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Bankruptcy Reform and the Financial Well-Being of Women:

HOW INTERSECTIONALITY MATTERS IN MONEY MATTERS

Kristin Brandser Kalsem[†]

I. INTRODUCTION

After eight years of heated controversy,[1] President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[2] into law on April 20, 2005 and that legislation became effective on October 17, 2005.[3] Massive in size[4] and far-reaching in effect,[5] this piece of legislation has

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[1] As Senator Durbin commented during the last bankruptcy reform hearing held in February 2005, "the bankruptcy debate has moved around the Congressional stove—from high to low simmer—for eight years now." *Bankruptcy Reform: Hearing on S. 256 Before the S. Comm. on the Judiciary,* 109th Cong. 1 (2005) [hereinafter 2005 Bankruptcy Hearing] (statement of Sen. Richard J. Durbin).

[2] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (to be codified at scattered sections of Titles 11, 12, 15, and 28 of the United States Code) [hereinafter 2005 Bankruptcy Act].

[3] Press Release, White House, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html. For a detailed discussion of the effective dates of various provisions, including the general effective date of October 17, 2005, see HON. WILLIAM HOUSTON BROWN & LAWRENCE R. AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 11-13 (2005).

[4] CBSNews.com, New Rules for Bankruptcy, http://www.cbsnews.com/stories/2005/04/20/politics/main689741.shtml (last visited Mar. 19, 2006) ("The 500-page legislation won final congressional approval last week after being pushed for eight years by banks and credit card companies.").

[5] *See infra* note 47 and accompanying text.

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been part of the congressional agenda since 1997.[6] The title of the 2005 Bankruptcy Act suggests a dual purpose of addressing abuse of the bankruptcy system, while at the same time offering protections to consumers. Specifically, all parties involved in the debates about bankruptcy reform were concerned about the fact that over 1.5 million people were filing for bankruptcy annually.[7] There was no such consensus, however, about why that number was so large, what those filings signaled, or what role the proposed reform legislation should play in tackling this large increase in bankruptcies. The sound bites for the opposing sides of the debate as to the necessity of the contemplated comprehensive reforms ran along the following lines.

Generally, proponents of the legislation claimed that there is a "bankruptcy crisis"[8] and that "wealthy people . . . continue to abuse the system at the expense of everyone else."[9] Supporters claimed "broad public support"[10]

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[6] In 1997, the National Bankruptcy Review Commission issued a report with recommendations to Congress of certain revisions to the bankruptcy system. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT, at i (1997) [hereinafter Commission Report]. Following the issuance of the Commission Report, Senators Grassley and Durbin developed the first of many comprehensive bankruptcy reform bills, all of which, for a wide variety of reasons, were not enacted. For a brief legislative history of the 2005 Bankruptcy Act, see H. COMM. ON THE JUDICIARY, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, H.R. DOC. NO. 109-31, at 6-10 (2005). On February 1, 2005, however, Senator Grassley, Senate Finance Chairman, introduced the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" in the Senate. 151 CONG. REC. S739 (daily ed. Feb. 1, 2005). This bill was the same as the measure considered in the 108th Congress, save for the exclusion of an amendment relating to debts arising from abortion clinic protests. *See Grassley Re-introduces Bankruptcy Measure*, AM. BANKR. INST. UPDATE, Feb. 3, 2005, http://www.abiworld.org/e-news/02-03-05.html. A companion bill (H.R. 685) was introduced in the House of Representatives by Representative James Sensenbrenner, House Judiciary Committee Chairman, on February 9, 2005. *See Senate to Mark Up Bankruptcy Bill on Thursday*, AM. BANKR. INST. UPDATE, Feb. 15, 2005, http://www.abiworld.org/e-news/02-15-05.html; *see also* 151 CONG. REC. H521 (daily ed. Feb. 9, 2005). The Senate passed the 2005 Bankruptcy Act on March 10, 2005, and the House passed the 2005 Bankruptcy Act without amendment on April 14, 2005. *See* BROWN & AHERN, *supra* note 3, at 11.

[7] AM. BANKR. INST., U.S. ANNUAL BUSINESS AND NON-BUSINESS FILINGS BY YEAR (1980-2004), http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=13743 (last visited Mar. 8, 2006). A chart prepared by the American Bankruptcy Institute reflects that the total number of bankruptcy filings has increased dramatically since 1980. In 1980, there were 287,570 consumer bankruptcy filings. In 1990, the total number of filings had more than doubled, reaching 718,107. In 2002, there were 1,539,111 consumer bankruptcy filings; in 2003, there were 1,625,208; and in 2004, there were 1,563,145. *Id.*

[8] 147 CONG. REC. S1805, S1806 (daily ed. Mar. 5, 2001) (statement of Sen. Grassley).

[9] 147 CONG. REC. S1794 (daily ed. Mar. 5, 2001) (statement of Sen. Hatch).

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for reforms that would, in effect, eliminate the "bankruptcy tax"[11] that abuse of the system imposed on hardworking Americans.

Opponents of the reform proposals emphasized that the legislation was the "wish list"[12] of banks and credit card companies who engaged in a "full-court press" on these bills.[13] Much concern was expressed about the lack of consumer protections in "a slam dunk, unbalanced, one-sided bankruptcy reform that favored credit card companies and financial institutions, and, frankly, did little or nothing for consumers and families across America."[14] With respect to the bill that ultimately passed, Senator Kennedy commented, "It is a bonanza for the credit card companies, which made $30 billion

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[10] *Id.* ("I am heartened, but not surprised, by the results of the nationwide voter poll conducted for the Credit Union National Association which indicates broad public support for reforming our bankruptcy system.").

[11] *See, e.g.*, 151 CONG. REC. S2113 (daily ed. Mar. 7, 2005) (statement of Sen. McConnell) ("I rise today on behalf of every American who each year is forced unknowingly to pay a hidden tax. We all know we have to pay an income tax, a sales tax, a payroll tax, but what about a bankruptcy tax? You may not have heard of this tax, but you and every other man, woman, and child in America pay it every single year . . . . According to a Department of Justice study, the bankruptcy tax amounts to a staggering $400 for every man, woman, and child in America once a year every year. Let me repeat that so I can be sure it soaks in. That is $400 for every man, woman, and child in America once a year every year."); Donald L. Barlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 70 ("'What every American needs to understand is that somebody is paying the price,' says [Senator] Torricelli. 'I believe this is the equivalent of an invisible tax on the American family, estimated to cost each and every American family $400 a year.'").

[12] 147 CONG. REC. S1799 (daily ed. Mar. 5, 2001) (statement of Sen. Kennedy) ("We need to separate the myths from the facts—and focus on the real winners and losers under the proposed legislation. By any fair analysis, this bankruptcy bill is the credit industry's wish list, a blatant effort to increase its profits at the expense of working families."). *See also* 151 CONG. REC. S2421 (daily ed. Mar. 10, 2005) (statement of Sen. Durbin) ("[The Republican leadership] came [to the Senate] with the granddaddy of special interest bills, this 500-page gift to the credit industry in America.").

[13] 147 CONG. REC. S2280 (daily ed. Mar. 14, 2001) (statement of Sen. Wellstone). *See also* Barlett & Steele, *supra* note 11, at 66 ("What is the real reason Congress is [reforming bankruptcy]? Because it is just what banks, credit-card companies and other financial-services businesses ordered . . . . Says a Capitol Hill staff member who worked on the bankruptcy legislation: 'If this were NASCAR, the members would have to have the corporate logos of their sponsors sewn to their jackets.' The Bankruptcy Reform Act is typical of legislation that Congress writes for the benefit of special-interest groups that are hefty campaign contributors—at the expense of ordinary Americans who contribute nothing.").

[14] 147 CONG. REC. S2288 (daily ed. Mar. 14, 2001) (statement of Sen. Durbin).

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in profits last year, and a nightmare for the poorest of the poor and the weakest of the weak."[15]

One of the key issues that emerged from what became a battle of catchy sound bites was the impact that the proposed legislation would have on women.[16] Facts, such as that "more than a million women will find their way to the bankruptcy courts this year—more women than will graduate from four-year colleges, receive a diagnosis of cancer, or file for divorce," became public knowledge.[17] Headlines such as "Bankruptcy Reform Hits Women Hard"[18] and "Credit Card Debt and College Loans are Creating Financial Hardship for Many of Today's Young Working Women"[19] were commonplace. In the midst of these debates, Elizabeth Warren wrote a law review

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[15] 151 CONG. REC. S2200-01 (daily ed. Mar. 8, 2005) (statement of Sen. Kennedy). *See also* 151 CONG. REC. S2324 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy) ("This bill . . . turns the American dream into the American nightmare. This bankruptcy bill turns its back on our most basic values as Americans. It is not a bill of the people, by the people, or for the people. It is a bill of the credit card companies, written by the credit card companies, and for the credit card companies, and it has no place in America.").

[16] Whether "women" would be helped or harmed by the bankruptcy legislation became central to the debate. Proponents of the legislation argued that women would greatly benefit from the revisions. *See, e.g.*, 151 CONG. REC. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) ("[S. 256] helps women and children by providing a comprehensive set of protections for child and domestic support throughout the bankruptcy process."); 150 CONG. REC. H145 (daily ed. Jan. 28, 2004) (statement of Sen. Sessions) ("Modern bankruptcy reform has taken a long and somewhat arduous journey . . . . The result is what I believe to be a carefully balanced package that protects women, children, family farmers, low-income individuals, and provides access to bankruptcy for all Americans who have a legitimate need."). Opponents of the reform legislation highlighted its harm to women. *See, e.g.*, Marilyn Gardner, *Bankruptcy Reform Hits Women Hard*, CHRISTIAN SCI. MONITOR, Apr. 4, 2005, at 13 (quoting Elizabeth Warren, "Make no mistake, the new bankruptcy bill will fall hardest on women."); Stephen Labaton, *Bankruptcy Bill Set for Passage; Victory for Bush*, N.Y. TIMES, Mar. 9, 2005, at A1 ("[Critics of the legislation] say the legislation will do far more damage than good by hitting middle-income families, women and the elderly who have used bankruptcy protection in growing numbers to protect themselves."); Press Release, National Organization of Women, Bankruptcy Bill Puts Women's Economic Status and Reproductive Rights at Risk (May 21, 2002), http://www.now.org/press/05-02/05-21.html ("'The federal bankruptcy bill, as it stands now, is a gift to the U.S. credit card industry at the expense of women and their families,' said NOW Action Vice President Olga Vives. 'More than 1.2 million women a year will be affected by this legislation—women who have faced serious hardships and are trying to put their lives back together, as well as women who rely on alimony and child support to keep their families afloat.'").

[17] Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 21 (2002) [hereinafter Warren, *What Is a Women's Issue?*].

[18] Gardner, *supra* note 16, at 13.

[19] Janet Kidd Stewart, *Credit Card Debt and College Loans are Creating Financial Hardship for Many of Today's Young Working Women*, CHI. TRIB., Apr. 27, 2005, at C1.

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article titled "What Is a Women's Issue? Bankruptcy, Commercial Law, and other Gender-Neutral Topics," emphasizing that financial issues should be top agenda items for those interested in improving women's lives.[20] Specifically, she argued, this "sharp rise in the use of bankruptcy by women thrusts the bankruptcy system into a critical role as a safety net for the financial health of American women."[21] Acknowledging the significance of the bankruptcy legislation, more than forty major organizations dedicated to "women's issues" sent letters to Congress, and these letters became an integral part of the congressional debates and record.[22]

This Article takes as its starting premise that all of this attention on the impact on women of bankruptcy reform and other economic issues is a very good thing. The national spotlight that has illumined the troubling 800% increase in the number of bankruptcy filings by women in the past twenty years makes this the ideal time to formulate and pursue an agenda for economic reform that will address these pressing societal issues.[23] As this Article will demonstrate, however, it is imperative to focus on these financial issues as "women's

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[20] Warren, *What Is a Women's Issue?*, *supra* note 17, at 19. Warren responds to the question she poses with her title by demonstrating that subjects such as bankruptcy and commercial law are far from gender-neutral. Rather, they are topics that have an enormous effect on women and should be high priorities for people working to better the lives of women. Offering a critical insight, Warren argues that "issues tied to physical differences between the sexes . . . [o]ther issues close to the hearts of many women . . . [and] [e]conomic issues focusing on equality" get attention, whereas "business and economic topics are often overlooked." *Id.* at 23.

[21] *Id.* at 29. Warren has engaged in a pathbreaking campaign to call attention to the fact that those concerned about women and women's issues should be paying attention to bankruptcy reform and other economic legal issues. Not only has she performed much important empirical work in the field of bankruptcy, she has also testified at congressional hearings and rallied women's advocacy groups to speak out against this legislation.

[22] *See, e.g.*, 146 CONG. REC. S9458 (daily ed. Sept. 28, 2000) (letter from thirty-one women's and children's organizations); 146 CONG. REC. H9826 (daily ed. Oct. 12, 2000) (letter from thirteen "long-time advocates for women and children"); 147 CONG. REC. H520 (daily ed. Mar. 1, 2001) (letter from twenty organizations who "urge you to stand with America's women, children, and working families"); 151 CONG. REC. S1839 (daily ed. Mar. 1, 2005) (letter from the National Women's Law Center); 151 CONG. REC. S2229-30 (daily ed. Mar. 8, 2005) (letter from the National Coalition Against Domestic Violence, the National Network to End Domestic Violence, and the Family Violence Prevention Fund); 151 CONG. REC. S2227 (daily ed. Mar. 8, 2005) and 151 CONG. REC. S2408 (daily ed. Mar. 10, 2005) (letter from The Children's Defense Fund).

[23] Warren, *What Is a Women's Issue?*, *supra* note 17, at 24. This finding was uncovered in connection with the multi-state survey of 1,496 debtors that Warren completed with Teresa Sullivan and Melissa B. Jacoby in 1999. The increase was calculated using data from Warren's earlier 1981 study with Sullivan and Jay Westbrook. *Id.* at 24 & n.29.

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issues" in an anti-essentialist way and through an intersectional lens.

Without foregrounding how issues of gender, race, and class matter, reform efforts made on behalf of women will, in fact, harm women. Specifically in the context of bankruptcy, an analysis of the reform debates reveals the privileging of certain women over others, as well as the construction of an "ideal" image of womanhood that perpetuates economic insecurity for all women. Drawing on the work of critical race feminists such as Angela Harris and Kimberle Crenshaw, this Article seeks to intervene at this crucial juncture by showing how the activism that is developing in the bankruptcy and commercial law areas on behalf of women needs to be re-conceptualized such that reform efforts work toward the goal of financial well-being for all.

In her pathbreaking 1990 article, Harris exposed the dangers of thinking that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[24] Such "gender essentialism," she demonstrated, results in the privileging of certain voices and experiences (usually those of white heterosexual middle-class women) and the silencing of others.[25] At the same time, Crenshaw was introducing intersectionality as a powerful methodological tool for examining the interrelationships between categories of identity such as race and gender.[26] An intersectional analysis explores "the way power has clustered around certain categories and is exercised against others" and identifies "particular values attached to [such categories] and the way those values foster and create social hierarchies."[27] This methodology emphasizes that categories such as gender, race, class, sexual orientation, age, and color need to be critically examined and taken into account in framing political agendas for reform.[28]

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[24] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

[25] *See id.*

[26] *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, *Demarginalizing the Intersection*]; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

[27] Crenshaw, *Mapping the Margins*, *supra* note 26, at 1297.

[28] *See id.* at 1244 n.9 (calling for the expansion of the concept of intersectionality beyond race and class "by factoring in issues such as class, sexual orientation, age, and color").

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Scholarship focusing on issues of gender, race, and class and the intersectionality of these fundamental axes of society has significantly altered the discourse in fields such as constitutional law,[29] employment discrimination,[30] violence against women,[31] property law,[32] and tax law.[33] Moreover, there are exciting recent inroads into such fields as corporate[34] and contract law.[35] In response to the passage of such a substantial and controversial rewriting of the Bankruptcy Code and related statutory provisions, in the next few years many groups will pay close attention to the effects of changes that were and were not made in the 2005 Bankruptcy Act. Much will be at stake in

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[29] *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1428 (1991) (arguing, based on an intersectional analysis that places the experiences of poor Black women at the center, that the government has an "affirmative obligation to guarantee the rights of personhood and must recognize the connection between the right of privacy and racial equality").

[30] *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (arguing that the identity work that "outsiders" feel pressured to perform to negate negative stereotypes based on race and gender, for example, is a form of employment discrimination); Crenshaw, *Demarginalizing the Intersection*, *supra* note 26, at 141-52 (analyzing Title VII cases to show how single-axis frameworks that focus on either race *or* sex discrimination fail to take into account the experiences of Black women, often leaving them without a remedy).

[31] *See, e.g.*, Crenshaw, *Mapping the Margins*, *supra* note 26, at 1244 (examining "the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color"); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 181 (1997) (analyzing the "racialized (hetero)sexual harassment" that results from a "unique complex of power relations that [Asian Pacific American] women experience in the workplace").

[32] *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714-15 (1993) (examining the origins of whiteness as property, tracing its roots from white supremacy over Black and Native American peoples to its modern-day role "as the unspoken center of current polarities around the issue of affirmative action").

[33] *See, e.g.*, Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997) (exploring the impacts of federal tax law on married women based on their race, class, and gender).

[34] *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004) (analyzing the racial terms and conditions upon which people of color rise to the top of the corporate ladder and arguing that the law must address institutional discrimination in the workplace because senior minority management are not best positioned to do so).

[35] *See, e.g.*, Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005) (proposing a good faith anti-discrimination claim and arguing that the private law doctrine of good faith might assist in effecting a public law norm of equality); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003) (arguing that the doctrine of good faith and fair dealing in contract law should be used to prohibit discriminatory conduct based on race, gender, sexual identity, age and/or other categories of identity).

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determining what revisions and further steps are necessary. The time is ripe to bring critical paradigm-shifting insights to the fields of bankruptcy and commercial law.[36]

This Article takes that critical first step towards shifting the focus in this area by identifying dominant ideologies that have shaped the terms of the reform debates thus far. It is necessary "to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them."[37] This Article then demonstrates ways

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[36] Several important and insightful articles in these fields have analyzed various issues relating to gender, race, and class; however, the focus of this scholarship has not been on the convergences of these identity categories. *See, e.g.*, Peter C. Alexander, *Building "A Doll's House": A Feminist Analysis of Marital Debt Dischargeability in Bankruptcy*, 48 VILL. L. REV. 381 (2003) (employing feminist analyses to argue that the marital debt discharge provisions of the Bankruptcy Code actually disadvantage women); Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351 (1994) (exploring the disparate treatment of men and women under the "gender-neutral" marital debt discharge provisions of the Bankruptcy Code); Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217 (2004) (offering a thick description of the contexts in which predatory lending transactions occur, emphasizing the necessity, when addressing issues of race and class, of taking into account the role that informal small-sum lending has played as a social safety net); Rebecca M. Burns, *Killing Them With Kindness: How Congress Imperils Women and Children in Bankruptcy Under the Facade of Protection*, 76 AM. BANKR. L.J. 203, 214 (2002) (discussing the negative impacts on women of proposed revisions to the Bankruptcy Code); A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 19 (1999) (drawing comparisons between the "welfare crisis" and the "bankruptcy crisis" and concluding that "attempts to reform bankruptcy laws have been, and will always be, controversial because society has never been willing to admit that some employed (or employable) able-bodied people may need ongoing public economic support"); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004) (arguing that the "Ideal Debtor" under the Bankruptcy Code is white and that bankruptcy laws should be revised to remove racially-biased provisions such as those that favor individuals with wealth); Karen Gross, Marie Stefanini Newman & Denise Campbell, *Ladies in Red: Learning From America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1 (1996) (offering a historical perspective on women and bankruptcy); David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695, 1697 (2004) (offering a historical context for the connections among race, credit, markets and bankruptcy and concluding that "the most striking legacy of the discrimination of the past is the magnified vulnerability of blacks to more subtle forms of discrimination in the present"); Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1779 (2004) (analyzing empirical data to reveal that "Hispanic families are nearly twice as likely to file for bankruptcy as their white neighbors, and black families are more than three times more likely to [end up in bankruptcy]" and that home ownership makes Hispanics and blacks even more vulnerable); Zipporah Batshaw Wiseman, *Women in Bankruptcy and Beyond*, 65 IND. L.J. 107, 119 (1989) (analyzing the marginal economic situation of women generally and asking, "What would a woman-centered view of bankruptcy look like?").

[37] Crenshaw, *Mapping the Margins*, *supra* note 26, at 1297.

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in which a critical intersectional analysis opens up opportunities to think differently and more broadly about the financial health and well-being of women.[38]

Part II of this Article discusses the eight-year long process of bankruptcy reform and sets up a framework for analyzing how issues of gender, race, and class informed the ideas about "women" that were reinforced, constructed, and contested in the reform debates. Part II.A draws on the work of cultural and literary theorist Mary Poovey to demonstrate why and how what was said about "women" in the bankruptcy debates matters in the real world. It sets forth a theoretical approach for examining the role that texts play in producing and reproducing cultural sets of beliefs or ideologies. Part II.B then briefly explores key concepts of gender, race, and class that are particularly relevant to an analysis of the representations of "women" in the bankruptcy debates.

Part III performs an intersectional analysis of the bankruptcy debates and shows why such an approach is necessary to any reform agenda that seeks to address systemic problems of economic insecurity. As this Part illustrates, the contrast between the presentation of women who are involved in the bankruptcy system as "support creditors" versus women who are filing for bankruptcy themselves illumines that, within this context, a certain image of "woman" is deemed more deserving than others. Moreover, gender, race, and class played a significant (although largely unacknowledged) role in determining which issues were given priority in the reform debates and which were marginalized (or deemed completely irrelevant). This intersectional analysis uncovers the ways in

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[38] This Article's approach to thinking more expansively about women's financial health and well-being has its origins in the 2004 "Women Coming Together: Claiming the Law for Social Change" conference that was hosted by the University of Cincinnati College of Law and its Joint Degree Program in Law and Women's Studies. The goal of this conference, sponsored by the Ford Foundation, was to articulate and activate a new women's movement, one with an inclusive and progressive agenda that would bring issues of concern for marginalized women to the center. For more than a year, I participated in a twenty-person planning committee, a truly diverse group of women who represented a broad spectrum of life, work, and activist experiences, but who all shared a deep commitment to improving women's lives. The discussions among these women led to the selection of "women's health and well-being" as the central focus of the conference. The approach to this topic was holistic, with women's health and well-being examined from an expansive perspective such that it included relevant topics such as women's financial security. The conversations of the planning committee, as well as the emphasis at the conference on developing new strategies and expanding and enhancing coalitions, very much informed the development of this Article. I am hoping that this Article, like the conference, will begin a dialogue and contribute to coalition building around financial health and well-being for all.

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which dominant sets of beliefs about the traditional patriarchal family and the "ideal" woman to support that family model, not only shaped the contours of the bankruptcy debates, but also accounted for the reforms that actually were enacted. Importantly, however, this analysis also identifies places in the debates where that particular image of "woman" was contested and fissured.

A "fissure" is defined as "a narrow opening or crack of considerable length and depth [usually] occurring from some breaking or parting."[39] Poovey, in her historical work, has studied the ways in which these fissures in dominant ideologies open up possibilities for change. Part IV of this Article argues that looking at the representations of women in the bankruptcy debates from an anti-essentialist and intersectional perspective exposes the fundamental flaws in the image of woman governing in those debates and makes clear why she must be re-imagined. In this way, the theoretical tools of critical race feminism not only facilitate the location of fissures, but serve themselves to fissure—to "crack apart" old systems of belief and to "break open" new ways of thinking about specific issues that arose in the context of the bankruptcy debates, as well as financial health generally. This Article thus concludes by showing how an intersectional analysis and approach can and should matter in money matters.

II. UNCOVERING IDEOLOGIES IN THE BANKRUPTCY CONTROVERSY

> What we do here when we establish law, as our Founding Fathers always knew, and I think we are forgetting, is that we are setting public policy that guides and shapes American values. What we say you must do and what we say you don't have to do shapes opinions and values.
>
> Senator Jeff Sessions, Alabama[40]

A. Representations That Matter: Locating "Unevenness"

"Ideologies exist not only as ideas," writes Poovey, "[T]hey are given concrete form in the practices and social

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[39] WEBSTER'S NEW COLLEGIATE DICTIONARY 433 (1973).

[40] 147 CONG. REC. S2345 (daily ed. Mar. 15, 2001) (statement of Sen. Sessions).

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institutions that govern people's social relations . . . ."[41] While ideology is an elusive concept to define, this Article will use the term as Poovey uses it, to refer to a "set of beliefs" that is supported by a system of ideas, institutions, and practices.[42] An ideology becomes dominant—and literally governing—when it is supported by powerful systems such as the law. Senator Sessions' comment above, made in the context of the bankruptcy reform debates, expresses the power of the law to guide and shape cultural beliefs, values, and behavior—to influence societal norms. But, as legislators also are elected officials, what they say must and must not be done reflects, as well as works to construct, dominant cultural beliefs.

In examining the cultural controversy that was the eight-year process of reforming the bankruptcy system, this Article takes Poovey's work as a starting place because it provides a framework for analyzing the representations of women in the bankruptcy debates, as well as methodological tools for doing so. Specifically, in her study *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England*,[43] Poovey analyzed representations of women in the context of five different cultural controversies that developed in mid-nineteenth-century England. Much like the recent bankruptcy reform process, these controversies brought about intense political and cultural debates on important societal "problems."[44] Poovey selected events that she termed "border cases" because "those issues that are constituted as 'problems' at any given moment are particularly important because they mark the limits of ideological certainty."[45] In other words, such controversies tend to expose how ideologies are "simultaneously constructed, deployed, and contested."[46]

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[41] MARY POOVEY, UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND 3 (1988).

[42] *Id.*

[43] *Id.*

[44] For example, Poovey examined the 1840s medical controversy over whether it was appropriate to administer chloroform to women to lessen the natural pain of childbirth. *See id.* at 24-50. Poovey also analyzed the 1850s debates concerning changes to British divorce laws. These debates, by publicizing the reality of marital discord as well as women's economic dependence, threatened to destabilize the domestic ideal of womanhood. *See id.* at 51-88.

[45] *Id.* at 12.

[46] In her analysis, Poovey examines representations of women in these controversies, identifying both "conservative ideological work," as well as an "oppositional voice." *Id.* at 4. While Poovey's own study focused primarily on gender—"[i]t is about the specific instabilities of one ideological formulation and the sites at which that formulation was contested and its instabilities revealed"—her analysis

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Similar to those described by Poovey, the "problem" of bankruptcy provoked widespread and intense responses. As Brady Williamson, Chair of the National Bankruptcy Review Commission in 1996 and 1997, explained at a 2003 symposium on bankruptcy reform:

> The fact that you have 1.6 million American families and some of this country's most distinguished businesses filing for bankruptcy, has made this an issue that has to be in the pages of *USA Today*, and has to be given attention by people in both parties who care about American economic and social life.[47]

Moreover, this controversy came to involve policy discussions on integral aspects of the economic and social lives of all Americans. Health care, housing, credit, taxes, marriage, divorce, and the war in Iraq are just a sampling of the issues that were on the table during this reform process. As will be discussed in detail below, these wide-ranging discussions blurred the lines of ideological demarcation, bringing sets of beliefs about gender, race, and class into a complex interplay.[48]

Poovey's work presents a helpful approach for excavating dominant ideologies and the resistance thereto from texts, such as the record of the legislative debates, produced in the context of bankruptcy reform. Analyzing a variety of sources, Poovey deconstructs the texts themselves, looking for "internal contradictions and the artificiality of the 'truths' they purport to tell."[49] Specific to the area of law, Poovey cites the work of Gerald Bruns, explaining that "[b]ecause texts 'belong to traditions of understanding,' which are effects of the social and cultural relationships that obtain at the moment of production, the conditions that govern the production of texts are reproduced in the texts themselves as the condition of possibility for meaning."[50] Thus, each text has something to say about the conditions that produced it, including ideological ideas about gender, race, and class.

Poovey's work is also useful in thinking about why and how representations within texts matter *outside* of those texts.

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applies more broadly, with the book being generally "about the conditions that facilitated change." *Id.*

[47] Roundtable Discussion, *Bankruptcy Reform: Then and Now*, 12 AM. BANKR. INST. L. REV. 299, 308 (2004) (statement of Brady C. Williamson).

[48] *See infra* Part III.

[49] POOVEY, *supra* note 41, at 17.

[50] *Id.* (citing Gerald L. Bruns, *Law as Hermeneutics: A Response to Ronald Dworkin*, *in* THE POLITICS OF INTERPRETATION 319-20 (W.J.T. Mitchell ed., 1983)).

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Drawing on formalist, Marxist, and psychoanalytic literary theory, Poovey reads texts to see how they "produce meanings in excess of what seems to be the text's explicit design."[51] Thus, she examines how each text "participates in a complex social activity."[52] From this perspective, for example, in thinking about the meanings of the representations of "women" in the bankruptcy debates, it is important to consider what kind of cultural work these representations do and what kind of material effects they have. Interestingly, the bankruptcy reform debates feature a dominant representation of "women" strikingly similar to what Poovey located in the cultural controversies she studied in the mid-nineteenth century. One hundred and fifty years later, this "woman" is still white, middle-class, and primarily defined by her maternal and domestic roles within a traditional patriarchal family.

A final way that Poovey's work is important to this Article's analysis of the bankruptcy reform debates is her conclusion that when ideologies are "uneven"—when they are "fissured by competing emphases and interests"[53]—there is an opportunity for change. The idea that there are reforming possibilities located within the fissures in governing ideologies presents a helpful way to think about reshaping the terms of discussions about women's financial well-being. As Poovey's study demonstrated, an ideology that was "always under construction" also was "always open to revision, dispute, and the emergence of oppositional formulations."[54] In the next section, this Article examines issues of gender, race, and class in a way that suggests oppositional formulations to the discussions of women's financial security that took place in the context of the recent bankruptcy debates.

B. A Framework for Discussion: Issues of Gender, Race, and Class

Margaret L. Andersen and Patricia Hill Collins explain that it is imperative to develop a framework of analysis that acknowledges that "race, class, and gender are fundamental axes of society and, as such, are critical to understanding people's lives, institutional systems, contemporary social

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[51] *Id.* at 16.

[52] *Id.* at 17.

[53] *Id.* at 3.

[54] *Id.*

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issues, and the possibilities for social change."[55] The following subsections briefly highlight certain features of each axis that are particularly relevant to a textual analysis of the bankruptcy debates.[56] This organization is in no way to suggest that the categories of gender, race, and class are "exclusive or separable"[57] and, indeed, there is overlap and fluidity among the subsections. Rather, as Andersen and Collins explain, "Understanding the intersections between race, class, and gender requires knowing how to conceptualize each . . . to learn what each means and how each is manifested in different group experiences."[58] The following discussion offers specific insights into issues of gender, race, and class that play out in the bankruptcy context. An understanding of these layers will facilitate the analysis in Part III focusing on the interrelationships among these axes.

1. Gender and the Patriarchal Family

Martha Fineman, in her study of the twentieth-century cultural controversy surrounding welfare reform, identifies the set of beliefs about women, specifically mothers, that was setting the terms of those debates.[59] Employing a similar method of analysis to Poovey, Fineman explains the ways in which "the study of rhetoric about motherhood reveals something about the existence and content of dominant ideology that in turn reveals something about the location of power within society."[60] As Fineman argues, dominant

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[55] Margaret L. Andersen & Patricia H. Collins, *Introduction* to RACE, CLASS, AND GENDER: AN ANTHOLOGY 1, 2 (Margaret L. Andersen & Patricia Hill Collins eds., 5th ed. 2004) [hereinafter RACE, CLASS, AND GENDER].

[56] Ideologies involving issues of sexual orientation and age, for example, were also very much at play in the bankruptcy debates. While this Article focuses on gender, race, and class, the primacy of the patriarchal family model in these debates is also relevant to Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) work in such areas as marriage and child custody. These are important topics for further analysis. *See infra* note 168.

[57] Crenshaw, *Mapping the Margins*, *supra* note 26, at 1244 n.9 ("In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt tendencies to see race and gender as exclusive or separable.").

[58] RACE, CLASS, AND GENDER, *supra* note 55, at 75.

[59] Martha A. Fineman, *Images of Mothers in Poverty Discourse*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 205, 205-23 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

[60] *Id.* at 219. Fineman defines her understanding of ideology as follows:

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ideologies "serve to 'tame' or 'domesticate' discourses by exerting a confining pressure on their initial development, ultimately channeling even the most radical ideas into set categories approved by the existing conceptual system."[61] In other words, the dominant ideologies shape the debates, almost invisibly determining what is up for discussion and what is not.

In the context of welfare reform, for example, Fineman examines how the dominant ideology of the patriarchal family was determinative of the discussions and proposals for addressing the "welfare crisis."[62] Specifically, Fineman identifies the ways in which single motherhood is portrayed as deviant, not only as an indicator of poverty but also a cause:

> I am particularly interested . . . in those political and professional discourses in which the existence of single mother status is defined as one of the primary predictors of poverty. Such association of characteristic with cause has fostered suggestions that an appropriate and fundamental goal of any proposed poverty program should be eradication of the status and practice of single motherhood. This goal is to be accomplished through appropriate coupling of the single mother with the child's father, who would then assume his rightful place in the family and fulfill his financial obligations. By his so doing, the paramount welfare reform objective—letting the state off the economic hook–will have been achieved.[63]

The effect of focusing the debates in this way, however, is that other real and pressing societal problems are not addressed at all; they are not considered relevant to the discussion. As Fineman argues, for example, "The dominance of family imagery contained in the ideology of patriarchy has required rejection of economic subsidies that would truly

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> [A] system constituted by a more-or-less complementary collection of symbols, beliefs, and assumptions that, in combination, rationalize and give meaning to discourses in the context of power. Ideology in this regard can be considered a selection and sorting mechanism in that it provides coherence, structure, and form to social and political discourses.

Id.

[61] *Id.* at 220.

[62] Fineman's analysis related to debates that preceded the passage of the Temporary Assistance to Needy Families Program (TANF) in 1996. *See, e.g.*, Tom Mashberg, *GOP's Welfare Benefits Taken Away This Year*, BOSTON HERALD, Nov. 3, 1996, at 10 (describing California as "at the hub of the welfare crisis"); Adam Meyerson, *Which Programs Work?*, WASH. POST, Sept. 4, 1996, at A15 (referencing the "crisis in the welfare state"); George F. Will, *A Few Tips for Dole*, WASH. POST, June 9, 1996, at C7 (referencing the "crisis in the welfare state").

[63] Fineman, *supra* note 59, at 205.

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support single mother families."[64] As Part III will discuss in more detail, Fineman's rhetorical work in the context of the debates on welfare reform and the representations of women therein offers provocative analogies to the representations of women in the bankruptcy debates. Moreover, the primacy of the idea of the patriarchal family and women's role within that paradigm also plays a central part in the bankruptcy context.

2. Racialized Patriarchy

Dorothy Roberts' study of the welfare debates makes clear that, while it is "useful to make patriarchy a focus of feminist inquiry," it also is imperative to explore the "relationship between racism and patriarchy."[65] She explains that racism and patriarchy "are two interrelated, mutually supporting systems of domination, and their relationship is essential to understanding the subordination of all women."[66] Specifically with respect to the discourses about poverty and single motherhood, Roberts responds to Fineman's conclusion that "the condemnation of single mothers in current poverty reform discourse is primarily a reflection of patriarchy," by describing the ways in which race too is deeply implicated.[67]

Tracing the unique pattern of Black single motherhood in the history of the United States, Roberts concludes that "[i]deologically, in America single motherhood is Black. The current condemnation of unwed mothers is rooted in the myth of the Black matriarch, the domineering female head of the Black family."[68] Drawing on the work of Regina Austin and Patricia Hill Collins, Roberts concludes: "Society penalizes

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[64] *Id.* at 222.

[65] Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 224 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

[66] *Id.*

[67] *Id.* at 237.

[68] *Id.* at 237-38. Crenshaw identifies as one of the failings of the feminist movement its non-response to the patriarchal assumptions underlying the Moyers televised special, *The Vanishing Black Family*, which presented "female-headed households as a problem of irresponsible sexuality, induced in part by government policies that encouraged family breakdown." Crenshaw, *Demarginalizing the Intersection*, *supra* note 26, at 164. Crenshaw suggests that the debates on welfare reform and family policy may have proceeded differently if there had been a strong feminist critique of conclusions in the Moyers report such as that "the welfare state reinforced the deterioration of the Black family by rendering the Black male's role obsolete" and that welfare is "dysfunctional because it allows poor women to leave men upon whom they would otherwise be dependent." *Id.*

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Black single mothers not only because they depart from the norm of marriage as a prerequisite to pregnancy but also because they represent rebellious Black culture. To some extent, society punishes white single mothers because they are acting too much like Black women."[69]

Roberts agrees with Fineman that the answer to poverty does not lie in the restoration of the patriarchal family. More productive to improving the material lives of Black single women would be "expanding women's access to day care, low-income housing, nontraditional job markets, and health care."[70] These would be more helpful "short-term remedies" until more "fundamental social change" is achieved.[71] That is, until the ideology of racial patriarchy is dismantled. Roberts' analysis of the ways race and gender played out in the welfare debates offers important insights into the meanings of "women" and "family" in the context of bankruptcy, a different social safety net.

3. Boundaries of Class

The meaning of class in the United States is complex and elusive. In a recent eleven-part series on class in America, the *New York Times* describes class as "indistinct, ambiguous, the half-seen hand that upon closer examination holds some Americans down while giving others a boost."[72] Factors that have been considered in determining a person's class include income,[73] wealth,[74] education,[75] and culture.[76] Central to any

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[69] Roberts, *supra* note 65, at 238.

[70] *Id.*

[71] *Id.*

[72] Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, at 1. This series reflected a year-long exploration by a team of reporters of the ways in which class "influences destiny" in the United States, "a society that likes to think of itself as a land of unbounded opportunity." *Id.*

[73] *See, e.g.*, Chuck Collins & Felice Veskel, *Economic Apartheid in America*, *in* RACE, CLASS, AND GENDER, *supra* note 55, at 127, 134-36 (exploring income disparities and the wage gap, emphasizing the influences of racism and sexism).

[74] *See, e.g.*, *id.* at 136-38 (exploring wealth as a measure of the distribution of prosperity); Dalton Conley, *Wealth Matters*, *in* RACE, CLASS, AND GENDER, *supra* note 55, at 149, 152 ("In order to understand a family's well-being and the life chances of its children—in short, to understand its class position—we not only must consider income, education, and occupation but also must take into account accumulated wealth.").

[75] *See, e.g.*, David Leonhardt, *The College Dropout Boom*, N.Y. TIMES, May 24, 2005, at A1 (quoting Lawrence H. Summers, president of Harvard University, "We need to recognize that the most serious domestic problem in the United States today is the widening gap between the children of the rich and the children of the

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understanding of class, however, is the acknowledgment, as Andersen and Collins argue, that issues of class are issues of power:

> Social class is not just a matter of material difference; it is a pattern of domination in which some groups have more power than others. *Power* is the ability to influence and dominate others . . . . Groups with vast amounts of wealth, for example, have the ability to influence systems like the media and the political process in ways that less powerful groups cannot. Privilege in social class thus encompasses both a position of material advantage and the ability to control and influence others.[77]

As such, class is also very interrelated to the systemic axes of gender and race. These relationships are masked, however, when the discussion of class shifts from the societal to the individual level. As Donna Langston argues:

> Some people explain or try to account for poverty or class position by focusing on the personal and moral merits of an individual. If people are poor, then it's something they did or didn't do; they were lazy, unlucky, didn't try hard enough, etc. This has the familiar ring of blaming the victims. Alternative explanations focus on the ways in which poverty and class position are due to structural, systematic, institutionalized economic and political power relations. These power relations are based firmly on dynamics such as race, gender, and class.[78]

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poor . . . . And education is the most powerful weapon we have to address that problem.").

[76] Donna Langston describes class also as culture, explaining that:

> Class is your understanding of the world and where you fit in; it's composed of ideas, behavior, attitudes, values, and language; class is how you think, feel, act, look, dress, talk, move, walk . . . . In other words, class is socially constructed and all-encompassing. When we experience classism, it will be because of our lack of money (i.e., choices and power in this society) and because of the way we talk, think, act, move—because of our culture.

Donna Langston, *Tired of Playing Monopoly*, *in* RACE, CLASS, AND GENDER, *supra* note 55, at 140, 141.

[77] Andersen & Collins, *Conceptualizing Race, Class, and Gender*, *in* RACE, CLASS, AND GENDER, *supra* note 55, at 75, 91.

[78] Langston, *supra* note 76, at 140. For example, Thomas Shapiro concludes in his study, *The Hidden Cost of Being African American*:

> Racial inequality appears intransigent because the way families use wealth transmits advantages from generation to generation. Furthermore, the twenty-first century marks the beginning of a new racial dilemma for the United States: Family wealth and inheritances cancel gains in classrooms, workplaces, and paychecks, worsening racial inequalities.

THOMAS SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN 183 (2004). Also, as Collins and Veskel explain, "The persistent wage gap between men and women means

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Like Fineman and Roberts, Langston has studied the debates on welfare reform, concluding that "[a]ttacks on the welfare system and those who live on welfare are a good example of classism in action."[79] She explains the "dual welfare" system in America as follows: "Almost everyone in America is on some type of welfare; but, if you're rich, it's in the form of tax deductions for 'business' meals and entertainment, and if you're poor, it's in the form of food stamps. The difference is the stigma and humiliation connected to welfare for the poor . . . ."[80] Specifically with respect to women, she comments,

> The 'dual welfare' system also assigns a different degree of stigma to programs that benefit women and children . . . and programs whose recipients are primarily male, such as veterans' benefits. The implicit assumption is that mothers who raise children do not work and therefore are not deserving of their daily bread crumbs.[81]

Of course, this conclusion itself raises complex intersectionality issues because, as Crenshaw and others have emphasized, considerations of race and class are integral to cultural ideas about whether or not women are *supposed* to work outside of the home.[82]

While Langston does not talk specifically about bankruptcy as a form of welfare, it is interesting to consider this particular form of "financial relief" in these terms. Bankruptcy generally has been considered a "middle-class safety net"[83] and, in the bankruptcy context, class clearly has to

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that households headed by single women wage earners make up an enormous percentage of the families in poverty." Collins & Veskel, *supra* note 73, at 134-35.

[79] Langston, *supra* note 76, at 143.

[80] *Id.*

[81] *Id.*

[82] Also, as Crenshaw points out, while the feminist movement has critiqued gender norms that impose expectations on women without taking into account what women would freely choose (if possible) for themselves, feminist analyses may fail to take into account how gender norms under patriarchy are harmful to women of color:

> An analysis of patriarchy that highlights the history of white women's exclusion from the workplace might permit the inference that Black women have not been burdened by this particular gender-based expectation. Yet the very fact that Black women must work conflicts with norms that women should not, often creating personal, emotional and relationship problems in Black women's lives.

Crenshaw, *Demarginalizing the Intersection*, *supra* note 26, at 156. *See also infra* notes 113-14 and accompanying text.

[83] *See, e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 6 (2000) (examining and presenting "evidence that, even though some upper- and lower-class Americans

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signify something other than financial wherewithal. In the vast majority of cases, people filing for bankruptcy have no money.[84]

In his essay *Bankruptcy Law, Ritual, and Performance*, Donald Korobkin argues that, in fact, bankruptcy plays an important role in maintaining the power (both symbolic and real) of the middle-class.[85] Korobkin begins by setting out the material and ideological dilemmas that financial distress of the middle class creates in a capitalist society:

> On the one hand, powerful social and legal norms and purposes dictate that people should keep their commitments, and must face appropriate sanctions if they do not. Capitalistic ideology pictures economic life as a competition with a level playing field: There are winners and losers and individuals rise or fall based on their own efforts . . . . Against this backdrop, it would be difficult to accept any governmental program that changes the rules in the middle of the game—releasing debtors from their promises, depriving creditors of their hard-earned bargains, and rewarding the "losers."
>
> On the other hand, it would be equally unacceptable in a capitalist society for middle-class people systematically to lose their status and lifestyles. The economic hardship that would result from the deterioration of the middle class is only part of the concern. The threat is also ideological. The widespread failure of the middle class would undermine the capitalist creed that economic progress is inevitable: that hard-working people inevitably succeed and that the American middle class is hardworking.[86]

Korobkin then describes how the "ritual" of bankruptcy negotiates these tensions, offering a process by which rules can be broken (i.e., promises to pay back debt), but in such a way as

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may find themselves in bankruptcy court, bankruptcy is a largely middle-class phenomenon"); Melissa B. Jacoby et al., *Rethinking the Debates Over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001) (exploring how "middle-class families have used bankruptcy as a safety net, or as insurance of last resort, in the financial aftermath of medical problems"); David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 54 (2004) ("Our generous bankruptcy discharge can be seen as a substitute for the extensive middle class social welfare protections one sees in Europe."); Elizabeth Warren, *The Economics of Race*, *supra* note 36, at 1779 ("Bankruptcy is a middle class phenomenon . . . .").

[84] 151 CONG. REC. S1823 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) ("The American Bankruptcy Institute is a nonpartisan research and education organization that says 3 percent of the people who file for bankruptcy could afford to repay—3 percent . . . . The rest don't have two nickels to rub together. The credit card industry says it is 10 percent. Even if you accept their own figure, that means 90 percent of the people who file for bankruptcy are flat broke.").

[85] Donald Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124 (2003).

[86] *Id.* at 2126.

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to reaffirm cultural norms.[87] Moreover, this ritual performance secures class boundaries and class power: "Insulating mostly middle-class debtors from the experience of long-term poverty, the bankruptcy process protects the political power of the middle class and offers a redemptive possibility that works to vindicate middle-class ideology in the face of its challenges."[88] Korobkin's analysis illumines the role that the bankruptcy system plays in maintaining class boundaries and existing power relations.

Drawing on the foregoing discussions of gender, race, and class, the next Part specifically analyzes the representations of women found within the debates surrounding the passage of the 2005 Bankruptcy Act. In uncovering and critically examining the dominant sets of beliefs about gender, race, and class that shaped the contours of the debates, the work of the critical scholars discussed above suggests the importance of keeping questions such as the following central to the analysis: What role has patriarchy, for example, played in determining which reforms were adopted and which were off the table? How were the debates about "women" really of material help to women? Which women are the reforms intended to help? What is the relationship between racism and patriarchy in the context of the bankruptcy debates? How is class visible and invisible in addressing concerns about women's financial security? Finally, if bankruptcy is indeed a "women's issue," what does and should that mean? Foregrounding the institutional axes of gender, race, and class makes it possible to read the sound

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[87] After explaining Arnold van Gennup's three phases of a rite of passage (separation, transition, and reincorporation), Korobkin examines how bankruptcy follows a similar pattern. *Id.* at 2146-47. First, there is a separation of the debtor in terms of both space and time when a bankruptcy petition is filed. A new space is created for sorting out the debtor's financial situation with the creation of a bankruptcy estate. Time also is altered in that the automatic stay stops all creditors' efforts to collect from the debtor; moreover, the time frames set out by the Bankruptcy Code, Rules, and Judge now govern. *Id.* at 2148. The administration of the case itself serves as a period of transition. Korobkin emphasizes that, during this time, "[b]ankruptcy law also compels the debtor to act in ways that symbolically show the necessity of the relief that he seeks." *Id.* at 2154. Among other things, the debtor must publicly "confess" his financial situation, "testify to his subjection" by either surrendering his assets to the estate or agreeing to devote his disposable income in the future to the repayment of creditors, and "submit himself to the moral inventory embodied in the rules governing the granting or denial of discharge." *Id.* at 2154. Finally, there is the reincorporation that takes place after the case is closed and the debtor and the creditors return to the "real" commercial world where all of the normal rules remain in place. *Id.* at 2147.

[88] *Id.* at 2131.

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bites anew, with the purpose of identifying the dominant sets of beliefs that informed these most recent economic reforms, as well as locating the fissures in those ideological underpinnings.

III. THE MEANINGS OF "WOMEN" IN THE BANKRUPTCY DEBATES

Bankruptcy is a "women's issue," but in the same way that it is a "societal issue"—for myriad, interrelated, and complex reasons. The following analysis approaches bankruptcy as a women's issue through an anti-essentialist lens. It foregrounds the ways in which women's historical, economic, and social experiences are different. Moreover, it examines multiple and diverse systems of gender-, race-, and class-based oppressions at work in the representations of women in this context. This Part is organized in accordance with the way that women were most explicitly categorized in the bankruptcy debates, either as support creditors or debtors. As the following analysis will show, this categorization itself has ideological implications.

The first Section examines the representations of women as support creditors. These women are affected by the bankruptcy system because the persons owing them spousal and/or child support have filed for bankruptcy. Thus, these women are involved in the bankruptcy process as creditors. The second Section examines women as debtors[89]; these women have filed for bankruptcy themselves.

A. Women as Support Creditors

Since early in the reform effort, there has been concern that the proposed changes would be particularly devastating to ex-spouses who were trying to collect spousal and child support from persons who filed for bankruptcy.[90] Under the Former

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[89] The 2005 Bankruptcy Act made revisions to the Bankruptcy Code (11 U.S.C. §§ 101-1330 (2005)) and other related statutory provisions. References in this Article to the Bankruptcy Code prior to the amendments made in the 2005 Bankruptcy Act will be to the Former Bankruptcy Code (e.g. "Former Bankruptcy Code § 101"). References to the Bankruptcy Code, as amended by the 2005 Bankruptcy Act, will be to the New Bankruptcy Code (e.g. "11 U.S.C. § 101"). Persons who file for bankruptcy are defined as "debtors" under both the Former and New Bankruptcy Codes. *See* 11 U.S.C. § 101(13).

[90] *See, e.g.*, 146 CONG. REC. S11725 (daily ed. Dec. 7, 2000) (statement of Sen. Dodd).

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and New Bankruptcy Codes,[91] spousal and child support payments are treated specially, in that they cannot be discharged in bankruptcy.[92] Only a very limited number of other claims are similarly protected.[93] The New Bankruptcy Code, however, increases the kinds of debt that are not dischargeable in bankruptcy, including certain credit card obligations.[94] Early critics of the legislation, such as Senator Dodd, noted that the reforms would result in ex-spouses having to compete against credit card companies for the limited funds available to the debtor post-bankruptcy:

> The impact that this legislation would have on single-parent households is particularly disturbing to me. Single parents have one of the hardest jobs in America. Most work all day, cook meals, keep house, help their children with homework, and schedule doctors' appointments, parent-teacher meetings, and extracurricular activities. Life isn't easy for working single parents and often the financial assistance they receive in the form of alimony and child support is critical to keeping their families from falling into poverty. I believe that the conference report before the Senate would frustrate the efforts of single-parent families to collect support payments . . . . For the first time, it would make credit card and other consumer debts essentially nondischargeable. So, while a divorced spouse would still be obliged to pay alimony and child support, his or her other unsecured debts would remain intact.[95]

While Senator Dodd phrased these comments in gender-neutral terms, the ratio of men to women who filed for bankruptcy and are obligated to make support payments is 13 to 1.[96] Moreover, the description of the typical day in the above paragraph closely resembles accounts of a woman's "second shift" that have played a central role in the debates on work

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[91] *See supra* note 89.

[92] Former Bankruptcy Code § 523(a)(5), (15); 11 U.S.C. § 523(a)(5), (15) (2005). For a discussion of changes to these sections that clarify and support creditors' claims, see BROWN & AHERN, *supra* note 3, at 62-64.

[93] *See generally* Former Bankruptcy Code §§ 523, 1328; 11 U.S.C. §§ 523, 1328 (2005).

[94] For instance, § 310 of the 2005 Bankruptcy Act expands on the presumption of nondischargeability for fraud in the use of credit cards, as set forth in § 523(a)(2)(C) of the Bankruptcy Code. Specifically, the "amount that the debtor must charge for 'luxury goods' to invoke the presumption is reduced from $1225 to $500; the amount that the debtor must withdraw in cash advances to invoke the presumption is reduced from $1225 to $750." EUGENE R. WEDOFF, AM. BANKR. INST., MAJOR CONSUMER BANKRUPTCY EFFECTS OF THE 2005 REFORM LEGISLATION (2005), http://www.abiworld.org/pdfs/s256/mainpoints10.pdf (last visited Mar. 8, 2006).

[95] 146 CONG. REC. S11725 (daily ed. Dec. 7, 2000) (statement of Sen. Dodd). *See also* 151 CONG. REC. S2072 (daily ed. Mar. 4, 2005) (statement of Sen. Dodd).

[96] Warren, *What Is a Women's Issue?*, *supra* note 17, at 32.

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and family issues.[97] Others, however, like Senator Kennedy, spoke explicitly of support creditors as women and children:

> But under the pending bill, more debt is created that cannot be discharged after bankruptcy—credit card debt. This step will certainly create intense competition for the former husband's limited income .... We all know what happens when women and children are forced to compete for these scarce resources with these sophisticated lenders—they lose![98]

In response to early criticisms regarding the legislation's detrimental effects on women and children, proponents of bankruptcy reform made changes to the bill in two primary respects. First, support creditors were moved from a seventh position of priority of distribution in bankruptcy to a first position.[99] This means that if there is any money in the bankruptcy estate to be distributed to creditors, those creditors who are owed spousal and child support will be paid first. Only after those claims have been paid in full will other creditors receive any money.[100] As Senator Sessions explained, the revision has the effect of "plac[ing] women and children at the highest level of protection."[101]

Second, several changes were made to make support payments easier to collect in the context of bankruptcy. For example, the automatic stay no longer applies to an order withholding support payments from a debtor's wages.[102] Therefore, the bankruptcy process itself should no longer interrupt the collection of support payments from wage

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[97] *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 46-48 (2000) ("Women's entrance into the workforce without changes to either the structure of market work or the gendered allocation of family work means that women with full time jobs work much longer hours than women at home."); ARLIE R. HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 6 (1997) (characterizing the extra time that women who work outside the home spend on home and child care as the "second shift").

[98] 147 CONG. REC. S1799 (daily ed. Mar. 5, 2001) (statement of Sen. Kennedy). *See also*, Barlett & Steele, *supra* note 11, at 66 ("The proposed legislation would treat a bankrupt man's credit-card debt the same as his obligation to pay child support, meaning that MasterCard and an unmarried mother would compete for the same limited pool of cash.").

[99] *Compare* Former Bankruptcy Code § 507(a)(7) *with* 11 U.S.C. § 507(a)(1) (2005).

[100] Other lower priority creditors, for example, include employees who are owed wages and governments who are owed taxes. *See* 11 U.S.C. § 507(a)(4), (a)(8) (2005).

[101] 147 CONG. REC. S2178 (daily ed. Mar. 13, 2001) (statement of Sen. Sessions).

[102] 11 U.S.C. § 362(b)(2)(C) (2005).

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earners. The automatic stay also will not interfere with efforts to collect support such as revoking the debtor's driver's license, reporting the failure to pay support to credit reporting agencies, or intercepting a debtor's income tax refund.[103] Other new provisions provide that a debtor will not be able to obtain confirmation of a bankruptcy plan and receive a discharge if support payments have not been paid in full[104] and that a support creditor may seek dismissal of a debtor's bankruptcy plan if on-going support payments are not made.[105] Philip Strauss, a retired attorney with the San Francisco Department of Child Support Services, described these and other support-related amendments included in the New Bankruptcy Code as reflecting a "wish list" of support collectors.[106]

Opponents of the legislation responded to the change in the priority of distribution from seventh to first by emphasizing that in most bankruptcy cases there is nothing at all to distribute. Thus, "[g]ranting women and children first priority for bankruptcy distributions permits them to stand first in line to collect nothing."[107] The second set of changes actually do make it easier for some support payments to be collected in the bankruptcy process. These changes, however, do not address the issue of competition with credit card companies for limited funds. As Senator Dodd stated,

> The proponents of the bill will say this [legislation] does no harm to the divorced spouses or children because the ex-spouses are still at the front of the collection process. But there is, in my view, a huge practical difference between being first in line and being the only one in line.[108]

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[103] 11 U.S.C. § 362(b)(2)(D)-(F) (2005).

[104] 11 U.S.C. §§ 1228(a), 1325(a)(8) (2005).

[105] 11 U.S.C. § 1112(b)(4)(P) (2005).

[106] *See* 2005 Bankruptcy Hearing, *supra* note 1 (statement of Philip Strauss) ("I developed, in association with my colleagues, what essentially became a 'wish list' of amendments to the Bankruptcy Code aimed at facilitating support collection from bankruptcy debtors.").

[107] 147 CONG. REC. S1800 (daily ed. Mar. 5, 2001) (statement of Sen. Kennedy). *See, e.g.*, 151 CONG. REC. S2408 (daily ed. Mar. 10, 2005) (letter from Children's Defense Fund) ("Being first among unsecured creditors in Chapter 7 bankruptcy is meaningless when over 95 percent of debtors have no resources to pay unsecured creditors."); 146 CONG. REC. S10773 (daily ed. Oct. 19, 2000) (statement of Sen. Kennedy) ("Changing the priority in distribution during bankruptcy will make a difference to women and children in less than 1% of the cases, and could actually result in reduced payments in some instances.").

[108] 151 CONG. REC. S2072 (daily ed. Mar. 4, 2005) (statement of Sen. Dodd).

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Thus, the opposing sides have addressed the support issue, but each on its own *and different* terms.

For purposes of this Article, however, the point that I want to emphasize is that, while there was much disagreement about what really was best for "women and children," the idea that women as support creditors are deserving of protection became a very prominent sound bite in this debate.[109] The pervasive use of the word "protection" in this context is very telling because the word itself is grounded in a particular legal history. In the nineteenth century, the "protection" provided by the common law of coverture[110] was used to keep middle-class White women "safely" bound within the private sphere.[111] This kind of "protection" and the subordination of women that the law supported with it were sharply critiqued as part of the

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[109] *See, e.g.*, 151 CONG. REC. S2464 (daily ed. Mar. 10, 2005) (statement of Sen. Biden) ("If a bankrupt household is a sinking ship, then women and children should be *protected* first. This is what the current law fails to do, but it is what this bill does: it puts women and children first . . . . Personally, I am proud of this bill, and I wish that those who are fabricating wild claims about it would stop. If they have their way, the women and children in this country who depend on alimony and child support will be robbed of real *protections*. That would be a crime.") (emphases added).

[110] Coverture was the common law legal fiction that, upon marriage, the husband and wife became one. William Blackstone defined coverture in his *Commentaries on the Laws of England* as follows:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing . . . and her condition, during her marriage, is called her *coverture*.

WILLIAM BLACKSTONE, 1 COMMENTARIES *339. Under coverture, a married woman generally was prohibited from entering into contracts, making a will or suing on her own behalf in court. She also had no right to control her own property and no right to her own wages. *See generally* MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND 1850-1895, at 8 (1989) (discussing the doctrine of coverture).

[111] Moreover, women "ruled" within this private sphere with "power" derived from their domesticity—their nurturing, supportive, and moral nature. As Poovey explains:

> Maternal instinct was credited not only with making women nurture their children, but also with conferring upon them extraordinary power over men. Women may have been considered physically unfit to vote or compete for work, but, according to this representation, the power of their moral influence amply compensated them for whatever disadvantages they suffered . . . . The model of binary opposition between the sexes, which was socially realized in separate but supposedly equal "spheres," underwrote an entire system of institutional practices and conventions at mid-century, ranging from a sexual division of labor to a sexual division of economic and political rights.

POOVEY, *supra* note 41, at 7-9.

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nineteenth-century movements to reform, for example, married women's property acts and divorce laws.[112]

Collins, Roberts, Crenshaw, and others have made clear, however, that this nineteenth-century separate spheres ideology that "gave women a place, role, and importance in the home, while preserving male dominance over women," reflects the experience of White women.[113] As Collins explains,

> According to the cult of true womanhood that accompanied the traditional family ideal, "true" women possessed four cardinal virtues: piety, purity, submissiveness, and domesticity. Propertied White women and those of the emerging middle class were encouraged to aspire to these virtues. African-American women encountered a different set of controlling images.[114]

Historically, these images were those of the mammy and the matriarch. The mammy was the "faithful, obedient domestic servant"[115] who "is the public face that Whites expect Black women to assume for them."[116] The matriarch is the "'bad' Black mother" who is "overly aggressive, unfeminine,"

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[112] *See* MAEVE E. DOGGETT, MARRIAGE, WIFE-BEATING AND THE LAW IN VICTORIAN ENGLAND 86-87 (1993). As Doggett explains:

> In the nineteenth century . . . the fiction of marital unity became a focus for feminist wrath. Women railed against the idea that their legal existence was suspended during marriage and, in the process, made the Blackstonian rendition of the fiction into common currency . . . . The fiction of marital unity provided an ideal focus for polemical attacks; however, feminists saw it as more than a tactical device . . . . [T]hey made it central to their case for reform because they perceived the vital role that it played in maintaining their oppression.

Id.; *see also* Kristin Brandser Kalsem, *Looking for Law in All the "Wrong" Places: Outlaw Texts and Early Women's Advocacy*, 13 S. CAL. REV. L. & WOMEN'S STUD. 273, 300-03 (2004) (analyzing the activist work of nineteenth-century women writers in "outlaw texts" to expose the devastating real-life meanings to women of the law's "protection" under coverture).

[113] Roberts, *supra* note 65, at 233. As Crenshaw elaborates:

> The critique of how separate spheres ideology shapes and limits women's roles in the home and in public life is a central theme in feminist legal thought. Feminists have attempted to expose and dismantle separate spheres ideology by identifying and criticizing the stereotypes that traditionally have justified the disparate societal roles assigned to men and women. Yet this attempt to debunk ideological justifications for *women's* subordination offers little insight into the domination of *Black* women.

Crenshaw, *Demarginalizing the Intersections*, *supra* note 26, at 155 (emphasis added).

[114] PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 72 (2d ed. 2000).

[115] *Id.* at 72.

[116] *Id.* at 73.

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and who cannot "properly supervise [her] children."[117] In the mid-twentieth century, as Black women became more politically powerful and demanded access to public assistance, the image of the welfare mother developed, which later "evolved into the more pernicious image of the welfare queen."[118] As Collins elaborates:

> In contrast to the welfare mother who draws upon the moral capital attached to American motherhood, the welfare queen constitutes a highly materialistic, domineering, and manless working-class Black woman. Relying on the public dole, Black welfare queens are content to take the hard-earned money of tax-paying Americans and remain married to the state.[119]

Making these cultural images visible clarifies that, in the context of the bankruptcy debates—with all the rhetoric of saving the money of hard-working Americans and stopping the abuse of those who hope to game the system—not all women would be viewed as "deserving" of protection. In fact, as the word "protection" itself signaled, the image of the woman most worthy of protection was that of the domestic "ideal," a woman who primarily is defined by her "good mothering" (not a matriarch) and who has unfortunately "lost" her role within a traditional middle-class patriarchal family (not a welfare queen). Moreover, also of particular ideological importance in the bankruptcy context is that this image of the deserving woman carries the implication that being part of a traditional family brings economic security.

Thus, the idea of women as support creditors does not disturb the dominant ideology of the patriarchal family at all. Yes, there has been a divorce, which has been identified as another problem in American society. However, the idea that women and children need and deserve to be supported by the father works to reinforce the primacy of the traditional patriarchal family.[120]

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[117] *Id.* at 75.

[118] *Id.* at 80.

[119] *Id.*

[120] With respect to White middle-class women, it also reinscribes those characteristics associated with the nineteenth-century's cult of true womanhood. *See supra* note 113 and accompanying text. Moreover, with respect to Black women, see Angela Onwuachi-Willig's fascinating article, *The Return of the Ring*, in which she situates the modern-day proposed "marriage cure" under TANF within the historical context of the government's post-bellum efforts to promote marriage for newly-freed slaves. *See* Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1648 (2005) (analyzing how "marriage laws were used in the post-bellum period as a means of

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The bankruptcy debates did not include discussions about systemic issues that might lead to family break-up or why it is so likely that women will fall into poverty if they do not receive support payments. As described above, larger societal problems can be ignored if the focus is on the personal and moral merits of individuals.[121] The rhetoric surrounding the support issue in the bankruptcy debates shaped the discussion not in terms of "structural, systemic, institutionalized economic and political power relations,"[122] but rather in terms of individual bad actors—specifically "deadbeat dads."[123] And, in the context of the bankruptcy debates, of course, this is a perfect ideological fit. Those deadbeat dads sound a lot like those "irresponsible debtors" who are the rationale for the comprehensive reform in the first place.[124]

In 2002, Elizabeth Warren noted the sharp difference in treatment between women as support creditors and women as debtors: "The ex-spouse issue has been treated differently [than that of women filers] . . . . When divorce and child support are on the table, it seems that a switch is triggered and the supporters of the bankruptcy bill at least feel a need to respond."[125] On the other hand, she describes women who are filing for bankruptcy themselves as "simply ignored."[126] The

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minimizing states' economic responsibility to provide for newly-emancipated Blacks, especially former slave children").

[121] *See supra* note 78 and accompanying text.

[122] Langston, *supra* note 76, at 140.

[123] There was tremendous emphasis in the debates on the phrase "deadbeat dad," with the phrase repeated often and with great derision. *See, e.g.*, 151 CONG. REC. S2464 (daily ed. Mar. 10, 2005) (statement of Sen. Biden) ("When this bill passes and the President signs it, the law will hold the deadbeat dad's feet to the fire: he will pay, he will pay in full."); 151 CONG. REC. S2407 (daily ed. Mar. 10, 2005) (statement of Sen. Kennedy) ("We have a chance to say to women across America, who are taking responsibility every single day for their children, but have a deadbeat dad who won't do his part, that we're on your side. We believe it's more important for you to get back on your feet than for the credit card companies to have greater profits."); 145 CONG. REC. S14071 (daily ed. Nov. 5, 1999) (statement of Sen. Sessions) ("[T]he deadbeat dad will be under the control of the bankruptcy court . . . and will have to report his income on a regular basis. If he is not paying that, he can be disciplined through the bankruptcy court."); 144 CONG. REC. S12146 (daily ed. Oct. 9, 1998) (statement of Sen. Hatch) ("Are they willing to continue to let deadbeat dads use the U.S. bankruptcy system to get off the hook for child support?"); 144 CONG. REC. S10650 (daily ed. Sept. 21, 1998) (statement of Sen. Grassley) ("I want to point out that some bankruptcy lawyers actually advertise that they can help deadbeat dads get out of their child support and other marital obligations . . . . I think it is outrageous . . . that bankruptcy lawyers are helping deadbeats to cheat to force spouses out of alimony and to cheat children out of child support.").

[124] *See generally supra* notes 8-11 and accompanying text.

[125] Warren, *supra* note 17, at 38-39.

[126] *Id.* at 38.

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following section examines the differently represented women as debtors.

B. Women as Debtors

Some women who are debtors also are support creditors. Because of the breakup of a marriage or family, these women are struggling to make ends meet and either because they are receiving inadequate support from their ex-partner or because of other factors associated with divorce, they have little choice but to file for bankruptcy.[127] In the final days of the debates, Senator Kennedy proposed an amendment that would make filing bankruptcy less onerous for a "single parent who failed to receive child support or spousal support that she was entitled to receive pursuant to a valid court order totaling more than 35 percent of her household income within a 12-month period."[128] To support this amendment, he offered the following statistics that tell "a great deal about the reality of why people are in bankruptcy"[129]:

> In 2004, $95 billion in child support—$95 billion—was uncollected. Failure to receive that child support put millions of single-parent families in a deep financial hole through no fault of their own, and it is the children who suffer the most in these situations. Why on earth would we want to make things even more difficult for these families? Most single moms have to struggle to make ends meet. They are working in low-wage jobs without good benefits. Over three quarters, 78 percent, of them are concentrated in four typically low-wage occupational categories. When the economy is tough, they are often the first ones let go.
>
> The poverty rate for single moms is nearly 40 percent as compared to 19 percent for single fathers. It is no wonder that single mothers are now more likely to go bankrupt than any other demographic group—

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[127] *See, e.g.*, Barlett & Steele, *supra* note 11, at 77 ("Even women in jobs that pay solid middle-class wages find themselves in financial trouble and must seek bankruptcy protection when they are overwhelmed by debt following a breakup or a divorce.").

[128] 151 CONG. REC. S2322 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy). Specifically, this amendment exempted these persons from the means test, which is a requirement under the 2005 Bankruptcy Act that generally provides that persons filing for bankruptcy must prove that their current monthly income minus specific allowed deductions does not leave them more than $100 per month to use to repay creditors. See *infra* notes 144-45 and accompanying text for a more detailed discussion of the means test requirements under the New Bankruptcy Code.

[129] 151 CONG. REC. S2322 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy).

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> more than the elderly, more than divorced men or married couples, more than minorities or people living in poor neighborhoods.[130]

Many of those single moms working at low-wage jobs and living below the poverty level are "minorities or people living in poor neighborhoods." Rhetorically, however, Kennedy separates them. In trying to make the most persuasive case, Kennedy presents the amendment as benefiting the most "innocent" women debtors—those who are in bankruptcy *through no fault of their own*[131]—and who, because of the way they are presented, can be read as *not* minorities and *not* "poor" in other than financial terms.[132] As discussed above, this image of "women" poses little threat to conservative family models.[133]

But, of course, there also are *other* single women filing for bankruptcy, women who may be considered less "innocent"

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[130] 151 CONG. REC. S2322-23 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy).

[131] Citing the women's and children's organizations that opposed the bankruptcy bill, Kennedy notes:

> They do so because of . . . the heavy weight it puts upon women generally and most particularly on innocent women who are being denied child support and alimony and because they, through no fault of their own, run into this kind of a financial crisis . . . . They point out that the bill would inflict additional hardship on over 1 million economically vulnerable women and families who are affected by the bankruptcy system each year—1 million women, the majority of whose *only* problem is that their husbands have failed to provide alimony and child support. And we are going to wrap them in with the spendthrifts who run amok with their credit. These are innocent individuals.

151 CONG. REC. S2323 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy) (emphasis added).

[132] This particular amendment (Amendment 70) was rejected by a vote of 41 to 58. *See* AM. BANKR. INST., BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: ROLL CALL VOTES, http://www.abiworld.net/bankbill/ (last visited Mar. 8, 2006) [hereinafter ROM].

[133] In fact, it reaffirms certain gender roles associated with women who need to be "protected." In a similar context, Senator Murray emphasized the particular vulnerability of women:

> The bill will have an enormous impact on women and child support. The largest growing group of filers are women, usually single mothers. The bill's overall philosophy of pushing debtors from chapter 7 to chapter 13 will have an unintended effect on women. They usually have fewer means and are more susceptible to crafty creditors seeking to intimidate and reaffirm debts. They need the *protection* of chapter 7, but could be pushed into chapter 13.

147 CONG. REC. S2374 (daily ed. Mar. 15, 2001) (statement of Sen. Murray) (emphasis added). Senator Murray raises important issues with this comment; however, the troubling facts that the "largest growing group of filers are women, usually single mothers," and that they "usually have fewer means" go completely unexamined. Rather, the emphasis shifts to the necessity of continuing to offer women appropriate "protection" because they are represented as particularly likely to fall prey to the wiles and bullying tactics of creditors.

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and less deserving of protection. As Fineman discusses in connection with her study of poverty discourses, those might be women who, in fact, are minorities and who are living in poor neighborhoods. In other words, they are separated from the "innocent" filers by race and class:

> [T]he single mother family under consideration [in the poverty discourses] is not typically presented as the once-married, formally middle-class housewife and mom and her children who now find themselves upon hard times as the result of divorce. The single mother crafted and located within poverty discourses is not constructed with the same characteristics as the single mother fashioned by divorce discourses–she is differentiated by race and by class from her divorced sister.[134]

Fineman also concludes that there are "ideological implications"[135] to the "absence of the formal legal tie to a male": "In addition to providing a basis for determining who is deserving in our culture, single motherhood is often seen as 'dangerous' and even 'deadly' not only to those who are single mothers and their children but to society as a whole."[136] Regina Austin suggests, for example, that the inquiry must be made as to whether "young, single, sexually active, fertile, and nurturing Black women are being viewed ominously because they have the temerity to attempt to break out of the rigid economic, social, and political categories that a racist, sexist, and class-stratified society would impose upon them."[137]

The ways in which the bankruptcy debates themselves reproduce this cultural uneasiness around the meanings of women single filers is an example of "the conditions that govern the production of texts [being] reproduced in [them]."[138] For example, in 2000, Senator Wellstone addressed the issue of the extremely high numbers of women in bankruptcy. He reported, "Women single filers are now the largest group in bankruptcy, and are one third of all filers. They are also the fastest growing. Since 1981, the number of women filing alone increased by more than 700 percent."[139] As he continues, however, these "women single filers" become "single women

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[134] Fineman, *supra* note 59, at 206.

[135] *Id.* at 214.

[136] *Id.*

[137] Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 555 (1989).

[138] POOVEY, *supra* note 41, at 17.

[139] 146 CONG. REC. S11684 (daily ed. Dec. 7, 2000) (statement of Sen. Wellstone).

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with children." The focus then shifts to women who were at one time part of a traditional patriarchal family:

> A woman single parent has a 500 percent greater likelihood of filing for bankruptcy than the population generally. Single women with children often earn far less than single men aside for [sic] the difficulties and costs of raising children alone. Divorce is also a major factor in bankruptcy. Income drops, women, again, are especially hard hit. They may not have worked prior to the divorce, and now have custody of the children.
>
> Are single women with children deadbeats? This bill assumes they are. The new nondischargeability of credit card debt will hit hard those women who use the cards to tide them over after a divorce until their income stabilizes.[140]

Thus, by the end of this speech, because of conditions governing the production of these Senatorial debates, including the dominant sets of beliefs that garner the most political support, Senator Wellstone ultimately ends up advocating for the most ideologically acceptable "single woman filer."

Moreover, attempts to talk about women as debtors outside the context of the traditional family model—to spend any time talking about women's financial insecurity generally—was deemed irrelevant to these debates. An intersectional analysis of two specific issues relating to bankruptcy filers generally illumines what was and was not on the table for discussion and how gender, race, and class mattered in setting the parameters of the debates. The first of the following subsections examines the relationship of the bankruptcy legislation to "the poor." The second subsection examines a proposed amendment to increase the minimum wage as part of the overall bankruptcy reform effort.

1. "The poor are not affected"[141]

A guiding framework of the bankruptcy debates was that, if put to its proper purpose, bankruptcy primarily is a middle-class issue. Thus, discussions about "the poor" in the debates often were summarily dismissed. Somehow, rhetorically, this legislation was not about "them." Late in the debates, Senator Durbin brought this marginalization and dismissal to the forefront by proposing an amendment that he

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[140] *Id.*

[141] *See, e.g.*, 151 CONG. REC. S2307 (daily ed. Mar. 9, 2005) (statement of Sen. Durbin) (quoting Sen. Hatch).

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argued made the legislation actually do what its proponents had been saying that it did all along—*not* negatively impact the poor.

Senator Durbin opened the discussion of this amendment by generally summarizing the arguments that had been made by proponents of the bill:

> The argument behind this bankruptcy reform bill is it is not going to affect people in lower income categories. Senators on the other side of the aisle have come to the floor and said: Don't worry about this bill. Yes, it is stricter, you have to file more documents, it will cost more in legal fees, but if your income is lower than the median income and you file for bankruptcy, it does not affect you. You are exempt from it.[142]

Whether a person's income is lower than the median income in that person's state is a very important concept under the New Bankruptcy Code. One of the most significant changes made in this new legislation is the implementation of a "means test." Generally, under the reform legislation, if a debtor files for bankruptcy under Chapter 7[143] with a current monthly income that, after allowed deductions, leaves $100 monthly that could be repaid to unsecured creditors, then that debtor is presumed to be abusing the bankruptcy system. Unless the debtor rebuts the presumption, her or his case will be dismissed or converted to another chapter, most likely Chapter 13.[144] Senator Durbin's point was that, even though filers may be below this median income, under the legislation,

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[142] *Id.* (statement of Sen. Durbin).

[143] Chapter 7 of the Former and New Bankruptcy Codes is the liquidation chapter. Generally, in a Chapter 7 proceeding, the debtor's existing assets (minus certain exempt assets) are collected and sold, and the proceeds are used to pay creditors. The debtor's debts (with a few exceptions) are discharged, and the debtor is given a "fresh start." For a more detailed description of a Chapter 7 liquidation, see CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 1-5 (1997). Other chapters of the Former and New Bankruptcy Codes provide for rehabilitation of the debtor rather than liquidation. For individual debtors, the most commonly used rehabilitation chapter is Chapter 13, which allows debtors who meet certain qualifications to keep their assets and to repay their debts over a three to five year period out of future earnings. Chapter 12 is a similar rehabilitation chapter applicable to farmers. For more detailed analyses of Chapter 12 and 13 rehabilitations, see *id.* at 5-10.

[144] For a detailed analysis of the specifics of the means test, see BROWN & AHERN, *supra* note 3, at 25-35. The implementation of a means test has been a highly controversial aspect of these reforms from the beginning. The Commission Report did not recommend means testing, however, some form of means testing has been included in proposed legislation from the start. *See* Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 1-2 (1998).

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they still are subject to the increased paperwork and expense involved in proving that inapplicability. Elizabeth Warren has termed the new requirements under the 2005 Bankruptcy Act as "a thousand paper cuts."[145]

The substance of Durbin's argument is intended to show how rhetorically this real issue affecting the poor has been glossed over—identified as a non-issue. He quotes Senator Hatch as saying, "Let me tell you at the outset, the poor are not affected by the means test. The legislation provides a safe harbor for those who fall below median income."[146] In fact, Senator Hatch argued earlier in the week that "the means test protects the poor."[147] Durbin then quotes Senator Frist: "This bankruptcy reform act exempts anyone who earns less than the median income in their State,"[148] and Senator Sessions: "I remind all of my colleagues that people who are economically distressed and have incomes below the median income already will be exempt from the means test."[149] But, Durbin argued, this rhetoric does not hold true and, in effect, the poor will be *very* affected by this legislation.[150] His amendment, which would have required lower income debtors to show only the documentation already required under Chapter 7 and proof of their monthly income, was voted down by a vote of forty-two to fifty-eight.[151]

While the means test was a primary arena for any discussions at all about the impact of this legislation on the poor, there were other issues relating to class that arose in the debates. Specifically in connection with this bankruptcy

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[145] Barlett & Steele, *supra* note 11, at 66 ("And some people will bleed to death from a thousand paper cuts.").

[146] 151 CONG. REC. S2307 (daily ed. Mar. 9, 2005) (statement of Sen. Durbin) (quoting Sen. Hatch).

[147] 151 CONG. REC. S1900 (daily ed. Mar. 2, 2005) (statement of Sen. Hatch). While this statement stands alone, without a specific explanation, Hatch later references the bankruptcy tax as harming the poor: "If you want to help the poor, vote for this bill because this bill will save the poor at least $400 a year, minimally, for each household." *Id.*

[148] 151 CONG. REC. S2307 (daily ed. Mar. 9, 2005) (statement of Sen. Durbin, quoting Sen. Frist).

[149] *Id.* (quoting Sen. Sessions).

[150] As Senator Reed explained, "The nonpartisan American Bankruptcy Institute found that over 96 percent of families seeking to go into chapter 7 bankruptcy would be judged as unable to pay under the new means test. However, the means test would likely deter qualifying families from filing for bankruptcy due to the addition of regulatory requirements and legal costs." 151 CONG. REC. S2467 (daily ed. Mar. 10, 2005) (statement of Sen. Reed).

[151] *See* ROM, *supra* note 132, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP00110: (Amendment No. 110).

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reform process, much evidence has been produced that the poor actually are targeted by credit card companies as a source of major profits. Senator Harkin brought into the Record examples of negative amortization, citing a March 6, 2005 article in *The Washington Post*.[152] Negative amortization is "what regulators call it when a consumer makes payments but balances continue to grow because of penalty costs."[153] Senator Harkin, citing the case of Ruth Owens, recounted how she tried for six years to pay off a $1,900 balance. She sent

> the credit card company a total of $3,492 in monthly payments from 1997 to 2003. Yet her balance grew to $5,564.28 even though she never used the card to buy anything more. So she paid $3,492 on a $1,900 balance, and she still has yet to pay off her balance . . . . This is what is happening to poor people.[154]

Senator Dodd introduced into the Record an article from the *Los Angeles Times*[155] that offered an historical account of the changes in credit card practices that have made "the poor" so vulnerable to bankruptcy:

> [Credit card] companies have found ways to make money even on cardholders who eventually go broke . . . . [U]nder the companies' new systems, many cardholders—especially low-income users—have ended up on a financial treadmill, required to make ever-larger monthly payments to keep their credit card balances from rising and to avoid insolvency. "Most of the credit cards that end up in bankruptcy proceedings have already made a profit for the companies that issued them," said Robert R. Weed, a Virginia bankruptcy lawyer and onetime aide to former Republican Speaker Newt Gingrich. "That's because people are paying so many fees that they've already paid more than was originally borrowed."[156]

While these issues were not dismissed as unimportant, they were characterized as not relevant to the *bankruptcy* debates. Thus, the practical reality was that they were, in fact, dismissed. Senator Sessions' comments exemplify the ways in

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[152] 151 CONG. REC. S2123 (daily ed. Mar. 7, 2005) (statement of Sen. Harkin).

[153] Kathleen Day & Caroline E. Mayer, *Credit Card Penalties, Fees Bury Debtors; Senate Nears Action on Bankruptcy Curbs*, WASH. POST, Mar. 6, 2005, at A01.

[154] 151 CONG. REC. S2123 (daily ed. Mar. 7, 2005) (statement of Sen. Harkin).

[155] 151 CONG. REC. S2070 (daily ed. Mar. 4, 2005) (statement of Sen. Dodd).

[156] Peter G. Gosselin, *Credit Card Firms Won as Users Lost; They Sought New Laws but Found Ways to Make Money Even on People Who Went Bankrupt*, L.A. TIMES, Mar. 4, 2005, at A1.

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which the contours of the debates were narrowed and strictly confined[157]:

> "Oh, you know." Well, we are going to complain about credit cards today. A couple of days ago, it was about health insurance, we need to reform health insurance. If we reform health insurance, they argue, we wouldn't have bankruptcy.
>
> If we don't fix credit cards and interest rates and truth in lending and banking issues—they are not part of the Judiciary Committee but part of the Banking Committee's financial lending portfolio of issues—we have to deal with them.
>
> We can't deal with bankruptcy. This is a bankruptcy bill.
>
> This bill would create a workable process for filing bankruptcy in Federal court, so fairness occurs based on the debt people have incurred. If you want to deal with the debts being incurred and giving more money, or have a welfare increase, whatever you want to do, let us propose that somewhere else to give people more money. But once they choose to file bankruptcy, let us create a system that is fair.[158]

By framing the debates in this way, many important and relevant topics were judged inappropriate. Issues relating to consumer protection, for example, which both statistics and anecdotal examples showed to have serious gender, race, and class implications, ultimately were characterized as outside of the jurisdiction of these bankruptcy debates.[159] Moreover, potential *causes* of bankruptcy—the reasons why, for example, over one million women are debtors in bankruptcy each year—were deemed to not really be about bankruptcy at all.

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[157] This confinement of the issues became especially apparent in the final push to pass this legislation in the spring of 2005—when any and all efforts that might cause yet another failure in passage were dismissed as against the greater good of the overall reform. On the Senate floor, all Democratic-sponsored amendments were rejected except one. *See* ROM, *supra* note 132. The one exception was Senator Durbin's Amendment No. 112 which protected disabled veterans from certain provisions of the means test under certain circumstances. *See id.*

[158] 151 CONG. REC. S2077 (daily ed. Mar. 4, 2005) (statement of Sen. Sessions).

[159] Senator Dayton, who proposed an amendment to "limit the maximum annual interest rate that could be charged to any consumer by any creditor to 30 percent," was one of those to express much frustration about the dismissal of issues relating to consumer protection: "[T]his legislation is entitled 'The Bankruptcy Abuse Prevention and Consumer Protection Act.' Unfortunately, there is actually very little consumer protection in it." 151 CONG. REC. S1981 (daily ed. Mar. 3, 2005) (statement of Sen. Dayton).

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2. Raising the Minimum Wage

An examination of the proposal to increase the minimum wage as part of the bankruptcy reform package also highlights how gender, race, and class affected the terms of the bankruptcy debates in connection with bankruptcy filers.[160] Just as proponents of the bankruptcy legislation had emphasized that bankruptcy reform had been a long eight years in the making, Senator Kennedy stressed that "we have not had an opportunity to increase the minimum wage for some 8 years."[161]

Senator Kennedy specifically highlighted issues of gender, race, and class in his opening statement on this amendment:

> These individuals that work at the minimum wage are hard-working individuals, men and women of great pride—primarily women, and women with children, and in many instances men and women of color . . . . People can ask, why is this relevant to the bankruptcy bill? In fact, a third of all bankruptcies take place from people who have income below the poverty level.[162]

His explanation emphasizes why raising the minimum wage should be a "women's issue," however, his phrasing again suggests that arguments on behalf of "women" are different from the arguments made on behalf of "women of color."[163] The substance of his comments, however, reflects why this issue should be of importance to a revised economic agenda that is concerned about addressing systemic causes of poverty and

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[160] Senator Kennedy proposed an amendment that would raise the minimum wage to $7.25 in three steps: 70 cents 60 days after enactment, 70 cents a year later, and 70 cents a year after that. *See* 151 CONG. REC. S2114 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy). Senators Lieberman, Durbin, Sarbanes, and Harkin were added as co-sponsors of the amendment. *See* 151 CONG. REC. S2116 (daily ed. Mar. 7, 2005).

[161] 151 CONG. REC. S2113 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy).

[162] *Id.*

[163] For other examples of treating "women's issues" as separate from issues of race and class in the context of the minimum wage discussions, see, for example, 151 CONG. REC. S2116 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy) ("Raising the minimum wage is critical to preventing the economic free-fall that often leads to bankruptcy. Amending the bankruptcy bill to increase the minimum wage will help many people this so-called reform is likely to hurt; low-income families, minorities and women."); 151 CONG. REC. S2132 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy) ("It is a women's issue. It is a children's issue because a third of those women have children. It is a children's and a women's issue—and a family issue. It is a civil rights issue because so many of the men and women who receive the minimum wage are men and women of color. And most of all, it is a fairness issue.").

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financial insecurity.[164] This is an area where a different image of "woman" is presented, one who is economically insecure for reasons other than a "deadbeat dad." This woman is not justly compensated for her work.[165] Moreover, Senator Kennedy presents statistics to demonstrate the racial impacts of such a low minimum wage.[166] Finally, this is another place where the fact that bankruptcy really is about "the poor" surfaces. An intersectional perspective, one that insists on examining underlying power dynamics, foregrounds the moves that were made to take this issue off the table.

Specifically, Senator Santorum argued that the minimum wage was much more appropriate in the discussions of welfare reform:

> I was hoping the Senator from Massachusetts would not offer his amendment and would allow this amendment to the minimum wage laws to be offered at a different time. I think we are marking up the welfare reform bill this week. It is an extension of the 1997 act. It is an appropriate place, in my opinion. We are talking about welfare-to-work, and we are talking about helping low-income individuals

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[164] It is beyond the scope of this Article to examine the substantive arguments for and against raising the minimum wage. For purposes of this Article, it is sufficient to note that it is an economic issue relevant to women, and that its consideration should be attended to as a "women's issue." For arguments against the implementation of the minimum wage, see, for example, 151 CONG. REC. S2116 (daily ed. Mar. 7, 2005) (statement of Sen. Sununu) ("When the minimum wage is raised, workers are priced out of the market."); 151 CONG. REC. S2118 (daily ed. Mar. 7, 2005) (statement of Sen. Santorum) ("So this blunt instrument of the minimum wage helps folks who are not the point of what a minimum wage is all about. When people come out here and say they need the minimum wage, they don't talk about the son of the wealthy businessman as the point. They talk about this mom. Increasing the minimum wage, yes, helps everyone—if you want to say 'helps.' Obviously, it will hurt many because they will not be able to keep their job at this high rate of pay, for the maybe low skills that the employee may bring to the business."). Senator Santorum offered a different minimum wage bill that offered a lower increase ($1.10), one that he argued was more balanced and "makes a lot more sense, to help those in need more directly, more surgically, than the blunt instrument of the Senator from Massachusetts . . . ." *Id.*

[165] 151 CONG. REC. S2132 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy) ("This issue [the minimum wage] is about women working in our society, because a majority of those who will benefit from this minimum wage increase are women."); 151 CONG. REC. S2116 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy) ("Sixty-one percent of those who will benefit from the minimum wage increase are women and one-third of those women are mothers."); 151 CONG. REC. S2123 (daily ed. Mar. 7, 2005) (statement of Sen. Harkin) ("We have heard in the past that it is mostly teenagers and part-time workers who are working for the minimum wage. That is not the case. The facts are, 35 percent of those earning the minimum wage are the family's sole breadwinners, 61 percent are women, and almost a third of those women are raising children.").

[166] 151 CONG. REC. S2120 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy) ("The greatest impact of raising the minimum wage is going to be lifting up Hispanics and African American workers. That is what the statistics demonstrate.").

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> transition into the workplace and providing them with a quality of life that is family sustaining.[167]

In other words, Senator Santorum's comment suggests that the minimum wage really is about different people than those who are the focus of the bankruptcy bill. Moreover, issues of gender, race, and class come into play and suggest that addressing the economic insecurity of those "other" people will require a different conversation. Specifically, as Senator Santorum articulates, different solutions will be appropriate in that context:

> There are lots of things that work [to get people out of poverty]. One of them is work. Another is marriage. We are going to have an opportunity on the floor of the Senate, when the welfare bill comes up, to talk about how we shift Government policy away from, at best—I think it is "at best"—neutrality toward marriage, how we shift Government policy when it comes to interacting with families and being neutral with respect to marriage. See what the huge impact is on the poor, the huge impact on poor communities and poor children, when moms and dads are helped to stay together in marriage and, more importantly, when they are introduced to the concept because many women and, unfortunately, men choose not to marry when children are born out of wedlock. [168]

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[167] 151 CONG. REC. S2119 (daily ed. Mar. 7, 2005) (statement of Sen. Santorum).

[168] 151 CONG. REC. S2122 (daily ed. Mar. 7, 2005) (statement of Sen. Santorum). This proposed solution to poverty—married moms and dads—is, of course, unavailable to millions of Americans in same-sex partnerships. The federal Defense of Marriage Act ("DoMA") and many state laws and constitutions specifically allow only heterosexual marriage. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C (2000). Some thirty-seven states have passed legislation similar to the federal DoMA. See http://www.religioustolerance.org/hom_marr.htm for a list of states. *See, e.g.*, ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (1996); ARIZ. REV STAT. § 25-901 (1998); ARK. CODE ANN. § 9-11-109 (1997); COLO. REV. STAT. § 14-2-104 (2000); FLA. STAT. ANN. § 741.212 (1997); GA. CODE ANN. § 19-3-31 (1996). In addition to being prohibited from participating in this marriage "solution," those in same-sex partnerships are similarly precluded from taking advantage of aspects of bankruptcy protection. *See, e.g.*, *In re* Allen, 186 B.R. 769 (Bankr. N.D. Ga. 1995) (holding that same-sex partners are not "spouses" for the purposes of the Bankruptcy Code because they are not legally married and are therefore not permitted to file a joint petition). The 2005 Bankruptcy Act does not address the criticisms of bankruptcy law that have arisen vis-à-vis DoMA. *See* A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69 (1998) (arguing that Congress should amend bankruptcy laws to allow for the awarding of benefits to those in "economic units," whether married or unmarried); *see also* Elizabeth Fella, Comment, *Playing Catch Up: Changing the Bankruptcy Code to Accommodate America's Growing Number of Non-Traditional Couples*, 37 ARIZ. ST. L. J. 681 (2005) (arguing that either eliminating the marriage requirement for joint filing or allowing for a partnership petition would

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At this moment in the bankruptcy debates, when the issue of economic security comes up in the context of welfare and "the poor," a very different image of the single mom is presented. She is no longer the innocent victim of a deadbeat dad who has been the quintessential image of un-American irresponsibility in the context of bankruptcy reform. Now, because we are talking about welfare moms, issues of race and class come into play and it appears that, more than anything—including a living wage—these women need men to head their families.[169]

The discussion of the minimum wage is a place where there were "fissures" in representations, both of the single mother and the deadbeat dad. These ideological breaks, however, are never highlighted or examined because *connections* between economic security in the bankruptcy and welfare contexts are never part of the conversation. This is a place where an intersectional analysis makes clear that different people are treated differently—because issues of gender, race, and class matter. Ultimately, there was no increase in the minimum wage made in connection with the bankruptcy reform legislation and it is unclear when this issue will be up for consideration again.[170]

This, of course, is another reflection of power—what issues are given legislative attention and priority. In discussing bankruptcy as a system that helps to maintain current power relationships, Korobkin argues that the availability of a fresh start for middle-class debtors has far-reaching political implications:

> The existence of the discharge keeps many relatively powerful persons—with educations and in occupations typical of the middle-class—from joining the political constituency of the poor. In this way, the availability of a bankruptcy discharge indirectly contributes to the current political situation, in which the day-to-day concerns of

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rightly take DoMA out of bankruptcy law and would more closely follow Congressional intent regarding both debtor and creditor protection).

[169] 151 CONG. REC. S2123 (daily ed. Mar. 7, 2005) (statement of Sen. Santorum) ("This bill [the amendment], in my opinion, belongs on welfare legislation, requiring work, more work, which is what is going to be required in this bill, as well as some things to bring fathers back into the home with the Father Initiative that Senator Bayh and Senator Domenici and I have been pushing for several years, as well as the marriage initiative that the President talked about.").

[170] Senator Kennedy's minimum wage amendment (Amendment No. 44) failed to pass on a vote of 46 to 49. *See* ROM, *supra* note 132, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP00044:. Senator Santorum's competing minimum wage amendment (Amendment No. 128) also failed to pass on a vote of 38 to 61. *Id.* at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP00128:.

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> the middle class often receive more attention than the basic needs of the long-term poor.[171]

The eight-year congressional attention span on the issue of bankruptcy reform, in light of, for example, the difficulty in finding a forum to fully debate the minimum wage,[172] supports Korobkin's observation. During the debates on bankruptcy reform in 2001, Senator Kennedy made the following comment:

> Those who will benefit [from the reform] are the credit card industry and the banks, make no mistake about it. That is enormously interesting to me, as someone who is the prime sponsor of the minimum wage. We can find time for consideration of the bankruptcy bill; yet, we do not have time to look at an increase in the minimum wage for hard-working Americans. We cannot find time to schedule that, but we can find time to consider legislation that is going to benefit some of the wealthiest and most powerful companies and corporations in America. Make no mistake about it, that is what this legislation is about.[173]

Again in 2005, much was made about the high priority that was placed on passage of the bankruptcy legislation, the "second highest priority in this session."[174] An intersectional perspective spotlights the significance of the legislative agenda. It pays attention to when, what, and why "women's issues" are part of the conversation.

An analysis of these bankruptcy debates makes clear that a certain image of "woman" was at play in determining who was and was not deserving of protection and in what form

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[171] Korobkin, *supra* note 85, at 2157.

[172] In these debates, Senator Kennedy references his attempt to include an amendment to raise the minimum wage in connection with various other issues:

> [W]hen I offered this legislation even on the welfare bill, which my friend and colleague from Pennsylvania [Senator Santorum] says is where it belongs, the legislation was pulled last year, rather than having a debate and vote on an increase in the minimum wage. I offered it on the State Department reauthorization because the other side—the Republican leadership—would not give us an opportunity or a vehicle on which to consider this legislation, or by itself, so it was necessary to try to amend existing legislation. They said, oh, no, and they pulled that legislation. When I offered it last year on the class action bill, they pulled the class action bill because they did not want to vote on an increase in the minimum wage.

151 CONG. REC. S2114 (daily ed. Mar. 7, 2005) (statement of Sen. Kennedy).

[173] 147 CONG. REC. S1801 (daily ed. Mar. 5, 2001) (statement of Sen. Kennedy).

[174] 151 CONG. REC. S1823 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin). *See also* Jennifer Brooks, *Congress Again Moves to Toughen Bankruptcy Laws*, GANNETT NEWS SERVICE, Mar. 4, 2005 ("President Bush has identified the bankruptcy bill as one of his top legislative priorities, and he's backed by stronger Republican majorities in Congress.").

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that protection would be available. The ideal representation of women that Poovey identified as such a dominant ideological force in the nineteenth century is still very much with us today—and this ideal does not serve to improve the financial security of any women.

Such an ideal supports an economic dependence that may, for example, compel women to stay in relationships that, for reasons such as abuse, should not be maintained.[175] It leaves women vulnerable to divorce and family laws that do not take into account the value of the contributions they have made to the family unit when it breaks apart.[176] Such an image means that issues specific to the financial wherewithal of women who threaten dominant sets of beliefs about the American middle-class family simply are not part of the discussion. As the discussions of the applicability of the means test and the minimum wage amendment make clear, it is difficult to get any discussion at all of those issues that may be most important to women who, for a wide variety of reasons, do not fit the ideological "ideal."

Fifteen years ago, Angela Harris identified the need for feminist theory and work to "move beyond essentialism and

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[175] The patriarchal family model has been sharply criticized by domestic violence survivors and their advocates in the context of the marriage promotion initiatives that have been proposed in connection with TANF reauthorization. As Sarah Olsen reports:

> Domestic violence survivors say their abuse was often a barrier to work, and many reported being harassed or abused while at work. Most survivors needed welfare to escape the relationship and the violence. Any policy that provides incentives for women to become and stay married is in effect coercing poor women into marriage. Many women on welfare . . . say that their marriages, rather than helping them out of poverty, set up overwhelming barriers to building their own autonomous and productive lives.

Sarah Olson, *Marriage Promotion, Reproductive Injustice, and the War Against Poor Women of Color; Healthy Marriage Initiative*, DOLLARS & SENSE, Jan. 1, 2005, at 14.

[176] As Joan Williams explains, based on her in-depth study of the ideal-worker norm, market work, and family entitlements:

> Although the impoverishment of women upon divorce is a well-known phenomenon, commentators rarely link it with domesticity's system of providing for children's care by marginalizing their caregivers. Mothers marry, marginalize, and then divorce in a system that typically defines women's and children's postdivorce entitlements in terms of their basic "needs," while men's entitlements reflect the assumption (derived from domesticity) that they "own" their ideal-worker wage. This double application of the ideal-worker norm, first in market work, then in family entitlements, leaves roughly 40 percent of divorced mothers in poverty.

WILLIAMS, *supra* note 97, at 3.

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toward multiple consciousness as feminist and jurisprudential method."[177] This shift, she argued, would mean that "feminism will change from being only about 'women as women' . . . to being about all kinds of oppression based on seemingly inherent and unalterable characteristics. We need not wait for a unified theory of oppression; that theory can be feminism."[178] Harris is clear, however, that for many reasons, including political ones, it is necessary to categorize.[179] Raising awareness of the importance to women of bankruptcy and other economic issues—making them "women's issues"—can have positive, real-life material effects. Harris emphasizes, however, the importance of making any categories "explicitly tentative, relational, and unstable," and that it is most important to do so "in a discipline like law, where abstraction and 'frozen' categories are the norm."[180] Thus, the idea of bankruptcy as a "women's issue" can itself be a fissure—"opening up" the interconnections among people and systems that must be explored in addressing financial issues that are important to women.

With the spotlight that the high-profile bankruptcy reform process has shone on key economic issues for women, there is an opportunity not to allow the "women" who are deserving of financial security to be read only as a certain unreal image of women. This is the time to write over the old

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[177] Harris, *supra* note 24, at 608.

[178] *Id.* at 612.

[179] *Id.* at 586.

[180] *Id. See also* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L. J. 1757 (2003) (reviewing the collection of critical race theory articles included in *Crossroads, Directions, and a New Critical Race Theory*, edited by Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris). In discussing Catharine MacKinnon's response to Harris's anti-essentialist critique of feminism, Carbado & Gulati write:

> Undergirding CRT's critique of feminism is an empirical claim that "women's experiences" in feminism have most often meant *white* women's experiences. CRT's anti-essentialist critique is not, then, that the category "women" necessarily lacks the representational capacity to capture the experiences of all women. (Thus, few critical race theorists would argue that it is necessarily problematic to structure antipatriarchal intellectual or political work around the category "women.") Instead, it is that an unmodified articulation of the category "women"—the conceptualization of women as women—has historically peripheralized the social realities of women *of color.*

Id. at 1776 (discussing Catharine A. MacKinnon, *Keeping It Real: On Anti-"Essentialism,"* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71 (Francisco Valdes et al. eds., 2002)).

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script and to consider more expansive ways of thinking about and addressing financial health and security in America.

IV. MOVING TOWARD FINANCIAL WELL-BEING

In moving to focus more on bankruptcy and commercial law issues as "women's issues," it is important to be aware of the pervasive ideologies that shape the development of these discussions. Approaching these topics through an anti-essentialist critical lens and focusing on intersectionalities should enable us to see more clearly the fissures in these ideologies—those places where governing norms are under construction but also contested—and then to shift the perspective.

As this Article has shown, one of the sound bites that had significant political purchase for both advocates and opponents of the reform legislation was that women needed to be protected. The intersectional analysis performed in Part III brought to the forefront questions such as "which women?" and "in what circumstances?" But a reconstructive critical analysis, one that aspires toward real change, also brings to the table another question—"protected from what?"[181]

In the context of the larger ideological purpose of bankruptcy reform, it seems that the best answer to that question is "from irresponsibility": women should be protected from irresponsibility. When the image of the woman to be protected resembles the Poovey model—as she did in the debates—then the irresponsible one is the "deadbeat dad" who is not providing financial support to his family. However, a critical analysis that deconstructs that image of woman and reconstructs a broadly imagined coalition of women with multiple shared and different experiences[182] calls attention to other sources of irresponsibility that have led to bankruptcy

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[181] As Martha Chamallas explains, feminism and critical race theory, as well as LGBTQ studies, are intellectual movements that are allied, not only in their theoretical approach, but also in their goal of changing the status quo. For these "schools of intellectual thought," which emphasize the connections between theory and practice, "[t]ransformation of the current political and social order appears to be an objective of even the most highly theoretical work." MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 135 (2d ed. 2003).

[182] *See* Roberts, *supra* note 65, at 224 (citing the important work of Harris, Crenshaw, Marlee Kline and Elizabeth Spelman and noting that the "racial critique of gender essentialism in feminist theory has inspired the ongoing reconstruction of a feminist jurisprudence that includes the historical, economic, and social diversity of women's experience").

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being such a "women's issue." In keeping with feminist and critical race theories' emphasis on putting theory into practice, this Article will conclude by considering what concerns might be included on the reform agenda of a broad-based, diverse coalition formed with the goal of moving toward women's financial well-being.[183] The following sections include specific ideas about potential agenda items that have arisen in connection with the bankruptcy debates. In particular they focus on areas of irresponsibility that need to be addressed, as well as more general thoughts about reshaping the terms of the debates on women and economic security.

A. Keeping the Spotlight: Shifting the Focus

One major source of "irresponsibility" that was identified in the bankruptcy controversy was the credit card industry. As the various bills were debated, stalled, passed, and pocket vetoed over eight years, the congressional actions were accompanied by high-profile articles in major newspapers and magazines. Several highlighted abuses in the credit card industry.[184] In the final days of debate before passage of the 2005 Bankruptcy Act in the Senate, much concern was expressed about the need for increased consumer protections and several amendments were proposed to regulate the credit

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[183] Crenshaw has suggested that the identity categories in which we find ourselves are "potential coalitions waiting to be formed." Crenshaw, *Mapping the Margins*, *supra* note 26, at 1299. Such coalitions are only possible, however, if there is an "awareness of intersectionality" and a commitment to "acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics." *Id.* Such awareness and commitment would be crucial to the success of any diverse coalition that formed around the substantive goal of women's financial well-being.

[184] *See, e.g.*, Jonathan Alter, *A Bankrupt Way to Do Business*, NEWSWEEK, Apr. 25, 2005, at 29 ("The law was literally written by the credit-card industry, the same folks whose siren-song targeting of high-risk borrowers caused much of the bankruptcy problem in the first place . . . . History should remember the 109th as the Credit Card Congress."); Barlett & Steele, *supra* note 11, at 74 (contrasting two sides of the credit card story, "the talk" of the card issuers about sophisticated underwriting and "the reality" of customers being bombarded with solicitations that are an "invitation to endless debt"); Day & Mayer, *supra* note 153, at A01 ("Punitive charges—penalty fees and sharply higher interest rates after a payment is late—compound the problems of many financially strapped consumers, sometimes making it impossible for them to dig their way out of debt and pushing them into bankruptcy."); Patrick McGeehan, *Soaring Interest is Compounding Credit Card Woes for Millions*, N.Y. TIMES, Nov. 21, 2004, § 1, at 1 ("[L]egal teams crafted contracts of 12 or more single-spaced pages that gave the banks the leeway to change their terms whenever they wanted. A typical term sheet for a Visa card issued by Bank One . . . includes: 'We reserve the right to change the terms at any time for any reason.'").

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card industry. Senator Dayton, for example, offered an amendment that would limit consumer interest rates to 30%.[185] Senator Akaka proposed an amendment that would require credit card issuers to provide information on credit bills such as the specific costs that would be incurred if the cardholder made only minimum payments.[186] Senators Feinstein, Kyl, and Brownback co-sponsored an amendment that required certain disclosures on credit card statements, including a detailed minimum payment warning.[187] None of these amendments were included in the 2005 Bankruptcy Act.[188] However, promises were made that regulations of the credit card industry would be considered at a later time[189] and, indeed, the

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[185] 151 CONG. REC. S1979 (daily ed. Mar. 3, 2005). This amendment was voted down 74 to 24. *See* 151 CONG. REC. S1982 (daily ed. Mar. 3, 2005). Specifically with respect to this amendment (Amendment 31), Senator Shelby commented,

> I fear that his amendment will result in credit becoming less accessible to more Americans. Market forces are the best regulator of prices. As Chairman of the Banking Committee, which has jurisdiction over consumer credit and price controls, I must oppose this amendment and encourage my colleagues to do so. We are going to have some hearings on similar matters in the Banking Committee, and I hope Senator Dayton would work with us in that regard.

151 CONG. REC. S1979 (daily ed. Mar. 3, 2005) (statement of Sen. Shelby). Senator Sarbanes added, "It does not seem to me to be a wise or prudent course to consider what would, in effect, be a very major legislative step in the absence of appropriate consideration by the committee of jurisdiction; therefore, I intend to also oppose this amendment, primarily on those grounds." *Id.* (statement of Sen. Sarbanes).

[186] 151 CONG. REC. S1834 (daily ed. Mar. 1, 2005). The Akaka amendment (Amendment No. 15) was rejected on a vote of 40 to 59. *See* ROM, *supra* note 132, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP00015:. This amendment was also opposed on jurisdictional terms. *See, e.g.*, 151 CONG. REC. S1894 (daily ed. Mar. 2, 2005) (statement of Sen. Shelby) ("This amendment makes considerable changes to an area of law squarely within the jurisdiction of the Banking Committee which I chair, and I hope it will not be included in the bankruptcy bill. This is simply not a dispute about asserting the Banking Committee's jurisdiction which we have here. The Akaka amendment, if it were agreed to, would be a significant change to the Truth in Lending Act.").

[187] 151 CONG. REC. S1911-12 (daily ed. Mar. 2, 2005). This amendment was withdrawn. *See* ROM, *supra* note 132, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP00019:.

[188] The 2005 Bankruptcy Act does require credit card issuers to provide general information about the consequences of making only minimum payments and to include a toll free number that consumers can call to find out more specific information. *See* 2005 Bankruptcy Act, *supra* note 2, at § 1301 (amending § 127(b) of the Truth in Lending Act, 15 U.S.C. § 1637(b)). Senator Akaka has described these protections as "woefully inadequate." *Examining the Current Legal and Regulatory Requirements and Industry Practices for Credit Card Issuers with Respect to Consumer Disclosures and Marketing Efforts, Hearing Before the S. Comm. on Banking, Housing, and Urb. Affairs*, 109th Cong. (2005) [hereinafter 2005 Credit Card Hearing] (statement of Sen. Akaka).

[189] Specifically, in the bankruptcy debates, Senator Shelby noted:

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Senate Committee on Banking, Housing, and Urban Affairs did hold a hearing in May of 2005.[190]

Several pieces of legislation that would regulate various forms of irresponsibility on the part of the credit card industry were discussed at the hearing, including Senator Akaka's Credit Card Minimum Payment Warning Act of 2005,[191] Senator Feinstein's Credit Card Minimum Payment Notification Act,[192] and Senator Dodd's proposed Credit Card Accountability Responsibility and Disclosure Act of 2005, which regulates a wide array of credit card practices.[193] An early agenda item for a coalition of activists concerned about women's financial well-being would be to actively promote consumer protection proposals and to work to make certain that the legislative spotlight does not shift away from this important "women's issue."

Another key source of irresponsibility that was highlighted in the bankruptcy reform process was that of predatory lenders—in the home mortgage market, as well as with respect to payday loans and car title loans. Again, this

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> [T]hrough the course of the debate on the bankruptcy reform bill, it has become clear there are many Senators who have concerns about the numerous aspects of the credit card industry . . . . I want to indicate for the Record that I recognize these concerns and too note that I have had a longstanding interest in exploring these matters more deeply. Therefore, I am willing to commit to holding hearings in the Banking Committee later this year to examine the credit card industry and the need to reform credit card regulations.

151 CONG. REC. S2515 (daily ed. Mar. 11, 2005) (statement of Sen. Shelby). *See also id.* (statement of Sen. Sarbanes) ("I share your interest in holding hearings on the credit card industry and would hope that we might hear from all those Senators who have expressed an interest and may wish to testify before the committee.").

[190] 2005 Credit Card Hearing, *supra* note 188.

[191] S. 393, 109th Cong. (2005). This legislation closely tracks Senator Akaka's proposed amendment to the 2005 Bankruptcy Act that failed to pass. *See supra* note 186 and accompanying text.

[192] S. 1040, 109th Cong. (2005). This legislation closely tracks the amendment to the 2005 Bankruptcy Act that Senators Feinstein, Kyl and Brownback co-sponsored and then withdrew. *See supra* note 187 and accompanying text.

[193] S. 499, 109th Cong. (2005). Senator Dodd's Act includes proposals such as requiring credit card companies to give obligors advance notice of interest rate increases and notice of the right to cancel one's credit line prior to the effective date of increase, S. 499, 109th Cong. § 111 (2005); prohibiting credit card companies from penalizing obligors for making on-time payments, S. 499, 109th Cong. § 113 (2005); and obligating credit card companies to give additional notice concerning "teaser rates," S. 499, 109th Cong. § 211 (2005). This Act also affords protection to underage consumers. *See* S. 499, 109th Cong. § 411 (2005).

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was a hot topic in the media,[194] as well as in the congressional debates themselves. For example, in an attempt to hold these lenders responsible for their contributions to the increase in bankruptcy filings, Senator Durbin offered an amendment that would prohibit a predatory mortgage lender who had violated the Truth in Lending Act from pursuing its claim in bankruptcy.[195]

In advocating for his amendment, he cited testimony of a career employee in the predatory lending business who acknowledged "that unscrupulous lenders specifically market their loans to elderly widowed women, blue-collar workers, people who have not graduated with higher education, people on fixed incomes, non-English speaking, and people who have significant equity in their homes."[196] Senator Durbin also reported the conclusions of a study conducted by the Center For Responsible Lending that borrowers in minority communities are particularly at risk: "Hispanic Americans are two and a half times more likely than whites to receive a refinancing loan from one of these lenders. African Americans are more than four times more likely to be targeted."[197] While the Durbin amendment was not passed, there was some acknowledgment in the congressional debates that this was an issue requiring much more attention.[198] Policy discussions about approaches to curb the abuses of predatory lenders, with all of the gender, race, and class implications of such lending practices, would be greatly enriched by the contributions of a

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[194] *See, e.g.*, Barlett & Steele, *supra* note 11, at 72 (recounting stories from the "world of payday lending, where annual interest rates would make Mob loan sharks of an earlier era blush in embarrassment," and highlighting that "[t]he business flourishes in working-class neighborhoods where people run out of money before their next payday"); Michael Moss, *Erase Debt Now (Lose Your Home Later)*, N.Y. TIMES, Oct. 10, 2004, at 1 (telling the stories of people, including one disabled man who committed suicide, who refinanced their mortgages in the subprime market and lost their homes); Edward Robinson, *Preying on the Poor*, BLOOMBERG MARKETS, Nov. 23, 2004 (discussing payday lending practices, including annual interest rates as high as 780 percent, and those people most affected by them, including military personnel and single mothers).

[195] 151 CONG. REC. S1920 (daily ed. Mar. 2, 2005).

[196] 151 CONG. REC. S1921 (daily ed. Mar. 2, 2005).

[197] *Id.*

[198] The Durbin amendment (Amendment No. 38) failed on a vote of 40 to 58. *See* ROM, *supra* note 132, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP00038:. *See, e.g.*, 151 CONG. REC. S2471 (daily ed. Mar. 10, 2005) (statement of Sen. Akaka) ("It is low-income working families that will be hardest hit by this anti-consumer legislation. After passage of this legislation, we will need to take additional steps to prevent further exploitation of consumers from unscrupulous lenders and to improve relevant and useful information about credit to consumers.").

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coalition bringing women's multiple and diverse knowledge, perspectives, and experiences to the table.

Finally, with respect to women's economic security generally, it also is necessary to hold lawmakers accountable for any irresponsibility on their part. With so much vehement disagreement about the harms and benefits of the 2005 Bankruptcy Act, it is imperative to pay attention to the real material effects of this legislation. As the Act is implemented, it will be important to follow the trends and to critically analyze what any changes in the number of filings really signify. Just as the "success" of the TANF program is called into question by figures showing that there has been an increase in women's poverty level,[199] similarly any "successes" claimed under the 2005 Bankruptcy Act must be questioned with respect to their real-life significance.[200]

These are just a few specific suggestions of what might be important coalition agenda items in the immediate aftermath of the cultural controversy that was the bankruptcy reform process.

B. Speaking (Differently) About Women's Financial Well-Being

Anderson and Collins, in speaking of making a difference and bringing about change, offer the following insights: "Re-envisioning and exercising power to bring about social change requires a sense of purpose and a vision that encourages us to look beyond what already exists. We must learn to imagine what is possible."[201] In the spirit of imagining what is possible, a re-envisioned agenda to address the widespread economic insecurity in America would take a much

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[199] *See, e.g.*, Griff Witte, *Poverty Up as Welfare Enrollment Declines*, WASH. POST, Sept. 26, 2004, at A03.

[200] One aspect of the 2005 Bankruptcy Act that needs to be closely monitored by those concerned about women and women's issues concerns new certification requirements for debtors' attorneys. Pursuant to these new requirements, attorneys may be held liable for inaccuracies in the papers a debtor files in bankruptcy. *See* 11 U.S.C. § 707(b)(4)(C), (D) (2005). *See* Gardner, *supra* note 16 (quoting a Los Angeles bankruptcy trustee, "It's widely believed in the bankruptcy community that many attorneys who provide moderate-cost legal services will pull out because they can't afford to do the case for that amount of liability for the same price. It would not be surprising that women would be adversely affected by not being able to find affordable legal representation."). It will also be important to monitor whether there are any changes in the practices of legal aid attorneys who often, for example in cases of domestic violence, assist their clients in filing for bankruptcy.

[201] RACE, CLASS, AND GENDER, *supra* note 55, at 517.

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wider view. There were moments in the bankruptcy debates when the need to formulate long-term solutions to major societal issues came into the picture. Senator Reed, for example, emphasized the need to "prevent bankruptcy by targeting its causes. We should work to ensure adequate worker compensation, lower the high cost of heath care, improve financial education, and stem predatory lending."[202] An intersectional perspective—one capable not only of identifying fissures but also creating them with its own critique—would emphasize the importance of investigating how the societal axes of gender, race, and class contribute to widespread financial insecurity.

One initial step toward greater possibilities is to begin to change the terms of these debates—to self-consciously change the way we talk about these issues. A coalition concerned about women's financial issues, for example, might stop speaking about "protecting" people, with the concept of unequal power dynamics built into the word itself. Instead, the emphasis could be on achieving economic justice for all.[203] A commitment by this coalition to talk and think in terms of financial well-being[204] may suggest new questions, approaches, and possibilities that could contribute to a transformational process.[205]

A possible research agenda for such a coalition might include critically investigating the premises of and connections between "social safety nets" such as TANF and bankruptcy, looking at the effects of predatory lending practices on the health of individual borrowers, neighborhoods, and

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[202] 151 CONG. REC. S2467 (daily ed. Mar. 10, 2005) (statement of Sen. Reed).

[203] A new casebook by Emma Coleman Jordan and Angela P. Harris examines widespread identity-based economic inequalities. *See* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY, AND ECONOMICS (2005).

[204] The expansive term "financial well-being" brings into focus the broad implications, including health implications, of economic *in*justice. *See* Will Lester, *AP Poll: Half of Americans Worry About Debts, Many Worried "Most of the Time,"* AP ONLINE, Dec. 19, 2004 (citing the findings of an Associated Press poll that "[o]ne-half of Americans say they worry about the money they owe, and many say they worry most of the time about their overall debts"). The poll also revealed the gender, race, and class implications of these findings in that "[e]xperiencing the highest levels of stress from debts were people at their credit card spending limit; those who are unmarried and have children; those without jobs; and minorities." *Id.*

[205] In discussing ways to address the economic inequalities analyzed in their casebook, Jordan and Harris do not suggest "a fixed set of remedies." JORDAN & HARRIS, *supra* note 203, at 1013. Rather, they affirm a commitment to the "*process* of creative resistance." *Id.* (emphasis added).

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communities, and examining how domestic violence is very much an economic issue.

As these possibilities for a re-envisioned reform agenda suggest, and as critical feminist theory makes clear, solutions that will have material effects on women's lives will require resisting the "confining pressure"[206] of dominant ideological paradigms and thinking much more expansively about matters of financial well-being.

[206] FINEMAN, *supra* note 59, at 220.

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