

Why Are Southern Bankruptcy Attorneys Scared of 7? Racially Disparate Uses of Chapter 13 Bankruptcy

*Nathan W. Vanderheyden**

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I. INTRODUCTION

Kerry Burns was a mother who left her job to care for her son after he was diagnosed with cystic fibrosis.¹ Unable to work, medical bills piled up as she prioritized her son’s health and care.² Unfortunately, Kerry’s son passed

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¹ Last Week Tonight with John Oliver (HBO), *Bankruptcy*, YOUTUBE (Apr. 18, 2021), <https://www.youtube.com/watch?v=GzFG0Cdh8D8&t=906s> [<https://perma.cc/A36A-FBQ6>].

² *Id.*

away.³ With no other options, she filed for bankruptcy.⁴ Despite common associations of bankruptcy with reckless behavior, millions seek bankruptcy relief because of medical bills, student loans, job loss, or other financial perils. Bankruptcy law should be designed to help the unfortunate regain their financial footing.

For most of America's history, bankruptcy law has been an uphill battle for debtors.⁵ Early on, bankruptcy law focused on helping creditors recoup their claims against debtors.⁶ While there was a shift in focus back to debtors in the 1930s, that shift was short-lived.⁷ Specifically, the credit card industry crafted the image of bankruptcy abuse and lobbied for the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005.⁸ After the passage of BAPCPA, certain debts became non-dischargeable, and the availability of bankruptcy relief decreased.⁹ Particularly, this availability decreased for poor Black debtors who could not afford to navigate the new and complex bankruptcy system.¹⁰

This Note will dive into Chapter 7 and Chapter 13 bankruptcies, explaining the requirements for each chapter and the different experiences they provide for debtors. For Chapter 13 debtors, the experience is generally more burdensome, with bankruptcy relief being harder to attain and more costly in the long term.¹¹ Thus, if possible, bankruptcy attorneys should typically place their clients in Chapter 7 bankruptcies. Yet, bankruptcy attorneys have placed Black debtors into Chapter 13 at a disproportionate rate compared to white debtors, despite similar financial situations.¹² This racial disparity is more profound in former Confederate states.¹³

This Note will argue that this racial bankruptcy disparity in the South is because of implicit bias. Institutional racism, born out of slavery and Jim Crow laws, has led to racial poverty.¹⁴ This racial poverty is greatest in southern states.¹⁵ As a result, southern bankruptcy attorneys are exposed to

³ *Id.*

⁴ *Id.*

⁵ *See infra* Section II.A.

⁶ *Id.*

⁷ *See infra* Sections II.A–B.

⁸ *See infra* Section II.B.

⁹ *Id.*

¹⁰ *See infra* Section II.D.

¹¹ *See infra* Section II.C.2.

¹² *See infra* Section II.D.

¹³ *Id.*

¹⁴ *See infra* Section II.E.

¹⁵ *Id.*

racial poverty to a greater extent than their northern counterparts. Additionally, racial poverty results in Black debtors taking advantage of “no money down” Chapter 13 bankruptcies more often than white debtors.¹⁶ Given the high workload of southern bankruptcy attorneys, these attorneys must rely on their schemas or past experiences to think fast and address issues quickly.¹⁷ Unfortunately, relying on their schemas can result in Black debtors being put into Chapter 13 when they qualify for Chapter 7. Specifically, their past experiences of placing Black debtors into Chapter 13 predispose them to put future Black debtors into “no money down” bankruptcies. Thus, given their experiences with the socioeconomic conditions of the South, southern bankruptcy attorneys inadvertently increase racial poverty by placing Black debtors into Chapter 13 at a higher rate than white debtors.

Educating bankruptcy attorneys on their implicit biases can reduce racially disparate uses of Chapter 13 bankruptcy. As the “watchdog” of the bankruptcy system, the United States Trustee Program (USTP) should lead the charge in educating bankruptcy attorneys. The USTP has the information and connections to identify “bad actors” in their judicial district. Upon identifying “bad actors,” the USTP should provide these attorneys with educational resources and track their progress in providing more equitable representation. If provided with proper funding, this solution can make a quick and immediate impact on the bankruptcy system and improve the experience of Black debtors.

II. BACKGROUND

Uniform bankruptcy law is notably absent from early American history.¹⁸ After uniform legislation was passed in 1800, there was a significant focus on creditors and prioritizing their claims over debtors.¹⁹ Thankfully, the Court changed that precedent in *Local Loan Co. v. Hunt*, which proclaimed the right to a fresh start;²⁰ specifically, the individual right to reorganize and discharge one’s debts.²¹ While subsequent legislation reaffirmed these principles, lobbying by the credit card industry created the image of bankruptcy abuse.²² This false narrative led to the passage of BAPCPA in 2005.²³ BAPCPA made

¹⁶ See *infra* Section III.F.

¹⁷ See *infra* Section III.G.

¹⁸ *A Brief History of Bankruptcy*, BANKRUPTCYDATA, <https://www.bankruptcydata.com/a-history-of-bankruptcy#:~:text=BAD%20ECONOMIC%20CONDITIONS.-,In%20the%20United%20States%2C%20early%20federal%20bankruptcy%20laws%20were%20temporary,law%20was%20passed%20in%201841> [https://perma.cc/K4NS-CV6W].

¹⁹ *Id.*

²⁰ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

²¹ *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1420–21 (2024).

²² Last Week Tonight with John Oliver (HBO), *supra* note 1.

²³ *A Brief History of Bankruptcy*, *supra* note 18.

filing for bankruptcy more difficult and created numerous ways for debtors to be denied bankruptcy relief based on a technicality.²⁴

In addition to the shift in focus of bankruptcy law back on the creditors, there has been a long trend of racial disparity in bankruptcy chapter choice. Although bankruptcy chapter choice is a complicated legal issue, with various variables to consider, research shows that Chapter 7 is generally preferable to Chapter 13 given the higher success rate and lower costs to debtors.²⁵ Despite this research, bankruptcy attorneys have repeatedly placed Black debtors into Chapter 13 at a much higher frequency than white debtors with similar financial situations.²⁶ This trend is even stronger in former Confederate states.²⁷ Denying Black debtors the same access to financial freedom as white debtors only reaffirms racial inequities in American society. Only by further exploring these issues can society create effective solutions to improve the quality and structure of the modern American bankruptcy system.

A. History of Bankruptcy

Bankruptcy relief dates to the nation's founding. Article I, Section 8 of the U.S. Constitution authorizes Congress to establish uniform, nationwide bankruptcy laws.²⁸ Specifically, the Constitution states, "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."²⁹ While Congress had the authority to establish permanent, uniform bankruptcy laws during the beginning of the nation's history, Congress declined. Instead, Congress initially utilized bankruptcy laws to temporarily respond to poor economic conditions.

Thirteen years after bankruptcy law's inscription within the U.S. Constitution, Congress enacted the first official bankruptcy law in 1800.³⁰ The law was passed in response to land speculation³¹ (i.e., an investment strategy of buying large quantities of land with hopes of selling the land for

²⁴ Angela K. Littwin, *The Do-It-Yourself Mirage: Complexity in the Bankruptcy System*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 157 (Katherine Porter ed., Stan. Univ. Press 2012).

²⁵ Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 394 (Sept. 2012).

²⁶ *Id.* at 393–94.

²⁷ *Id.* at 396.

²⁸ FED. JUD. CTR., THE EVOLUTION OF U.S. BANKRUPTCY LAW: A TIME LINE (2019), <https://www.fjc.gov/sites/default/files/materials/48/Bankruptcy%20Time%20Line%202019%20final.pdf> [<https://perma.cc/337N-4FB5>].

²⁹ U.S. CONST. art. I, § 8, cl. 4.

³⁰ *A Brief History of Bankruptcy*, *supra* note 18.

³¹ Jeremy Laukkonen, *What is Land Speculation?*, SMARTCAPITALMIND (May 16, 2024), <https://www.smartcapitalmind.com/what-is-land-speculation.htm> [<https://perma.cc/7AKV-BG9Y>].

profit) but was quickly repealed in 1803.³² The second official bankruptcy law was passed in 1841 in response to the Panic of 1837.³³ The Panic of 1837 was a financial crisis caused by a “real estate bubble and erratic American banking policy” that started a major depression.³⁴ This second law was repealed in 1841 following the end of the depression.³⁵ The next bankruptcy law was passed in 1867 in response to the Civil War and its corresponding economic disruption.³⁶ Again, this law was eventually repealed in 1878.³⁷

During this post-Civil War period, bankruptcy laws favored creditors at the expense of debtors. Before the 20th century, bankruptcy laws focused on recovering creditors’ investments.³⁸ The fact that almost all bankruptcies filed during this period were involuntary³⁹ (i.e., initiated by the creditor) demonstrated this focus.⁴⁰ Rather than rehabilitating debtors, these bankruptcy laws sought to make creditors whole and provide easier access to debtors’ assets.⁴¹ However, following the Court’s decision in *Local Loan Co. v. Hunt*,⁴² there was a shift in focus from creditors to debtors.⁴³

In *Local Loan Co.*, William Hunt (“the debtor”) borrowed \$300 from the Local Loan Company (“the creditor”).⁴⁴ A year later, the debtor filed for bankruptcy, with a federal district court in Illinois declaring the debtor bankrupt and discharging him of his debts.⁴⁵ Despite the discharge of his debts, the creditor brought an action against the debtor’s employer to garnish the debtor’s wages.⁴⁶ Subsequently, the debtor commenced an action to enjoin the creditor from attempting to enforce its prior, discharged claim

³² *A Brief History of Bankruptcy*, *supra* note 18.

³³ *Id.*

³⁴ 1837: *The Hard Times*, HARV. BUS. SCH., <https://www.library.hbs.edu/hc/crises/1837.html#:~:text=Historians%20have%20traditionally%20attributed%20the,and%20erratic%20American%20banking%20policy.&text=Most%20speculation%20concerned%20western%20land,among%20the%20most%20overvalued%20holdings> [<https://perma.cc/9XRV-7BDU>].

³⁵ *A Brief History of Bankruptcy*, *supra* note 18.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Involuntary Bankruptcy Filings & Legal Requirements*, JUSTIA (Oct. 2024), <https://www.justia.com/bankruptcy/involuntary-bankruptcy> [<https://perma.cc/MDK4-9HS3>].

⁴⁰ *A Brief History of Bankruptcy*, *supra* note 18.

⁴¹ For example, the Bankruptcy Act of 1841 prohibited debtors from using state law exemptions to protect assets from being liquidated. *See* FED. JUD. CTR., *supra* note 28.

⁴² *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

⁴³ *A Brief History of Bankruptcy*, *supra* note 18.

⁴⁴ *Local Loan Co.*, 292 U.S. at 238.

⁴⁵ *Id.*

⁴⁶ *Id.*

against the debtor.⁴⁷ The bankruptcy court ruled in favor of the debtor, with the Seventh Circuit Court of Appeals affirming the decision.⁴⁸ The Supreme Court affirmed the lower court's decision, holding that the debtor's wages earned after the bankruptcy adjudication were the debtor's property and not subject to claims of creditors.⁴⁹ Crucially, the Court held that the primary goal of bankruptcy was to offer debtors a fresh start.⁵⁰ Specifically, the Court stated that bankruptcy relief "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."⁵¹

Following this landmark decision, Congress passed several bankruptcy-related statutes, including the Bankruptcy Acts of 1933 and 1934, and the Chandler Act of 1938.⁵² This legislation led to the passage of the Bankruptcy Reform Act of 1978.⁵³ Serving as the basis of the modern bankruptcy system, this act created Chapter 11 (i.e., "reorganization" bankruptcy for businesses) and Chapter 13 bankruptcies (i.e., "wage earner's plan").⁵⁴ Overall, this act made it easier for individuals to seek bankruptcy relief.⁵⁵ The following year, the U.S. Department of Justice piloted a new program called, the "U.S. Trustee Program."⁵⁶

The USTP is the "watchdog over the bankruptcy process."⁵⁷ As a component of the U.S. Department of Justice, the USTP is tasked with promoting efficiency and protecting the integrity of the bankruptcy system.⁵⁸ Serving all federal judicial districts, except Alabama and North Carolina, the USTP is specifically responsible for (1) appointing and supervising private case trustees who administer bankruptcy estates; (2) taking legal action to enforce the requirements of the Bankruptcy Code; (3) referring matters for investigation and criminal prosecution to the appropriate federal agencies

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 243, 245.

⁵⁰ *Local Loan Co.*, 292 U.S. at 244.

⁵¹ *Id.*

⁵² *A Brief History of Bankruptcy*, *supra* note 18.

⁵³ *Id.*

⁵⁴ *Id.*; *Chapter 11 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [https://perma.cc/MJ7A-EYJ6]; *Chapter 13 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> [https://perma.cc/K72G-MCJX].

⁵⁵ *A Brief History of Bankruptcy*, *supra* note 18.

⁵⁶ FED. JUD. CTR., *supra* note 28.

⁵⁷ *About the Program. The United States Trustee Program*, U.S. DEP'T OF JUST., <https://www.justice.gov/ust/about-program> [https://perma.cc/VB7M-7Z9K].

⁵⁸ *Id.*

(e.g., U.S. Attorney's Office, IRS); (4) reviewing professional fees, bankruptcy filings, bankruptcy estates, and disclosure statements; and (5) advocating matters related to the Bankruptcy Code and rules of procedure.⁵⁹

Before the enactment of the USTP, bankruptcy abuse was rampant because of a "lack of supervision over bankruptcy cases."⁶⁰ Bankruptcy legislation prior to the Bankruptcy Reform Act of 1978 lacked the means for effectively monitoring the actions of debtors, creditors, and trustees.⁶¹ Such ineffective oversight was on full display in New York during the 1920s. During this period, "multiple and widespread bankruptcy fraud, scandals, and abuses resulted in an exhaustive investigation by the Southern District of New York."⁶² The investigation covered six cities, nineteen federal judges, 200 bankruptcy trustees, 1,000 cases, and over 4,000 witnesses.⁶³ Ultimately, the investigation resulted in numerous resignations, disbarments, and criminal convictions.⁶⁴

In response to systemic bankruptcy abuse, Congress created a commission in 1970 to investigate the bankruptcy process and propose structural changes.⁶⁵ The committee confirmed that the bankruptcy system lacked proper oversight and recommended that Congress create an "oversight agency with a network of local offices."⁶⁶ As a result, Congress piloted the USTP by opening fourteen offices with directives to "prevent fraud, dishonesty, and overreaching; establish trustee qualifications; and develop a structure for trustee supervision."⁶⁷ Following positive feedback, Congress turned the pilot program into a federal agency with the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.⁶⁸ Between 1987 and 1988, the USTP opened more than seventy offices, quickly fulfilling Congress' goal of becoming the "watchdog" of the national bankruptcy system.⁶⁹ Since 1988, the USTP has accomplished many

⁵⁹ *Id.*

⁶⁰ Charles R. Sterbach, *The United States Trustee Program: Celebrating 30 Years*, 8 CT. CONNECTION 1 (U.S. Tr. Program, Orlando, Fla.), Jan. 2019, at 1, <https://www.flmb.uscourts.gov/Newsletter/2019/January/Articles/12-Jan%202019%20US%20Trustee%20Article.pdf> [<https://perma.cc/6UYG-URT8>].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 2.

⁶⁶ Sterbach, *supra* note 60, at 2.

⁶⁷ *Id.* at 1–2.

⁶⁸ *Id.* at 2; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 111, 100 Stat. 3088, 3090.

⁶⁹ Sterbach, *supra* note 60, at 1.

objectives, such as implementing effective trustees,⁷⁰ enhancing efficiency in bankruptcy case filings,⁷¹ and protecting debtors⁷² and creditors.⁷³

B. *Credit Card Lobbying and the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)*

Around the period of the Bankruptcy Reform Act of 1978, the credit card industry experienced a period of steady deregulation. While deregulation allowed low-income consumers greater access to credit, it also allowed credit card companies to increase interest rates.⁷⁴ Specifically, in *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299 (1978), the Supreme Court held banks could charge out-of-state consumers the highest interest rate permitted in the bank's home state rather than the consumer's home state.⁷⁵ As a result, banks moved their business operations to states that allowed them to charge the highest interest rates.⁷⁶ To stay competitive with states with no ceilings on credit card interest rates, such as South Dakota and Delaware, states began to loosen their usury laws (i.e., "regulations governing the amount of interest that can be charged on a loan").⁷⁷ Today, "[twenty-nine] states have no limit on credit card interest rates."⁷⁸

Deregulation also allowed credit card companies to increase penalty fees. In 1996, the Supreme Court ruled in *Smiley v. Citibank*, 517 U.S. 735 (1996), that credit card late fees fell under the definition of "interest," as used in the provision of the National Bank Act.⁷⁹ The Court ruled that banks could charge late fees ("interest") at rates allowed by the laws of the bank's home

⁷⁰ U.S. DEP'T OF JUST., U.S. TRUSTEE PROGRAM ANNUAL REPORT FISCAL YEAR 2021 15–16 (U.S. Tr. Program ed., 2022) (discussing how the USTP appointed 250 subchapter V trustees, implemented extensive training, and drafted an outreach plan to ensure consistency and compliance with subchapter V's requirements).

⁷¹ Patricia Rummer, *The U.S. Trustee System: What Practitioners Think*, 4 COM. L. BULL. 7, 8 (1989) ("There's no question that the U.S. Trustees are expediting cases.").

⁷² U.S. DEP'T OF JUST., *supra* note 70, at 6 (illustrating how the USTP provided more than \$74 million in remediation to homeowners following agreements it reached in December 2020 with three mortgage servicers).

⁷³ *Id.* at 11 ("Payday lending principal sentenced for bankruptcy fraud in [a] case prosecuted with [the] assistance of USTP's Kansas City office" after debtor attempted to defraud creditors, with claims totaling more than \$15 million).

⁷⁴ TAMARA DRAUT & JAVIER SILVA, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S 33 (Demos ed., 2003).

⁷⁵ *Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 313 (1978).

⁷⁶ DRAUT & SILVA, *supra* note 74, at 33.

⁷⁷ *Id.*; see also Will Kenton, *Usury Laws: Definition, Purpose, Regulation, and Enforcement*, INVESTOPEDIA (July 18, 2022), <https://www.investopedia.com/terms/u/usurylaws.asp#:~:text=What%20Are%20Usury%20Laws%3F,are%20designed%20to%20protect%20consumers> [<https://perma.cc/SVR6-VEX3>] (defining usury laws).

⁷⁸ DRAUT & SILVA, *supra* note 74, at 33.

⁷⁹ *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 746–47 (1996).

state rather than the state laws of the consumer's residence.⁸⁰ As they did with interest rates, credit card companies quickly took advantage of the Court's ruling in *Smiley*, creating new types of penalty fees, including the "over the limit" fee, balance transfer fee, foreign exchange fee, and cash advance fee.⁸¹ While total consumer penalty fees totaled \$8.3 billion in 1995, this number jumped to \$18.9 billion in 1998.⁸² Additionally, the average late fee went from \$13 in 1996 to \$29 in 2002, becoming the "fastest growing source of revenue for the [credit card] industry."⁸³

In another blow to the consumer, deregulation resulted in aggressive marketing by credit card companies and the expansion of credit lines. Credit card solicitations grew from 1.52 billion in 1993 to 5.01 billion in 2001.⁸⁴ While the number of solicitations grew, credit card companies expanded the amount of credit they extended to consumers from \$777 billion in 1993 to almost \$3 trillion in 2000.⁸⁵ Combined with minimum payment requirements decreasing from 5% to 2–3%, credit card companies successfully created a longer, more vicious cycle of debt.⁸⁶

With consumers facing growing mounds of debt, credit card companies lobbied Congress to return bankruptcy law's focus on creditors. Specifically, credit card companies lobbied senators, including Iowa Senator Chuck Grassley, to make it more difficult for debtors to discharge consumer debt.⁸⁷ Senator Grassley, alongside the major credit card companies, perfected the image of bankruptcy abuse.⁸⁸ The image generated was of people who could afford to pay their bills, yet used bankruptcy to avoid their obligations and pass the costs onto taxpayers.⁸⁹ Repeating some of the credit card industry's major talking points, Senator Grassley stated before Congress that bankruptcy abuse cost the economy "[f]orty billion dollars . . . every year. Four-hundred dollars for a family of four."⁹⁰ However, no researchers have determined where Senator Grassley got this \$400 amount.⁹¹ This "phantom

⁸⁰ *Id.* at 747.

⁸¹ DRAUT & SILVA, *supra* note 74, at 35.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 37.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Last Week Tonight with John Oliver (HBO), *supra* note 1.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. 77, 77 (2004).

\$400” was “demonstrably false.”⁹² Despite the lack of research indicating bankruptcy abuse, Congress ultimately reverted the focus of bankruptcy law to protecting creditors with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

On April 19, 2005, President Bush signed BAPCPA into law.⁹³ When signing the bill, President Bush declared, “The new law will also make it more difficult for serial filers to abuse the most generous bankruptcy protections.”⁹⁴ The new legislation made it more difficult for a person to file for Chapter 7 bankruptcy (i.e., “liquidation” plan).⁹⁵ Specifically, BAPCPA created the means test (i.e., a test to determine whether a Chapter 7 filing is presumptively abusive based on the debtor’s current monthly income), required debtors to take credit counseling courses and participate in personal financial management education, and made student loans non-dischargeable.⁹⁶ Overall, BAPCPA created more than a dozen ways for debtors to be denied discharge based on a technicality.⁹⁷ Most importantly, BAPCPA failed to meet its objective of preventing bankruptcy abuse. This conclusion is supported by the fact that Chapter 7 filings in poor neighborhoods decreased 32% more than in wealthy neighborhoods.⁹⁸ Rather than curtailing bankruptcy abuse, BAPCPA created a more complicated bankruptcy system that could be navigated by the rich while creating hurdles that have become insurmountable for many low-income debtors.

C. Bankruptcy Chapter Choice: Chapter 7 vs Chapter 13

To better understand the inequities of racially disparate uses of Chapter 13 filings, this Note will explore the definitions and requirements of Chapter 7 and Chapter 13 bankruptcy. If a debtor qualifies for Chapter 7, certain assets are liquidated to pay off a portion of the debtor’s debts based on the priority of the creditors’ claims. After liquidation, most of the debtor’s debts are discharged, regardless of whether the creditors were paid in full. Chapter 13 bankruptcy, on the other hand, requires the debtor to form a three-to-five-year payment plan. The debtor makes installment payments to the Chapter 13 trustee, who then distributes these payments to the creditors.

⁹² *Id.*

⁹³ *A Brief History of Bankruptcy*, *supra* note 18.

⁹⁴ *Id.*

⁹⁵ Last Week Tonight with John Oliver (HBO), *supra* note 1; see also *Chapter 7 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> [<https://perma.cc/9XB5-C5EK>].

⁹⁶ Last Week Tonight with John Oliver (HBO), *supra* note 1; *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

⁹⁷ Littwin, *supra* note 24, at 157.

⁹⁸ Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 230 (2018).

After completion of the plan, most of the debtor's debts are discharged.

1. Chapter 7 Bankruptcy

Under Chapter 7, the debtor may be an individual or business entity.⁹⁹ To determine if the debtor qualifies for Chapter 7 bankruptcy, the debtor must compare their current monthly income to the state median. If the debtor's current monthly income is greater than the state median, the Bankruptcy Code requires the application of the "means test" to determine whether the Chapter 7 filing is presumptively abusive.¹⁰⁰ The means test was drafted to prevent debtors from filing Chapter 7 bankruptcy when they could afford to repay their debt obligations.¹⁰¹ Bankruptcy relief is available under Chapter 7 regardless of the amount of the debtor's debts or whether the debtor is insolvent, if the debtor satisfies the means test.¹⁰² Under the means test, abuse is presumed if the debtor's current monthly income over five years is equal to or greater than the lesser of (1) 25% of the debtor's nonpriority unsecured debt, or \$9,075, whichever is greater; or (2) \$15,150.¹⁰³ If abuse is presumed, the debtor is ineligible to file a Chapter 7 plan, and the debtor must file for Chapter 13 bankruptcy. While a debtor may rebut a presumption of abuse with a "showing of special circumstances that justify additional expenses or adjustments of current monthly income," the U.S. Trustee will ultimately report to the court regarding abuse under the means test.¹⁰⁴

Before filing, the debtor must have received credit counseling from an approved credit counseling agency within 180 days of filing.¹⁰⁵ Additionally, the debtor cannot file for any chapter of bankruptcy if the debtor had a prior bankruptcy petition dismissed voluntarily or involuntarily (e.g., failure to comply with court orders) within 180 days of filing.¹⁰⁶

A Chapter 7 case begins with the debtor filing their bankruptcy petition with the bankruptcy court in their area.¹⁰⁷ The debtor must also file with the court (1) schedules of assets and liabilities, (2) a schedule of current income and expenditures, (3) a statement of financial affairs (SOFA), and (4) a

⁹⁹ 11 U.S.C. §§ 101(41), 109(b).

¹⁰⁰ *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

¹⁰¹ Mark Henricks, *The Bankruptcy Means Test: What Is It and How Does It Work?*, FORBES (Aug. 2, 2022, 10:00 AM), <https://www.forbes.com/advisor/debt-relief/bankruptcy-means-test> [<https://perma.cc/LWG8-WK75>].

¹⁰² *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 11 U.S.C. §§ 109(h)(1), 111(a)(1).

¹⁰⁶ 11 U.S.C. §§ 109(g), 362(d)–(e).

¹⁰⁷ *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

schedule of executory contracts and unexpired leases.¹⁰⁸ Information that must be listed on these documents includes (i) a list of all creditors and the amount and nature of their claims; (ii) the source, amount, and frequency of the debtor's income; (iii) a list of all the debtor's property; and (iv) a list of the debtor's monthly living expenses (e.g., food, clothing, utilities).¹⁰⁹ Further, the debtor must also provide their most recent tax return, evidence of payment or statement of monthly net income, and records of any interest in a federal or state-qualified education or tuition account.¹¹⁰

In addition to the corresponding paperwork, the debtor must pay specific fees. Typically, the debtor must pay a \$245 case filing fee, a \$78 miscellaneous administrative fee, and a \$15 trustee surcharge upon filing. However, the individual debtors may pay in installments if the court permits.¹¹¹ While the court may provide for the payment of fees in installments, the number of installments is maxed at four, and the debtor must make the final payment no later than 120 days after filing (unless cause is shown to extend; if cause is shown, extended only 60 days).¹¹² In the rare case that the debtor cannot pay the Chapter 7 fees, even in installments, and the debtor's income is below 150% of the poverty line (as defined in the Bankruptcy Code), the court may waive the fee requirement.¹¹³

Upon filing the appropriate paperwork and meeting the fee requirement, an "automatic stay" is granted, preventing most collection actions by creditors against the debtor and their property.¹¹⁴ Between twenty-one and forty days after the petition filing, the case trustee will hold a meeting of creditors.¹¹⁵ During the meeting, the trustee puts the debtor under oath.¹¹⁶ Next, the Bankruptcy Code requires the case trustee to ensure the debtor knows the potential consequences of seeking bankruptcy relief (e.g., impact on credit history) and is aware of alternative bankruptcy chapters (i.e., Chapter 13).¹¹⁷ The case trustee and creditors, and potentially the U.S. Trustee, then ask the debtor questions regarding the property and financial

¹⁰⁸ FED. R. BANKR. P. 1007(b).

¹⁰⁹ *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

¹¹⁰ 11 U.S.C. § 521.

¹¹¹ 28 U.S.C. § 1930(a); FED. R. BANKR. P. 1006(b); *Bankruptcy Court Miscellaneous Fee Schedule*, U.S. CTS. (Dec. 1, 2023), <https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule> [<https://perma.cc/U7G4-4ZV4>] (citing fees listed under items 8–9).

¹¹² FED. R. BANKR. P. 1006(b)(2).

¹¹³ 28 U.S.C. § 1930(f).

¹¹⁴ 11 U.S.C. § 362.

¹¹⁵ *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

affairs of the debtor.¹¹⁸

Within sixty to ninety days of the meeting of creditors, the bankruptcy court will generally issue a discharge order.¹¹⁹ Excluding cases dismissed or converted under 11 U.S.C. § 727, individual debtors receive a discharge in more than 99% of Chapter 7 cases.¹²⁰ In executing a discharge, certain assets are liquidated to pay part of the debtor's debts. Notably, the Bankruptcy Code allows an individual debtor to protect specific property from the claims of creditors if the property is exempt under federal bankruptcy law or the laws of the debtor's home state.¹²¹ While Chapter 13 bankruptcy is often pursued to allow the debtor to keep their assets, these property exemptions can be a crucial reason to file for Chapter 7. For example, Iowa has a homestead exemption. This exemption prevents a debtor's homestead from being liquidated to satisfy debts, regardless of the home's value.¹²² If the debtor wants to protect certain assets from liquidation that are not exempt by statute, they can reaffirm the debt. Reaffirmation is an agreement where the debtor agrees to pay all or a portion of the debt owed to a creditor in exchange for the creditor forgoing repossession of the property.¹²³ Note that not all the debtor's debts are discharged.¹²⁴ Non-dischargeable debts include alimony and child support, student loans, and debts for willful and malicious injury.¹²⁵ Upon discharge, the debtor is given a "fresh start."

Overall, Chapter 7 is the ideal choice for debtors if they seek a quick and straightforward method to achieve financial freedom. Generally, debtors should file for Chapter 7 if their unsecured debts are greater than half their income, they have little to no disposable income, debt repayment would take longer than five years, and their monthly income is below their state's median income level (i.e., means test is not required).¹²⁶ Additionally, debtors may seek Chapter 7 bankruptcy relief to stop aggressive collection efforts by creditors through the automatic stay.¹²⁷ In a situation where the debtor has few non-exempt assets (i.e., property that is not exempt from liquidation under federal or state law) and the debtor needs immediate relief (e.g., requires a "fresh start" within three months), the debtor will typically file for

¹¹⁸ 11 U.S.C. § 343.

¹¹⁹ FED. R. BANKR. P. 4004(c).

¹²⁰ *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

¹²¹ 11 U.S.C. § 522(b).

¹²² IOWA CODE §§ 561.2, 561.16, 499A.18 (2023).

¹²³ *Chapter 7 – Bankruptcy Basics*, *supra* note 95.

¹²⁴ *Id.*

¹²⁵ 11 U.S.C. § 523(a).

¹²⁶ Bill Fay, *What Is Chapter 7 Bankruptcy?*, DEBT.ORG, <https://www.debt.org/bankruptcy/chapter-7> [https://perma.cc/272E-ACRB].

¹²⁷ *Id.*

bankruptcy under Chapter 7.

2. Chapter 13 Bankruptcy

Under Chapter 13 bankruptcy, the debtor proposes a repayment plan to their creditors, requiring the debtor to make installment payments over three to five years.¹²⁸ If the debtor's current monthly income is below the state median, the plan will be for three years.¹²⁹ However, the court can approve a longer period if cause is shown to extend the period.¹³⁰ If the debtor's current monthly income is above the state median, the plan generally must be for five years.¹³¹ No bankruptcy case can have a repayment plan that is longer than five years.¹³²

Any individual, even if self-employed or operating an unincorporated business, is eligible for Chapter 13 bankruptcy if they have combined total secured and unsecured debts less than \$2,750,000 as of the filing date.¹³³ Just like Chapter 7 bankruptcy, a debtor must have received credit counseling from an approved credit counseling agency, and the debtor cannot have had a prior bankruptcy petition voluntarily or involuntarily dismissed within 180 days of filing.¹³⁴ Additionally, like Chapter 7 bankruptcy, a debtor begins their Chapter 13 bankruptcy by filing: (1) their petition, (2) a schedule of assets and liabilities, (3) a schedule of current income and expenses, (4) SOFA, (5) schedule of executory contracts and unexpired leases, (6) most recent tax return, (7) evidence of payment, and (8) records of any interest in an education or tuition account.¹³⁵ Further, the debtor must provide the same information on these documents as a Chapter 7 debtor, specifically a list of all creditors and their claims, and information regarding the debtor's income, property, and living expenses.¹³⁶ Finally, the debtor must also meet the fee requirements.¹³⁷

Like Chapter 7 bankruptcies, a Chapter 13 debtor has some automatic stay protections. Special automatic stay provisions under Chapter 13 protect

¹²⁸ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 11 U.S.C. § 1322(d).

¹³³ 11 U.S.C. § 109(e).

¹³⁴ 11 U.S.C. §§ 109(g), 111, 362(d)–(e).

¹³⁵ FED. R. BANKR. P. 1007(b); 11 U.S.C. § 521.

¹³⁶ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹³⁷ For Chapter 13 cases, the debtor must pay a \$235 case filing fee and a \$78 miscellaneous administrative fee. Chapter 13 debtors save \$25 in fees compared to Chapter 7 debtors, who pay a \$245 case filing fee and a \$15 trustee surcharge in addition to the \$78 miscellaneous administrative fee. *Id.*; *Bankruptcy Court Miscellaneous Fee Schedule*, *supra* note 111.

co-debtors and prevent foreclosure. Unless authorized by the court, a creditor may not seek to collect a consumer debt from a co-debtor (i.e., any individual liable alongside the debtor).¹³⁸ For clarification, a consumer debt is incurred for personal, family, or household purposes.¹³⁹ Additionally, debtors may use a Chapter 13 proceeding to save their house.¹⁴⁰ This provision is vital for debtors who live in states that do not have homestead exemptions. In these cases, the automatic stay stops the foreclosure proceeding as soon as the individual files the Chapter 13 petition.¹⁴¹ Then, the debtor can become current on any past-due payments within a reasonable period.¹⁴²

Unique to Chapter 13 bankruptcies is the role of the case trustee. When an individual files a Chapter 13 petition, an impartial case trustee is appointed to administer the bankruptcy case.¹⁴³ The case trustee evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making installment payments to creditors.¹⁴⁴ Additionally, the case trustee oversees the meeting of creditors, as required under the Federal Rule of Bankruptcy Procedure 2003(a), placing the debtor under oath and having them answer questions regarding the debtor's property and finances.¹⁴⁵ After the meeting of creditors, the case trustee and willing creditors attend a court hearing on the debtor's repayment plan.¹⁴⁶

The debtor's repayment plan must be filed with the Chapter 13 petition or within fourteen days after filing.¹⁴⁷ The plan must provide for payments of fixed amounts to the trustee regularly, typically biweekly or monthly.¹⁴⁸ How creditors are paid is determined by the type of claim they possess against the debtor. There are three types of creditor claims. The first type of creditor claims are priority claims, which are claims granted special status by bankruptcy law (e.g., taxes, bankruptcy proceeding costs).¹⁴⁹ The second type is secured claims. Secured claims provide creditors the right to take back the

¹³⁸ 11 U.S.C. § 1301(a).

¹³⁹ 11 U.S.C. § 101(8).

¹⁴⁰ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 11 U.S.C. § 1302.

¹⁴⁴ 11 U.S.C. § 1302(b).

¹⁴⁵ 11 U.S.C. § 343.

¹⁴⁶ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹⁴⁷ FED. R. BANKR. P. 3015.

¹⁴⁸ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹⁴⁹ *Id.*

collateral or property.¹⁵⁰ The third and final type are unsecured claims. Unsecured claims provide the creditor with no special rights to collect.¹⁵¹ The repayment plan must pay priority claims in full unless otherwise agreed.¹⁵² For secured claims, the debtor must pay the creditor at least the value of the collateral if the debtor wants to maintain possession of the collateral.¹⁵³ Finally, a debtor's repayment plan does not need to pay any unsecured claims if the debtor is paying all of their projected disposable income over the repayment period, and the creditor is receiving at least as much under the plan as they would if under Chapter 7.¹⁵⁴

Within thirty days after filing, the debtor must start making plan payments to the trustee, even if the plan has yet to be approved by the court.¹⁵⁵ Within forty-five days after the meeting of creditors, the bankruptcy judge must hold a hearing, as previously mentioned, to determine whether the plan is feasible and compliant with the standards of the Bankruptcy Code.¹⁵⁶ If the plan is confirmed, the trustee will distribute funds to creditors according to the plan's terms.¹⁵⁷ If the plan is not confirmed, the debtor may file a modified plan.¹⁵⁸ The confirmed plan is binding upon the debtor and their creditors, with the debtor required to make the plan succeed.¹⁵⁹ Further, the debtor must seek approval from the trustee before incurring any new debt.¹⁶⁰ The court may dismiss the case if the debtor fails to make payments to the case trustee.¹⁶¹ Only after the debtor has completed all plan payments will the debts, provided for by said plan, be discharged.¹⁶²

Chapter 13 is the ideal choice for debtors if they earn income but have fallen behind on their debt obligations.¹⁶³ Chapter 13 can protect critical assets, such as an individual's residence, in states where the property is not exempt from liquidation under federal or state bankruptcy law. Further,

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² 11 U.S.C. § 1322(a).

¹⁵³ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹⁵⁴ 11 U.S.C. § 1325.

¹⁵⁵ 11 U.S.C. § 1326(a)(1).

¹⁵⁶ 11 U.S.C. §§ 1324–1325.

¹⁵⁷ 11 U.S.C. § 1326(a)(2).

¹⁵⁸ 11 U.S.C. § 1323.

¹⁵⁹ *Chapter 13 – Bankruptcy Basics*, *supra* note 54.

¹⁶⁰ 11 U.S.C. §§ 1305(c), 1322(a)(1), 1327.

¹⁶¹ 11 U.S.C. § 1307(c).

¹⁶² 11 U.S.C. § 1328.

¹⁶³ Bill Fay, *Chapter 13 Bankruptcy*, DEBT.ORG, <https://www.debt.org/bankruptcy/chapter-13> [<https://perma.cc/TU2L-ECD2>].

Chapter 13 allows the debtor to reorganize their debts and extend debt payments over a longer period.¹⁶⁴ Specifically, the debtor can eliminate unsecured debts (e.g., credit card payments) while catching up on secured debts (e.g., mortgage payments).¹⁶⁵ Here is a typical Chapter 13 bankruptcy case: a married couple, with one wage earner, has a \$150,000 mortgage, a \$7,000 car loan, and nearly \$20,000 in credit card debt.¹⁶⁶ The Chapter 13 repayment plan allows the couple to eliminate most of their credit card debt while keeping their car and residence by using their disposable income to pay off the car loan and cure late mortgage payments over three to five years.¹⁶⁷

D. Race and Chapter 13 Bankruptcy

It is more beneficial for a debtor to file under Chapter 7 than Chapter 13. Only around one-third of all Chapter 13 debtors manage to complete their repayment plan.¹⁶⁸ Additionally, debtors under a Chapter 13 plan pay more attorney's fees than Chapter 7 debtors (\$2,500–3,500 vs. \$1,000).¹⁶⁹ Given the lower success rate and higher costs to the debtor, research indicates that debtors should be placed in Chapter 7 if they meet the statutory requirements. However, bankruptcy attorneys place Black debtors more often in Chapter 13 compared to white debtors in similar financial situations.

While many variables are involved in chapter choice (e.g., debtor's assets, finances, creditor claims), these variables cannot fully explain the racial disparity in chapter choice. In comparing Chapter 13 rates by race, Black debtors were placed into Chapter 13 54.7% of the time.¹⁷⁰ White debtors were placed in Chapter 13 bankruptcy 28.6% of the time, Asian debtors 24.4%, and Hispanic debtors 21.7%.¹⁷¹ This racial disparity is more striking in southern states. Of the 24 judicial districts with the highest Chapter 13 rates, 23 were former Confederate states.¹⁷² Districts with the highest percentage of Black debtors in Chapter 13 cases included the Western District of Tennessee (79%), the Northern District of Alabama (75%), the Southern District of Mississippi (63%), and the Middle District of Georgia

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Braucher et al., *supra* note 25, at 394.

¹⁶⁹ *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFF., BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 23–26 (Yvonne D. Jones et al. eds., 2008)).

¹⁷⁰ Braucher et al., *supra* note 25, at 401.

¹⁷¹ *Id.*

¹⁷² *Id.* at 396.

(60%).¹⁷³ Meanwhile, the national average of Chapter 13 was only 31.7%.¹⁷⁴

Further demonstrating the impact of race on chapter choice was a research study conducted by the Journal of Empirical Legal Studies. The experiment consisted of surveys sent to bankruptcy attorneys, describing a fictional couple and their financial situation.¹⁷⁵ The finances of the fictional couple were the same in each survey.¹⁷⁶ The only variation was in the names, church affiliation, and bankruptcy choice preference.¹⁷⁷ There were three couple names: “Todd and Allison,” “R. and L.,” and “Reggie and Latisha.”¹⁷⁸ Each couple either indicated no preference or a preference for Chapter 7 or Chapter 13.¹⁷⁹ The results shown below¹⁸⁰ (percentage indicating the percent placed into Chapter 13) illustrate the implicit racial bias of bankruptcy attorneys, placing Black debtors at a strikingly higher frequency.

	Client’s Stated Preference		
	Chapter 7	None	Chapter 13
Black (“Reggie and Latisha”)	45%	36%	63%
No Race Identified (“R. and L.”)	31%	40%	37%
White (“Todd and Allison”)	22%	37%	38%

A prime example of individuals being placed into Chapter 13 when they qualified for Chapter 7 is *In re Jackson*, 2012 WL 909782 (Bankr. N.D. Ala. 2012). Both debtors filed for Chapter 13 bankruptcy, even though no presumption of abuse would have arisen under § 707(b)(2) of the Bankruptcy Code if they had sought relief under Chapter 7 (i.e., their current monthly income was below the state median level; no “means test” required).¹⁸¹ Further, the court noted that the debtors were “quintessential candidates for [C]hapter 7 relief” given their financial schedules, SOFAs, and proposed

¹⁷³ *Id.* at 404.

¹⁷⁴ *Id.* at 396.

¹⁷⁵ *Id.* at 406.

¹⁷⁶ Braucher et al., *supra* note 25, at 406.

¹⁷⁷ *Id.* at 406–08.

¹⁷⁸ *Id.* at 406.

¹⁷⁹ *Id.* at 407–08.

¹⁸⁰ *Id.* at 411.

¹⁸¹ *In re Jackson*, No. 11-42528-JJR-13, 2012 WL 909782, at *1 (Bankr. N.D. Ala. Mar. 16, 2012).

repayment plans.¹⁸² The debtors admitted they filed for Chapter 13 bankruptcy given their “inability or unwillingness to prepay their attorney fees in one lump sum” before filing their bankruptcy petitions.¹⁸³ The court held that bankruptcy relief under Chapter 7 would be in the debtors’ best interests.¹⁸⁴ Specifically, Chapter 7 would provide a quick discharge of their debts; the debtors would be protected under the automatic stay; they would not have to make plan payments for three years, as would be required under Chapter 13; and they would not run into the high risk of default and dismissal of their cases.¹⁸⁵ Further, there was no legitimate basis for the debtors to file for Chapter 13 since they only sought Chapter 13 relief to pay their attorney fees.¹⁸⁶ Thus, the court concluded that the Chapter 13 plans were not proposed in good faith and ordered each debtor to convert their cases to Chapter 7 within fourteen days.¹⁸⁷

While the court correctly denied the Chapter 13 plan in *In re Jackson*, it is not the judiciary’s role to place an attorney’s client in the right bankruptcy chapter. Bankruptcy attorneys must carefully examine their client’s financial situation and select the chapter that aligns with the debtor’s best interests, not the one most beneficial or convenient to the attorney. Currently, the best interests of Black debtors are not being represented.

E. Historical Racism and its Influences on Modern Racial Poverty

Throughout America’s history, systems have been designed and implemented to isolate individuals while empowering a select few.¹⁸⁸ Legislation policies and practices “have conferred advantages and disadvantages along racial lines—including in education, jobs, housing, public infrastructure and health.”¹⁸⁹ As a result, the median Black household income in 2017 was \$38,183 compared to \$61,363 for the average white household.¹⁹⁰ By exploring the history of slavery and discrimination in

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *9.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *4, *10 (noting that Chapter 13 was not intended as a payment collection device for bankruptcy attorneys); *see generally* *In re Buck*, 432 B.R. 13 (Bankr. D. Mass. 2010) (condemning the use of Chapter 13 as an attorney fee collection service where debtors were excellent candidates for Chapter 7 relief and filing under Chapter 7 would be in their best interest, despite being unable to pay their attorney fees up front).

¹⁸⁷ *In re Jackson*, 2012 WL 909782, at *10.

¹⁸⁸ Megan McGlinchey & Alyssa Smaldino, *500 Years of the Racial Wealth Gap: A Timeline*, LIVING CITIES (Apr. 14, 2020), <https://livingcities.org/resources/500-years-of-the-racial-wealth-gap-a-timeline> [<https://perma.cc/K359-SE9A>].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

America, attorneys can better understand the modern issue of racial poverty and its impact on their clients' situations.

In 1619, the first ship carrying enslaved Africans arrived in Virginia.¹⁹¹ Notably, “[p]rior to enslavement, many African tribes were wealthy and had no language for being ‘poor.’”¹⁹² Throughout the 17th century, North American settlers turned to slave labor.¹⁹³ Historians have estimated that six to seven million enslaved people were imported to America during the 18th century.¹⁹⁴ During this period, enslaved Africans mainly worked on tobacco, rice, indigo, and cotton plantations in the South.¹⁹⁵ Slavery produced phenomenal wealth for plantation farmers and became the foundation of the South’s economy, with cotton being the nation’s most valuable export. By 1831, the South produced nearly half the world’s raw cotton crop, with 350 million pounds picked.¹⁹⁶ Four years later, that amount grew to 500 million.¹⁹⁷ “By the eve of the Civil War, the Mississippi Valley was home to more millionaires per capita than anywhere else in the United States.”¹⁹⁸ To expand their wealth, plantation owners increased their operations to “capitalize on economies of scale inherent to cotton growing, buying more enslaved workers.”¹⁹⁹

“[B]efore the Civil War, Americans ‘lived in an economy whose bottom gear was torture.’”²⁰⁰ Enslaved people were prohibited from learning and were subjugated to a series of restrictive codes that inhibited their behavior and movement.²⁰¹ Many enslaved women were raped, and “rebellious” behavior was met with brutal punishment.²⁰² The immoral treatment of enslaved people in the South “fanned the flames of the growing abolitionist movement.”²⁰³ Ultimately, the election of Abraham Lincoln proved to be the breaking point, causing southern states to secede to form the Confederate

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Slavery in America*, HIST. (Jan. 26, 2024), <https://www.history.com/topics/black-history/slavery> [<https://perma.cc/ULQ7-LSRZ>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, THE N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html> [<https://perma.cc/QV6Y-KKHD>].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (quoting historian Edward Baptist).

²⁰¹ *Slavery in America*, *supra* note 193.

²⁰² *Id.*

²⁰³ *Id.*

States of America.²⁰⁴

In 1863, President Lincoln issued the Emancipation Proclamation, which declared “that all persons held as slaves” within the Confederate states “are, and henceforward shall be free.”²⁰⁵ However, the end of slavery would not occur for another two and a half years, when news of the end of the Civil War and the Emancipation Proclamation finally reached Galveston, Texas, on Wednesday, June 19, 1865 (i.e., “Juneteenth”).²⁰⁶ While Juneteenth was supposed to spark a new era of equality, racial inequities continued to persist and remain present today.

Immediately following the ratification of the Thirteenth Amendment in 1865, Jim Crow laws began to develop.²⁰⁷ Initially, Black codes were passed that determined when, where, and how Black citizens could work and their compensation.²⁰⁸ These codes served as a legal way to put Black individuals into indentured servitude, restrict voting rights, and dictate their way of life.²⁰⁹ Further, white people in the South frequently used violence, such as lynchings and cross burnings, to “systematically destroy or steal wealth and maintain social and political control.”²¹⁰ Eventually, Jim Crow laws were present throughout the former Confederate states, which legalized racial segregation and marginalized Black citizens.²¹¹ Jim Crow laws continued to segregate and marginalize Black citizens for a century until the Supreme Court ruled in *Brown v. Board of Education* that educational segregation was unconstitutional.²¹² President Johnson officially ended the “separate but equal” era with the passage of the 1964 Civil Rights Act.²¹³

Despite these efforts, in this same period, segregation was reinforced throughout the nation through redlining and discriminatory credit practices

²⁰⁴ *Id.*

²⁰⁵ *The Emancipation Proclamation*, U.S. NAT’L ARCHIVES & RECS. ADMIN., <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation#:~:text=President%20Abraham%20Lincoln%20issued%20the,and%20henceforward%20shall%20be%20free.%22> [<https://perma.cc/TTR4-8MEU>].

²⁰⁶ *Things to Know About Juneteenth*, ANTI RACISM COMMITMENT COAL. (May 13, 2023), [https://www.joinarcc.org/resources/aapi-experience-la5f7-clns9-lzpm-d-tt2g4-4b5l8-3fd5f-jt3gw-cgs77-nmkbj-ajwvr-xkdwz?gclid=CjwKCAjwkNOpBhBEEiwAb3MvvaUJGTyP9wv4Ad_JIAQIhbdp320-Ex84olfac44dx2uo9Qw2TaBn\]xoCxGgQAvD_BwE](https://www.joinarcc.org/resources/aapi-experience-la5f7-clns9-lzpm-d-tt2g4-4b5l8-3fd5f-jt3gw-cgs77-nmkbj-ajwvr-xkdwz?gclid=CjwKCAjwkNOpBhBEEiwAb3MvvaUJGTyP9wv4Ad_JIAQIhbdp320-Ex84olfac44dx2uo9Qw2TaBn]xoCxGgQAvD_BwE) [<https://perma.cc/LE6M-7D9B>].

²⁰⁷ *Jim Crow Laws*, HIST. (Sept. 11, 2023), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/R6UV-4C5R>].

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ McGlinchey & Smaldino, *supra* note 188.

²¹¹ *Jim Crow Laws*, *supra* note 207.

²¹² *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

²¹³ *Jim Crow Laws*, *supra* note 207.

by the Federal Housing Administration (FHA). Redlining denied people loans based solely on where they lived, even if they qualified for credit based on their finances.²¹⁴ Before the enactment of the 1968 Fair Housing Act, which outlawed racially motivated redlining, mortgage lenders widely redlined Black-populated neighborhoods.²¹⁵ Generally, the FHA favored construction loans in white-suburban areas compared to urban areas with Black residents.²¹⁶ The rationale of lenders was that loans for properties in Black-populated neighborhoods were not commercially favorable since the property's value would decrease over the life of the loan.²¹⁷ The FHA's 1938 Underwriting Manual confirmed this rationale, emphasizing the "negative impact of [the] 'infiltration of inharmonious racial groups' on credit risk."²¹⁸ Additionally, the FHA recommended the use of race-based restrictive covenants.²¹⁹ By 1940, 80% of Los Angeles and Chicago properties had race-based restrictive covenants that prohibited sales to Black people.²²⁰ The FHA's institutionalization of redlining, and the subsequent effects it caused, reflected the harsh segregation present in American society at this time.

Despite the end of the "separate but equal" era in 1964, the impacts of this era are still felt today. Jim Crow laws concentrated Black workers in undervalued occupations, institutionalized wage disparities, and perpetuated employment discrimination.²²¹ These discriminatory practices resulted in the Great Migration.²²² Starting in 1916 and lasting nearly six decades, approximately six million African Americans migrated from the South to northern cities.²²³ This migration was exacerbated by events such as the Tulsa Race Massacre. Known as "Black Wall Street," Tulsa was home to "hundreds of prosperous, Black-owned businesses."²²⁴ However, in 1921, a white mob stormed the Greenwood District in Tulsa to riot in response to a false assault accusation against a Black man.²²⁵ The massacre left more than 10,000 residents homeless and resulted in the tragic deaths of over 300 Black

²¹⁴ *Redlining*, FED. RESRV. HIST. (June 2, 2023), <https://www.federalreservehistory.org/essays/redlining> [https://perma.cc/9D3L-UA6E].

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ McGlinchey & Smaldino, *supra* note 188.

²²¹ DANYELLE SOLOMON ET AL., SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY 1 (Ctr. for Am Progress ed., 2019), <https://www.americanprogress.org/article/systematic-inequality-economic-opportunity> [https://perma.cc/2QEU-T9Q9].

²²² McGlinchey & Smaldino, *supra* note 188.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

residents.²²⁶ Violence and discrimination after the Civil War continued to deny African Americans, especially those in the South, an equal opportunity to attain wealth. Meanwhile, it only took one generation for former plantation owners to regain their wealth after the abolition of slavery.²²⁷

The “tough on crime” movement further exacerbated this economic disparity. “The War on Drugs” promoted the use of mandatory minimum sentences, longer prison terms, and zero-tolerance drug and violence policies.²²⁸ This movement resulted in mass incarceration, and Black men became eleven times more likely to serve jail time than white men.²²⁹ This higher rate of incarceration for Black men resulted in a decrease in hourly wages of 11%, reduced employment by nine weeks, and lowered annual earnings by 40%.²³⁰ In 2022, Black individuals made up 20.1% of the population in poverty while only representing 13.5% of the total population.²³¹ With one in nine Black children (11.4%) having an incarcerated parent, they are provided with less financial support than Hispanic or white children (3.5% and 1.8% have an incarcerated parent, respectively), creating a vicious cycle of racial poverty.²³²

The shackles of slavery are still felt the strongest in former Confederate states. Racial poverty is more prominent in the South, with “Deep South” states like Mississippi and Louisiana having the highest poverty rates and the largest Black-white poverty gaps.²³³ As a result of this nation’s dark history, racial disparities are still present today in jobs, wages, benefits, and overall economic well-being.²³⁴ American journalist and author Ta-Nehisi Coates perfectly described the impact of historical racism, stating, “Two hundred fifty years of slavery. Ninety years of Jim Crow. Sixty years of separate but

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Kenya Brumfield-Young, *Tough on Crime, Tough on Children – Is Tough on Everyone*, EMPOWER MO. (Aug. 13, 2023), <https://empowermissouri.org/tough-on-crime-tough-on-children-is-tough-on-everyone/#:~:text=In%20the%201980s%2C%20the%20United,tolerance%20drug%20and%20violence%20policies> [https://perma.cc/T7A9-LDWG].

²²⁹ Calvin Schermerhorn, *Why the Racial Wealth Gap Persists, More Than 150 Years After Emancipation*, WASH. POST (June 19, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation> [https://perma.cc/MGT3-E4S5].

²³⁰ BRUCE WESTERN & BECKY PETTIT, *COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY* 4 (Pew Charitable Trs. ed., 2010).

²³¹ Em Shrider, *Poverty Rate for the Black Population Fell Below Pre-Pandemic Levels*, U.S. CENSUS BUREAU (Sept. 12, 2023), [https://www.census.gov/library/stories/2023/09/black-poverty-rate.html#:~:text=For%20example%2C%20Black%20individuals%20made,povetry%20\(rati%20of%201.5\)](https://www.census.gov/library/stories/2023/09/black-poverty-rate.html#:~:text=For%20example%2C%20Black%20individuals%20made,povetry%20(rati%20of%201.5)) [https://perma.cc/J3DU-S7LB].

²³² WESTERN & PETTIT, *supra* note 230, at 4.

²³³ Regina S. Baker, *The Historical Racial Regime and Racial Inequality in Poverty in the American South*, 127 AM. J. SOCIO. 1721, 1722 (May 2022).

²³⁴ SOLOMON ET AL., *supra* note 221, at 1.

equal. Thirty-five years of racist housing policy. Until we reckon with our compounding moral debts, America will never be whole.”²³⁵

III. ANALYSIS

A clear pattern exists of wrongfully placing Black debtors in Chapter 13. Placing Black debtors into a chapter of bankruptcy that is less successful and more costly only reaffirms the fiscal disparities in American society. Black debtors are less likely to get a “fresh start” when they are being placed into a system rigged by BAPCPA at a higher rate than white debtors.

Given the flexibility of fee payments under Chapter 13 (i.e., “no money down” Chapter 13 bankruptcies) and the importance of keeping assets from being liquidated, a general trend of placing poor debtors into Chapter 13 over Chapter 7 endures. Because of racial poverty stemming from Jim Crow laws and mass incarceration, these poor debtors are more often Black individuals. In former Confederate states, the disparity in racial wealth is more pronounced. Being exposed to large populations of poor Black citizens, southern bankruptcy attorneys have likely created racial schemas. Specifically, southern bankruptcy attorneys may associate Black debtors with low income and few assets, given the high frequency of past cases that required debtors to utilize “no money down” Chapter 13 bankruptcies. This automatic assumption would predispose southern bankruptcy attorneys to place Black debtors into “no money down” Chapter 13 bankruptcies. Such a predisposition could result in southern bankruptcy attorneys incorrectly placing future Black debtors into Chapter 13 and denying them the bankruptcy relief they desperately need.

To prevent racially disparate uses of Chapter 13, bankruptcy attorneys must be educated on implicit biases. Only by identifying their own biases can attorneys provide fair and equitable representation. In the case of bankruptcy law, identifying implicit biases will allow bankruptcy attorneys to analyze a debtor’s financial situation more objectively and accurately. Identifying implicit biases in bankruptcy attorneys would result in proper relief for Black debtors. As the “watchdog” of the bankruptcy system, the USTP should lead the initiative in educating bankruptcy attorneys in their judicial districts. Specifically, the USTP should analyze trends in race and bankruptcy filings to identify and educate “bad actors.” This additional oversight would immediately impact implicit, discriminatory practices in bankruptcy law.

A. “No Money Down” Chapter 13 Bankruptcies and Racial Poverty

The history of racial segregation and racial poverty has led to high rates of discriminatory practices in former Confederate states; precisely, southern bankruptcy attorneys are placing Black debtors into “no money down” Chapter 13 bankruptcies at a disproportionate rate compared to white

²³⁵ McGlinchey & Smaldino, *supra* note 188.

debtors. Debtors must meet their fee requirements when filing for either Chapter 7 or Chapter 13 bankruptcy. However, when debtors must pay differs depending on which chapter the debtor files under. For Chapter 7, the debtor must generally pay their attorney up-front or before filing.²³⁶ For Chapter 13, the debtor can pay the attorney's fees over the repayment period.²³⁷ Given the flexibility in payment under Chapter 13, many Chapter 13 bankruptcy attorneys offer "no money down" bankruptcies. "No money down" bankruptcies allow the debtor to pay nothing upfront and spread the total amount owed throughout the repayment period.²³⁸ Thus, debtors can start the bankruptcy process with no initial costs.

"No money down" bankruptcies originated and continue to be highly prevalent in former Confederate states. This type of bankruptcy filing started as an experiment by an Alabama bankruptcy court in the 1930s.²³⁹ Eventually, "no money down" bankruptcies were added to the Bankruptcy Code by a congressman in Memphis, Tennessee.²⁴⁰ Today, this type of bankruptcy filing has become the main casework for southern bankruptcy attorneys. From 2011 to 2015, a Memphis law firm filed over 8,000 Chapter 13 cases and fewer than 900 Chapter 7 cases, with around 80% of the firm's clients living in predominately Black neighborhoods.²⁴¹ Another Memphis law firm stated it files 90% of its bankruptcy cases under Chapter 13, with a majority of its clientele being Black debtors.²⁴² Additionally, research appears that southern bankruptcy attorneys are actively pushing their Black debtors into "no money down" bankruptcies. A Memphis bankruptcy attorney admitted to arguing with his clients who asked for a Chapter 7 filing, stating, "They need to learn how to live not buying things on credit."²⁴³ Another Memphis attorney advised debtors to start with Chapter 13 since it is "more affordable to get into."²⁴⁴ While the attorney claims a debtor can always switch from Chapter 13 to Chapter 7, which is true, only 5% of Chapter 13 filings have been converted in the Western District of Tennessee since 2008.²⁴⁵

²³⁶ Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1058 (2017) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 529 (2004), holding that a Chapter 7 attorney cannot be compensated unless the trustee employs the attorney under 11 U.S.C. § 327).

²³⁷ Foohey et al., *supra* note 236, at 1058.

²³⁸ *Id.* at 1059.

²³⁹ Paul Kiel & Hannah Fresques, *How the Bankruptcy System Is Failing Black Americans*, PROPUBLICA (Sept. 27, 2017), <https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13> [<https://perma.cc/Z6FG-MJP2>].

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Kiel & Fresques, *supra* note 239.

Given that many who seek bankruptcy relief are in financial peril, “no money down” bankruptcies appear to be a great option. However, as mentioned previously, Chapter 13 bankruptcies have a lower success rate, and “no money down” bankruptcies cost more long term than Chapter 7. Thus, if possible, a debtor should be placed in Chapter 7. Further, southern bankruptcy attorneys should modify their attorney’s fees. Specifically, they should not offer “no money down” bankruptcies to their clients given its significantly poor success rate.²⁴⁶ Alternatively, they can offer a small upfront fee for Chapter 13 filings (e.g., \$200) and reduce the upfront fee they generally charge for Chapter 7 fees (e.g., from \$1,000 to \$600) to ensure steady revenue while creating a more balanced choice for Black debtors. The discretion southern bankruptcy attorneys have in chapter choice and fee arrangements is a prime opportunity for implicit bias to seep in.²⁴⁷

B. Implicit Bias and Views on Bankruptcy’s Purpose

To reduce racially disparate uses of Chapter 13 bankruptcy, attorneys must be educated on recognizing and addressing implicit biases. High exposure to racial poverty has created an implicit bias in southern bankruptcy attorneys, who then use this learned bias to place Black debtors more frequently into Chapter 13. To analyze this implicit racial bias, one must understand schema theory.

Schema theory is a branch of cognitive science revolving around how the brain organizes knowledge.²⁴⁸ A schema is an organized unit of knowledge of a subject based on prior experiences.²⁴⁹ Individuals access schemas when analyzing current situations and actions to guide their understanding.²⁵⁰ For example, assume an individual has gone to an ice cream shop in the past and arrives at a new ice cream shop. The individual asks for chocolate ice cream. The store clerk says to the individual, “cone or dish.” Based on their prior experiences, the individual understands that the clerk wants to know how they want their ice cream to be made rather than what shape they prefer. However, an individual may be unable to comprehend the situation correctly if presented with information that does not fit into the schema. In the ice cream example, assume the store clerk instead says to the individual, “mud

²⁴⁶ *Id.* (highlighting that one Memphis firm that offered “no money down” bankruptcies had a success rate of only 10%).

²⁴⁷ Betsy Mason, *Curbing Implicit Bias: What Works and What Doesn’t*, KNOWABLE MAG. (June 4, 2020), <https://knowablemagazine.org/content/article/mind/2020/how-to-curb-implicit-bias> [<https://perma.cc/EGW4-TCJS>] (“Implicit bias can fuel discrimination, especially when individuals use discretion to make a decision.”).

²⁴⁸ Charlotte Nickerson, *Schema in Psychology: Definition, Theory, & Examples*, SIMPLY PSYCH. (Oct. 18, 2023), <https://www.simplypsychology.org/what-is-a-schema.html> [<https://perma.cc/NCD5-3EL6>].

²⁴⁹ *Id.*

²⁵⁰ *Id.*

or mocha.” Since the individual has never been to the store, they are confused by the question and do not understand why they are being asked this question, when “mud” and “mocha” are ice cream flavors offered at the shop. While schemas allow one’s brain to work more efficiently, they can cause individuals to arrive at the wrong conclusion. An example of this “wrong conclusion” is when schemas form implicit biases.

Experiences shape an individual’s schemas. Past experiences create automatic assumptions about various traits and characteristics, including gender, age, and ethnicity. Thus, for example, direct, real-world experiences with the elderly will shape the image generated in a person’s mind when they think of the “elderly.” Books, films, and various forms of media further influence these automatic assumptions. As a result, racial stereotypes depicted in the media can shape how society thinks about minorities and how a white person interacts with a person of color. An individual, influenced by their schemas, can inadvertently exhibit discriminatory behaviors and produce actual social harm.

Recognizing one’s implicit biases is crucial for lawyers to advocate for their clients. Schemas allow individuals to “think fast” and act as shortcuts to quickly integrate large amounts of incoming information without spending too much time analyzing a particular situation.²⁵¹ However, schemas influence how individuals view incoming information. People gravitate to information that reaffirms their preexisting assumptions and ignore incongruent facts.²⁵² Thus, while an individual may be well-intentioned in analyzing an important problem, they are biased at an unconscious level. This unconscious bias can lead to discriminatory behavior that is harmful to marginalized communities, as demonstrated in the world of bankruptcy.

Chapter 13 bankruptcy attorneys’ views on the purpose of bankruptcy are generally different than those of Chapter 7 bankruptcy attorneys. In an experimental study with bankruptcy attorneys, Braucher and Sullivan sought out how bankruptcy attorneys viewed their role in the bankruptcy system.²⁵³ Chapter 7 attorneys saw their role as getting the best financial deal for their clients.²⁵⁴ Meanwhile, Chapter 13 attorneys emphasized their clients’ need for self-esteem and desire to do what they consider “morally right.”²⁵⁵ The testimony of Memphis bankruptcy attorneys confirmed these attitudes of imposing financial discipline. Memphis has become known as the

²⁵¹ Rebecca Howlett & Cynthia Sharp, *Eliminating Implicit Bias Among Lawyers, Part 1*, A.B.A. (Mar. 26, 2021), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2021/march-2021/eliminating-implicit-bias-among-lawyers-part-1 (on file with author).

²⁵² *Id.*

²⁵³ Braucher et al., *supra* note 25, at 397.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

“bankruptcy capital of the [United States].”²⁵⁶ One Memphis bankruptcy attorney said, “With a Chapter 7, wham bam it’s over, and they’re back to the same old thing, the bad habits that got them in trouble to begin with.”²⁵⁷ Similarly, another Memphis attorney stated that debtors need Chapter 13 to train them to get their financial houses in order and instill discipline in their unruly spending. Today, many bankruptcy attorneys view Chapter 13 as a more “honorable” form of bankruptcy because it includes an attempt to repay debts, with several believing that Chapter 13 teaches debtors to “live within your means.”²⁵⁸

While research illustrates the general trends of racial poverty in former Confederate states, southern bankruptcy attorneys must view each client’s case objectively. Practicing in former “Jim Crow” states, southern bankruptcy attorneys are exposed to racial poverty and see the impacts that discriminatory systems and policies have taken on the South’s current socioeconomic climate. Given the vicious cycle of mass incarceration of Black people²⁵⁹ and insufficient resources, many Black debtors are forced to rely on “no money down” bankruptcies since they cannot afford the upfront fees. Subsequently, many southern bankruptcy attorneys place these debtors into Chapter 13. Given the higher proportion of Black debtors that utilize “no money down” bankruptcies, bankruptcy attorneys may implicitly assume that future Black debtors cannot afford the upfront fees. As a result, these attorneys may incorrectly place their clients into Chapter 13 despite qualifying for Chapter 7 and being able to pay the fees before filing. Additionally, since the upfront fees in Chapter 7 can be waived if the debtor cannot pay them and their income is below 150% of the poverty line, it is key for bankruptcy attorneys to sufficiently review a client’s financials to determine if they meet the Chapter 7 requirements.

Similarly, it is essential for southern bankruptcy attorneys to carefully review their state’s Chapter 7 property exemptions for each case. One of the major reasons a debtor files under Chapter 13 instead of Chapter 7 is to protect their assets from liquidation. Bankruptcy attorneys recognize this trend, generally referring to Chapter 13 as a “keep your stuff” chapter.²⁶⁰ Knowledge of this trend can unconsciously bias southern bankruptcy attorneys to place Black debtors into Chapter 13 when they have only a few crucial assets. While selecting Chapter 13 may be appropriate in some cases,

²⁵⁶ Kiel & Fresques, *supra* note 239.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ “The United States experienced unprecedented increases in . . . incarceration between the mid-1970s and the first decade of the 2000s. . . . [I]ncarceration is disproportionately concentrated among men, African Americans, and those with low levels of formal schooling.” Becky Pettit & Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77 *AM. J. ECON. & SOCIO.*, 1153, 1154–55 (2018) (citation omitted).

²⁶⁰ Kiel & Fresques, *supra* note 239.

a debtor may qualify for Chapter 7 and be able to keep their assets more efficiently and cost-effectively. For example, the following southern states have an unlimited homestead exemption: Arkansas, Florida, Oklahoma, and Texas.²⁶¹ In these states, a debtor can discharge most of their debts under Chapter 7 within 60–90 days of the meeting of creditors and pay less in attorney’s fees, all while protecting the full value of their house. Thus, southern bankruptcy attorneys must give proper weight and consideration to Chapter 7.

To be clear, this Note does not argue that racially disparate uses of Chapter 13 bankruptcy are because of explicit racism. No evidence suggests any “overt conspiracy” of discrimination in bankruptcy cases.²⁶² Instead, as this Note illustrates, the true culprit is implicit bias. Being exposed to a racially unequal socioeconomic climate, southern bankruptcy attorneys are predisposed to thinking that Chapter 13 is the proper fit for Black debtors. This automatic assumption is further compounded by the numerous filings bankruptcy attorneys must process. In 2023, total bankruptcy filings equaled 418,724, a 10% increase from 2022 (380,634 total filings).²⁶³ For April 2023, there were 15,287 bankruptcy filings in southern states alone.²⁶⁴ This large workload forces southern bankruptcy attorneys to “think fast” and rely on their schemas. Unfortunately, this natural tendency ultimately denies Black debtors the “fresh start” they need.

C. Revising the USTP’s Role as the “Watchdog” of the Bankruptcy System

Given the importance of providing fair and equitable legal representation for debtors, bankruptcy attorneys must recognize their implicit biases and take conscious steps to curtail their potentially harmful consequences. According to the ABA, there are five action steps attorneys can take to

²⁶¹ *Homestead Exemptions by State and Territory*, ASSET PROT. PLANNERS, <https://www.assetprotectionplanners.com/planning/homestead-exemptions-by-state/#:~:text=State%2C%20federal%20and%20territorial%20homestead,not%20offer%20any%20homestead%20protection> [https://perma.cc/54MG-LQHM].

²⁶² Tara Siegel Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, TRUTHOUT (Jan. 21, 2012), <https://truthout.org/articles/blacks-face-bias-in-bankruptcy-study-suggests> (quoting Robert M. Lawless, a bankruptcy expert and law professor at the University of Illinois College of Law) (on file with author).

²⁶³ *Bankruptcy Filings Rise 10 Percent*, U.S. CTS. (July 31, 2023), <https://www.uscourts.gov/news/2023/07/31/bankruptcy-filings-rise-10-percent#:~:text=According%20to%20statistics%20released%20by,cases%20in%20the%20previous%20year> [https://perma.cc/6A9U-VG3T].

²⁶⁴ U.S. CTS., TABLE F-2 MONTHLY. U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE ONE-MONTH PERIOD ENDING April 30, 2023, BASED ON DATA CURRENT AS OF JUNE 30, 2023 1–4 (2023), https://www.uscourts.gov/sites/default/files/data_tables/bf_f2.1_0630.2023.pdf [https://perma.cc/G9FR-W4KM] (including North Carolina, South Carolina, Virginia, West Virginia, Louisiana, Mississippi, Texas, Kentucky, Tennessee, Arkansas, Missouri, Oklahoma, Alabama, Florida, and Georgia).

interrupt implicit bias.²⁶⁵ First, attorneys should understand where their own implicit biases lie.²⁶⁶ Until a bias is recognized, it is impossible to learn how to overcome that bias. Second, attorneys must develop cultural competency.²⁶⁷ Attorneys should actively listen to their clients, remain curious, and welcome divergent perspectives.²⁶⁸ Third, attorneys must commit to learning something new every day.²⁶⁹ Fourth, attorneys must embrace diversity and inclusion as core values, including consciously creating a diverse workplace with varying viewpoints.²⁷⁰ Finally, attorneys should utilize mindfulness meditation—also known as mindfulness—to further develop their awareness.²⁷¹ “Mindfulness is a type of meditation in which you focus on being intensely aware of what you’re sensing and feeling in the moment, without interpretation or judgment.”²⁷² By slowing down and observing one’s surroundings, attorneys can better recognize when their actions are discriminatory.²⁷³

Attempting to eliminate racial bias, several states have imposed a Continuing Legal Education (CLE) requirement in diversity, equity, and inclusion.²⁷⁴ While this is a step in the right direction, more must be done to ensure Black debtors are given an equal chance at a “fresh start.” In particular, more must be done to educate bankruptcy attorneys and ensure their clients receive equal, quality representation.

As the “watchdog” of the bankruptcy system, the USTP should analyze any trends regarding race and bankruptcy filings in their respective field offices. The USTP already monitors professional fees and supervises private case trustees who administer bankruptcy estates (e.g., ensure the trustee timely manages bankruptcy cases).²⁷⁵ Further, the USTP has access to the necessary data (e.g., the debtor’s race, attorney, and current monthly income). Thus, the USTP should utilize their local field offices to gather the monthly filings in their judicial district and compare trends among local bankruptcy

²⁶⁵ Howlett & Sharp, *supra* note 251.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Howlett & Sharp, *supra* note 251.

²⁷² *Mindfulness Exercises*, MAYO CLINIC (Oct. 11, 2022), <https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/mindfulness-exercises/art-20046356> [<https://perma.cc/A6BG-LDLR>].

²⁷³ Howlett & Sharp, *supra* note 251.

²⁷⁴ *Id.*

²⁷⁵ *About the Program – The United States Trustee Program*, U.S. DEP’T. OF JUST. (Feb. 3, 2022), <https://www.justice.gov/ust/about-program> [<https://perma.cc/2BTE-U6A6>].

attorneys. Specifically, the USTP should look for bankruptcy attorneys who are disproportionately placing Black debtors into Chapter 13 more than white debtors, despite similar financial situations (e.g., similar current monthly income). After identifying potential “bad actors,” the USTP should present its findings to the bankruptcy attorney and provide educational resources. Suppose the “bad actor” continues to place Black clients into Chapter 13 disproportionately. In that case, the USTP can and should file a cause of action under the ABA Model Rule of Professional Conduct 8.4(g).²⁷⁶

Admittedly, a government agency is only effective if provided with the proper resources. The Office of the Inspector General for the U.S. Department of Justice recently audited the USTP’s debtor audit programs. Under BAPCPA, the USTP is authorized to hire third parties to audit Chapter 7 and 13 bankruptcy filings.²⁷⁷ These “debtor audits” seek to determine the accuracy and completeness of the debtor’s financial information as contained in their bankruptcy filing.²⁷⁸ Debtor audits are performed to “identify and deter cases of fraud, abuse, and error.”²⁷⁹ Under federal law, the USTP is required to audit at least one out of every 250 randomly selected bankruptcy filings.²⁸⁰ However, according to the Inspector General’s report, the USTP had not met the statutory requirement for debtor audits between fiscal years (FY) 2016 and 2019.²⁸¹ The USTP’s nationwide audit ratios during this period ranged from one out of every 1,876 randomly selected debtor audits to one out of every 406.²⁸² The main reason for failing to meet this statutory requirement is funding.²⁸³ “Based on interviews with USTP officials, the program has never received base budget resources to conduct the statutorily required number of debtor audits, forcing USTP officials to determine the number of . . . debtor audits that can be performed based on its budget each year.”²⁸⁴ The USTP estimates that \$5.1 million is

²⁷⁶ Under Model Rule 8.4, “it is professional misconduct . . . [to] engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity . . . in conduct related to the practice of law.” Howlett & Sharp, *supra* note 251.

²⁷⁷ U.S. DEP’T. OF JUST., AUDIT OF THE UNITED STATES TRUSTEE PROGRAM’S ADMINISTRATION OF THE PANEL TRUSTEE AND DEBTOR AUDIT PROGRAMS AND ASSOCIATED PROCUREMENTS AWARDED TO TRONCONI SEGARRA & ASSOCIATES LLP 1 (Off. of the Inspector Gen. ed., 2024), <https://oig.justice.gov/sites/default/files/reports/24-024.pdf> [<https://perma.cc/5ABA-JCRU>]; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 603, 119 Stat. 23, 122 (2005).

²⁷⁸ U.S. DEP’T. OF JUST., *supra* note 277, at 1.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 5; Bankruptcy Abuse Prevention and Consumer Protection Act § 603.

²⁸¹ U.S. DEP’T. OF JUST., *supra* note 277, at 6.

²⁸² *Id.*

²⁸³ *Id.* at 9.

²⁸⁴ *Id.*

necessary to comply with the statutory requirement for debtor audits.²⁸⁵ Yet, the U.S. Department of Justice budget submitted to Congress only allocated \$2 million for debtor audits.²⁸⁶

Congress must adequately fund the USTP to improve its role as the “watchdog” of the bankruptcy system. From FY 2012 to FY 2019, the USTP’s budget remained flat.²⁸⁷ Because of this funding constraint, a government hiring freeze, and recruiting difficulties, the number of full-time employees at the USTP was reduced by more than 20%.²⁸⁸ As a result, the average caseload per employee increased as employees had to take on multiple roles.²⁸⁹ While slight increases in funding in FYs 2020, 2021, and 2022 resulted in the number of full-time employees increasing to 985, the USTP continues to struggle with workload issues as the scope, complexity, and number of bankruptcy cases remain high.²⁹⁰ Additionally, budget constraints prevent the USTP from expanding or enhancing its operations. Currently, “[a]lmost 90 percent of the [USTP’s] annual appropriation is tied directly to staffing, rent, and other fixed costs, which leaves very little funding to address critical operational enhancements like IT infrastructure upgrades and investments.”²⁹¹ Additional funding must be provided to the USTP to enhance its operations and meet its evolving and complex caseload. Furthermore, funding is essential to give the USTP sufficient resources to track local bankruptcy filings and identify “bad actors” filing Chapter 13 bankruptcies at racially disparate rates.

Addressing the racial issues embedded within the American bankruptcy system will be a complex and challenging task. Ideally, legislation would be passed to make the bankruptcy system more flexible and easier to navigate. Additionally, this ideal legislation would return the focus of bankruptcy law to the debtors. Such ideal legislation has been previously proposed. In 2020, Senator Elizabeth Warren introduced the Consumer Bankruptcy Reform Act of 2020.²⁹² The bill would eliminate the pre-credit counseling requirement; make student loans dischargeable; streamline the filing process, thus reducing attorney’s fees; and replace Chapter 7 and Chapter 13 with a new Chapter 10

²⁸⁵ *Id.* at 10.

²⁸⁶ *Id.*

²⁸⁷ U.S. DEP’T. OF JUST., UNITED STATES TRUSTEE PROGRAM FY 2024 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 15 (U.S. Tr. Program ed., 2023), https://www.justice.gov/d9/2023-03/ustp_fy_2024_pb_narrative_omb_cleared_3.10.23.pdf [<https://perma.cc/VX7Z-LTDU>].

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 16.

²⁹² *The Consumer Bankruptcy Reform Act of 2020*, AM. BANKR. INST., <https://www.abi.org/feed-item/the-consumer-bankruptcy-reform-act-of-2020> [<https://perma.cc/84Q4-K9QV>].

consumer bankruptcy plan.²⁹³ Chapter 10 bankruptcy would eliminate the “means test,” allow debtors to pay attorney fees over time (impossible under Chapter 7), and eliminate racial disparities by replacing the two-chapter system with a single chapter.²⁹⁴ Proposals for more minor statutory changes have been made, such as amending Bankruptcy Code § 523(a)(8) to allow student loans to be modified or revised, rather than the current “all-or-nothing” approach to student loan dischargeability.²⁹⁵ However, bankruptcy reform legislation is unlikely to be passed soon, given the current partisan divide in the legislature.²⁹⁶ Therefore, adequately funding the USTP is the most immediate and efficient solution to preventing racially disparate uses of Chapter 13 bankruptcy.

IV. CONCLUSION

It is essential to look beyond the curtain of purported bankruptcy abuse. While there are some cases of bankruptcy fraud, many honest debtors utilize the bankruptcy system to get a fresh start financially. It is imperative to remember that debtors do not desire to file for bankruptcy. Most debtors, like Kerry Burns, are forced into filing because of external factors such as medical emergencies, student loan debt, job loss, or systemic poverty. As a society, the goal of the American bankruptcy system must be to help the “honest but unfortunate debtor” get back on their feet.

Further, the United States needs a bankruptcy system that provides equal opportunity to debtors, regardless of race. Given the systemic disadvantages to Black citizens, Black debtors must have the same chance at a fresh start as white debtors. However, these systemic disadvantages have led bankruptcy attorneys to implicitly place Black debtors in Chapter 13 at a discriminatory rate. This implicit bias is more profound in southern states, where the chains of racial poverty and wealth disparity are strongest.

More systematic changes are needed to uproot the deeply entrenched racial inequalities in the American legal system, such as reforming bankruptcy law to become more flexible and affordable for debtors. Further, it would be ideal to commit resources and funding to address racial poverty and reduce the need for Black debtors to utilize “no money down” bankruptcies. Until then, this proposed solution of better financing and utilizing the USTP to oversee local bankruptcy attorneys could provide an immediate impact. Specifically, bankruptcy attorneys can be educated on their implicit racial

²⁹³ *Id.*; Last Week Tonight with John Oliver (HBO), *supra* note 1.

²⁹⁴ *The Consumer Bankruptcy Reform Act of 2020*, *supra* note 292.

²⁹⁵ Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)*, 75 IOWA L. REV. 733, 736–37 (1990).

²⁹⁶ For example, only 27 bills were passed by Congress in 2023. Eric McDaniel, *Congress Wasn't Very Productive in 2023. Here Are the 27 Bills It Passed*, NPR (Dec. 29, 2023, 5:53 PM), <https://www.npr.org/2023/12/29/1222245114/congress-wasnt-very-productive-in-2023-here-are-the-27-bills-it-passed> [https://perma.cc/7672-G56T].

biases, with the USTP ensuring Black debtors are not being placed into Chapter 13 bankruptcy at racially disparate rates. In doing so, bankruptcy attorneys can take the first step in addressing the racial issues inherent in the American bankruptcy system.