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Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project

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by

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INTRODUCTION

Over the past quarter century, our knowledge of individuals who seek relief through the consumer bankruptcy system has been derived largely from the information that has been collected and analyzed by the Consumer Bankruptcy Project.[1] But for the steadfast commitment of the researchers who have spearheaded and continued the Project, an immense void would exist: Not only has the Project produced comprehensive empirical accounts of consumer debtors generally,[2] it has undoubtedly inspired and informed the work of scholars who have empirically investigated specific areas of the consumer bankruptcy system.[3]

The most recent iteration of the Consumer Bankruptcy Project, the 2007 Consumer Bankruptcy Project (the "2007 CBP"), extends well beyond prior

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[1]For a description of the Consumer Bankruptcy Project, see Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 387-98 (2008).

[2]TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS (reprint ed. 1999) (study of debtors who filed in 1981); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000) (study of debtors who filed in 1991); ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003) (study of debtors who filed in 2001); Lawless et al., *supra* note 1 (study of debtors who filed in 2007).

[3]*See* Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 966 & n.14 (2006) (discussing Consumer Bankruptcy Project and specialized empirical studies of the consumer bankruptcy system). The Consumer Bankruptcy Project has certainly inspired and informed my own research. *See, e.g.,* Rafael I. Pardo & Michelle Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 440-76 (2005) (relying extensively on 1981 and 1991 data from the Consumer Bankruptcy Project to draw comparisons between the general bankruptcy population and bankruptcy debtors who seek a discharge of their student loans).

iterations by drawing a nationwide random sample of bankruptcy filings.[4] The first report published in connection with the 2007 CBP (the "First Report" or "Report"), entitled *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*,[5] seeks to evaluate the success of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[6] in sorting debtors according to their ability to repay past debts from future income. Specifically, the First Report focuses on a comparison of the median income levels of pre-BAPCPA and post-BAPCPA debtors to discern how BAPCPA's sorting mechanism—the means test—has functioned. Based on its finding that the difference in the income profile of debtors who filed in 2007 and in 2001 is statistically insignificant,[7] the First Report concludes "that instead of functioning like a sieve, carefully sorting the high-income abusers from those in true need, the amendments' means test functioned more like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual circumstances."[8] In other words, bankruptcy reform failed.[9]

This Commentary argues that the First Report has possibly failed to answer the research question that it presented for three primary reasons. As an initial matter, the Report relies on two questionable assumptions to support its analysis. It assumes that enactment of the means test deterred 800,000 individuals from filing for bankruptcy in 2007. It also assumes that the combined income profile of these 800,000 individuals and those who actually filed in 2007 is similar to the income profile of debtors who filed in 2001. If neither of these assumptions holds, then the Report's analysis potentially cannot stand.

Second, the Report provides an incomplete account of the purpose of the means test and does not provide a sufficiently nuanced account of the manner in which the means test would be expected to affect (1) the behavior of individuals who were considering filing for relief under Chapter 7 of the Bankruptcy Code and (2) the dismissal or conversion of Chapter 7 cases that

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[4]Lawless et al., *supra* note 1, at 354, 391.

[5]*Id.* at 377 (referring to article as the "first report of the 2007 Consumer Bankruptcy Project").

[6]Pub. L. No. 109-8, 119 Stat. 23 (codified as amended primarily in numerous sections of 11 U.S.C. and secondarily in scattered sections of 28 U.S.C.).

[7]*See* Lawless et al., *supra* note 1, at 361 & nn.51-52.

[8]*Id.* at 353.

[9]*See id.* at 361 ("These data indicate that by yet another measure, BAPCPA seems to have failed its announced mission. . . . The large sorting effects based on income that the means test was supposed to produce simply did not occur. Instead, the principal effect of the new law was apparently random and arbitrary . . . ."); *id.* at 363 ("Our data seem inconsistent with the conclusion that the means test worked as its proponents promised it would. If anything, when measured by the criteria announced by its supporters, the data suggest the opposite: BAPCPA's much-touted means test was a failure."); *id.* at 385 ("The principal feature of the amendments was an income-based screen that was supposed to differentiate can-pay debtors from their can't pay counterparts. The data suggest that this failed . . . .").

were ultimately filed.[10] As a result, the First Report improperly frames the research question.

Third, even if one considers the Report's research question as it has been framed (i.e., as an inquiry into the deterrent effect of the means test), several methodological deficiencies cloud the data marshaled by the First Report. Among these deficiencies, the pre-BAPCPA sample of debtors may not be representative of the income profile of debtors nationally in 2001. Moreover, the Report focuses on the total income of debtors, rather than their disposable income, as a metric for evaluating the effectiveness of the means test—an odd choice given the means test's focus on disposable income. Finally, the Report does not account for state variation and family size when considering debtor income levels, which makes income by itself an unsuitable metric for evaluating the deterrent effect of the means test.

This Commentary proceeds as follows. Part I discusses the assumptions upon which the First Report relies for its analysis and sets forth reasons to question those assumptions. Part II describes the purpose and operative effect of the means test in order to establish the backdrop for why the Report improperly frames its research question. Part III addresses the manner in which the First Report tests whether bankruptcy reform failed and argues that, as a result of methodological flaws, the data marshaled by the First Report potentially tell us little, if anything at all, about the deterrent effect of the means test.[11] This Commentary concludes that, without better designed research questions and metrics for answering those questions, we cannot answer whether bankruptcy reform has failed.

I. THE QUESTIONABLE ASSUMPTIONS OF THE FIRST REPORT

As previously mentioned, the First Report compares the income of pre-BAPCPA and post-BAPCPA debtors who filed for bankruptcy relief in order to ascertain whether BAPCPA has had a nonrandom deterrent effect on the filing behavior of individual debtors—specifically, whether the means test has dissuaded "high-income abusers"[12] from filing for bankruptcy. To make the comparison, the Report primarily relies on income data regarding debtors who filed for bankruptcy in 2001 (i.e., pre-BAPCPA) and 2007 (i.e., post-BAPCPA).[13] The lack of a statistically significant difference in the income of pre- and post-BAPCPA debtors leads the First Report to conclude that the

[10]This Commentary uses the term "Bankruptcy Code" to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101-1532).

[11]The First Report concludes otherwise. *See* Lawless et al., *supra* note 1, at 377 ("The data from this first report of the 2007 Consumer Bankruptcy Project shed somber light on the efficacy of BAPCPA.").

[12]*Id.* at 353.

[13]*See, e.g., id.* at 361, 362 fig.3.

deterrent effect of the means test has been random.[14]

The First Report rests its statistical analysis, and hence its conclusion, on two central assumptions. First, the Report assumes that, but for BAPCPA's enactment, there would have been slightly more than 1.6 million bankruptcy filings in 2007.[15] Pursuant to this assumption, 800,000 filings did not occur as a result of passage of the law,[16] a group referred to by the First Report as "the missing 800,000."[17]

What makes this assumption problematic? If the goal of the First Report is to ascertain whether "the means test [was] responsible for the precipitous decline in bankruptcy filings after the law changed,"[18] then the Report needs to provide an account that explains why it is reasonable to assume that the missing 800,000 did not enter the consumer bankruptcy system in response to the existence of the means test. Although the First Report acknowledges the possibility that other BAPCPA-related provisions may have had a greater effect in deterring bankruptcy filings,[19] it casts the research question as one that would characterize the effect of bankruptcy reform as a function of a single provision of the Bankruptcy Code.[20] If the means test has had a deterrent effect only on a subset of the missing 800,000, and if the economic profile of that subset differs from the remaining group of debtors in the missing 800,000,[21] then one cannot answer the question of whether the means

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[14]*See id.* at 353, 361.

[15]*Id.* at 351.

[16]*See id.*

[17]*Id.* at 375.

[18]*Id.* at 358.

[19]*See id.* at 380 (noting Professor Ronald Mann's argument that "the aspects of BAPCPA that should have the biggest impact on debtors are those that increase costs, insert more delays or otherwise raise the bar of desperation that a family must feel before making the decision to file for bankruptcy," as well as Professor James J. White's argument that BAPCPA was "designed to impose a death by a thousand cuts through low-visibility procedural burdens, and that high-visibility, substantive provisions, such as the means test, were simply distracting bonuses").

[20]*See id.* at 357 ("There are two ways in which *an income-based means test* should affect the financial profile of bankruptcy filers." (emphasis added)).

[21]For example, by virtue of the increased complexity in the law, BAPCPA has increased the cost of representation for debtors. *See, e.g.,* Robert J. Landry & Amy K. Yarbrough, *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 340-44 (2008) (providing empirical evidence that BAPCPA has increased attorneys' fees for consumer Chapter 7 debtors); 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, 191 (2005) (observing that, by virtue of the 2005 amendments to the Bankruptcy Code, "[t]here is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law"). It seems reasonable to conclude that some of the debtors from the missing 800,000 did not file for bankruptcy relief because they could not afford representation and were not willing to file pro se. *See, e.g.,* Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., SEPT. 2005, at 1, 70 ("BAPCPA requires a lot more work for debtors' attorneys. Debtors will pay for that work, and some debtors will simply be priced out of bankruptcy."). One would expect that the income

test has succeeded or failed without knowing more about that economic profile.

This consideration calls into question the First Report's second, and most critical, assumption: The Report assumes that, if one were to combine debtors who actually filed in 2007 (the "2007 Filing Population") and the missing 800,000 (the "2007 Deterred Population") into a single pool (the "2007 Combined Population"), the income distribution of that pool would be exactly the same as the debtors who actually filed in 2001 (the "2001 Filing Population").[22] The reason the second assumption is so critical to the First Report's analysis is that the 2007 CBP has no data on the income profile of the 2007 Deterred Population.[23] Accordingly, to make an inference about the 2007 Deterred Population from the data comparing the 2007 Filing Population to the 2001 Filing Population, that inference must rest on an assumption that the income distribution of the 2007 Combined Population is similar to the income distribution of the 2001 Filing Population.[24] Without this assumption, no such inference can be made. Figure 1 illustrates the relevant populations of interest.

Why is the second assumption problematic? Recall that a subset of the 2007 Deterred Population probably consists of debtors who were deterred from filing for some reason unrelated to the means test.[25] Were one to exclude this subset from the 2007 Deterred Population, and if that exclusion altered the income distribution of the 2007 Combined Population, the possibility exists that the income profiles of the 2001 Filing Population and the revised 2007 Combined Population would be dissimilar, thereby precluding any inference based on a comparison of the 2007 Filing Population and the 2001 Filing Population.

Because the First Report does not address the concerns stemming from its assumptions, these concerns remain unresolved and call into question the Report's conclusions. But even if these concerns could be explained away,

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profile of this subset of the missing 800,000 would be lower than that of the group of debtors deterred by the means test.

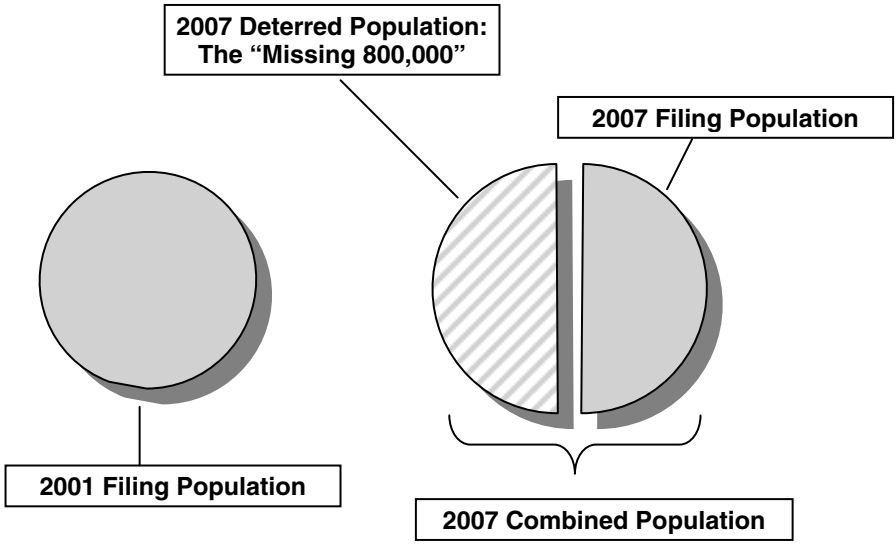
[22]*Cf. id.* at 357 n.42 ("We should articulate a necessary assumption: that there was not a trend of rising income among those who tend to file for bankruptcy.").

[23]*See id.* at 375 ("But what, if anything, can we say about the families who did not enter the bankruptcy system—the 800,000 families who we would have expected to file but for BAPCPA? To be sure, we have no device to detect and study these would-have-filed families directly . . . .").

[24]It is clear that the First Report makes such an inference. *See id.* at 352 ("[W]e examine *who* is filing after 2005 (and, by implication, who has been pushed out of the system)."); *id.* at 375-76 ("[A]lthough the number of petitioners filing for bankruptcy relief in 2007 was half the number immediately preceding BAPCPA, those who filed in 2007 looked no different in income profile from those who filed in earlier studied years. The logical inference is that, when measured by income profile, the 800,000 families that did not file, as a statistical group also looked like those who did file—both those who filed before the 2005 amendments and those who still managed to file after the amendments became law.").

[25]*See supra* note 21 and accompanying text.

Figure 1
Envisioning Pre- and Post-BAPCPA Bankruptcy Filings



distinct problems in the First Report's research question and methodology would persist and cast doubt on the assertion that bankruptcy reform has failed. The Commentary now turns to a discussion of these problems.

II. THE PURPOSE AND OPERATIVE EFFECT OF THE MEANS TEST

To understand the flaws in the First Report's research question and methodology that preclude it from answering whether bankruptcy reform failed, one must recognize that the Report does not adequately account for the purpose of the means test or the complexity of provision. The First Report initially frames the research question through the lens of the purpose of the means test. The Report, however, does not distinguish between the express purpose and the implied purpose of the means test and only considers the latter. This results in an incomplete analysis of the effectiveness of the means test. More importantly, the Report provides a thin account of the manner in which the means test would be expected to affect the filing behavior of debtors. By not considering the statutory details of the means test, the First Report generates hypotheses that improperly test the effectiveness of the means test. A description of the purpose and operative effect of the means test now follows in order to lay the groundwork for these claims.

A. The Purpose of the Means Test

The First Report repeatedly identifies reduction of bankruptcy filings by debtors with repayment ability as the purpose of the means test.[26] Here, there is a need for nuance that is missing from the First Report—specifically, a discussion of (1) the type of bankruptcy filings that the means test sought to reduce and (2) the manner of reduction.

In terms of the type of bankruptcy filing that the means test sought to reduce, Congress clearly intended for the means test to reduce certain types of Chapter 7 bankruptcies—that is, Chapter 7 cases filed by individual debtors with an ability to repay their past debts with future income.[27] There are two ways in which the test may have been designed to effectuate such a reduction: (1) deterrence of would-be Chapter 7 debtors with repayment ability and (2) the conversion or dismissal of Chapter 7 cases actually filed by debtors with repayment ability. Though the First Report does not place this distinction into sharp focus, it seems to consider exclusively the deterrent effect of the means test.[28] This is problematic because the express purpose of the means test was not deterrence but rather the screening of a particular subset of the consumer bankruptcy population—that is, above-median debtors who have filed for Chapter 7 relief. In other words, the means test is meant to affect the filing population rather than the nonfiling population. In fact, the First Report quotes the statements of the proponents of the means test that are to this effect.[29]

While it may very well be that the implied purpose of the means test was deterrence, a point which the First Report emphasizes,[30] any evaluation of

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[26]*See* Lawless et al., *supra* note 1, at 352 ("If there is a reduction of can-pay debtors—abusers—in bankruptcy, then BAPCPA should be declared a success. But if the reduction of filers is random and arbitrary, then it should be condemned as a failure that imposes senseless pain on families that need help."); *id.* at 377 ("BAPCPA was advanced with a narrative that while some could not afford to pay their creditors in bankruptcy, many others could, and the new law would sort the can-pays from the can't-pays."); *id.* at 385 ("Our initial findings should dampen the enthusiasm with which some trumpet BAPCPA's success in reducing the number of bankruptcies.").

[27]*See* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 Am. Bankr. L.J. 471, 473-79 (2007).

[28]Lawless et al., *supra* note 1, at 357 ("But what, if anything, can we say about the families who did not enter the bankruptcy system—the 800,000 families who we would have expected to file but for BAPCPA?").

[29]*See, e.g., id.* at 351 ("'[P]eople under the median income in our country *who apply for bankruptcy* almost certainly will be accorded almost automatically the fresh start which their financial circumstances dictate. But we also said that if the income is over the median income, then that set of financial circumstances should be more closely scrutinized to determine if any money can be repaid to this debt that has been accumulated.'" (alteration in the original) (emphasis added) (quoting 145 Cong. Rec. 8509 (1999) (statement of Rep. Gekas))); *id.* at 356 ("'This bill does this by providing for a means-tested way of steering *people who are filers*, who can repay a portion of their debts, away from chapter 7 bankruptcy.'" (emphasis added) (quoting 151 Cong. Rec. S1856 (Mar. 1, 2005) (statement of Sen. Grassley))).

[30]*See id.* at 379-83.

whether the means test has been a success would, at a minimum, need to consider its effects on the filing population that it has targeted—specifically, by examining the dismissal and conversion of Chapter 7 cases under the abuse-dismissal framework and ascertaining whether that group of cases statistically significantly differs in a substantively meaningful way from those cases that remain in Chapter 7. The First Report, however, does not investigate this issue.[31]

B. The Operative Effect of the Means Test

The First Report also suffers by not theorizing adequately about the manner in which BAPCPA would be expected to alter the decision-making process of individuals who consider filing for bankruptcy relief, particularly those considering Chapter 7 relief. This is not to say that the Report should have devised a complex theoretical model of debtor decisionmaking from which hypotheses could be formulated. The First Report, however, could have delineated the manner in which BAPCPA amended the Bankruptcy Code and how those statutory changes would be expected to affect a debtor's evaluation of his or her choices in considering (1) whether to file for bankruptcy and (2) the chapter of relief under which the debtor would file. Had the Report done so, I posit that it would have framed differently the question of whether bankruptcy reform failed, and that this, in turn, would have led the authors to focus on more appropriate metrics for answering the question.

The First Report generally does not engage with the statutory language of the means test. Instead, the Report makes broad generalizations about the test, which lead to suboptimal hypotheses. Prior to setting forth hypotheses to investigate whether bankruptcy reform failed, the First Report's most comprehensive discussion of the means test is the following statement: "Based on a complex formula, debtors with incomes above the median for their states are scrutinized more closely for bankruptcy eligibility and, depending on the formula, pressed into Chapter 13 or tossed out of bankruptcy altogether."[32]

Aside from this statement, the First Report does not delve into the com-

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[31]If the goal of the First Report is to evaluate whether, on the whole, the means test has improved the consumer bankruptcy system, a comprehensive cost-benefit analysis is required. Obviously, one cost that would have to be considered is the consequence of deterring individuals who otherwise would have been eligible for Chapter 7 relief. This cost, however, would have to be weighed against the benefit of deterring ineligible debtors as well as the postfiling dismissal or conversion of Chapter 7 cases deemed abusive under the means test. The First Report does not lay out any framework for such an analysis, instead focusing on a particular cost (i.e., overinclusive deterrence) to the exclusion of considering whether the express purpose of the means test has been realized. This is yet another reason why the hypotheses set forth in the First Report are flawed.

[32]Lawless et al., *supra* note 1, at 356. Although the statement does not so expressly state, it alludes to the fact that a Chapter 7 debtor whose disposable income exceeds a certain threshold will trigger the presumption of abuse, *see* 11 U.S.C. § 707(b)(2)(A)(i) (2006), and thus have his or her case converted to Chapter 13 or dismissed, *see id.* § 707(b)(1). *See* Lawless et al., *supra* note 1, at 356 (stating that, "depend-

plexity of the means-test formula.[33] This is quite unfortunate. It seems reasonable to conclude that, by virtue of the shadow of the law, an attorney who advises an individual considering filing for bankruptcy will surely consider the effect that the means test could have on his or her client's eligibility for Chapter 7 relief—if not because the attorney looks out for the client's best interest, then because of BAPCPA's provision that the signature of an attorney on a petition constitutes a certification that the attorney determined that the petition does not constitute an abuse of Chapter 7.[34]

How would the complexity of the means test formula affect a debtor's evaluation of his or her options regarding bankruptcy relief—specifically, eligibility for Chapter 7 relief? Before even considering the effect of the means

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ing on the formula, [debtors will be] pressed into Chapter 13 or tossed out of bankruptcy altogether"). The statement, however, ignores two important considerations.

First, debtors may rebut the presumption of abuse by establishing special circumstances that warrant a downward departure in income and/or an upward departure in expenses, which would result in a lower amount of disposable income that would not trigger the presumption of abuse under the means test. *See* 11 U.S.C. § 707(b)(2)(B). Were abuse not established pursuant to the means test, and if it could not be established that the debtor filed for bankruptcy in bad faith or that the totality of the circumstances of the debtor's financial situation demonstrated abuse, *see id.* § 707(b)(3), then a court would not have any authority to dismiss or convert the Chapter 7 debtor's case on the basis of abuse. *See id.* § 707(b)(1) (requiring court to find "that the granting of relief would be an abuse of the provisions of . . . [Chapter 7]" as a condition for dismissal under Code § 707(b)(1)).

Second, a finding of abuse does not mandate dismissal of a debtor's Chapter 7 case. It merely grants the court authority to dismiss the case. The court, however, retains discretion not to dismiss the case by virtue of the plain language of the Code's abuse dismissal provision, which provides that the court "may" dismiss a case if it finds abuse. *Id.* ("[T]he court . . . may dismiss a case . . . if it finds that the granting of relief would be an abuse . . . ."); *see also* Pardo, supra note 27, at 485-86 ("Congress has clearly demonstrated throughout the entire abuse dismissal framework that it knows how to engraft an imperative through use of the mandatory 'shall.' If Congress had intended for courts to dismiss a case in every instance where there was an unrebutted presumption of abuse or where abuse existed by virtue of the debtor's bad faith or the totality of the circumstances, it would have amended the Bankruptcy Code to read 'the court hall dismiss a case.'"); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 507 (2007) ("The Code still appears to leave the ultimate question of whether to dismiss or (with the debtor's consent) convert a case for abuse to the discretion of the judge, since § 707(b)(1) provides that the court 'may' dismiss or convert.").

[33]At one point, the First Report states the following: "Unsecured debts are of course indirectly relevant in calculating the means test's threshold, but we spare our readers this tangent of statutory torture. So too we omit the means test's treatment of priority unsecured debts." Lawless et al., *supra* note 1, at 386 n.126 (citation omitted).

[34]11 U.S.C. § 707(b)(4)(C)(ii). It is, of course, inevitable that some debtors will not have the assistance of counsel and will file pro se. Given the increased complexity of the law post-BAPCPA, it seems likely that most pro se debtors would be disadvantaged relative to represented debtors in evaluating (1) whether to file and (2) the chapter of relief under which they should file. That said, it is a reasonable assumption that the overwhelming number of debtors are likely to be represented by an attorney. *See* Rafael I. Pardo, An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors 18 tbl.2 (Nov. 19, 2008) (unpublished manuscript, on file with author) (setting forth data indicating that, for all voluntary cases originally commenced under Chapter 7 of the Bankruptcy Code and filed between October 17, 2005 (BAPCPA's effective date) and December 31, 2007 in the Western District of Washington by individual debtors, approximately 87% (i.e., 10,439 out of 12,021) of the cases involved represented debtors).

test, a debtor would consider whether he or she would be subject to means-test screening. First, the only type of debtor potentially subject to an abuse dismissal (of which the means test is a component) is an individual debtor whose debts are primarily consumer debts.[35] Accordingly, an individual debtor whose debts are primarily business debts (e.g., a sole proprietor) does not have to worry about an abuse dismissal, let alone the means test.

Second, even if a debtor's debts consist primarily of consumer debts, if the combined annual income of the debtor and the debtor's spouse is less than or equal to the state median income for a family size comparable to that of the debtor's household, the debtor will not face an abuse-dismissal motion predicated on the means test.[36] Annual income is calculated by multiplying "current monthly income," which the Bankruptcy Code defines as the average monthly income that the debtor receives from all sources during one of two possible historical six-month periods,[37] by twelve.[38] The fact that "current monthly income" is based on an historical average raises the possibility that "current monthly income" could either be higher or lower than the debtor's actual monthly income at the time he or she files for bankruptcy, depending on whether the debtor experienced income fluctuations prior to filing. Accordingly, a debtor whose actual annual income is above the applicable state median income level will not be subject to means-test screening if the annual income figure calculated using "current monthly income" is at or below the applicable state median income level.

Finally, it goes without saying (but is nonetheless important to note) that state median income levels will vary by state and by family size. Thus, two debtors with identical annual income and identical household size may not be treated identically for purposes of means testing—that is, one debtor may be deemed to be an above-median debtor and subject to screening and the other may be deemed to be a below-median debtor and not subject to screening.[39]

In the event that a debtor would be subject to means testing, the debtor

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[35]*See* 11 U.S.C. § 707(b)(1).

[36]*See id.* § 707(b)(7)(A). Regardless of whether the debtor has filed jointly with his or her spouse, the income of the debtor's spouse will be considered for purposes of determining standing to bring an abuse dismissal motion pursuant to the means test, unless the debtor and the debtor's spouse are separated. *See id.* § 707(b)(7)(B).

[37]*See id.* § 101(10A)(A). The definition also includes amounts regularly paid by nondebtor individuals toward the debtor's household expenses. *See id.* § 101(10A)(B).

[38]*See id.* § 707(b)(7)(A).

[39]For example, consider a debtor with $65,000 of annual income living in a two-person household who filed for bankruptcy on October 1, 2008. If such a debtor filed for bankruptcy in New Jersey, the debtor would have been deemed to be a below-median debtor since the median income for a family of two in New Jersey as of October 1, 2008 was $67,270. *See* U.S. Trustee Program, Census Bureau Median Family Income by Family Size (Cases Filed on and After October 1, 2008), http://www.usdoj.gov/ust/eo/bapcpa/20081001/bci_data/median_income_table.htm (last visited Nov. 26, 2008). If, on the other hand, such a debtor filed for bankruptcy in New York, the debtor would have been deemed to be an above-

would have to consider whether his or her *disposable* income would be sufficient to trigger the presumption of abuse. As I have described elsewhere,

> [i]n oversimplified terms, a court calculates a debtor's disposable monthly income by subtracting from a debtor's current monthly income . . . three categories of deductions: (1) a debtor's monthly expenses specified either by certain IRS guidelines or by the Bankruptcy Code, (2) the debtor's average monthly secured debt payments, and (3) the debtor's monthly expenses for the payment of priority unsecured claims.[40]

If the debtor's disposable monthly income equals or exceeds an applicable threshold dollar amount, then a presumption of abuse would arise,[41] which would provide a basis for dismissal or conversion of the debtor's case unless the debtor could rebut the presumption.[42] Accordingly, for purposes of means testing, the concern for an above-median debtor considering Chapter 7 relief is not one regarding total income but rather one regarding disposable income.

III. TESTING WHETHER BANKRUPTCY REFORM FAILED

In light of the prior discussion of the express purpose and operative effect of the means test, how should this inform an assessment of the deficiencies in the hypotheses set forth in the First Report? For purposes of illustration, this Commentary will focus on the First Report's first hypothesis ("Hypothesis 1"):

> There are two ways in which an income-based means test should affect the financial profile of bankruptcy filers. First, the means test, by barring most high-income debtors from Chapter 7, is designed to shunt some of them from Chapter 7 to Chapter 13. If effective, that test should differentiate bankrupt debtors by income, causing the Chapter 7 debtors to be relatively poorer and Chapter 13 debtors to be relatively richer after 2005.[43]

To test this hypothesis, the First Report relies on a nationwide random sample of Chapter 7 and Chapter 13 cases that were filed in 2007 in the fifty

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median debtor since the median income for a family of two in New York as of October 1, 2008 was $54,898. *See id.*

[40]Pardo, *supra* note 27, at 481 (footnote omitted).

[41]*See* 11 U.S.C. § 707(b)(2)(A)(i).

[42]*See supra* note 32.

[43]Lawless et al., *supra* note 1, at 357.

states and the District of Columbia by individual debtors.[44] It then separates the sample into two distinct pools: a pool of Chapter 7 cases and a pool of Chapter 13 cases. The median income for each pool is calculated and then compared to the median income of the Chapter 7 and Chapter 13 pools from the 2001 Consumer Bankruptcy Project (the "2001 CBP").

Bivariate analysis reveals that the differences between the Chapter 7 pools from 2007 and 2001 are statistically insignificant; so too are the differences between the Chapter 13 pools from 2007 and 2001 statistically insignificant.[45] Based on these results, the First Report concludes that the express purpose of the means test failed:

> These data indicate that by yet another measure, BAPCPA seems to have failed its *announced mission*. The means test has pushed a higher proportion of bankruptcy debtors into Chapter 13, but it has not pushed a targeted group of presumptively abusive high-income earners. The large sorting effects based on income that the means test was supposed to produce simply did not occur. Instead, the principal effect of the new law was apparently random and arbitrary—the antithesis of what the supporters of the amendments promised.[46]

There are flaws with Hypothesis 1 and the methodology implemented to test it, which potentially lead to an unsupportable conclusion (at least based upon the data and analysis presented). Each will be considered in turn.

First, consider the flaws in Hypothesis 1. The hypothesis is that the means test, if effective, will divert high income debtors from Chapter 7 to Chapter 13. The hypothesis, however, fails to specify whether its focus is on prefiling diversion (i.e., deterring a Chapter 7 filing and instead encouraging a Chapter 13 filing) or postfiling diversion (i.e., conversion or dismissal of an abusive Chapter 7 case). At first blush, it appears that Hypothesis 1 focuses on postfiling diversion insofar as the hypothesis states that the "[means] test should differentiate bankrupt debtors by income." Because the test does not have operative effect on nonfiling debtors (i.e., it can only screen debtors who have filed for Chapter 7),[47] the hypothesis must be referring to postfiling

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[44]*Id.* at 391.

[45]*See id.* at 361.

[46]*Id.* at 361-62 (emphasis added).

[47]By saying that the means test does not have operative effect on nonfiling debtors, I do not mean to suggest that it does not have any effect on nonfiling debtors. In all likelihood it does have a deterrent effect on some debtors (i.e., either deterring debtors from filing for Chapter 7 relief or from filing for bankruptcy relief at all). That said, the statutory language of the means test clearly operationalizes an aspect of case administration—namely, the dismissal of a particular type of Chapter 7 case. *See* Pardo, *supra* note 27, at 492 ("A disputed abuse dismissal motion ultimately requires the court to make a decision

diversion. There is no indication in the First Report, however, that the Chapter 7 and Chapter 13 cases were pooled taking into account postfiling events—specifically, the conversion or dismissal of abusive Chapter 7 cases. Accordingly, if cases from the sample were separated according to the chapter under which the debtor originally filed, the focus of Hypothesis 1 would be on prefiling diversion. If this is the case, then there is a mismatch between the hypothesis and the conclusion that the means test "failed its announced mission."[48] As previously discussed, deterrence was never the test's express purpose.[49]

If we disregard for the moment the flawed conclusion, what conclusion can be drawn from the First Report's finding that differences in median income levels across time (i.e., 2001 and 2007) for both Chapter 7 and Chapter 13 cases were statistically insignificant? Does this finding establish that the means test failed to deter "presumptively abusive high-income earners"[50] from filing for Chapter 7 relief? It may not for a variety of reasons.

First, the Report fails to address the implications of comparing a nationwide random sample of bankruptcy cases (i.e., the 2007 CBP) to a sample of cases drawn solely from federal judicial districts in California, Illinois, Pennsylvania, Tennessee, and Texas (i.e., the 2001 CBP).[51] That the 2001 CBP sample is not necessarily representative of debtors nationwide in 2001,[52] a point expressly acknowledged in the First Report,[53] is potentially problematic. For example, according to Census 2000, the median household incomes in 1999 of Pennsylvania, Tennessee, and Texas were below the median household income of the entire United States.[54] If this state of affairs re-

about the course of action that should be taken regarding administration of a debtor's Chapter 7 case (i.e., whether it ought to be dismissed), and this necessarily entails a prediction about the debtor's future ability to repay creditor claims."). Accordingly, the operative effect of the provision targets something distinct from the prefiling behavior of debtors. In contrast, consider the Bankruptcy Code provision requiring individual debtors to obtain prebankruptcy credit counseling as a condition for eligibility to be a debtor under the Bankruptcy Code. *See* 11 U.S.C. § 109(h)(1) (2006). In this example, one witnesses a statutory provision whose operative effect patently targets the prefiling behavior of debtors.

[48]Lawless et al., *supra* note 1, at 361.

[49]*See supra* Part II.A.

[50]Lawless et al., *supra* note 1, at 361.

[51]*See* WARREN & TYAGI, *supra* note 2, at 182-83.

[52]*See id.* at 183 (stating that core sample from 2001 CBP "varies from a representative national sample of bankruptcy debtors in that it represents relatively few districts"); *see also* Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1009 n.14 (2002) (noting underrepresentation of joint petitioners in 2001 CBP sample).

[53]*See* Lawless et al., *supra* note 1, at 355 n.32 ("Our prior studies were not random national samples but random samples drawn from five judicial districts."); *id.* at 398 ("The three prior studies are not nationally representative.").

[54]The U.S. median household income in 1999 was $41,994 (in 1999 dollars). ED WELNIAK & KIRBY POSEY, U.S. DEP'T OF COMMERCE, HOUSEHOLD INCOME: 1999, at 6 tbl.2 (U.S. Census Bureau, Census 2000 Brief No. C2KBR-36, 2005), *available at* http://www.census.gov/prod/2005pubs/c2kbr-36.pdf. The

mained unchanged as of 2001, it would mean that 3 of the 5 states from which bankruptcy cases were drawn for the 2001 CBP were from states with median household incomes below the national median. If the income data from the 2001 CBP were skewed toward the lower end of the income scale, the showing that the income data from the 2007 CBP was indistinguishable from the 2001 CBP would not establish that the means test had failed to deter high-income debtors from filing for Chapter 7 relief (and, in fact, would possibly suggest the opposite). While the First Report briefly states that the comparison of the random national sample to the random non-national sample was appropriate,[55] it does not provide any detail about testing for the absence of statistical bias.[56]

Second, in conducting its statistical analysis of differences in income levels, the Report did not exclude cases filed by individuals whose debts consisted primarily of business debts. Recall that cases involving such individuals are not subject to abuse dismissal.[57] Similarly, under the pre-BAPCPA analogue to the abuse dismissal (i.e., dismissal of an individual Chapter 7 case on the basis of substantial abuse),[58] individuals whose debts consisted primarily of business debts did not have to contend with dismissal under that provision. Accordingly, inclusion of pre- and post-BAPCPA cases filed by individuals whose debts consisted primarily of business debts in the pool of cases to be analyzed is improper given the research question presented. It may be possible that including such cases would not skew the Report's results, but the Report does not address the issue and thus fails to assuage concerns on this front.[59]

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median household incomes in 1999 of California, Illinois, Pennsylvania, Tennessee, and Texas were, respectively, $47,493; $46,590; $40,106; $36,360; and $39,927 (in 1999 dollars). *Id.*

[55]*See* Lawless et al., *supra* note 1, at 355 n.32 ("Our prior studies were not random national samples but random samples drawn from five judicial districts. We have no reason to believe this affects the comparisons we make to these earlier cohorts of bankruptcy filers.").

[56]This is not to suggest that the First Report should have extensively discussed nonresults from tests for statistical bias. There is a middle ground, however, between no detail and too much detail. Readers of the First Report would have benefited greatly to have a general sense of the tests that led to the Report's conclusion that comparing a national sample to a non-national sample was appropriate. *See supra* note 55.

[57]*See supra* note 35 and accompanying text.

[58]*See* 11 U.S.C. § 707(b) (2000) (providing for dismissal of "a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts . . . if [the court] finds that the granting of relief would be a substantial abuse of the provisions of [Chapter 7]") (amended 2005).

[59]At one point, the First Report does recalculate the median monthly income of Chapter 7 and Chapter 13 cases filed in 2007 after excluding (1) cases that did not involve individuals whose debts primarily consist of business debts and (2) cases that contained incomplete information in the debtor's schedules. *See* Lawless et al., *supra* note 1, at 361 n.52. The recalculated income figures are very similar to those that include all the cases from the sample. *See id.* at 361 & n.52. That said, because the recalculated figures do not exclude solely cases involving individuals whose debts primarily consist of business debts, there is no way for the reader to ascertain whether the inclusion of these cases in the originally calculated figures skews the data. Moreover, there is no indication that the First Report recalculated the median monthly income of Chapter 7 and Chapter 13 cases filed in 2001 as it did for cases filed in 2007.

Third, in testing Hypothesis 1, the Report relies on an unsuitable metric: total income.[60] As an initial matter, while the Report indicates that some data were obtained from the financial schedules filed by the debtor in his or her case,[61] it does not indicate whether the income data were obtained from: (1) Official Form 6I ("Schedule I – Current Income of Individual Debtor(s)");[62] or (2) Official Form B22A ("Chapter 7 Statement of Current Monthly Income and Means-Test Calculation"),[63] or alternatively Official Form B22C ("Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income").[64] Given the retrospective nature of "current monthly income,"[65] it is possible that the current monthly income figure from Official Form B22 could differ from the debtor's actual monthly income, which would be set forth in Schedule I.[66] Because Official Form B22 did not exist prior to BAPCPA, and because the First Report compares income data from the 2001 CBP and 2007 CBP, the income data relied upon for testing Hypothesis 1 likely refer to the information obtained from Schedule I.

Why is it not suitable to use total income as a metric for testing Hypothesis 1? As previously mentioned, the means test focuses on *disposable income* rather than total income. High-income debtors need not worry about the means test provided that they have a level of disposable income that is insufficient to trigger the presumption of abuse under the means test. While high income levels may be correlated with high disposable-income levels, that need not be the case. For example, a 2007 study based on a sample of bankruptcy filings in eight judicial districts between April and November 2006 found that only 8% of Chapter 7 debtors had sufficiently high income to be screened for repayment ability pursuant to the means test and that only 10% of debtors within that group had sufficient disposable monthly income to trigger the presumption of abuse.[67] Thus, total income is too broad of a metric for ascertaining what deterrent effect, if any, the means test has had in

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[60]*See id.* at 353 ("[W]e use income as our primary metric in examining our sample of post-BAPCPA debtors.").

[61]*See id.* at 394.

[62]*See* 11 U.S.C. app. at 458 (2006).

[63]*See id.* app. at 533.

[64]*See id.* app. at 544.

[65]*See supra* notes 37-38 and accompanying text.

[66]*See supra* Part I. In fact, the most recent version of Schedule I expressly makes this point. *See* Official Form 6I, *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006I_1207f.pdf ("The average monthly income calculated on this form may differ from the current monthly income calculated on Form 22A, 22B, or 22C.").

[67]EXECUTIVE OFFICE FOR U.S. TRS., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: IMPACT OF THE UTILIZATION OF INTERNAL REVENUE STANDARDS FOR DETERMINING EXPENSES ON DEBTORS AND THE COURT 3-4 (2007), *available at* http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/Rpt_to_Congress_on_IRS_Standards.pdf.

deterring individuals from filing for Chapter 7. A better metric would have been disposable income,[68] and the expectation would be that the disposable

[68]In an ideal world, one would calculate disposable income for pre- and post-BAPCPA debtors using the definition of "current monthly income" since the means test uses that definition as a starting point for calculating disposable income. *See* 11 U.S.C. § 707(b)(2)(A)(i) (2006). But since "current monthly income" is a post-BAPCPA concept, pre-BAPCPA cases would likely not have sufficient information to calculate what would have been "current monthly income" for pre-BAPCPA debtors had the definition existed at the time. If, however, one could engineer "current monthly income" for pre-BAPCPA debtors, and if one could obtain pre-BAPCPA IRS guidelines in order to calculate a pre-BAPCPA debtor's expenses consistent with the manner in which post-BAPCPA above-median debtors must calculate their expenses, *see id.* § 707(b)(2)(A)(ii)(I), then one would have sufficient information to map the means-test concept of disposable income onto pre-BAPCPA debtors given that pre-BAPCPA filings would have information regarding a debtor's secured debt and priority unsecured debt (respectively, in Official Forms 6D and 6E). With this in mind, some of the First Report's findings suggest that post-BAPCPA debtors would likely have less disposable income (per the means test) than would pre-BAPCPA debtors. While the Project found that income levels remained flat, *see* Lawless et al., *supra* note 1, at 361, it found that secured debt levels rose from 2001 to 2007, *see id.* at 365-67. All other things being equal, this would translate into less disposable income for the 2007 debtors than for the 2001 debtors.

A second-best approach would be to calculate disposable income as the difference between the debtor's current income as set forth in Schedule I, *see* 11 U.S.C. app. at 458, and the debtor's current expenses as set forth in Official Form 6J ("Schedule J – Current Expenditures of Individual Debtor(s)"), *see id.* app. at 459. Since Schedules I and J were required to be filed prior to BAPCPA's enactment, *see* 11 U.S.C. § 521(1) (2000) (amended 2005) (requiring debtor to file a schedule of current income and current expenditures), and continue to be required post-BAPCPA, *see id.* § 521(a)(1)(B)(ii) (2006), this is a comparison that could easily be made across time. While this measure of disposable income would not be perfectly congruent with the measure of disposable income set forth in the means test, it would nonetheless be a better metric for evaluating debtor behavior in response to the means test than income generally.

A concern with this second-best approach would arise if the requirements for the reporting of income and expenses by debtors in 2001 differed from the requirements in 2007. A comparison of the pre- and post-BAPCPA versions of Schedules I and J indicates, however, that the schedules are virtually identical with regard to the manner in which debtors have been required to document income and expenses. *Compare* 11 U.S.C. app. at 984-85 (2000) (pre-BAPCPA Schedules I and J), *with* 11 U.S.C. app. at 458-59 (2006) (post-BAPCPA Schedules I and J). While possible that the legal significance placed on income and expenses by the means test may have changed the incentives of post-BAPCPA debtors in documenting those amounts, with the result that statistical bias would be introduced into a disposable-income construct based on Schedules I and J, it seems reasonable to conclude that this would not be the case for a couple of reasons.

First, the influence of the means test on the reporting of income and expenses is likely to be confined to the information reported by debtors in Official Form B22A ("Chapter 7 Statement of Current Monthly Income and Means Test Calculation"), or alternatively Official Form B22C ("Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income"). *See id.* app. at 533 (Official Form B22A); *id.* app. at 544 (Official Form B22C). Second, debtors are likely to be questioned under oath at the meeting of creditors, *see id.* § 343 (providing that "[t]he debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a)"), about the accuracy of their schedules. *See, e.g.,* United States v. Naegele, 341 B.R. 349, 352 (D.D.C. 2006). Depending on the circumstances, a debtor who provides inaccurate information on his or her schedules potentially faces criminal penalties. *See* 18 U.S.C. § 152(2) (2006) (providing that a person who "knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11 . . . shall be fined . . ., imprisoned not more than 5 years, or both"); *id.* § 152(3) (providing that a person who "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury . . ., in or in relation to any case under title 11 . . . shall be fined . . ., imprisoned not more than 5 years, or both"). Accordingly, both pre- and post-BAPCPA debtors have had a strong incentive to ensure the accuracy of

income of post-BAPCPA Chapter 7 debtors would be statistically significantly lower than the disposable income of pre-BAPCPA Chapter 7 debtors.

Even assuming that total income were an appropriate metric, considering the median income level of all Chapter 7 filers and all Chapter 13 filers fails to account for differences in median income levels across states and according to family size (i.e., state effects and family-size effects).[69] Recall that debtors whose annual income is less than or equal to the state median income for a family size comparable to that of the debtor's household, the debtor will not face an abuse-dismissal motion predicated on the means test.[70] Accordingly, one would expect that, prior to filing for bankruptcy, a post-BAPCPA individual would pay close attention to his or her annual income relative to the applicable state median income. If the individual discovered that he or she would be deemed an above-median debtor and thus subject to means-testing, he or she may be deterred from filing for Chapter 7 and instead file for Chapter 13 or not file for bankruptcy at all (although both alternatives seem highly

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their schedules. This dynamic has assuaged the concerns of researchers who have relied upon petition data in studying the consumer bankruptcy system. *See, e.g.,* Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 383 (2001) (observing that, despite interpretive difficulties, "petition data have the advantage of being filed under the penalty of perjury").

[69]Yet another reason to take into account geographical differences would be the variation across circuits regarding interpretation of the means test and related provisions that would affect a debtor's evaluation of his or her choices in considering (1) whether to file for bankruptcy and (2) the chapter of relief under which the debtor would file. *See* Pardo, *supra* note 27, at 482-84 (discussing the inherent uncertainty and ambiguity in application of the means test). The First Report fails to acknowledge that this may affect the results of its study. The Report's authors assume that the state of the law regarding the means test was certain in 2007. *See* Lawless et al., *supra* note 1, at 354 ("The decision to study debtors who filed for bankruptcy in 2007 was a difficult one. By that date, enough time had plausibly elapsed after the October 1, 2005 effective date of BAPCPA so that the enforcement of the new law had reached a normal state."). Even if this assumption were correct, certainty in the law does not necessarily translate into uniform application of the law. In other words, although the law within each circuit may have been certain by 2007, the circuits may nonetheless have applied the law differently from one another.

Moreover, any assumption that the law was certain within each circuit as of 2007 is also doubtful. *See* Ad Hoc Comm. on Bankr. Court Structure and Insolvency Processes, ABA Section of Bus. Law, *Working Paper: Best Practices for Debtors' Attorneys*, 64 Bus. Law. 79, 83 (2008) (noting that "the case law related to the topics discussed in th[e] Working Paper is evolving, especially with regard to the means test and the changes encompassed in BAPCPA"). As an example, consider the recent case of *Maney v. Kagenveama (In re Kagenveama)*, which was not decided until 2008. 541 F.3d 868 (9th Cir. 2008). In that case, the Ninth Circuit considered upon direct appeal from the bankruptcy court, *see id.* at 871; *see also* 28 U.S.C. § 158(d)(2)(A) (2006) (providing for direct appeal from the bankruptcy court to the circuit court of appeals pursuant to a certification procedure if, for example, the appeal involves a question of law unresolved by the court of appeals for the circuit or if the appeal involves a question of law requiring resolution of conflicting decisions), the meaning of "projected disposable income" and "applicable commitment period," *see Kagenveama*, 541 F.3d at 871, two terms that can be central to confirmation of a Chapter 13 debtor's repayment plan, *see* 11 U.S.C. § 1325(b)(1)(B) (2006), and thus relevant to a potential debtor's decision-making process in evaluating whether to file for bankruptcy and the choice of chapter.

[70]*See* 11 U.S.C. § 707(b)(7)(A).

unrealistic given that high income alone does not trigger a presumption of abuse under the means test).

A comparison of the percentage of above-median debtors in 2001 to the percentage of above-median debtors in 2007 would have provided some insight into the question of the effect that BAPCPA's standing limitations associated with the abuse-dismissal framework have had on debtor filing behavior. There is some evidence suggesting that the percentage of debtors with annual income below the applicable state median income has been greater post-BAPCPA than pre-BAPCPA.[71] This possibly indicates that debtor filing behavior has been responsive to the focus of the means test on above-median debtors. Such evidence would counter the First Report's assertion that the deterrent effect of the means test has been "random and arbitrary."[72]

For all of these reasons, the First Report has not presented a convincing account of the deterrent effect, if any, of the means test. Additionally, the First Report does not set forth any hypothesis that would test whether the means test has achieved its express purpose—that is, a case administration mechanism for dismissing or converting Chapter 7 cases filed by debtors with an ability to repay past debts from future income. Finally, by framing the research question of whether bankruptcy reform failed solely through the lens of the means test, the First Report does not consider the effect, if any, that the alternative to the means test within the abuse-dismissal framework has had on bankruptcy filings. When the presumption of abuse under the means test does not arise or is rebutted, a Chapter 7 debtor's case may nonetheless be dismissed if it can be established that the debtor filed for bankruptcy in bad faith or that the totality of the circumstances of the debtor's financial situation demonstrates abuse.[73] This point clearly has implications for inter-

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[71]*Compare* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 37-38 (1999) (finding prior to BAPCPA that 76% of debtors had income below the national median), *and* Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Pre-Bankruptcy Planning Limits Means-Testing Impact*, AM. BANKR. INST. J., Feb. 2000, at 22 (finding prior to BAPCPA that 84% of debtors had income less than the applicable state median), *with* EXECUTIVE OFFICE FOR U.S. TRS., *supra* note 67, at 3-4 (finding after BAPCPA that 92% of debtors had income below the applicable state median).

It should be noted, however, that 92% of the debtors from the 2001 CBP had income less than the applicable state median, *see* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS at 161 (5th ed. 2006), the same figure as that found in the post-BAPCPA study by the Executive Office for United States Trustees, which is cited above in this footnote. This evidence would possibly suggest that the standing limitations associated with the abuse-dismissal framework have not affected debtor filing behavior. This evidence, however, would not be very probative of the effect of the means test's screening function, which focuses on disposable income. *See supra* notes 40-42 and accompanying text.

[72]Lawless et al., *supra* note 1, at 352.

[73]*See* 11 U.S.C. § 707(b)(3).

preting the meaning of the income profile of post-BAPCPA debtors.[74]

CONCLUSION

Readers of the Commentary should not infer that I am either a defender of or an apologist for BAPCPA. To the contrary, not only do I tend to agree with the various critiques of the legislation, I have criticized it in some of my scholarship.[75] Moreover, I believe in the importance of empirically documenting the manner in which deficiencies in the statutory scheme have adversely affected participants in the consumer bankruptcy system, particularly debtors who seek a fresh start. Studies such as these can be instrumental in revealing to courts and policymakers the need for reform. If, however, researchers tell a story that cannot be supported by the data from the underlying study, the story loses credibility and thus its ability to influence change. It is my hope that this Commentary will encourage the co-investigators of the 2007 CBP to conduct additional analysis that implements a more nuanced approach along the lines that I have suggested, with the ultimate goal of determining whether BAPCPA has truly failed.

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[74]The First Report appears to have overlooked this point. *See* Lawless et al., *supra* note 1, at 386 ("[F]amilies that owe a little and families that owe a lot of unsecured debt are equally eligible for Chapter 7 relief once they have survived the income-based means test."). Even if the debtor is deemed to be an at-median or below-median debtor, the court or the U.S. Trustee has standing to bring an abuse dismissal motion based on Code § 707(b)(3) against such a debtor. *See* 11 U.S.C. § 707(b)(6), 707(b)(7). For the argument that a debtor's income-based repayment ability is a proper consideration under Code § 707(b)(3), see Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035 (2006).

[75]*See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181-82 (2009) (criticizing BAPCPA provision that has made private student loans nondischargeable unless debtor can establish undue hardship); Pardo, *supra* note 27 (criticizing BAPCPA for its adverse impact on the ability of pro se debtors to access Chapter 7 relief).