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## Potential and Peril of BAPCPA for Empirical Research, The

Katherine Porter

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# The Potential and Peril of BAPCPA for Empirical Research

Katherine Porter\*

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## I. INTRODUCTION

Lamentations and hand-wringing accompanied the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).<sup>1</sup> The last year has shown that the amendments have indeed created troubling issues.<sup>2</sup>

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\* Associate Professor, University of Iowa College of Law. I thank Michelle Arnopol Cecil for inviting me to participate in the symposium. Jennifer Knapp and Ariane Holtschlag assisted with my research.

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, [hereinafter BAPCPA] (All further references to sections of BAPCPA that will be codified are to the United States Code. References to other sections of BAPCPA will be to the public law sections). Numerous professors predicted that the bill would harm the bankruptcy system. See, e.g., Charles Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1 (2001). The American Bar Association also lobbied against the bill, asserting that attorney liability provisions would have “disastrous” consequences for the entire bankruptcy court system. See Letter from the Am. Bar Ass’n to Sen. Frist and Sen. Daschle (Nov. 21, 2003), available at <http://www.abanet.org/poladv/letters/108th/bankruptcy112103.pdf>.

2. Commentary on a variety of problems with BAPCPA, including cases struggling to interpret the new law, is available at a current blog. See ABI’s BAPCPA Blog, <http://bapcpa.blogspot.com> (last visited July 18, 2006); see also *Trying to Make Sense out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191 (2005). Courts are struggling with BAPCPA’s provisions as well. See, e.g., *In re Kane*, 336 B.R. 477 (Bankr. D. Nev. 2006) (addressing purported drafting mistake in BAPCPA provision). The first large empirical study of post-BAPCPA cases reported problems with the bill’s credit counseling provisions. See NAT’L ASSN. OF CONSUMER BANKR.

This symposium identifies ambiguities and problems in the amended Bankruptcy Code and begins to untangle the effects of the new law on the bankruptcy system.<sup>3</sup> These provocative issues are fundamentally research questions. The next few years are likely to powerfully demonstrate how comprehensive law reform such as BAPCPA whets the academic appetite for research.

BAPCPA does not just raise research questions, however. The law itself actually seeks to provide answers. The statute has numerous explicit provisions about statistics and studies,<sup>4</sup> and the law's emphasis on disclosure implicitly increases the amount of data about people and businesses in financial trouble.<sup>5</sup> The central place of empirical research in BAPCPA reflects the importance of data in modern policymaking. Indeed, much of the bankruptcy reform debate was a battle of numbers.<sup>6</sup> By including research mandates in the new law, Congress articulated an empirical research agenda about bankruptcy for the federal government. This intertwining of research and legal reform provides an unprecedented moment to advance bankruptcy policymaking based on empirical reality, rather than theoretical speculation.

This article surveys the history of bankruptcy data and identifies the BAPCPA provisions that bear directly on research. It concludes by examining how such studies will and should proceed. BAPCPA provides both opportunities and hazards to advance our understanding of bankruptcy. The development of comprehensive federal data offers the potential to dramatically increase the scope of knowledge about the bankruptcy system. The peril lies in the government conducting its research without the transparency and accountability necessary to convince private industry, academic scholars, and the general public of the integrity and usefulness of these data. Rather than eclipsing academic research, the federal government's bold new foray into empirical bankruptcy work challenges the scholarly community to engage

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ATTORNEYS, BANKRUPTCY REFORM'S IMPACT: WHERE ARE ALL THE "DEADBEATS?" (Feb. 22, 2006) [hereinafter DEADBEATS], available at [http://nacba.com/files/main\\_page/022206NACBAbankruptcyreformstudy.pdf](http://nacba.com/files/main_page/022206NACBAbankruptcyreformstudy.pdf) (concluding that few consumers can use debt management programs or can pay anything on their debts but that credit counseling is an additional burden before bankruptcy).

3. Some of the pieces in this symposium volume comment on the process that shaped the legislation, and discuss why BAPCPA failed to address certain areas for reform. Professor Keating and Professor Dickerson offer insights on this issue. Other articles, such as those contributed by Professor Jacoby and Judge Wedoff, speculate about how BAPCPA will affect the problems that people bring to bankruptcy and how judges should apply the law to these problems.

4. See *infra* Part III.B.

5. See *infra* Part III.A.

6. See, e.g., Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. 77 (2004); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 13-16; Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709 (1999).

with government and private industry to ensure collective improvement of bankruptcy knowledge. If these collaborations succeed, the result will be a new world of research that features more reliable empirical data and facilitates a better understanding of the bankruptcy system.

## II. HISTORY OF BANKRUPTCY DATA

Empirical research about bankruptcy is relatively young.<sup>7</sup> Academics such as Marjorie Girth, Phillips Shuchman, and the trio of Sullivan, Warren, and Westbrook pioneered empirical research about bankruptcy. This early work was crucial to sparking interest in the bankruptcy system and helped to shape the development and interpretation of the 1978 Bankruptcy Code.<sup>8</sup> During subsequent rounds of bankruptcy law-making, the credit industry began to use data to support its positions.<sup>9</sup> Industry-funded studies actively competed with independent academic research in what Elizabeth Warren has termed a “new marketplace for empirical data.”<sup>10</sup> The number of female bankruptcy filers, the amount of consumer debt discharged in bankruptcy each year, and the percentage of small businesses in bankruptcy all were crucial and contested facts in the bankruptcy reform debates.

The federal government has been a reluctant participant in empirical research about bankruptcy. In fact, most federal studies ignore bankruptcy entirely. The U.S. Census Bureau does not collect information about bankruptcy in its surveys, despite the fact that filing bankruptcy is as common of an experience as getting divorced or earning a college degree,<sup>11</sup> both of which are captured by Census data. The Small Business Administration, the Department of Defense’s military personnel studies, and the Survey of Consumer Finance all either ignore bankruptcy or limit themselves to asking if a respondent has ever filed. Calls for improved information about the bankruptcy system date at least to 1973.<sup>12</sup>

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7. The first large empirical study of bankruptcy was conducted in 1964 and funded by the Brookings Institute. See DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS & REFORM* (1971). Prior studies were small and examined only one bankruptcy district. See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *FRAGILE MIDDLE CLASS* 34, 296 (2000) (summarizing these studies).

8. See Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986*, 74 AM. BANKR. L.J. 35 (2000).

9. See Warren, *The Market for Data*, *supra* note 6, at 12-14 (describing credit industry studies during bankruptcy reform debates).

10. *Id.* at 39.

11. Elizabeth Warren, *What Is a Women’s Issue? Bankruptcy and Commercial Law and Other Gender-Neutral Topics*, 25 HARV. WOMEN’S L.J. 19, 21 (2001).

12. NAT’L BANKR. REVIEW COMM’N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 923 & n.2393 (1997) [hereinafter *BANKRUPTCY*], available at

Since the enactment of the Bankruptcy Code, academics have outstripped the government in cultivating bankruptcy data. Perhaps the most prominent example of this work is the ongoing Consumer Bankruptcy Project, which presently consists of three large general studies of consumer bankruptcy conducted by Dr. Teresa Sullivan, Elizabeth Warren, Jay Westbrook and other researchers.<sup>13</sup> In recent years, there has been a substantial increase in the number and specialization of empirical studies.<sup>14</sup> Many of these academic research findings were contested.<sup>15</sup> For example, Robert Rasmussen recently authored *Empirically Bankrupt*, which challenges the methodology and conclusions of three empirical studies.<sup>16</sup> While these critiques were not always mild,<sup>17</sup> the nature of academic research made these debates possible because researchers generally disclosed their data to critics and made their methodology explicit. This “open source”<sup>18</sup> methodology is the hallmark of academic empirical work.<sup>19</sup> Professor Lynn LoPucki’s database of large, public company bankruptcies is the epitome of this norm about shared data in the

<http://govinfo.library.unt.edu/nbrcreport/21bdata.pdf> (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pts. 1 & 2, at 111 (1973)).

13. For a description of the 2001 Consumer Bankruptcy Project and a summary of prior studies, see ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* 181-82 (2003).

14. See, e.g., Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005); Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Financial Failure*, 2005 WIS. L. REV. 969; Brian L. Betker, Stephen P. Farris & Robert M. Lawless, “Warm with Sunny Skies”: *Disclosure Statement Forecasts*, 73 AM. BANKR. L.J. 809 (1999); Scott F. Norberg, *Consumer Bankruptcy’s New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415 (1999); Culhane & White, *supra* note 6.

15. For example, Judge Edith Jones and Todd Zwicki have criticized data from the Consumer Bankruptcy Projects. See Warren, *The Market for Data*, *supra* note 6, at 36-37 (documenting the critique).

16. Robert K. Rasmussen, *Empirically Bankrupt* (Vanderbilt Law & Econ. Research Paper No. 06-07), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=895547](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895547).

17. See, e.g., Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 453-54 (1992) (critiquing Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992) and alleging a “gross error” by Bradley & Rosenzweig in analyzing data).

18. “Open source” is a technology term that describes software for which the source code is made publicly available for replication or modification. For an open source definition of the term open source, see Wikipedia, [http://en.wikipedia.org/wiki/Open\\_source#\\_note-0](http://en.wikipedia.org/wiki/Open_source#_note-0) (last visited Nov. 17, 2006).

19. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 38 (2002) (explaining that replication is a basic test for evaluating the quality of empirical work).

bankruptcy field.<sup>20</sup> It is free, easily accessed, and makes its methodology transparent. While concern about respecting the rights of human subjects does not always permit releasing all data, the academic community tends to treat data as collective goods to contribute to shared knowledge.

The recent bankruptcy reforms demonstrated that academics no longer enjoy a monopoly on empirical research about bankruptcy. The credit industry actively solicited Congress's attention for private research that the industry had funded and had distributed selected findings to the media.<sup>21</sup> For example, the work of the Credit Research Center was a very high profile part of the congressional debate about bankruptcy reform.<sup>22</sup> Industry-funded studies tried to measure how much bankruptcy debt is discharged and how much creditors could recover if the law were changed.<sup>23</sup> This private, industry-funded research arguably threatens to eclipse the work of professional academics in influencing policymaking.<sup>24</sup>

The government had little neutral data to use in settling these controversies. Since 1948, the Administrative Office of the U.S. Courts ("AO") has been tasked with providing aggregate statistics on the bankruptcy court system to the Judicial Conference.<sup>25</sup> The AO releases the number of bankruptcy filings broken down by chapter, business and non-business, and judicial district to the public.<sup>26</sup> These numbers are widely reported in the media, and used by some analysts as economic indicators.<sup>27</sup> For others, the trend of filings serves as a moral compass that indicates changing values about borrowing.<sup>28</sup> Yet, these data do not reveal anything about who uses the bankruptcy

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20. Professor LoPucki has loftily named his database the "Bankruptcy Research Database." Details about its scope and methodology, as well as raw data, are available at <http://lopucki.law.ucla.edu> (last visited July 18, 2006).

21. See Warren, *The Phantom \$400*, *supra* note 6 (tracing the history and use of the infamous \$400 "bankruptcy tax" figure).

22. See Warren, *The Market for Data*, *supra* note 6, at 30.

23. See Kim J. Kowalewski, *Evaluations of Three Studies Submitted to the National Bankruptcy Review Commission*, in *BANKRUPTCY: THE NEXT TWENTY YEARS* G-2.d app. at 7-8 (1997).

24. Warren, *The Market for Data*, *supra* note 6, at 43.

25. 28 U.S.C. § 604(a)(2), (13) (1948) (current version at 28 U.S.C. § 604(a)(2), (13) (2000)).

26. In recent years, the AO has used its website to release these statistics. They have posted some prior data as well. See U.S. Courts: Bankruptcy Statistics, <http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm> (last visited Nov. 17, 2006).

27. See e.g., Alan Deaton, *Large and Small Companies Exhibit Diverging Bankruptcy Trends*, *BANK TRENDS* (Jan. 2002), available at <http://www.fdic.gov/bank/analytical/bank/bt0201.html>; Vern McKinley, *Ballooning Bankruptcies* (1997), <http://www.cato.org/pubs/regulation/reg20n4f.html> (last visited Nov. 17, 2006).

28. See e.g., Judge Edith H. Jones & Todd Zywicki, *It's Time for Means Testing*, 1999 *BYU L. REV.* 177.

system, what problems they seek to solve, and whether the system functions effectively. Their main use is as time series data,<sup>29</sup> and even in this regard, they have been faulted for inaccuracy.<sup>30</sup> The lack of transparency about how these statistics are compiled spurs concerns about their reliability.<sup>31</sup> Without individual data, the “off-the-rack” government statistics do not permit meaningful analysis. Bare filing rates fail to reveal the subtleties of the bankruptcy system. They do not reveal how many debtors each year are young, female, disabled, unemployed, divorced, self-employed, or subject to garnishment. The official federal data gives the public only one gross figure to evaluate our bankruptcy system—the number of cases.<sup>32</sup> As the National Bankruptcy Review Commission noted in its report on “Data and Dissemination,” the AO “collects data for its own internal administrative purposes, not for the purpose of monitoring the efficient operation of the Bankruptcy Code” and that “public interest data” are not regularly collected.<sup>33</sup>

While the Administrative Office has only dabbled in data production, the Executive Office of the U.S. Trustee (“UST”), a branch of the Department of Justice,<sup>34</sup> has engaged in some serious empirical research. For years, Ed Flynn of the UST produced a column entitled “Bankruptcy by the Numbers” for the *American Bankruptcy Institute Journal* with co-author Gordon Bermant.<sup>35</sup> These studies examined issues such as the number of elderly bankruptcy debtors, the job tenure of debtors, and the payment of mortgages through Chapter 13 plans. Flynn and Bermant generally documented their methodology, which principally relied on public bankruptcy court records. The UST’s advantage in using these records is the cooperation of bankruptcy

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29. See e.g., Robert M. Lawless, *The Paradox of Consumer Credit* (Univ. Ill. Law & Econ. Research Paper No. LE06-015), available at <http://ssrn.com/abstract=906868> (comparing bankruptcy filing rate over time with different measures of consumer credit); ROBERT D. MANNING, CREDIT CARD NATION 127-29 fig.5.1 (2000) (comparing trend of bankruptcy filing with unemployment rate over time).

30. See, e.g., Elizabeth Warren & Robert Lawless, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743 (2005) (critiquing AO data); Jennifer Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307 (1996) (documenting inconsistencies in AO data collection).

31. BANKRUPTCY, *supra* note 12, at 923, 926 (complaining about inconsistent procedures in collecting data).

32. *Id.* at 923 (“About the only data accurately reported are the number of bankruptcy cases actually filed.”).

33. *Id.* at 928.

34. The U.S. Trustee Program is responsible for overseeing the administration of bankruptcy cases. See U.S. Trustee Program, <http://www.usdoj.gov/ust> (last visited Nov. 17, 2006).

35. These reports and other articles by UST officials are available at [http://www.usdoj.gov/ust/eo/public\\_affairs/articles](http://www.usdoj.gov/ust/eo/public_affairs/articles).

court clerks in gathering district-level data.<sup>36</sup> The UST also enjoys free access to electronic records in the Public Access to Court Electronic Records (PACER) system.<sup>37</sup> Others must pay a per-page fee or obtain a fee waiver from the chief judge in each district in which they wish to view the records. For empirical research, these fees can be substantial, as is the time and energy commitment required to follow through on persuading each judge to grant a fee waiver. These disadvantages hinder non-government researchers and may prevent independent or academic scholars from replicating federal studies.

While most federal researchers have either ignored bankruptcy or merely produced a few aggregate statistics, the Government Accountability Office did produce a few studies in the years preceding BAPCPA.<sup>38</sup> One such study critically evaluated the claims of the credit industry about how much debtors can pay on their debts,<sup>39</sup> and attempted to determine the relative reliability of this research.<sup>40</sup> The government was neither a repository for much important data about bankruptcy nor a producer of leading research; it merely examined existing research. The National Bankruptcy Review Commission criticized the “dearth of timely, accurate bankruptcy data” and proposed numerous improvements to the data collection system.<sup>41</sup>

BAPCPA changes the status quo in bankruptcy research. BAPCPA mandates public research to be conducted by the GAO, the U.S. Trustee, and other federal agencies,<sup>42</sup> thus adding a third player to the existing contest over bankruptcy data. These provisions provide an opportunity to head off the growing collision between scholars and for-hire researchers by creating shared, reliable, neutral, and transparent data. Whether BAPCPA will fulfill this potential is presently unclear. Its success will depend largely on the willingness of the government, private researchers, and academics to collaborate,

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36. Academic researchers obtain these data, if at all, with winning smiles, lots of patience, and good luck.

37. The PACER system is administered by the Administrative Office of the U.S. Courts.

38. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, BANKRUPTCY REFORM: USE OF THE HOMESTEAD EXEMPTION BY CHAPTER 7 BANKRUPTCY DEBTORS IN THE NORTHERN DISTRICT OF TEXAS AND THE SOUTHERN DISTRICT OF FLORIDA, GGD-99-142R (July 12, 1999); GEN. ACCOUNTING OFFICE, BANKRUPTCY ADMINISTRATION: CASE RECEIPTS PAID TO CREDITORS AND PROFESSIONALS, GGD-94-173 (July 13, 1994). “GAO” is now the acronym for the Government Accountability Office, which is the new title for the former General Accounting Office.

39. *See supra* notes 21-23 and accompanying text.

40. U.S. Gen. Accounting Office, *Personal Bankruptcy Analysis of Four Reports on Chapter 7 Debtors’ Ability to Pay*, GAO/GGD-99-103, 1, 5 (June 1999) (explaining that its analysis was hampered by industry researchers refusal to release data); U.S. Gen. Accounting Office, *Personal Bankruptcy: The Credit Research Center Report on Debtors’ Ability to Pay*, GAO/GGD-98-47, at 6 (Feb. 1998).

41. BANKRUPTCY, *supra* note 12, at 921-22.

42. *See infra* Part III.B. (detailing these BAPCPA provisions).



as well as the stimulation of a persistent, collective demand for accurate government bankruptcy data.

### III. DATA AND RESEARCH BENEFITS OF BAPCPA

BAPCPA should enhance the available data about bankruptcy in two ways. The reformed law makes implicit contributions to research by putting new duties on debtors and by expanding the required bankruptcy form. Industrious researchers can painstakingly transform these enhanced records into usable data. BAPCPA also contains explicit research mandates and requires multiple formal studies of certain aspects of the bankruptcy system.

#### A. Raw Data Sources

Despite being much maligned by professors,<sup>43</sup> the means test may have a silver lining. The Judicial Conference Advisory Committee on Bankruptcy Rules has promulgated Form B22A to implement the means test.<sup>44</sup> To establish a debtor's "current monthly income"<sup>45</sup> for use in the means test, Form 22A requires all Chapter 7 debtors to report their average income for the six calendar months before filing bankruptcy. The form also requires debtors to break this income out by the source of the income. These are new data,<sup>46</sup> and they should be highly reliable given the additional requirement of providing payment advices<sup>47</sup> and the sharp penalty for misreporting on bankruptcy forms.<sup>48</sup> These data allow comparisons between debtors' past income and what they are earning at the time of their bankruptcy filings. They could also be useful to identify debtors who operated a business or received unemployment benefits before bankruptcy. Additionally, these data could suggest what types of risks and problems precede financial failure.

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43. Law Professors' Letter to Senator Specter and Senator Leahy (Feb. 16, 2005) (critiquing the means test on numerous grounds), *reprinted in* Charles Jordan Tabb, *Consumer Bankruptcy After the Fall: United States Law Under S. 256*, CANADIAN BUS. L. J. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=859645](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=859645).

44. Office Form B22A is available at the U.S. Courts webpage, Bankruptcy Forms, <http://www.uscourts.gov/bkforms/index.html> (last visited July 18, 2006).

45. 11 U.S.C. § 101(10A) (Supp. V 2005).

46. Previously, the only data on past income came from the Statement of Financial Affairs, which asked for annual income for each of the three years before bankruptcy. From my experience coding bankruptcy court records as part of the 2001 Consumer Bankruptcy Project, a large national empirical study, I can attest that income fields on the Statement of Financial Affairs were frequently reported inconsistently, sometimes only partially completed, and occasionally even left entirely blank.

47. 11 U.S.C. § 521(a)(1)(B)(iv).

48. *Id.* § 110 (2000 & Supp. V 2005).

The expense information required by the means test will likely be of limited value. Only debtors whose current monthly income exceeds the applicable median family income are required to disclose expenses on Form B22A. Further, the means test attributes fictional expenses to debtors based on Internal Revenue Service standards.<sup>49</sup> When actual expenses are reported, however, such data could prove helpful in revealing the types of pressures that push families with substantial incomes to their financial breaking point. For example, research may show that these families frequently have very high expenses for health care, childcare, or domestic support obligations. I doubt that this data will prove worth the burden that its collection imposes on debtors,<sup>50</sup> but thoughtful scholars may be able to tease valuable insights from them.

BAPCPA's amendments to Chapter 13 also require enhanced disclosures. Form B22C requires Chapter 13 debtors to make calculations of income and expenses that parallel those required by the means test for Chapter 7 debtors.<sup>51</sup> To determine expenses that are not derived from IRS standards, debtors will have to estimate future costs for items such as health insurance, charitable contributions, and contributions to elderly, ill, or disabled family members. Longitudinal research could track the accuracy of these estimates and consider how differences between projected and actual expenses affect the rate of plan completion.

After their Chapter 13 plan is confirmed, Chapter 13 debtors must file annual statements at the request of the court, the U.S. trustee, or any party in interest in the case as required by section 521(f)(4). These annual statements are different than the means test calculations prepared at the time of bankruptcy filing, and must report "income and expenditures of the debtor . . . that [show] how income, expenditures, and monthly income are calculated" for each year that the debtor is making Chapter 13 plan payments.<sup>52</sup> A nationally standardized form for these annual reports has not been promulgated yet, and it remains unclear how frequently parties will request these annual statements. If widely available, these data on the income and expense trajectories of Chapter 13 debtors will illuminate the financial experiences of debtors after filing bankruptcy. A precipitous drop in income as reported in an annual statement may routinely precede the dismissal of a debtor's Chapter 13 case. Alternatively, perhaps debtors who report living on fixed incomes or entrepreneurs with income volatility are more or less likely to complete their Chapter 13 plans. These theories may not sound controversial. The reality,

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49. *Id.* § 707(b)(2)(A)(ii)(I) (Supp. V 2005).

50. Professor Elizabeth Warren described BAPCPA's procedural hurdles to bankruptcy as "a thousand paper cuts." See Paula Moore, *Critics Say Bankruptcy Reform Unfairly Targets Small Business*, DENVER BUS. J. (Aug. 30, 2002) (quoting Professor Warren).

51. Official Form B22C is available at the U.S. Courts webpage, Bankruptcy Forms, <http://www.uscourts.gov/bkforms/index.html> (last visited July 18, 2006).

52. 11 U.S.C. § 521(f)(4)(B).

however, is that the contours of Chapter 13 success are largely a mystery because difficulties in compiling longitudinal data have frustrated research on how debtors fare in Chapter 13.<sup>53</sup> The annual statements could spark a renewed debate about the efficacy of Chapter 13.<sup>54</sup>

Similar advances in understanding how small businesses fare in Chapter 11 may result from the new Chapter 11 reporting requirements. Section 308 requires “small business debtor[s]”<sup>55</sup> to “file periodic financial and other reports” that contain information on the debtor’s profitability, how the debtor’s projected cash receipts and disbursements compare with actual figures, and “such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures.”<sup>56</sup> A new Monthly Operating Report form is apparently soon to be published for comment as a proposed official form.<sup>57</sup> Enterprising researchers could compile data from these reports to construct a sample of small business cases to examine how such companies fare during bankruptcy. For example, how quickly do they become profitable after filing? How accurate are debtor’s cash flow projections? This window into the functioning of small business bankruptcy could support or allay concerns that Chapter 11 is too expensive, slow, complicated or inefficient for small businesses.<sup>58</sup>

### *B. Government Research Studies*

BAPCPA contains at least seven separate sections that instruct federal public agencies to conduct studies of aspects of the bankruptcy system. These public studies draw a range of federal agencies into the universe of bankruptcy research. It seems doubtful that these studies will prove entirely fruitful, however, given the inherent problems with the scope of the studies to be conducted and emerging problems with their execution.

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53. Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Plan Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557 (2005).

54. *Id.* at 557 n.5 (collecting studies on Chapter 13 plan completion).

55. *See* 11 U.S.C. § 101(51D) (defining term).

56. *Id.* § 308(b).

57. *USTP Making “Great Progress” on BAPCPA Challenge*, 46 BANKR. CT. DEC. 6 (May 30, 2006).

58. *See, e.g.*, Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005); Ford Elsaesser, *The Small Business-Blues—Making Bankruptcy Work in Mid-Size Cases*, AM. BANKR. INST. J., WL 091803 ABI-CLE 547 (2003); Robert M. Lawless et al., *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. ILL. L. REV. 847.

The Government Accountability Office (“GAO”) is the primary agency responsible for studying federal programs.<sup>59</sup> As noted previously, the GAO has produced bankruptcy studies in the past and evaluated non-government studies. Section 205 of BAPCPA instructs the GAO to study the “reaffirmation agreement process . . . to determine the overall treatment of consumers within the context of such process.”<sup>60</sup> The study should consider “(1) the policies and activities of creditors with respect to reaffirmation agreements; and (2) whether consumers are fully, fairly, and consistently informed of their rights pursuant to such title.”<sup>61</sup>

If taken seriously, this is a difficult charge. The activities of creditors encompass behaviors that cannot be gleaned from court records. For example, the reaffirmation process includes private hallway conversations between emotionally exhausted debtors and Sears’s representatives at the meetings of creditors<sup>62</sup> and the way in which attorneys counsel debtors on the wisdom of reaffirming a particular debt. Crucial information about reaffirmation simply is not quantitative. A sensitive ethnographer or a skilled field interviewer could perhaps illuminate these hidden processes, but the GAO report is unlikely to do so.<sup>63</sup> The GAO was also saddled with the weighty task of making “recommendations for legislation (if any) to address any abusive or coercive tactics found in connection with the reaffirmation agreement process.”<sup>64</sup> This type of explicit policy assessment was performed by the bankruptcy review commissions in previous rounds of bankruptcy law reform.<sup>65</sup>

The transfer of this type of responsibility to the GAO could reflect several views, including that the National Bankruptcy Review commissions were too hostile to the credit industry or that the GAO is more speedy and efficient than a commission. The GAO has contacted professors Marianne Culhane and Michaela White, authors of the leading academic study on reaffirmation,

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59. The GAO describes its purpose on its home page. See What is GOA?, <http://www.gao.gov/about/what.html> (last visited June 29, 2006).

60. BAPCPA, Pub. L. No. 109-8, § 205, 119 Stat. 23, 50 (codified as amended at 11 U.S.C. § 363 (2000 & Supp. V 2005)).

61. *Id.*

62. 11 U.S.C. § 341 (2000 & Supp. V 2005) (requiring debtors to attend a meeting with their creditors). These are often called “341 meetings” after the sections of the Bankruptcy Code that requires them.

63. The GAO is apparently conducting some interviews as part of the study, but it is not clear if these interviews are for background purposes to aid in study design or if they will be part of the data itself. The GAO will definitely rely on file data. Email from Marianne Culhane to Katherine Porter (July 19, 2006) (on file with author).

64. BAPCPA § 205(b).

65. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (current version codified as amended in scattered sections of 11 U.S.C.). For more details about the charge given to the most recent commission, see <http://govinfo.library.unt.edu/nbrcfacts.html>.

and asked for input on the study's design.<sup>66</sup> This outreach is laudable. Serious researchers build upon prior work, and the GAO should be commended for taking this approach. The report was due in September 2006,<sup>67</sup> but apparently will be delayed for an unknown period.<sup>68</sup>

BAPCPA requires the GAO to conduct another study. Its purpose is to evaluate the feasibility, effectiveness, and cost of requiring trustees to report the names and social security numbers of debtors to the Office of Child Support Enforcement to determine whether debtors have outstanding support obligations. A report was due "[n]ot later than 300 days after the enactment of [BAPCPA]."<sup>69</sup> By my calculations, it should have been issued by February 2006, but it is not yet available.<sup>70</sup> The delay illustrates the need to monitor the implementation of the BAPCPA research provisions. It also raises some doubt about Congress's intent in requesting such studies. Rather than reflecting a sincere desire for knowledge, the studies may be compromise legislation that allowed congressional representatives opposed to BAPCPA to feel that they will have some imprint on future bankruptcy policymaking.

BAPCPA vests substantial new powers in the UST program, including implementing the debtor financial education program. BAPCPA requires the UST to develop a pilot curriculum and to test the effectiveness of this program for eighteen months in six judicial districts.<sup>71</sup> A report is required that evaluates the UST's financial education program as well as those "carried out by the credit industry."<sup>72</sup> This report should complement the research of Professors Gross, Block-Lieb, and Weiner about debtor financial education and will hopefully replicate some of their methodological techniques and incorporate their substantive insights.<sup>73</sup> The UST must also submit a report to the congressional judiciary committees that contains findings on the "impact"

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66. Email from Marianne Culhane to Katherine Porter (July 19, 2006, 20:53 CST) (on file with author).

67. The report was not available at the time that this volume went to press, but should be available at <http://www.gao.gov>.

68. The GAO has stated that it is "currently determining the scope of the engagement and ha[s] not established our research objectives or when a report will be issued" for the reaffirmation study. Email from Orin B. Atwater to Katherine Porter (July 20, 2006, 12:32 CST) (on file with author).

69. BAPCPA § 230(b).

70. In fact, correspondence from the GAO suggests that the study is not even underway. A GAO analyst reported that the GAO is "in the design phase of the engagement and have not determined our research objectives or when a report will be issued." Email from Ellen T. Wolfe to Katherine Porter (July 20, 2006, 10:29 CST) (on file with author).

71. BAPCPA § 103.

72. *Id.* § 105.

73. Susan Block-Lieb, Karen Gross & Richard L. Wiener, *Lessons From the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503 (2002); Susan Block-Lieb & Karen Gross, *Debtor Education: Making Sure a Good Idea Does Not Go Awry*, NORTON BANKR. L. ADVISER 1, at 6 (Jan. 2000).

that using Internal Revenue Standards to determine current monthly income “has had on debtors and on the bankruptcy courts.”<sup>74</sup> The UST “may” make recommendations for amending the Bankruptcy Code based on its findings. The point of this study, and what possible methodology could be adopted to produce it, is ambiguous. With this broad of a charge, one could suspect that the report will largely echo the overall position of the UST supporting the means test, rather than making specific data-driven observations. The UST may have been sensitive to such concerns, however, because it has outsourced the study to the RAND Corporation.<sup>75</sup>

The UST has announced its involvement in advising the Attorney General with regard to conducting the financial audits of individuals who file bankruptcy.<sup>76</sup> Beginning October 20, 2006, approximately 8,000 debtors will be targeted for audits to determine the accuracy, veracity, and completeness of their bankruptcy records.<sup>77</sup> A report shall be produced for each audit and filed with the court.<sup>78</sup> It remains unclear whether researchers will be able to conduct meaningful electronic searches of court records to locate these reports. The statute does require annual public disclosure of the aggregate results of these audits. However, the only statistic that is specifically required is the “percentage of cases, by district, in which a material misstatement of income or expenditures is reported.”<sup>79</sup> The audits will be expensive for taxpayers,<sup>80</sup> and a costly opportunity will be foregone if the audit data are not released in individual form that facilitates meaningful analysis and evaluation of the audit procedures. For example, the audits should measure problems with debtors overestimating the value of their assets, not just identify underestimations. This is also an issue of the “accuracy” of schedules, one not considered by prior research.<sup>81</sup> Another benefit of audit analysis could be the identification of commonly omitted items and the development of software

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74. BAPCPA § 103.

75. Email from Marianne Culhane to Katherine Porter (July 19, 2006) (on file with author). Professor Culhane and White will be consultants on the study.

76. *USTP Making “Great Progress,” supra* note 57.

77. *Id.*

78. BAPCPA § 603(a)(2)(A).

79. *Id.* § 603(a)(2)(D).

80. The UST requested \$4.8 million for fiscal year 2006 to fund the audits. *Testimony before H. Subcomm. on Commercial and Administrative Law*, 109th Cong. 10 (Apr. 26, 2006) (statement of Clifford J. White, Acting Director for the Executive Office of the UST) available at [http://www.usdoj.gov/ust/ea/public\\_affairs/testimony/docs/testimony060426.pdf](http://www.usdoj.gov/ust/ea/public_affairs/testimony/docs/testimony060426.pdf).

81. See Steven W. Rhodes, *A Preview of “Demonstrating a Serious Problem with Undisclosed Assets in Chapter 7 Cases,”* 5 NORTON BANKR. L. ADVISER 1 (May 2002) (concluding that debtors in asset cases underestimate asset values in some situations). Overvaluation could harm debtors’ prospects of financial recovery because such estimations may be the basis for reaffirmation negotiations or the calculation of secured claims.

tools and continuing education for debtor's attorneys to help prompt clients to initially disclose such assets.

Beyond the GAO and the UST, new bankruptcy legislation singled out a few additional federal agencies to research bankruptcy issues.<sup>82</sup> Most notably, the Small Business Administration ("SBA") is required to study why small businesses file bankruptcy.<sup>83</sup> Due in April 2007, this study is supposed to identify ways in which "laws relating to bankruptcy may be made more effective and efficient in assisting small businesses to remain viable."<sup>84</sup> Substantial scholarship has considered this question already.<sup>85</sup> Congress's decision to request a SBA study is subject to two interpretations. It may reflect distrust or even disdain for academic research on bankruptcy, or it may be an indication that Congress will ignore academic research unless a federal agency validates those prior findings. Congress's mandate to the SBA may also be understood as a triumph for scholars. Their careful work may be responsible for prompting Congress to evaluate bankruptcy as a small business tool. Either way, the SBA study is noteworthy for forcing a government agency other than the usual duo of the AO and UST to acknowledge and evaluate the effects of bankruptcy law on overall policy.

### C. Future Approach to Statistics

BAPCPA explicitly references the need for improved bankruptcy data. Although only hortatory, section 604 expresses the "sense of Congress" that the "national policy of the United States should be that all data held by bankruptcy clerks in electronic form . . . should be released in a usable electronic form in bulk to the public."<sup>86</sup> The statute also seeks to improve the quality of bankruptcy statistics by stating that the bankruptcy data system should use a "single set of data definitions and forms . . . nationwide" and that "data for any particular bankruptcy case [should be] aggregated in the same electronic record." Empirical researchers should rejoice at these BAPCPA provisions, which represent radical advances in existing data protocols. The improved system should reduce problems with data consistency and facilitate large or national studies by reducing the cost of accessing records.<sup>87</sup>

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82. See, e.g., BAPCPA § 1308 (requiring the Federal Reserve Board to conduct a study of the bankruptcy impact of credit being extended to dependent college students).

83. *Id.* § 443.

84. *Id.*

85. See Judge A. Thomas Small, *If You Fix It, They Will Come — A New Playing Field for Small Business Bankruptcies*, 79 AM. BANKR. L.J. 981, 981 n.3 (2005) (collecting articles on small business bankruptcy).

86. BAPCPA § 604.

87. Viewed collectively, the data provisions in BAPCPA represent at least a partial victory for the National Bankruptcy Review Commission and its Data Study Project. Some of the statutes, such as section 602, are virtually identical to those sug-

BAPCPA has two distinct sections that directly address bankruptcy information. Section 601 amends the U.S. Code statute on judicial procedure to add a section pertaining to “improved bankruptcy statistics.”<sup>88</sup> Section 602 adds requirements pertaining to “bankruptcy data.”<sup>89</sup> The AO is responsible for implementing the former; the Attorney General is responsible for implementing the latter. The statutes are different in scope and purpose.

Section 601 is concerned solely with debtors “who are individuals with primarily consumer debts.”<sup>90</sup> While the referenced statistics “shall” be made available to the public, the statute’s main purpose is to facilitate annual reports to Congress. The annual reports will likely consist of aggregate statistics about the macroeconomic impact of consumer bankruptcy and the demographics of consumer debtors. The list of required information is worth careful study and is too exhaustive to list here, but includes information on the total assets, liabilities, income, and expenses of debtors.<sup>91</sup> These reports will reveal information that previously was only estimable through the painstaking work of academic researchers such as the Consumer Bankruptcy Projects<sup>92</sup> and the Reaffirmation Project.<sup>93</sup> With the new data, one should be able to determine how many dollars of debt are discharged each year in consumer cases and how debtors’ past and current incomes compare to average Americans. Further, studies about legal process will be possible and “local legal culture” can be examined<sup>94</sup> because the data are to be released “for each district.”<sup>95</sup>

The “bankruptcy data” provision, section 602, applies to trustees’ final reports in all cases and periodic reports in Chapter 11 cases. It requires the Attorney General, “within a reasonable time” after the enactment of BAPCPA, to “issue rules requiring uniform forms” for trustee’s reports.<sup>96</sup> The statute contains a laundry list of required information to be included in trustee

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gested in the Commission’s report on Data Compilation and Dissemination. *See* BANKRUPTCY, *supra* note 12, at 923-41; BAPCPA § 602.

88. BAPCPA § 601; 28 U.S.C. § 159 (Supp. V 2005).

89. BAPCPA § 602.

90. *Id.* § 601(a); 28 U.S.C. § 159(a).

91. BAPCPA § 601(c)(3).

92. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 15-18 (1989) (describing data the first Consumer Bankruptcy Project collected that the government did not make available).

93. *See* Culhane & White, *Debt After Discharge*, *supra* note 6.

94. *See generally* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801 (1994); Jean Braucher, *Lawyers and Consumer Culture: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

95. BAPCPA § 601(c)(2).

96. *Id.* § 602(a) (codified as amended at 28 U.S.C. § 589b (Supp. V 2005)).



reports.<sup>97</sup> The standardization and disclosure of these reports was recommended by the National Bankruptcy Review Commission report in 1994 and largely represent the fulfillment of the Commission's recommendations in this regard.<sup>98</sup>

The unknown factor about the new data requirements is the extent to which the government will make individualized data available in a useful format. Some statutes are unclear on what exactly must be released. Section 601's reference to "statistics" rather than data arguably means that only aggregated figures must be publicly disclosed. Section 602 explicitly requires that trustees' reports should be filed "so as to facilitate compilation of data and maximum possible access of the public."<sup>99</sup> However, this requirement could be satisfied merely by making the trustee reports available on the existing PACER court record system. Section 604 suggests a broader reading of public access is required by opining that national policy should be that all public record data "be released in a usable electronic form in bulk to the public."

The degree to which the government effectuates this "sense of Congress" provision will be crucial in determining if BAPCPA facilitates empirical research. Without individualized data in formats accessible to statistical software, research will be sharply curbed. The reference to the "public" in Section 604 is also intriguing. This should encompass not just the occasional curious citizen and academic scholars, but also for-profit researchers and the credit industry. Banks or lenders could harness these bankruptcy data to change their litigation tactics in bankruptcy cases or improve predictions about bankruptcy charge-offs. If all parties have equal access to raw data, academic researchers must continue to conduct empirical research or risk the domination of bankruptcy research by for-profit entities which have dollars at stake in the research results.<sup>100</sup>

#### IV. PITFALLS IN RESEARCH AFTER BAPCPA

##### *A. Data Gaps*

The potential of BAPCPA to improve bankruptcy research is vast. The research provisions arguably represent congressional acknowledgement that documenting the realities of the bankruptcy system — who uses it, what problems they bring to it, and how it functions — are critical to crafting effective bankruptcy policy. Additionally, the amended statutes themselves should force the disclosure of heretofore hidden data. Despite these advances, pitfalls remain for future bankruptcy empiricists.

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97. BAPCPA § 602(d), (e).

98. See *BANKRUPTCY*, *supra* note 12, at 934.

99. BAPCPA § 602(b).

100. See Warren, *The Market for Data*, *supra* note 6, at 7-8.

The usefulness of much BAPCPA data will be limited because of a lack of comparative data. Initially, it will be nearly impossible to draw any inferences from the new statistics about the changes made by BAPCPA because comparable figures do not exist for the pre-BAPCPA period. Although this problem will dissipate, allowing for longitudinal comparisons after BAPCPA, we simply will never have much of this information for the years before 2005. BAPCPA does nothing to resolve a parallel research problem, which is the lack of comparable figures for the general (non-bankrupt) American population. The U.S. Census and the Survey of Consumer Finances collect only limited types of financial information, and the methods used in these studies do not parallel the bankruptcy process. The result is that often the data are not comparable. The more serious difficulty arises when trying to compare debtors to others in financial distress that have not filed bankruptcy.<sup>101</sup> Identifying these individuals is hard or impossible,<sup>102</sup> as is garnering research participation from them.<sup>103</sup> Many believe that BAPCPA creates barriers to filing bankruptcy, which will discourage or prevent some people from seeking bankruptcy relief.<sup>104</sup> Yet, it will be challenging to document this trend and to study those excluded from the system. Recent improvements in state court records offer some data on foreclosures, judgments, and garnishments that could help identify families in financial trouble who may not file bank-

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101. The same problem exists in the business bankruptcy context but is less troubling. A forthcoming paper by Professor Edward Morrison, *Selecting Bankruptcy: An Empirical Study of Small Business Debtor* (manuscript on file with author) uses Dun & Bradstreet data to examine the trajectories of companies in financial trouble that do not file bankruptcy, comparing them to those that do file bankruptcy.

102. See RONALD MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS AROUND THE WORLD 186 (2006) (noting difficulty in collecting data on people who do not while bankruptcy but are in comparable financial circumstances to those who file bankruptcy).

103. Social scientists have found that people find talking about money almost as difficult as talking about sex. See Eleanor Singer, *Public Reactions to Some Ethical Issues of Social Research*, 11 J. CONSUMER RES. 501, 504 (June 1984) (noting that sex and income were most frequently mentioned topics that offended research participants, beating out mental health, drug use, and religion by wide margins).

104. See Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, U. ILL. L. REV. (forthcoming 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=895408](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895408) (arguing that the purpose of consumer bankruptcy reform was to delay filing, thereby driving up the amount of fees and interest owed by consumers in financial trouble); Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 411 (2002) ("All these new burdens would make Chapter 7 more cumbersome and thus more expensive and inaccessible."); Tabb, *Death of Consumer Bankruptcy*, *supra* note 1, at 34 ("The Reform Bill contains additional provisions that also will create entry barriers [to bankruptcy.]").

ruptcy.<sup>105</sup> Again, however, a lack of prior state court research will limit inferences about how BAPCPA has affected the consumer bankruptcy filing decision.

### *B. Research Obstacles*

BAPCPA increases the roles of the AO and the UST as custodians of bankruptcy data and as researchers responsible for generating bankruptcy statistics. However, heightened government participation in data collection is not without peril. These agencies must balance debtors' privacy, the public's desire for full access, and efficient functioning of the bankruptcy system. The AO's prior actions with regard to bankruptcy data suggest an institutional reluctance to share data and a failure to view responsibility for data as essential to the Judicial Conference's mission. A similar statement could be fairly made about the UST. For example, some bankruptcy court clerks argued that section 107 of the Bankruptcy Code, which makes papers filed in bankruptcy cases "public records . . . open to examination"<sup>106</sup> did not extend to data in electronic form. A similarly pinched reading of section 604 could be wielded by local or federal bankruptcy officials. Also, a collision between statistics and politics is certainly plausible, as the top officials at the UST and AO are appointed by the President and the Chief Justice of the Supreme Court, respectively, and could come under pressure to control the use of government data. Despite BAPCPA's "sense of Congress" provision about public access to data, there remains little or no recourse for researchers who are denied access to data.

The UST's new supervisory responsibilities under BAPCPA, such as approving credit counselors and financial education programs, may increase its influence on releasing data. The need for UST approval may discourage these counseling and education entities from participating in controversial academic studies for fear that cooperation could displease the UST. More alarmingly, rumors have circulated that the UST may have considered banning researchers from conducting studies at meetings of creditors,<sup>107</sup> but thus far this has not occurred. The UST could also effectively prohibit or condition research by directing panel trustees, who are chosen by the UST, to refuse to cooperate in any studies.<sup>108</sup> Such research protocols could equally harm credit industry and academic researchers, both of whom have relied on panel trustees and meetings of creditors to execute studies. Even worse, the AO or UST

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105. For example, Wisconsin makes data from each of its county courts available electronically and includes a data extraction option for a subscription fee. See Wisconsin Circuit Court Access, <http://wcca.wicourts.gov/index.xml> (last visited Oct. 11, 2006).

106. 11 U.S.C. § 107(a) (Supp. V 2005).

107. Each debtor is required to attend a meeting of creditors under 11 U.S.C. § 341(a) (2000). These meetings are open to the public.

108. See 28 U.S.C. § 586(a)(1) (2000); 28 CFR § 58.1 (2006).

could “play favorites” in choosing when and to whom to release data. BAPCPA contains no obvious remedy for this type of grievance.

BAPCPA did not address one of the most sensitive issues facing empirical legal researchers. The federal government’s system for obtaining court documents, PACER, currently charges a fee of eight cents per page viewed.<sup>109</sup> For large empirical projects, fees can quickly total thousands of dollars. Scholars may obtain a fee waiver by obtaining the written agreement of the chief judge of the district in which they wish to view records.<sup>110</sup> Not only is this procedure cumbersome for national studies, but it also raises the specter of censorship. Judges may be reluctant to facilitate studies that could be used to criticize the operation of the bankruptcy system in their jurisdictions. The judiciary’s outrage following the publication of Lynn LoPucki’s book, *Courting Failure*,<sup>111</sup> has only exacerbated this problem, or at least perceptions of it.<sup>112</sup> One solution would be to appoint a board consisting of bankruptcy judges, government officials from the AO, UST, GAO or other agencies, bankruptcy attorneys, and academic researchers to review proposals for fee waivers. The review should not be substantive; the panel’s sole purpose should be to verify that the requested data will be used exclusively for non-profit research.<sup>113</sup>

As the debate over the \$400 “bankruptcy tax” illustrated,<sup>114</sup> the credit industry uses data to advocate for their desired bankruptcy policies. Lenders have a substantial advantage over academic scholars in generating research, aside from the obvious fact that the industry has profit dollars at stake that justify large research budgets. Credit transactions are almost always private and conducted solely between the parties. Banks claim that much critical data about the consumer credit system is proprietary and that they currently are

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109. See Public Access to Court Electronic Records: Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Nov. 17, 2006).

110. See Electronic Public Access Fee Schedule, [http://pacer.psc.uscourts.gov/documents/epa\\_feesched.pdf](http://pacer.psc.uscourts.gov/documents/epa_feesched.pdf) (last visited Nov. 17, 2006) (explaining fee exemption policy and stating that exemption may be revoked at any time at discretion of court).

111. LYNN M. LOPUCKI, *COURTING FAILURE* (2005) (using empirical data to assert that competition between bankruptcy courts for large cases is producing undesirable and inefficient case outcomes).

112. See Brent Snavelly, *Local Judge Pushes to Make Firms File for Bankruptcy on Home Turf*, CRAIN’S DETROIT BUS., May 16, 2005, at 43 (quoting Judge Stephen Rhodes who characterized the book as “an inflammatory attack”).

113. The National Bankruptcy Review Commission called for the appointment of a “Bankruptcy Data Coordinator” to oversee data collection between the AO and the UST. See BANKRUPTCY, *supra* note 12, at 921. While BAPCPA did not appoint such a person, this could be an alternate method for coordinating data release and creating uniform and unbiased policies.

114. See Warren, *The Market for Data*, *supra* note 6, at 14 (describing the development of the \$400 bankruptcy cost figure and how it shaped debate over bankruptcy reform).

under no obligation to share most of this data.<sup>115</sup> Banks know, for example, what percentage of dollars that consumers charge to credit cards is paid to hospitals, doctors, or medical facilities. Academics researching the medical causes of bankruptcy are disadvantaged without these data, yet private industry can produce such figures at their whim to interject into policy debates. Scholars cannot attack these numbers because the underlying proprietary data remains protected from scrutiny. By creating a larger universe of publicly-generated data, BAPCPA may alleviate some of this tension between academic and industry research, but will not entirely alleviate the problem.

BAPCPA coincidentally generates new proprietary data by requiring potential debtors to go through credit counseling and financial education. These organizations will have useful information about who considers bankruptcy from credit counseling and about the post-filing circumstances of families from financial education sessions. A consumer advocacy group has already released a study using credit counseling data gathered from willing agencies.<sup>116</sup> Future partnerships with these entities could produce other fruitful collaborations, although most of the credit industry has generally refused access to legal scholars. This relationship contrasts with the incredible access that banks and other corporations grant to business school professors seeking to write case studies or conduct marketing or finance research. Law has adopted a more independent research model, free from actual or implied bias by contact with private industry. The drawback to this approach is that problems with cost and access more frequently limit the scope of legal research.

## V. CONCLUSION

BAPCPA made sweeping changes to the Bankruptcy Code as written. This symposium highlights some key elements of these reforms and speculates on how BAPCPA will function. The challenge going forward is for researchers to explore the realities of the amended Bankruptcy Code as experienced. BAPCPA provides tremendous opportunities to obtain new data and develop fresh approaches for empirical research. The time to attack potential problems with bankruptcy data is now, and the task is to ensure that these data and studies are valid, accessible, and meaningful. To capitalize on these opportunities, the federal government, scholars, attorneys, judges, and industry should cooperate in the design and execution of this research and should critically analyze what available data reveal about the bankruptcy system. Scholars can and should contact respective government agencies to offer their expertise in designing empirical studies. They should request in advance that the data be released in ways that will be most useful for analysis, rather than

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115. The Home Mortgage Disclosure Act does require the disclosure of information about home loans, *see* 12 U.S.C. §§ 2801-2810 (2000), but there is no similar requirement for most other types of consumer debt.

116. DEADBEATS, *supra* note 2.

lamenting these problems after the fact, and should offer concrete models such as the U.S. Census Bureau's American Factfinder service<sup>117</sup> and the Department of Justice's Bureau of Justice Statistics to the AO and UST as examples of how to release data to the public.<sup>118</sup> These agencies should be forthcoming with information about pending studies and invite public comment on their proposed methodologies. At this point, the predominant model seems to be obscurity and privacy. If the BAPCPA studies are produced in isolation and the release of new data is limited, the credibility of the federal government as a purveyor of bankruptcy research will be damaged. Transparent and cooperative data collection could eliminate tensions between academic and industry researchers and provide a foundation for a new level of bankruptcy knowledge. BAPCPA's potential to improve bankruptcy data is vast. Avoiding the perils of these new studies and data collection policies requires timely and sustained efforts from all parties concerned about accurate, timely, and reliable bankruptcy data.

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117. The Census Bureau makes detailed data available to be downloaded and imported into leading statistical programs. *See* U.S. Census Bureau American Fact-Finder Home Page, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (last visited Nov. 17, 2006).

118. The Bureau of Justice Statistics is a component of the Department of Justice and has existed for twenty-five years. *See* Bureau of Justice Statistics Home Page, <http://www.ojp.usdoj.gov/bjs> (last visited Nov. 17, 2006).

