human Understanding* that “we must consider what [a] person stands for . . . [it] is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places”⁴⁸ Locke’s view of personhood emphasizes self-consciousness, thought, and memory. A person in Locke’s writings is a thinking, intelligent being that has the ability to reason, engage in rational thought, and reflect. A person, therefore, can

⁴¹ PIERRE BOURDIEU, PASCALIAN MEDITATIONS 131 (Richard Nice trans., 2000).

⁴² *Id.* at 132.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Peter A. French, *The Corporation as a Moral Person*, in 16 AMERICAN PHILOSOPHICAL QUARTERLY 207 (Nicholas Rescher ed., 1979).

⁴⁶ John Locke, *An Essay Concerning Human Understanding*, (originally published in 1690), available at <ftp://ftp.dca.fee.unicamp.br/pub/docs/ia005/humanund.pdf>.

⁴⁷ See generally IMMANUEL KANT, CRITIQUE OF PURE REASON (Marcus Weigelt ed., trans., 2007).

⁴⁸ Locke, *supra* note 46, at 318.

consider herself as herself. A person, because of memory, is a collection of beliefs, capacities, capabilities, and dispositions that, for the most part, remain consistent in different places and times. Kant added to this notion of personhood the idea that a person is a thinking and reasoning individual who is a holder of legally recognized rights. Due to these features, a person, in the Enlightenment human rights tradition, has a biological, human anchor.

In Latin, “person” has its roots in the Latin word *persona*, “meaning among other things, a theatrical role.”⁴⁹ A person has only two dimensions from this perspective. Under Roman law, the term “person” referred to “anything that could act on either side of a legal dispute.”⁵⁰ Roman law developed an idea of personhood as any entity possessing rights and duties in legal disputes.⁵¹ “Person” is connected to the idea of an identity or outward expression of juridical traits.⁵² The biological anchor of a person is irrelevant to both Latin and Roman legal notions.⁵³ A person is a creation of form rather than content. Under Roman law, a person is simply an artifact of legal processes, statutory enactments, and judicial opinions.⁵⁴

The Oxford English Dictionary (“OED”) illustrates these two primary ways of thinking about persons in its definition of ‘person.’ In subparts 1-5 of the definition, a person is discussed as an individual anchored to a biological body with capacities and capabilities and as possessing a coherency.⁵⁵ In these definitions, a person is not a robot, chimpanzee, or legal entity. The individual person is not a free-floating and inconsistent entity without form. In definition 6, the OED adopts the Roman law characteristics of “person” stating, “[l]aw . . . [person is a] body corporate or corporation (*artificial person*) having rights . . . recognized by the

⁴⁹ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 962 (1982); see also French, *supra* note 45, at 208.

⁵⁰ French, *supra* note 45, at 208.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 724 (1971) (“Persons: 2. An individual human being; a man, woman or child . . . as distinguished from a thing, or from the lower animals . . . 3. A self-conscious or rational being . . . 4. The living body of a human being . . .”).

law.”⁵⁶ Providing an example from a 1765 text, the OED quotes as follows: “artificial [persons] are such as are created and devised by human laws for the purposes of society and government”⁵⁷ The corporation is a fictive, rhetorical manifestation, a fundamental economic unit, created by and for economic society.

The U.S. Supreme Court gave this rhetorical manifestation, the corporate person, human rights and protections under the Constitution.⁵⁸ Since 1886, the Court has invoked the Due Process and Equal Protection clauses under the 14th Amendment⁵⁹ to protect corporate persons from the power of individual states.⁶⁰ A line of Supreme Court cases proclaims that a state could not deprive a corporate person of property without the same protections afforded a human person.⁶¹ Under these cases spanning from 1886 to the recent *Citizens United*⁶² opinion, a corporate person can successfully challenge the validity of any

⁵⁶ *Id.* The definition of “person.”

⁵⁷ *Id.* The definition of “person.”

⁵⁸ CLEMENTS, *supra* note 14, at 65.

⁵⁹ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁶⁰ *Cnty. of Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394 (1886) (This Supreme Court case is most often inaccurately cited as holding that “corporations are persons” for purposes of the 14th Amendment. This is a citation of the head note to the case written by the Supreme Court reporter stating “One of the points made and discussed at length in the brief of counsel for defendants in error was that ‘Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States’ [b]efore argument.”). This was not the holding of the Court. The Court held only on a state law issue. HARTMANN, *supra* note 14, at 26-29.

⁶¹ *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210 (1888); *Charlotte C. & A. R. Co. v. Gibbes*, 142 U.S. 386 (1892); *Covington and L. Turnpike Rd. Co. v. Sandford*, 164 U.S. 578 (1896); *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁶² Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1955-56 (2010). The article discusses the impact of the recent opinion extending First Amendment protections to corporations, and how this opinion reaffirms the corporation as a fictive person in American law. *Id.*

state action adversely affecting its Constitutional rights.⁶³ State and federal legislatures also adopt the Roman law definition of a “person.” State and federal statutes often define “person” as including individuals and corporations.⁶⁴ In these laws, corporate persons have rights and duties distinct from the rights and duties of human persons.

It is through legal fiat that an entity without a body, that does not directly act, speak, or think has expansive legal protections and rights. A corporate person is able to invoke the protections of the judicial system similar to a human person. Court opinions and statutory law recognize the freedom of corporate persons to hold and manage private property and to engage in private contracts as any human person. The constitutionally protected right to property and private contract are most apparent in the legal structures and practices controlling insolvency, financial failure, and bankruptcy. Depending on whether a debtor is a corporate person or a human person, the legal structures mediating debt relations take on distinct characteristics practically and symbolically.

⁶³ Howard Jay Graham, *An Innocent Abroad: The Constitutional Corporate “Person”*, 2 UCLA L. REV., 155, 163-64 (1955). This article explains that the holdings in the corporate person line of cases are tantamount to two constitutional amendments: 1. “Corporations are free to challenge any governmental action opposed to their interests.” 2. “The Supreme Court is empowered to review all governmental action—State and Federal—pertaining to corporations and to veto any such action deemed arbitrary or unreasonable.” *Id.*

⁶⁴ *E.g.*, Cal. Vehicle Code § 470 (West 2012) (“‘Person’ includes a natural person, firm, copartnership, association, limited liability company, or corporation.”); Clean Water Act, 33 U.S.C. § 1362 (2011) (“The term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”); Mike Masnick, *Activist Tells Court that Since Corporations Are People, He Can Drive In The Carpool Lane With Incorporation Papers*, TECHDIRT (Jan. 14, 2013, 2:15 PM) <http://www.techdirt.com/blog/?tag=carpool+lane> (last visited on Jan. 21, 2013). This is a recent California case in which an HOV lane driver cited the California Vehicle Code § 470 as stating that “person” includes “a natural person, firm, corporation.” *Id.* The defendant cited the code section as a defense to an HOV lane traffic violation. The defendant explained that he had the papers establishing incorporation and corporate personhood in his vehicle, therefore, two persons were in the vehicle as required by the HOV law. The court agreed with defendant’s statutory interpretation, but still found the defendant guilty by citing statutory intent. *Id.*

III. BANKRUPTCY, BAPCPA, AND “PERSONS”

Under the Bankruptcy Code, an eligible “person” can file a bankruptcy petition invoking the protections and relief of the bankruptcy court.⁶⁵ Although the Bankruptcy Code defines “person” as both an “individual . . . and corporation,”⁶⁶ the Code gives a corporate person significantly more powers and protections and places more burdens and duties on a human debtor. The asymmetric treatment of corporate persons and human persons has never been more apparent than it is in BAPCPA, which addresses debtor abuse of the bankruptcy laws and in the bankruptcy process.

Although corporate persons engage in similar behavior in debt relationships and bankruptcy as human persons, their behavior is not labeled as abuse. First, a corporate debtor has no pre-bankruptcy credit counseling requirement to ensure it has tried other non-bankruptcy options to pay its creditors. Second, a corporate debtor’s accounts receivable is not scrutinized under a means test to determine whether it is barred from immediate relief under Chapter 7, or whether it should be forced into a five year repayment plan with its excess income.

Repeated filings of bankruptcy petitions by a corporate debtor do not result in an elimination of protections of the automatic stay as such behavior does for human debtors. Finally, under BAPCPA, the corporate debtor’s powerful bankruptcy sword used to bifurcate or “strip down” secured debts into secured and unsecured portions based on actual value is unaffected. Human debtors, on the other hand, are now subject to set time frames

⁶⁵ 11 U.S.C. § 101(41) (2006).

⁶⁶ *Id.* § 101(9) “The term ‘Corporation’—(A) includes—(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; (ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association; (iii) joint-stock company; (iv) unincorporated company or association; or (v) business trust; but (B) does not include limited partnership.” *Id.* Note: a corporate person is broadly defined under the Code to include many types of legal forms. Individual person is left undefined by the Code but is read by the bankruptcy courts with its natural language meaning a “human being.” When a term or phrase is left undefined by a statute, the Supreme Court instructs that such a term or phrase is given its natural language meaning. *See United States v. Santos*, 553 U.S. 507, 511 (2008).

post-filing within which they are prevented from bifurcating an obligation and listing it separately on the schedules.

A. BAPCPA Shackles: Credit Counseling, Means Testing, and Financial Management Instructional Courses

Under the headings of “Needs-Based Bankruptcy” and “Discouraging Bankruptcy Abuse,”⁶⁷ the recent amendments cast the human debtor into financial shackles with the enactment of several provisions scrutinizing human debtor finances: the “means test” determining availability of Chapter 7 protections and pre-filing credit counseling for bankruptcy debtor status eligibility. The means test removes the presumption of good faith favoring a discharge of individual debt and replaces it with a presumption of abuse that must be overcome to receive a discharge.⁶⁸ Not surprisingly, corporate debtors are exempt from the means test and are not denied a complete discharge in a Chapter 7 relief based on an income to expense analysis.⁶⁹

1. The Means Test

After BAPCPA’s passage and enactment, several questions arose concerning the application of a significant section of the act known as the “means test.”⁷⁰ Human persons under the Code are subject to in-depth financial scrutiny to which corporate persons are immune. Most significantly, BAPCPA substituted this new test for the 1978 Code’s presumption in favor of granting the relief requested by a human debtor.⁷¹ A human debtor, not a corporate

⁶⁷ Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23, Titles I & III (2005).

⁶⁸ H.R. REP. NO. 109-31, at 13 (2005); *reprinted in* 11 U.S.C. § 707(b) (2006).

⁶⁹ 11 U.S.C. § 707(b)(2) (2006) (Applies to debtors with “primarily consumer debts.”).

⁷⁰ *Id.*; *see also* 11 U.S.C. app. Official Forms B22A and B22C.

⁷¹ 11 U.S.C. § 707(b)(1) (2006).

[T]he court, on its own motion or on a motion by the United States trustee, trustee. . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . if it finds that the granting of relief would be [a substantial] abuse of the provisions of this chapter.

debtor, must now pass an abuse test, the means test, to receive a discharge of his or her debts.⁷²

The Means Test is a codification of a previous informal test applied by the U.S. Trustee's Office in the Department of Justice.⁷³ The former informal test focused on the debtor's ability

Id. There shall be a presumption in favor of granting the relief requested by the debtor. Post-BAPCPA, § 707(b)(1) changes "substantial abuse" to simply "an abuse." And BAPCPA removes the presumption. *Id.*

⁷² After the enactment of the 2005 Act, significant questions arose as to the imposition and enforcement of this new 'means test' section. The bankruptcy judges and their law clerks needed to create clear procedural guidelines and practices for the enforcement of the new Act. During my field work, a judge asked me to write a memo with recent case law discussing the application of the 'means test' to debtors. Our conversation according to my notes:

Bankruptcy judge: Linda, I have reviewed the memo you wrote on the new means test. I have a question regarding the A1 Auto Parts Chapter 7 case. Does the Code require the debtor in that case to perform the means [test] before filing?

Linda Coco: No, judge. The debtor in that case is a business. The new Code requiring the court to dismiss a Chapter 7 debtor's case when the debtor does not perform the 'means test' or the debtor fails the repayment test only applies when the debtor is a human individual.

BJ: An individual, not a person.

LC: An individual under the Bankruptcy Code is defined as a natural person, not a legal person such as a company or corporation. The Bankruptcy Code includes companies and corporations within the meaning of a person, but not within the meaning of an individual. This classification of the company as a person allows such legal entities to file a bankruptcy petition. However, the 'means test' section states that it applies only to "an individual debtor under this chapter whose debts are primarily consumer debts."

BJ: So, a company or a business debtor need not perform the 'means test' before filing and need not determine whether it can pay a portion of debts, and such a debtor is not required to repay its creditors if it can stay in business and pay.

LC: That is correct.

BJ: (Pause) Wow, companies are treated differently in bankruptcy. Huh, I had not thought of that before.

⁷³ Prior to passage of the 2005 Amendments, the United States Trustee's Officer (UST) performed an analysis informally that considered a debtor's disposable income over a period of 36 months. The total amount of disposable income is used to determine the percentage of unsecured debts a debtor could pay. If a debtor could pay more than 35% of his or her unsecured debts, the UST filed a motion to dismiss under the 11 U.S.C. § 707(b)(2) substantial abuse provision. The decision to perform this test and file a motion to dismiss is informal, because it was made on a case-by-case basis and required a judge order. It was not an automatic statutory formula.

to repay his debts based on his excess income after deducting expenses. The informal test involved a calculation of the debtor's total debt in relation to the debtor's income over a three to five year period. If the debtor could pay 30% or greater of the outstanding total debt over a five year period, the U.S. Trustee's Office would ask the bankruptcy court to require the debtor to repay his or her creditors in a Chapter 13 repayment plan. If the court determined that the debtor had the means to repay his or her creditors, then the debtor would be required to do so through a Chapter 13 repayment plan or the court would dismiss the bankruptcy petition and thus deny the human debtor the protections of bankruptcy law.

BAPCPA codified the previously informal practice, making the means test a required calculation for all consumer debtors.⁷⁴ Before the human debtor files a Chapter 7 or Chapter 13 petition, the individual must calculate his income based on national standards, and he must consider whether he can repay a small portion of his total debt.⁷⁵ BAPCPA mandates presume that the human debtor is a bad actor until he or she proves the inability to pay \$11,075 over 60 months from disposable income; if the possible repayment amount is less, then the human debtor must show an inability to pay 25% of his or her outstanding unsecured debts.⁷⁶ If the human debtor fails this test, BAPCPA mandates dismissal for abuse of Chapter 7 by a debtor who can pay.⁷⁷ If the debtor remains in bankruptcy, BAPCPA forces the debtor to pay creditors a portion of the debtor's income and live on a bread and water diet under a five year repayment plan in Chapter 13.⁷⁸

Under the means test, human debtors are permitted a small living expense allowance with explicit statutory caps.⁷⁹ The Collection Financial Standards of the Internal Revenue Service

⁷⁴ 11 U.S.C. § 707(b)(2) (2006). This section applies only to debtors with primarily consumer debts.

⁷⁵ *Id.*; see also 11 U.S.C. app. Official Form B22A.

⁷⁶ 11 U.S.C. § 707(b)(2).

⁷⁷ *Id.* (replacing the phrase "substantial abuse" under the 1978 Bankruptcy Code with "abuse", indicating that to allow the debtor to file a chapter 7 petition, the debtor now needs to show that a filing of a bankruptcy petition is not simply an "abuse" and revealing that the presumption of honesty has switched to a presumption of dishonesty).

⁷⁸ *Id.* § 1325(b). See also Official Form B22C.

⁷⁹ 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2006). See also Official Form B22 CB22C.

(“IRS”) set the debtor’s permissible food, clothing, and shelter expenses.⁸⁰ These standards found in the Internal Revenue Manual (“Manual”) delineate the allowed living expense standards for delinquent taxpayers and income tax evaders.⁸¹ The Manual allows tax evaders only those expenses that are deemed “necessary to provide for a taxpayer’s and his or her family’s health and welfare and/or production of income.”⁸² The expenses are deducted from the human debtor’s “current monthly income”⁸³ to arrive at the debtor’s “projected disposable income.”⁸⁴ The “disposable income” is paid to the unsecured creditors pursuant to the five-year plan.⁸⁵

For example, a family of four living in Seminole County, Florida, with an income above \$63,937 is allowed the following monthly living expenses:

Housing	\$1,634.00
Food	\$765.00
Housekeeping Supplies	\$244.00
Personal Care Products	\$76.00
Car Ownership Allowance	\$517.00
Utilities	\$613.00 ⁸⁶

All income remaining after subtracting these expenses is considered disposable income and must be paid into a Chapter 13

⁸⁰ 11 U.S.C. § 707(b)(2)(A)(ii) (2006).

⁸¹ Internal Revenue Manual (IRM), Part 5: Collecting Process: Chapter 15. Section 1—Financial Analysis Handbook, *available at* http://www.irs.gov/irm/part5/irm_05-015-001.html (last visited Jan. 21, 2014).

⁸² *Id.* at 5.15.1.7. Allowable Expense Overview.

⁸³ *Hamilton v. Lanning*, 130 S. Ct. 2464, 2470 (2010) (explaining 11 U.S.C. § 1325(b)(2) (2006)). *See also* 11 U.S.C. § 101 at (10A) (defining “current monthly income”).

⁸⁴ 11 U.S.C. § 1325(b)(2) (2006).

⁸⁵ *Id.* § 1325(b)(4).

⁸⁶ Census Bureau, IRS Data and Administrative Expenses Multipliers, <http://www.justice.gov/ust/eo/bapcpa/20121101/meanstesting.htm> (last visited Jan. 21, 2014); IRS National Standards: Food, Clothing and Other Expenses, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/National-Standards-Food-Clothing-and-Other-Items> (last visited Jan. 21, 2013).

plan.⁸⁷ These allowances give the human debtor the bare minimum to live.⁸⁸ Meant originally as retribution for tax evaders, these limits on expenses act as a punishment for individuals who are facing difficult financial circumstances.

A human person, unlike a corporate person, who files a petition under Chapter 11⁸⁹ rather than Chapter 13 remains subject to the mandates of BAPCPA's means test to confirm a Chapter 11 plan.⁹⁰ The drafters of BAPCPA ensured that a human person who files a bankruptcy petition under Chapter 11 is uniformly subject to an income and expenses analysis to determine whether he or she has an ability to pay a portion of his or her debts. BAPCPA "engrafts onto chapter 11 chapter 13-like provisions that bring into the estate a consumer debtor's future wages based on the new 'means test.'"⁹¹

Corporate persons filing either a Chapter 7 or a Chapter 11 petition are *not* subject to a comparable screening test of their debts and ability to pay as they pass through the bankruptcy process.⁹² In fact, when a corporate person files a Chapter 11 bankruptcy petition through its shareholders and officers, its

⁸⁷ 11 U.S.C. § 707(b)(2) (2006) (providing strict formula for debt-paying ability).

⁸⁸ IRM, *supra* note 81.

⁸⁹ 11 U.S.C. § 109(e) (2006). An individual who exceeds the debt limits is ineligible to file a Chapter 13 petition. Chapter 7 and Chapter 11 are the only remaining options when an individual is ineligible. *See id.*

⁹⁰ *Id.* § 1129(a)(15).

In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

Id.

⁹¹ G. Ray Warner, *Garnishment Restrictions and the Involuntary Chapter 11: Rethinking Kokoszak in a Means Test World*, 13 AM. BANKR. INST. L. REV. 733, 735 (2005)

⁹² 11 U.S.C. § 109(e) (2006) (Corporate persons are only eligible for a Chapter 7 and Chapter 11 petition filing. Section 109(e) of the Bankruptcy Code Chapter 13 is reserved for "individuals with regular income.").

managing body remains intact. The managing structure continues to manage the debtor as the debtor-in-possession (“DIP”). The DIP has all the powers of a trustee.⁹³ As the DIP, the corporate debtor retains decision-making authority, remains in possession of all corporate assets,⁹⁴ and is only subject to the “business judgment” rule.⁹⁵ Contrary to the means test, the business judgment rule ensures that the corporate debtor has great discretion in day-to-day operations and full authority to make business decisions.

a. Pre-Petition Credit Briefing/Counseling

BAPCPA section 106(a) added to the Bankruptcy Code a “credit briefing” condition for eligibility in filings involving human debtors, but excludes corporate debtors.⁹⁶ The human debtor is required in the six month period before filing a bankruptcy petition to receive “from an approved nonprofit budget and credit counseling agency . . . an individual or group briefing . . . that outlined the opportunities for available credit counseling”⁹⁷ This section is interpreted to require that the debtor receive “credit counseling,”⁹⁸ obtain a certificate of counseling, and file the certificate with the bankruptcy petition.⁹⁹ The case will be

⁹³ 11 U.S.C. § 1107(a) (2012) (“Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2),(3), and (4) of this title, of a trustee serving in a case under this chapter.”).

⁹⁴ *Id.*

⁹⁵ *Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772, 788. n.52 (Del. Ch. 2004) (“[T]he business judgment rule remains [an] important [corporate tool in bankruptcy] and provides directors with the ability to make a range of good faith, prudent judgments about the risks they should undertake on behalf of troubled firms.”). The business judgment rule protects the corporate directors and officers from responsibility and liability due to decisions that impact the restructuring corporation. *See id.*

⁹⁶ Allan N. Resnick, Henry J. Sommer, & Lawrence P. King. *Collier Pamphlet Edition. Part 1: Bankruptcy Code*. Lexis Nexis (2008 version providing the redactions and additions of BAPCPA) p. 132; Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, Title I, § 106(a), 119 Stat. 23, 37 (2005).

⁹⁷ 11 U.S.C. § 109(h)(1).

⁹⁸ Resnick et al., *supra* note 96, at 132.

⁹⁹ 11 U.S.C. § 521(b)(1).

dismissed either automatically or by a motion filed by the U.S. Trustee if the certificate is not filed with the petitions.

The credit briefing requirement was included in BAPCPA as a pre-bankruptcy requirement for a human debtor, not a corporate debtor, to review his or her income and expenses to determine if the debts can be paid.¹⁰⁰ The requirement is intended to guide a human debtor away from filing a bankruptcy petition.¹⁰¹ If a debtor fails to obtain counseling and file the certificate with the bankruptcy court at the time of filing, the debtor's case is automatically dismissed.¹⁰² Upon case dismissal, section 302 of BAPCPA is invoked.

B. Bankruptcy Shields and BAPCPA: The Automatic Stay

The moment a bankruptcy petition is filed in the U.S. Bankruptcy Court an automatic stay is activated.¹⁰³ As an element of the fresh start, the stay prevents creditors from taking further collection, foreclosure, or repossession actions against the debtor or any of the debtor's property.¹⁰⁴ The automatic stay is fundamental to the bankruptcy process under all chapters—

¹⁰⁰ First Shore Fed. Sav. & Loan Ass'n v. Hudson, 352 B.R. 391, 392-93 (Bankr. D. Md. 2006) (applying section 109(h)(1)). See also Resnick et al., *supra* note 96, at 132.

¹⁰¹ 11 U.S.C. § 109(h)(1) (stating that “[A]n individual may not be a debtor under this title unless such individual has, during the 180-day period [preceding] 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 . . . that outlined the opportunities for available credit counseling”); see also First Shore Fed. Sav. & Loan Ass'n, 352 B.R. at 394-95 (interpreting the new provision requiring debtors to obtain a credit briefing in the 180-day period preceding the date of filing).

¹⁰² In re Seaman, 340 B.R. 698, 700-09 (Bankr. E.D.N.Y. 2006) (addressing the consequences of a section 109(h) dismissal of the debtor's petition and the impact of that dismissal on the debtor's subsequent filing, and explaining that such a dismissal results in a limitation on the automatic stay).

¹⁰³ 11 U.S.C. § 362(a) (“Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities . . .”).

¹⁰⁴ *Id.* § 362(a)(1)-(8); see also Bankruptcy Reform Act of 1978, H.R. REP. NO. 95-595, at 174 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6135 (1978) (“For the consumer, the stay ceases all harassment by bill collectors; for the ailing business, the stay gives the business a breathing spell and time to work constructively with its creditors, or in the case of a liquidation, prevents some creditors from obtaining preferential treatment by quick action.”).

liquidations, reorganizations, and repayment plan cases.¹⁰⁵ The automatic stay provides the indebted individual or corporation a cessation of creditors' collection activities.¹⁰⁶ This cessation maintains the status quo and gives a debtor time to develop a financial plan.¹⁰⁷ It also preserves the debtor's assets for all creditors from the collection actions of any individual creditor.¹⁰⁸ The Bankruptcy Code provides greater protective shields for corporate debtors under the automatic stay than human debtors. Corporate persons are not subject to the new repeat file provisions resulting in automatic termination of the automatic stay.

At the moment of filing, a bankruptcy estate is created that contains all of the debtor's interests in property.¹⁰⁹ According to the 1978 Code, the estate property is protected by the stay through the pendency of the case or until lifted by the bankruptcy court.¹¹⁰ BAPCPA altered the application of this automatic stay for property of the debtor and for property of the estate for cases involving human persons. The automatic application of the stay created by the 1978 Code is distorted into an automatic termination of stay instead.¹¹¹ Under BAPCPA, there are several circumstances in which the automatic stay will not apply to a human debtor or will be limited or terminated upon the filing of a bankruptcy petition.

First, BAPCPA section 302 significantly changes the 1978 Code subsections by adding sections 362(c)(3) and 362(c)(4) with a rebuttable presumption of bad faith for successive filings by a

¹⁰⁵ H.R. REP. NO. 95-595, 1978 U.S.C.C.A.N. at 6296-97. The stay stems from the fact that bankruptcy courts are courts of equity with in rem jurisdiction over the debtor's assets. See Kimberly Lehnert, *Termination of the Stay for Successive Filers: Interpreting § 362(c)(3)*, 29 EMORY BANKR. DEV. J. 243, 247. (2012).

¹⁰⁶ H.R. REP. NO. 95-595, *reprinted in* 1978 U.S.C.C.A.N. at 6296-97.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 11 U.S.C. § 541(a); see also H.R. REP. NO. 95-595 ("[I]nterests in property the debtor has at the commencement of the case. This includes all interests, such as interests in real or personal property, tangible and intangible property . . . choses in action, rights such as copyrights, trade-marks, patents, . . . contingent interests, and future interests.")

¹¹⁰ 11 U.S.C. § 362(c)(1)-(2); see also H.R. REP. NO. 95-595, *reprinted in* 1978 U.S.C.C.A.N. at 6296-97.

¹¹¹ See generally Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749 (2005).

human debtor.¹¹² These provisions limit and deny the automatic stay with respect to individual human debtors who had one or more cases pending before the bankruptcy court in the previous year. Repeat bankruptcy petition filings are a significant problem with corporate persons in Chapter 11.¹¹³ Consider the well-known two-timers over the last two decades: Interstate Bakeries (a.k.a. Hostess Brands),¹¹⁴ Trans World Airlines,¹¹⁵ Trump Hotels & Casino Resorts,¹¹⁶ U.S. Airways Group,¹¹⁷ and Montgomery Ward.¹¹⁸ Notwithstanding the fact that repeat filings by corporate debtors is a significant issue, BAPCPA section 302 only applies to human debtors.¹¹⁹

Section 362(c)(3) applies to “an individual” who files a bankruptcy petition under Chapter 7, 11, or 13 who had a case pending before the bankruptcy court in the preceding year in any chapter. If a debtor has had a pending case, and that case was not dismissed for abuse under the means test, then the debtor can file a motion to extend the automatic stay by proving that the second case is filed in good faith.¹²⁰ When the debtor establishes that the second petition is filed in good faith, the stay is extended beyond

¹¹² Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, § 302, 119 Stat. 23, 75-77 (2005).

¹¹³ See James D. Key, *The Advent of the Serial Chapter 11 Filing and Its Implications*, 8 EMORY BANKR. DEV. J. 245, 248, 269 (1991); see also Noel S. Cohen, *Serial Chapter 11 Filings: Finding Method in the Madness*, 17 EMORY BANKR. DEV. J. 461, 461 (2001).

¹¹⁴ Associated Press, *Twinkies Maker Hostess Seeks Bankruptcy Protection*, Wall St. J., Associated Press, (Jan. 11, 2012, 6:08 PM) <http://online.wsj.com/article/AP77fea05596234df88db14ee0d901e114.html> (demonstrating that Hostess filed bankruptcy twice).

¹¹⁵ Trans World Airlines filed bankruptcy three times: 1992, 1995, 2001.

¹¹⁶ Trump Industries and Trump Hotels & Casino Resorts filed bankruptcy four times.

¹¹⁷ *U.S. Airways Chronology*, USAIRWAYS.COM, <http://www.usairways.com/en-US/aboutus/pressroom/history/chronology.html> (last visited Jan. 21, 2014) (showing that U.S. Airways filed bankruptcy in 2002 and 2004).

¹¹⁸ Donald Woutat, *Montgomery Ward Files for Bankruptcy*, L.A. TIMES, July 8, 1997 at A10 (showing that Montgomery Ward filed initially in 1997). Montgomery Ward filed a second petition in 2000. In re Montgomery Ward, LLC, Case No. 00-4667 (KG) 1748, 2007 WL 4322530, at *1 (Bankr. D. Del. 2007) (memorandum decision).

¹¹⁹ Key, *supra* note 113, at 248 (“[O]ne of the most controversial of these issues is the propriety of reorganized debtors filing a second Chapter 11 bankruptcy petition.”).

¹²⁰ 11 U.S.C. § 362(c)(3) (2006). This section applies voluntary and involuntary petition filings. *Id.*

the thirty days.¹²¹ The presumption is that the second petition filing is not in good faith. A debtor may overcome the not-in-good-faith presumption by a showing that he or she did not fail to file or amend the petition or other documents, provide adequate protection for a secured creditor, or perform the terms of a plan confirmed.¹²² A debtor also can overcome the not-in-good-faith presumption by presenting “clear and convincing evidence” that there has been a substantial change in his or her “financial or personal affairs” and that the latter case will conclude with a discharge or a confirmed plan.¹²³

Section 362(c)(4) applies to “an individual” who files a bankruptcy petition under Chapters 7, 11, or 13 and has two or more pending cases before the bankruptcy court in the preceding year that were similarly not dismissed for abuse under the Means Test. If these factors are met, the automatic stay will not go into effect when the debtor files the petition. Again the presumption of not-in-good-faith prevents the automatic stay from going into effect and protecting the debtor’s property from the creditors. A debtor may overcome the presumption by meeting similar criteria established in section 362(c)(3).

In practice, the effects of these two provisions are overbroad. Initially intended to curb serial filing abuses that were fairly common under the 1978 Code, these new provisions are extremely detrimental to individual debtors by creating a hostile bankruptcy environment.¹²⁴ The National Bankruptcy Review Commission (“Commission”) in 1994¹²⁵ initially investigated the very specific practices of serial filing in consumer cases involving secured creditors with liens on real property. As mentioned above, the Commission recommended a limited elimination of the automatic stay for a real property foreclosure action when the individual consumer had a prior filing in the preceding 180 days. The

¹²¹ 11 U.S.C. § 362(c)(3)(B).

¹²² 11 U.S.C. § 362(c)(3)(C)(I)-(II).

¹²³ 11 U.S.C. § 362(c)(3)(C)(III).

¹²⁴ Perhaps the hostile environment is intended to act as a “keep out” sign on the bankruptcy court house doors. *See generally* Mann, *supra* note 33; Coco, *supra* note 16.

¹²⁵ President Clinton signed on October 22, 1994 the Bankruptcy Reform Act of 1994 creating the Bankruptcy Review Commission. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4107 (1994).

Commission recommended against a general elimination of the automatic stay in repeat filer cases.

The Commission wrote that “the evidence still is not sufficiently conclusive on the prevalence of [the] . . . causes of refiling to warrant a drastic change in access [to the automatic stay] when a more moderate approach would suffice.”¹²⁶ Senator Howell Heflin expressed concern that an inflexible standard would work as a hardship for honest individual debtors who have legitimate reasons for dismissal and refiling.¹²⁷ Reviewing the reports of judges and scholars, the Commission was unable to conclude that all repeat filing is abusive. Rather, “[p]arties file for bankruptcy relief repeatedly for different reasons,” including employment changes, family crisis, persistent financial difficulties resulting in inability to pay timely on the plan, lack of education about the process, and heavy reaffirmed debt load.¹²⁸

Further, the Commission determined that repeat filing is more a result of a debtor’s moral compulsion to make payments to creditors and optimism about future earnings and ability to pay under a Chapter 13 plan than abuse.¹²⁹ Misguided by these beliefs, debtors attempt to make payments to creditors under a plan, fail, and then attempt a second and third filing and plan rather than file a Chapter 7 petition.¹³⁰

Recognizing the complexity of repeat filing by individual consumer debtors, the Commission recommended against a total elimination of the automatic stay for the second and third cases in the previous year.¹³¹ Rather, the Commission recommended that “[a] debtor . . . not be precluded from filing two petitions within a six-year time frame. If a debtor sought bankruptcy relief for the third time in six years . . . , within six months of the dismissal or conversion of the second filing” the stay would not go into effect.¹³²

Ignoring the Commission’s recommendation, Congress codified through BAPCPA a drastic elimination of the automatic

¹²⁶ NAT’L BANKR. COMM’N FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS 280 (1997) [hereinafter “NBRC Report”].

¹²⁷ *Id.* at 280 n.370.

¹²⁸ *Id.* at 276-78.

¹²⁹ *Id.* at 277.

¹³⁰ *Id.*

¹³¹ *Id.* at 281.

¹³² *Id.*

stay for human debtors. Misguided in their attempts to eliminate abuse in the bankruptcy system, the drafters targeted serial filers generally without detailed consideration of specific fact scenarios.¹³³ Exceeding the mandate of preventing abuse and fraud, this general elimination of the automatic stay, together with the addition of numerous new BAPCPA automatic dismissal provisions in human debtor cases, creates invisible trap doors that open and drop individual human debtors out of bankruptcy court protections.

BAPCPA creates several circumstances in which a human debtor's case is dismissed for actions not involving fraud or abuse. As discussed above, the credit counseling requirement requires a human debtor to obtain counseling or a waiver of the requirement in the 180-day period before filing a bankruptcy petition.¹³⁴ If a debtor fails to obtain counseling and file the certificate with the bankruptcy court at the time of filing, the debtor's case is automatically dismissed.¹³⁵

Further, BAPCPA section 316 created a new requirement that if an individual debtor fails to file a list of creditors, a schedule of assets and liabilities, a schedule of current income and expenditures, a statement of financial affairs, six months of paycheck stubs, and a statement of any reasonably anticipated increases in income, the petition shall be automatically dismissed.¹³⁶ Also, an individual debtor's case is automatically dismissed if the debtor fails to provide the trustee with a copy of his or her filed federal tax return for the year prior to the petition

¹³³ H.R. REP. NO. 109-31, at 3-4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 91-92.

¹³⁴ 11 U.S.C. § 109(h)(1) (2005) (“[A]n individual may not be a debtor under this title unless such individual has, during the 180-day period preceding 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 . . . that outlined the opportunities for available credit counseling”); *First Shore Fed. Savings & Loan Ass’n v. Hudson*, 352 B.R. 391, 394-95 (Bankr. D.Md. 2006) (interpreting the new provision requiring debtors to obtain a credit briefing in the 180-day period preceding the date of filing).

¹³⁵ *In re Seaman*, 340 B.R. 698, 700-09 (Bankr. E.D.N.Y. 2006) (Bankruptcy Judge Stong addressing the consequences of a section 109(h) dismissal of the debtor's petition and the impact of that dismissal on the debtor's subsequent filing and explaining that such a dismissal results in a limitation on the automatic stay.).

¹³⁶ Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 § 316; 11 U.S.C. § 521(i)(1).

filing.¹³⁷ None of these new provisions provides an exception for attorney neglect or for the exercise of judicial discretion to avoid a severe injustice to the “honest but unfortunate” human debtor.¹³⁸

Next, the automatic stay will *terminate* for a human debtor if the Chapter 7 debtor fails to act to redeem or reaffirm secured debt connected to personal property of the estate.¹³⁹ An “individual debtor” must file a statement of intention stating whether the debtor plans to retain, reaffirm, or surrender the property within 30 days of filing the petition. The debtor must perform according to the stated intention within 30 days of the meeting of creditors.¹⁴⁰ If the human debtor fails to do either, BAPCPA requires a termination of the automatic stay allowing a secured creditor to seize the personal property.¹⁴¹ Additionally, a

¹³⁷ Pub. L. No. 109-8, 119 Stat. 23 § 720; 11 U.S.C. § 521(e).

¹³⁸ Mantas Valiunas, *Anything But Automatic: Dismissal Under § 521*, 28 EMORY BANKR. DEV. J. 231, 232-33 (2011)

Imagine Emma, a single mother who has been burdened by numerous bills, child support, and a recent layoff from work. She has been living paycheck to paycheck, and the current economic slump has not helped her situation. Harassed by debt collectors every day and barely able to feed her children, she decides to file for chapter 7 to get a fresh start through bankruptcy. She attempted to compile all the necessary information as advised by her attorney, but unfortunately her employer could not provide pay stubs for the last week of her employment because a fire destroyed the business. Since her paycheck was the same amount every week, her attorney extrapolated the information for the last pay stub and provided it to the court. A few months after filing, a creditor asked the court to provide an order stating that the case has been automatically dismissed after forty-five days since Emma did not provide all the information required by § 521. Emma’s failure to provide the last pay stub from her employer did not meet the requirements of § 521 and her case was automatically dismissed on the forty-sixth day despite her honest need for bankruptcy protection. Emma was an honest but unfortunate debtor who filed her information in good faith but was denied bankruptcy relief because of a minor technicality.

Id.

¹³⁹ Pub. L. No. 109-8, 119 Stat. 23 § 311; 11 U.S.C. § 362(h)(1)(A)&(B).

¹⁴⁰ Pub. L. No. 109-8, 119 Stat. 23 § 311; 11 U.S.C. § 521(a)(2)(A)&(B).

¹⁴¹ Pub. L. No. 109-8, 119 Stat. 23 § 311; *see also* Napoli, *supra* note 113, at 758. The author discusses the varied interpretations of this new provision stating:

[T]wo divergent lines of case law developed. One line holds that a debtor who is current on payments under the terms of his agreement with a creditor holding a security interest in property of the estate may retain the property and continue to make payments without either reaffirming the debt or redeeming the property. The other line holds that, if a debtor wishes to retain

creditor can request that the court issue an order confirming that the automatic stay is terminated.¹⁴²

These new BAPCPA provisions for automatic dismissal, paired with automatic termination of the automatic stay for repeat filings, function to leave human debtors outside the protection of the bankruptcy laws. Corporate debtors¹⁴³ do not lose the protective shield of the automatic stay for repeat petition filings in the prior year. There is no presumption of bad faith that must be overcome by a corporate debtor to keep the automatic stay in place. Individual human debtors are, therefore, at a significant disadvantage and are subject to extreme financial hardship with the automatic termination of the protective shield.¹⁴⁴

C. BAPCPA Swords: Strip Down or Cram Down

One powerful weapon available to debtors, both human and corporate, under the 1978 Bankruptcy Code was an ability to bifurcate an undersecured creditor's claim in Chapter 7, 11, and 13.¹⁴⁵ Based on the categorization of claims as either secured or unsecured, the Bankruptcy Code allows claims for a debt against the debtor's estate to be bifurcated. In the case of an undersecured creditor's claim, for example, the debt is separated and listed on the schedules as a secured portion and an unsecured portion. The secured portion of the claim is paid in full under any plan proposed by a debtor, and the unsecured portion of the claim is paid at the rate of other non-priority unsecured claims. This

property of the estate that is subject to a security interest, that debtor's only choices . . . are to reaffirm [or] to redeem

Id.

¹⁴² 11 U.S.C. § 362(j) (2005).

¹⁴³ The Commission was concerned with concurrent repeat petition filings by small businesses (not large corporations). It recommended an elimination of the automatic stay in the second pending case. The Commission provided for relief from the application of this provision if a debtor can establish by a preponderance of the evidence that: "(1) the new case has resulted from circumstances beyond the control of the debtor not foreseeable at the time the first case was filed and (2) it is more likely than not that it will confirm a feasible plan . . . within a reasonable time." NBRC Report, *supra* note 129, at 649. This recommendation was adopted by the drafters of BAPCPA. It is now found at 11 U.S.C. § 362(b)(21).

¹⁴⁴ Napoli, *supra* note 113, at 785.

¹⁴⁵ 11 U.S.C. § 506 (2005).

enables individual debtors to keep needed collateral at a reduced rate—lower than the contract—and to pay the debt over a longer period of time. The bifurcation and allocation of the debt as partially secured and partially unsecured is a powerful weapon for a debtor.

After the enactment of BAPCPA, the ability of a human debtor to bifurcate a secured claim under a Chapter 13 plan was severely limited by the language of the hanging paragraph found at the end of Bankruptcy Code section 1325.¹⁴⁶ Section 1325 provides that section 506 shall not apply to a secured claim in a personal use automobile if the creditor holds a purchase money security interest (“PMSI”) acquired within a 910-day period preceding the date of the petition filing.¹⁴⁷ If the four required elements of this new section are met—(1) part of a secured creditor’s interest is unsecured; (2) the creditor’s interest originates from a purchase money loan; (3) the vehicle was purchased in the 910-day period before a bankruptcy petition filing; and (4) the vehicle was purchased for a debtor’s personal use—a debtor’s ability to apply section 506 to the obligation is eliminated.

The hanging paragraph, also referred to as the “anti-cramdown” provision of BAPCPA, destroys a pre-BAPCPA mechanism that afforded consumer debtors the ability to keep needed collateral at a reduced rate and to pay the debt over a

¹⁴⁶ Pub. L. No. 109-8, 119 Stat. 23 § 306(b). Section 306(b) adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506 does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days preceding the filing of the petition. *Id.* Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case. *Id.*

¹⁴⁷ See U.C.C. § 9-107 (2005)

A security interest is a ‘purchase money security interest’ to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price; or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

Id. Most states in the U.S. have adopted a variation of this definition in their commercial codes.

longer period of time. This mechanism to eliminate an unsecured portion of a lien against property remains available, however, to corporate persons regardless of the length and timing of the contracting obligation and bankruptcy filing. The corporate person also continues to have other valuable legal weapons in the bankruptcy process unavailable to human debtors.

Corporations enjoy a statutory presumption to DIP status in a Chapter 11, a right entirely unavailable to the human debtor.¹⁴⁸ A DIP, through officers and managers, retains possession of all estate assets and decision-making authority. Predicated on an extremely limited court-created business judgment rule, the corporate person continues to make day-to-day business operating decisions and transactions, manages and controls the bankruptcy estate, and drafts and proposes a reorganization plan.

In addition, corporate persons in bankruptcy have the power to rewrite binding contracts. A corporate person is able to select which executory contracts it will accept and continue to perform, and those it will reject.¹⁴⁹ This power releases a corporate person from undesired agreements such as union contracts or collective bargaining contracts. For example, a corporate person can reject the terms and confines of the agreement for set wage increases, benefits, and pension contributions and plans. This power forces unions back into negotiations with the corporate debtor with the only likely result being a reduction of wages and benefits for employees. This sweeping power to assume or reject unperformed contracts in bankruptcy gives the corporate debtor unparalleled leverage in the reorganization process. Indeed, due to their possession of the remarkable ability to rewrite traditional contract law, corporate persons have the ability to lien strip an undersecured creditor in a reorganization plan.

¹⁴⁸ “[D]ebtor in possession’ means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case” 11 U.S.C. § 1101(1) (2005). This section establishes a corporate person as both the debtor and the trustee in the bankruptcy process. *Id.* The DIP would only lose this power in the rare instances of mismanagement or fraud in which an independent trustee is appointed under section 1104. The DIP approach is the norm in the bankruptcy process for corporate persons.

¹⁴⁹ 11 U.S.C. § 365(a) (2005); 11 U.S.C. § 1123(b)(2) (2005).

CONCLUSION

John Courson, as the CEO of the Mortgage Bankruptcy Association, (“MBA”) encouraged homeowners to honor their contractual debt even if it was not in their economic interest, while the trade group quietly abandoned its glass façade, a 10-story headquarters building in Washington D.C.¹⁵⁰ MBA found itself underwater with its lender PNC Financial Services Group in the 2007 market crash.¹⁵¹ By 2010, MBA decided to shirk its financial obligation selling the \$79 million property to CoStar Group for \$41 million leaving their previous lender holding the deficiency.¹⁵² Representatives and commentators regarded the decisions as a simple failure of business judgment rather than a flaw in the moral character of the officers and managers.¹⁵³ Individual consumers, on the other hand, are disciplined and punished as they attempt to walk away from their contractual obligations and file bankruptcy.¹⁵⁴

The 2005 amendments to the Bankruptcy Code lock in the governance forms of disciplining neo-liberalism by creating new legal shackles and at the same time providing fewer legal protections and limiting the powers of the natural person in the bankruptcy process. At the time in U.S. history when individual consumers needed the most protections—the 2008 financial crisis—individual human debtors received less protection. In contrast, BAPCPA did not significantly alter the protections, rights, or powers of the corporate debtor in the U. S. Bankruptcy Code. If policy and legal shift need to occur, the focus should be on corporate persons. Entities such as Enron, Worldcom, Lehman Brothers, and Chrysler should be closely scrutinized. The social

¹⁵⁰ James R. Hagerty, *Mortgage Bankers Association Sells Headquarters at Big Loss*, WALL ST. J. (Feb. 6, 2010), available at <http://online.wsj.com/news/articles/SB10001424052748704829704575049111428912890>

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ H.R. REP. NO. 109-31 at 3-4, reprinted in 2005 U.S.C.C.A.N. at 91-92. BAPCPA was enacted to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system [by forcing debtors to pay their contractual obligations].” *Id.* H.R. REP. NO. 109-31(I) explains that filing bankruptcy is stealing for the individual consumer.

and economic impacts of large corporation's financial behaviors are far greater than individual financial behaviors.

The shifts in the bankruptcy laws reflect a disposition to protect private wealth at the expense of individual consumers and the collective. Neoliberal models fail to recognize that the health of this country's economy has always depended on the free flow of money and the movement of credit. Money must move to generate wealth. As the largest segment of the population, the middle class has traditionally been the engine driving the economy with its purchasing power. While servicing burdensome debts in various forms, the middle class is precluded from the wealth creation process. The cumulative debt load or crushing debt overhang from interlocking debt structures will absorb the future incomes of consumers and prevent them from engaging in the economy. This will detract from economic growth. Future income used to pay old debts means less money circulating the economy. The flow of money is truncated and the velocity of capital slowed.