A Fresh Start for a Women’s Economy: Beyond Punitive Consumer Bankruptcy

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A Fresh Start for a Women’s Economy: Beyond Punitive Consumer Bankruptcy

Emma Caterine†

There are times you have no choice . . . This is what I had to do in order to move on with my life . . . It’s not like I was trying to get away with something that was bad.1

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In 2002, with the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) imminently approaching passage into law, Elizabeth Warren

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made the case that bankruptcy was not simply an economic issue or even a consumer issue but also a women’s issue. She did so by using the data produced in her own Consumer Bankruptcy Project in 2001, which showed that women were the largest group in bankruptcy at 39.1 percent and the group growing most quickly at a rate of 800 percent in twenty years. Despite this data, Warren showed that within both the media coverage of the bankruptcy debate and Congress itself, little attention was being paid to bankruptcy as a women’s issue. Warren advocated strongly against female invisibility and called upon women’s advocates to create “a far more inclusive definition of a women’s issue . . . among women’s advocates.”

Fifteen years after Elizabeth Warren broke the economic justice glass ceiling, bankruptcy continues to be a women’s issue. The changes made by BAPCPA in 2005 only increased this phenomenon. Gendered consumption practices are an “abuse” of bankruptcy, but BAPCPA ignored the extent to which the American economy depends upon that consumption. Bankruptcy law’s disparate impact upon women cannot be considered in isolation from that economy. Bankruptcy exemplifies the need for a convergence between the feminist struggle for gender liberation and the struggle of working people for economic justice.

Debt forgiveness is not obviously condoned under a global capitalist system, where governments and media punish and stigmatize consumer debtors. Nevertheless, the Constitution and courts of the United States are charged with giving a “fresh start” to certain debtors who are unable to make their payments.

3. Id. at 27-28.
4. Id. at 38-55.
5. Id. at 56.
7. See Section III, page 17.
9. U.S. Constitution article I, section 8, clause 4 (Congress has the power to “establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”).
10. This common policy concern comes from trends seen in 19th century Supreme Court decisions. See, e.g. Traer v. Clews, 115 U.S. 528, 541 (1885) (“The policy of the bankrupt act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start”). In the 1980s it was narrowed to only being applicable to “honest debtors.” In re Hunter, 771 F.2d 1126, 1130 (8th Cir. 1985) (affirmed by Hadcock v. Myers (In re Hadcock), Bankruptcy No. 12-50034 Chapter 7, Adv. No. 12-5008, 7 (Bankruptcy Court D. South Dakota 2012). For a more in-depth look at the idea of a “fresh start,” see Lawrence Ponoroff, “Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity,” 88 American Bankruptcy Law Journal 353 (2014).
But in modern consumer bankruptcy, a “fresh start” can mean losing control of your life, as well as your family’s life. What counts as a “necessity” is determined by people who are more often interested in recovering revenue and reinforcing gender norms than ensuring basic human welfare.\textsuperscript{11}

As a whole, bankruptcy case law richly displays the intersection between economic exploitation and patriarchal oppression. This Article specifically focuses on bankruptcy provisions added or changed under BAPCPA for Chapter 7 bankruptcy: the presumption of abuse and safe harbor from that presumption, child support prioritization, financial counseling requirements for filing, and the increased limit on refiling for bankruptcy. Building on the work of Elizabeth Warren,\textsuperscript{12} Kristin B. Kalsem,\textsuperscript{13} and many others, this Article views the woman consumer in bankruptcy from macroeconomic, cultural, and legal perspectives. Rather than focusing on gender disparity and the loss of a middle class as Warren has done, this Article will show how normative ideas of gender are the cultural and material engine of consumption by examining how capitalism and patriarchy have shaped one another.\textsuperscript{14}

Section I builds the foundation of the analysis by laying out bankruptcy’s macroeconomic function and how it fits into the circumstances of the Great Recession. Section II provides cultural examples of how feminized consumer identity has taken shape alongside the emergence of the modern capitalist economy from the end of the nineteenth century to the present. Section III outlines how the “presumption of abuse” puts female consumers in the double bind of being pressured to fetishize feminine commodities versus being labeled a profligate. Section IV explores the “safe harbor” exception in the bankruptcy code from presumption of abuse and how women are less likely to have access to it. Section V challenges the alleged benefits of the child support prioritization for women. Section VI uncovers how the stated goal of consumer education incorporates punitive requirements that patronizingly “rescue” women from their own consumption behaviors, reinforcing the idea that reckless spending causes debt defaults. Section VII argues that limits on refiling are consequences of the gendered stigma against bankruptcy, and these consequences raise troubling implications of how harmful this provision is not only to women individually but

\textsuperscript{11} As the cases throughout will illustrate, a wide range of authority figures make determinations of what is a “necessity”—not just the creditors seeking to recover but also the financial counselors, former spouses, judges, lawyers, and US Trustees.


\textsuperscript{14} For an example of this theoretical perspective applied more broadly, see, e.g. Maria Mies, Patriarchy and Accumulation on a World Scale (Zed Books, 1986); Gita Sen & Caren Grown, Development, Crises, and Alternative Visions (Monthly Review Press, 1987).
to the stability of the economy itself. Section VIII concludes with proposed immediate reforms to BAPCPA that could reduce harm to women and questions whether bankruptcy itself is an impediment to, rather than a means of attaining, liberation from destitution.

I. Things Fall Apart

A. A Brief History of U.S. Bankruptcy

To understand and then remedy the gender disparity within consumer bankruptcy requires understanding bankruptcy as a legal tool for maintenance of the circuit of capital accumulation. In the process of circulation, capital becomes stalled in certain stages, thus disrupting the flow of commodities and consequently the economy itself. Bankruptcy is the means by which capitalism revives itself from periods of depression and recession, recycling dead capital to resurrect profitability. In other words, bankruptcy resolves debts that have gone into default, allowing the projected payments to be at least partially realized in distribution to the creditors. This resolution frees consumer income to be spent on new consumption, both of which allow the capital to be redeployed in the circuit of accumulation.

Both consumer advocates and economists across the political spectrum recognize this resuscitation of the circuit of accumulation by bankruptcy. The first bankruptcy system, as enacted by the Bankruptcy Act of 1800, was limited to merchants. Surprisingly, thirty-nine years before the first Married Women’s

15. Karl Marx writes about how:

the circuit [of capital] itself necessitates the fixation of capital for certain lengths of
time in its various phases. In each of its phases industrial capital is tied up with a
definite form: money-capital, productive capital, commodity-capital. It does not
acquire the form in which it may enter a new transformation phase until it has
performed the function corresponding to each particular form.
https://perma.cc/6QR8-48Y3. But he goes on to note that commodities are particularly
susceptible to such fixation as they:

[serve] only to transform it, first into money, and from money into a number of other
commodities serving private consumption . . . if this circuit begins to stagnate or is
otherwise disturbed, not only the consumption of [commodities] restricted or entirely
arrested, but also the disposal of that series of commodities which serve to replace
[the commodities produced earlier].
Id., Chapter II, https://perma.cc/BF3F-3BJQ.

155 (May 1981).

17. Id.

https://perma.cc/4U3J-2D28; Skylar Brooks et al., Identifying and Resolving Inter-Creditor
and Debtor-Creditor Equity Issues in Sovereign Debt Restructuring, 53 CIGI Policy Brief 8
Robert Reich Doesn’t Know About Economics,” Forbes (28 Sept. 2015),
https://perma.cc/6GZD-BB9E.

Property Act, the 1800 Bankruptcy Act allowed women merchants to be debtors in bankruptcy. While they were given access that their consumer counterparts were not privy to, there were certain characteristics that set these women apart from other debtors in bankruptcy. First, the lion’s share were widows, often inheriting the businesses (and consequently, the debts) of their late husbands. Second, and most relevant to this Article, women were stigmatized for their debt, like Angelina Brown who explained her financial situation before the court to try to avoid punitive judgment (a very real fear when other women were being incarcerated for their debts):

I am a Boarding House Keeper. I keep house at 37 Broadway in the City of New York. I have kept house there for two years last May . . . I have no plate [sic], no silver spoons. I have a plated sugar bowl. I have no jewelry, no watch . . . I have lost many in that house and have not been able to meet my expenses. I cannot tell how I am doing now. I get along the best way I can. I am not making money, I am managing to live . . . I have no real estate . . . I have a mother living. She resides with me . . . She is now with me on account of sickness.

Bankruptcy, along with immigration, unemployment, and war, has served as a counter tendency to the rate of profit’s tendency to fall. As the economy goes through cycles of depression and recession, it is these counter tendencies that resurrect the profitability of firms and allow the economy to “recover.” That is why it was creditors, not consumer debtors, who advocated for the modern United States bankruptcy system during the fallout of the Long Depression (also known as the Panic of 1873). The modern system of bankruptcy was crafted precisely

Bankruptcy Institute Law Review 5, 14 (Spring 1995).
22. Id. at 16.
23. See id. at 35-36.
24. Id. at 30.
25. “[T]he ratio of constant capital over variable capital will rise over time. This ratio is called the organic composition of capital (C/V). If this rises over time and the rate of surplus value (S/V) is constant, the rate of profit must fall . . . As the rate of profit falls, at a certain point this causes a fall in total profit, engendering a slump in investment and the economy as a whole. The slump eventually reduces the cost of constant capital of the means of production (through bankruptcies and write-offs of equipment) and variable capital (through unemployment, migration, etc.).” Michael Roberts, The Long Depression, 13-14 (Haymarket Books, 2016) (emphasis removed).
26. See id. at 43, Figure 2.4, “US Organic Composition of Capital (OCC) Ratio and Rate of Profit (ROP) Ratio.”
27. Charles Jordan Tabb, “A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998,” 15 Bankruptcy Developments Journal 343, 357 (Spring 1999). I refer to this period as the Long Depression, rather than its common description by orthodox US economists as a panic and recession because it (1) was international; (2) was debilitating over a period of several years; (3) created a “square root sign” when measuring real world
with this objective in mind.

B. The US Bankruptcy Code and the Enormity of Modern Consumer Debt

The US Bankruptcy Code is divided into nine chapters: Chapters 1, 3, and 5 contain general definitions and rules of bankruptcy, and Chapters 7, 9, 11, 12, 13, and 15 provide specific forms of debtor-relief. Chapter 7 provides the means of liquidation of non-exempt assets for the discharge of individual debtors: it takes what the debtor has, distributes that among the creditors, and frees the debtor from their obligations. Conversely, Chapter 13 provides for the “Adjustment of Debts of an Individual With Regular Income.” The debtor proposes a payment plan that takes from their regular income and, upon completion, the court discharges their debts. Chapter 7 and 13 are the primary means of consumer bankruptcy, whereas Chapter 11 reorganization is the primary means of corporate bankruptcy.

The influence of creditors on the Code is also evident in how the Code is more accommodating of corporate debtors than individuals. Unlike either Chapter 7 or 13, Chapter 11 encourages filing by providing the debtor with “certain attractive features”—a presumption that the business will continue to operate; that the debtor, rather than an appointed trustee, will remain in possession; and that the debtor will exercise considerable control over plan negotiations. BAPCPA expanded the number of reasons why a Chapter 11 case could be converted or dismissed, but this was in conjunction with imposing additional duties on the trustees and unsecured creditors. As a part of these additional obligations, the Act mandated a study to see how Chapter 11 could be altered to be more favorable to small businesses, while imposing the worst restrictions on individual Chapter 11 debtors.

One could assume that the relative advantages of firm bankruptcy resulted from a greater economic need for corporations, as opposed to consumers, to not be encumbered by debts. But, leaving ethical and gendered implications aside, the macroeconomic reality of consumption and debt is not in sync with modern bankruptcy. First, it is important to recognize how much of the gross domestic


28. Collier on Bankruptcy, Volume 1, 1.01[2][a], 1.01 n.9 (eds. Alan N. Resnick & Henry J. Sommer, LexisNexis, 16th edition, 2017) [hereinafter Collier (16th ed.).]

29. Collier, Volume 6, (16th ed.) at 700.01.

30. Collier, Volume 8, (16th ed.) at 1300.01.

31. Id.

32. Collier, Volume 7, (16th ed.) at 1100.01.

33. Id.

product of the United States is made up of personal consumption (68.7 percent of GDP as of Q3 2016):

Also note that growth has slowed since 2009, and how this correlates with the movement of nonmortgage debt, as seen below:

Overall household debt is still only at 3.1 percent below its 2008 peak because of the decrease of mortgage debt. Despite this steady increase from 2004 to 2016 of more than one trillion dollars in total nonmortgage debt, the number of consumer bankruptcies has decreased:

C. Bankruptcy as a Punitive Tool

Beginning in the 1990s, major legislation was shaped by a bipartisan interest in neoliberal austerity. Though bankruptcy reform failed to pass during the Clinton administration, this ideology was manifested in criminal law reform that “created dozens of new federal capital crimes, mandated life sentences for some three-time offenders, and authorized more than sixteen billion dollars for state prison grants and the expansion of police forces.” Neoliberal ideology also shaped the Aid to Families With Dependent Children (“AFWDC”) legislation that “replaced the federal safety net with a block grant to the states, imposed a five-year lifetime limit on welfare assistance, added work requirements, barred undocumented immigrants from licensed professions, and slashed overall public welfare funding by $54 billion.” Creating the “highest rate of incarceration in the world” allowed the Clinton administration to obscure the true rate of joblessness for young, non-college-educated Black men (42 percent) with a large


40. Michelle Alexander, “Why Clinton Doesn’t Deserve the Black Vote,” The Nation (10 Feb. 2016), https://perma.cc/M9KK-EVY7. Another author blames bankruptcy reform not being passed under Clinton’s presidenc on the failure to curb homestead exceptions and resistance against the abortion amendment (the latter is discussed briefly in Section V of this Article), as well as a general attack of the legislation being “antifamily,” provoking President Clinton to veto the bill given to him in fall 2000. See David A. Skeel, Jr., Debt’s Dominion: A History of Bankruptcy Law in America, 209-10 (Princeton University Press 2001).

41. Alexander, see note 40.
amount of those unemployed “out of sight, out of mind, and no longer counted in poverty and unemployment statistics.”

Several years later, the Bush administration provided an opportunity to pass a bankruptcy bill that protected consumers in name only. Just as the democrats used mass incarceration and welfare reform to suppress the impoverished and disproportionately Black and Native American underclass, the republicans used bankruptcy to suppress the working class. Bankruptcy reform targeted the working class as directly as increased incarceration targeted young, college-educated Black men. In 2005, BAPCPA reconfigured consumer bankruptcy as a tool of punishment rather than a means of recycling capital stagnated in defaulted debt.

One distinction between neoconservatism and neoliberalism lies in their approaches to gender. The neoconservative utilizes the state to construct and reinforce gender roles; after all, Ronald Reagan coined the infamous “welfare queen.” The neoliberal only retains gender roles to the extent that they are profitable; Clinton “codified [the welfare queen] by shaping policy choices around the prevention of willful idleness and criminal behavior.” In keeping with this trend, BAPCPA contained explicitly gendered provisions that were not necessarily aligned with market values (see Section V on prioritization of child support).

The restriction of bankruptcy by BAPCPA is just one in a constellation of harms flowing from economic changes in the early twenty-first century. Businesses responded to economic downturn by looking for ways to cut the costs of production and regain profitability: wages at home stagnated while social

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42. Alexander, see note 40.
43. See Ahmed A. White, “Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society,” 37 Arizona State Law Journal 759 (Fall 2005). I use the term “underclass” here because criminal justice and welfare reform targeted those who were employed in illegal activities, underemployed, and unemployed and because unlike the term lumpenproletariat, “underclass” has generally been referred to as having the “capacity to disrupt the sphere of consumption. . . [not] to disrupt production through their control over labor.” Erik Olin Wright, Interrogating Inequality: Essays on Class Analysis, Socialism and Marxism, 49 (Verso 1994).
44. Of course, bankruptcy was only one of many issues that the Republicans attacked. For a comprehensive look at how neoconservative ideology affected education, see Anita F. Hill, “A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality,” 12 Michigan Journal of Race and Law 107 (2006). “[No Child Left Behind] assumes that standardized testing is the best way to measure achievement and that improving scores through sanctions will improve educational outcomes, particularly for minority, poor and disabled students.” Id. at 143 (emphasis added).
47. Id. See also Donna J. King, “The War on Women’s Fundamental Rights: Connecting U.S. Supreme Court Originalism to Rightwing, Conservative Extremism in American Politics,” 19 Cardozo Journal of Law & Gender 99 (2012).
48. From 2007–2015, the mean household income of the bottom 20 percent has increased 7.8 percent whereas the top 20 percent has increased 20.5 percent. United States Census Bureau,
media and monetization of the public commons created relentless marketing of commodities. There was a proliferation of advertising that targeted women for their tendency to share this information with their family and friends. That “sharing” generated profits for social media corporations. Specifically, marketers seamlessly integrated native advertising into entertainment consumption and social relationships. Native advertising is a form of inconspicuous product placement that aims to tap into subconscious drivers of consumer behavior. Rather than being directly told to buy Brand A laundry detergent, the consumer sees a character in a movie or in the background of a BuzzFeed listicle using “Brand A” laundry detergent. Advertisers attempt to smooth over consumer resistance to being told to buy things they do not really need.

Retailers can speed up the replacement cycle by producing low-quality goods that disintegrate faster and require consumers to replace goods more often. For example, companies cut production costs by making lower-quality commodities. Consumers may replace their old clothes or iPhones before they physically fall apart. Often, these commodities are purchased on credit.

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51. Max Byer, “Women Purchase More Than 80 percent of All Products and Services,” Business 2 Community (31 May 2012), https://perma.cc/43QL-37MT. There is a lot to be said about the lack of scientific studies to corroborate these simple polls conducted by marketing firms, and their numbers tend to vary widely. However, there is a wide consensus that women are both the predominant consumer and advocate of consumption. And regardless of whether this consensus is true, business publications’ belief in that notion shapes marketing practices.


54. BuzzFeed is specified in particular because of their role in pioneering this innovation in marketing: In 2014, they earned over $5 million in profit, which is substantially generated from native advertising. See Matt Weinberger, “BuzzFeed pays Facebook millions of dollars to promote its clients’ ads,” Business Insider (12 Aug. 2015), https://perma.cc/R26U-452B.

55. A dissonance that advertisers recognize and study extensively in order to subvert. See, e.g. Hairong Li et al., “Measuring the Intrusiveness of Advertisements: Scale Development and Validation,” 31 Journal of Advertising 37 (Summer 2002).


58. See Jason Steele, Payment method statistics, CreditCards.com (28 July 2015), https://perma.cc/DB4J-NNHX (finding that 40 percent of surveyed consumers chose credit card as their preferred form of payment).
Stagnating wages, constant encouragement to buy commodities, a privatized healthcare system, and easy access to credit created a perfect storm for consumer bankruptcy. However, the anti-consumer mantra of BAPCPA carries on, even as disdain for banks and corporations reaches its highest point since 2007. The presumption, both legally and socially, is that the consumer in bankruptcy is a product of unscrupulous hedonism funded by credit cards. The social notions of class and gender that developed in the United States both informing, and reacting to, the rise of modern capitalism, explain the perseverance of the stigma of debtors as hedonistic spenders.

II. GENDERED DREAMS OF CONSUMPTION

Throughout the history of the United States, two contradictory conceptions of consumerism have pervaded cultural representations of women. One narrative condemns and punishes the feminized consumer; the other celebrates women who fetishize commodities. To establish a chronological range, I will analyze four works: the novel *McTeague* by Frank Norris (1899); the television show *Queen for a Day* (1956); the movie *Pretty Woman* (1990); and the social media platform Pinterest (2010-present).

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60. Warren, see note 2, at 54 (“If the government provided health insurance for children, for example, hundreds of thousands of families would never file for bankruptcy.”).


63. See 11 U.S.C. § 707(b)(2) (“[T]he court shall presume abuse exists . . .”).

64. See American Consumer Credit Counseling, “Feelings About Bankruptcy Poll: Results of a January 2016 poll by ACCC” (Jan. 2016), https://perma.cc/8HL8-7N7R (finding that 47 percent of respondents would feel ashamed to file for bankruptcy and a similar share would not tell people that they had to file for bankruptcy).

65. Further, this stigma can mask gendered exploitation by framing it as a “choice,” and feminist scholars must “persistently deconstruct” this idea to determine “how the law contributes to women’s inferior economic status.” Martha Chamallas, *Introduction to Feminist Legal Theory*, 176 (Aspen Publishers, 2d ed., 2003).

66. See Andi Zeisler, *We Were Feminists Once: From Riot Grrrl to CoverGirl, the Buying and Selling of a Political Movement*, 4 (Public Affairs, 2016) (“The white, middle-class ‘new woman’ of the late nineteenth and early twentieth century, who had leisure enough to chafe against the Victorian ideal of the ‘angel in the house,’ was an early target of advertisers seeking a fresh demographic . . . For this woman, consumer goods were positioned as one route to autonomy: Shredded Wheat wasn’t just a cereal product, it was Her ‘Declaration of Independence.’”).
A. Little Murmurs of Affection

While women are judged as profligates for filing bankruptcy, McTeague shows that they are judged just as harshly for not spending money, even when in poverty. This double bind compels women’s consumption and then, when that consumption causes harm, blames them for the harm. McTeague is the story of a brutish, simple man, McTeague, his attempts to rise above his crude nature through his romance with his wife Trina, and his ultimate degeneration into alcoholism and murder. But as Jerome Loving writes, “it is mainly the ‘brute’ in Trina that brings down the McTeagues.”

Trina’s miserliness creates the tension that ultimately leads McTeague to kill her after she refuses to give her lottery winnings to him. Her frugality is a gendered and sexualized one, as depicted in the novel’s most infamous scene:

At times, when she knew that McTeague was far from home, she would lock her door, open her trunk, and pile all her little hoard on her table . . . Trina would play with this money by the hour, piling it, and repiling it, or gathering it all into one heap, and drawing back to the farthest corner of the room to note the effect, her head on one side. She polished the gold pieces with a mixture of soap and ashes until they shone, wiping them carefully on her apron. Or, again, she would draw the heap lovingly toward her and bury her face in it, delighted at the smell of it and the feel of the smooth, cool metal on her cheeks. She even put the smaller gold pieces in her mouth, and jingled them there. She loved her money with an intensity that she could hardly express. She would plunge her small fingers into the pile with little murmurs of affection, her long, narrow eyes half closed and shining, her breath coming in long sighs.

The normative gendered activities of the wife are transmuted from their ordinary forms into a worship of money. The beautification of the home turns into the aesthetic arrangement of the money, “piling it, and repiling it . . . drawing back to the farthest corner of the room to note the effect.” The cleaning of the house and its contents turns into the polishing of the gold pieces, appropriating the domestic tools of “soap” and “her apron.” The emotional labor of affection towards the husband and children turns into “draw[ing] the heap lovingly toward her . . . with little murmurs of affection . . . her breath coming in long sighs.”

While he portrays Trina’s cheapness as grotesque, Norris considers McTeague’s desire to be a consumer naïve, writing, “[w]hat he would do with the money once he had it, he did not precisely know. He would spend it in royal

69. Id.
70. Id.
71. Id.
fashion, no doubt, feasting continually, buying himself wonderful clothes . . . lavishly squandered . . .” 72 Neither frugality nor consumption will make them transcend their bestial selves: the couple is “hopelessly lower class and not deserving of the right to become tragic.” 73 Their licentiousness, and the condescending judgment of the upper classes, is inescapable.

B. Deeply Gendered Suburban Consumerism

With the advent of the television, ideas about women and consumption took to the airwaves, especially in the NBC giveaway show Queen for a Day. 74 The giveaway show is unlike most modern television shows that are oriented around competition and conflict; Queen for a Day was the “Cinderella show,” where “a succession of luckless women told their stories and made requests” for various commodities, which would then be given to them. 75

Andrea McArdle, a legal scholar who has written on a number of economic justice issues, 76 situates the show in the context of the aftermath of World War II, both for the number of widows it created and the capitalist ideology of the Cold War. Women on the show, virtually all of whom were married and had children, would tell their stories of hardship and then ask for “an array of consumables that, it was presumed, would relieve some of the oppressive circumstances.” 77 McArdle describes the show as a ritual of “deeply gendered . . . suburban consumerism.” 78

An episode of the show that aired in 1960 makes clear both how consumerism is held up as the solution for women’s problems and yet how attenuated the “rewards” are from actually solving participants’ economic strife. 79 The first participant is quickly dispatched with the offer of a wheelchair and a special bike for her disabled son: the show’s premise that consumer goods solve women’s problems is upheld. But the second participant presents a quandary for the host. While the host is excited to offer this woman a diaper service for her new

72. Id. at 235.
73. Loving, see note 67, at xviii.
74. This analysis of Queen for a Day is drawn from Andrea McArdle’s “The Postwar Consumer as Feminized Legal Subject.” While our aims are very similar, it should be noted that McArdle’s thesis was on “how consumer protection law internalized contemporary narratives of suburban consumerism and gender role stereotypes,” an absorption of the socioeconomic frameworks of capitalism and patriarchy by the legal system. Andrea McArdle, “The Postwar Consumer as Feminized Legal Subject,” 27 City University of New York (CUNY) Academic Works 222, 225 (2003). My thesis differs in causation: rather than staying within the process of capitalism and patriarchy creating the law, I view these three systems of intersecting power as constantly creating and deconstructing one another cyclically. This cyclical analysis is especially important for understanding BAPCPA, where its ties to ideas of feminized consumption are seen just as much from its socioeconomic effects as from the legislative history and preceding case law.
75. McArdle, see note 74, at 221.
77. Id. at 222.
78. Id. at 223.
triplets (after all, triple the consumption is triple the excitement), the woman is more concerned that one of her three children still requires hospitalization from being born underweight. The host awkwardly cuts her off with the promise of the diaper service, not addressing the more complicated situation at all, and then moves to the fashion segment where various clothing and trinkets are described in detail. The scene is especially ironic because hospitalization is the dark side of requisite consumption that has been responsible for so much of modern consumer bankruptcy. The host had to quickly refocus the audience from consumption as the trap of debt to the spectacle of commodities, just as many television shows and movies do today.

C. You’re Obviously in the Wrong Place

Pretty Woman provides a different kind of salvation through commodities, what Thomas Doherty calls “the Retail Orgy scene” that can be found in many modern romantic comedy films. In Pretty Woman, there are parallel scenes of the protagonist Vivian Ward going to the same boutique store: first in the ragged clothes and unkempt hair she wears as a low-income sex worker, and the next day in designer clothing and professionally-done hair and makeup. In the first scene, the store clerks avoid helping her make purchases, culminating in one of the clerks telling her “I don’t think we have anything for you, you’re obviously in the wrong place.”

When Vivian returns, transformed by the money and respectability that her new client has given her, the store clerks do not recognize her. But even more important than her new appearance are the shopping bags that Vivian carries into the store with her. Vivian asks the store clerk whether she works by commission, and then holds up her shopping bags and scolds “Big mistake. Big. Huge. I have to go shopping now,” and leaves the store. The store clerks are not judged for their rudeness to someone they perceived as lower class, but rather for impeding a woman from being a consumer, as demonstrated by Vivian showing them the shopping bags as their “[b]ig mistake” and then leaving the store because she has “to go shopping.” And these store clerks are punished for this impediment of consumption through their commission-based wages. However, the message is undermined by the plot itself: it is only when Vivian is given the aesthetic of bourgeois femininity that she is confident enough to confront the store clerks about having a valid consumer identity.

84. Id.
85. Id.
The curation of consumer identity has been intensified in the internet age, where consumer and feminine identities are shared through social media. No platform caters more to the display of those identities than Pinterest. Pinterest is a social media platform that allows users to “pin,” or post, images they like to their own personalized boards. It markets itself as a “catalog of ideas . . . [such as] recipes, parenting hacks, [and] style inspiration.”\(^86\) Social media in general tends to be disproportionately used by women but this is especially true for Pinterest, which is used by 33 percent of American women online but only by 8 percent of American men online.\(^87\)

**D. Curating A Gendered Consumer Identity**

Pinterest provides a lens into cultural ideas of gender in digital, postindustrial capitalism. Like *Queen for a Day* and other gendered representations of consumption, Pinterest idolizes the “privatized, housebound world . . . as an antidote to the corporatist, bureaucratized workplace.”\(^88\) Or as one critic phrased it, Pinterest is “an online scrapbook of recipes, frilly outfits, and inspirational sayings for chicks trying to lose weight.”\(^89\) While platforms like Instagram, Facebook, and YouTube\(^90\) are vehicles to show off one’s commodities, Pinterest has a “curated” aesthetic that triggers an “addictive yearning . . . addicted to the feeling that something is missing or incomplete.”\(^91\)

Of course, most of the items can be purchased with only a few clicks.\(^92\) However, Pinterest is not simply a means of directly marketing commodities to consumers: engagement is “aspirational,” coordinating an ideal commodity fantasy, and benefits firms less through direct sales than through “building brand awareness.”\(^93\) This “aspirational model” creates a feedback cycle: the user “pins” an image, the company behind the brand collects that information, increasing the exposure of that good and similar goods, and users viewing its proliferation are affirmed that they have successfully cultivated their identity or pin the new image so as to conform with the identity they wish to foster. As previously discussed with native advertising, engagement is a far more effective marketing strategy than

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88. McArdle, see note 74, at 232-33.
92. There is a dearth of analysis regarding whether digital ease of purchasing, validated by clickwrap and other legal doctrines, has harmed actual consent to the terms of purchase. See, e.g. Juliet M. Moringiello, “Signals, Assent and Internet Contracting,” *57 Rutgers Law Review* 1307 (Summer 2005).
directly telling people to purchase a certain commodity. In addition, engagement is even more effective when the illusion is created that the consumer has the good before even purchasing it. The next time that consumer sees the good, it is no longer just a good that they like. It is theirs, despite sitting on the store’s shelf, and the purchase becomes the means of resolving this contradiction.

It does not feel like marketing—the veil of socially sharing preferences to establish identity to others conceals the fact that means of expressing those preferences have become commoditized. The consumer does not say they like “red lipstick;” they pin an image of the new line of red lipstick by “Brand A.” The consumer and gender identity of the Pinterest user is intertwined: they express their femininity through consumption and they express their consumer identity through their gender roles (mom, wife, “chick,” even feminist).94

Throughout United States history, gender roles have encouraged the consumption of commodities which keeps the circuit of capital in motion. While some may think that a modern world with women CEOs and multi-million dollar feminist organizations precludes this exploitative use of gender roles,95 instruments like Pinterest show that consumption of commodities still relies heavily on sexism. Resisting this compulsion to purchase perverts gender itself, as in McTeague, and the dark side of consumption is glossed over, as in Queen for a Day. Consumption is put forth as the way to transform someone like the sex worker Vivian in Pretty Woman into a bourgeois woman worthy of respect.

And yet if working class women follow these messages, maximizing their consumption through credit, when they enter court to file bankruptcy they will hear a very different set of expectations. Rather than restraint from consumption being perversion, they are told they should have exercised restraint.96 Rather than consumption allowing them to transcend from an underclass to the elite, they are told that consumption is reserved for the elite.97 Rather than consumption allowing them to take on a new identity, they are told their gender is determinative.98

Women are only allowed the “Cinderella story” of consumption until debt turns them into fallen women. In this light, BAPCPA’s “presumption of abuse”99 seems more like victim blaming than reigning in abusers of government intervention: telling women that their life is measured by commodities,100 and then punishing them for mass consumption of commodities.

96. See discussion of In re Sloop in III(B).
97. See discussion of In re Witty in III(B).
98. See discussion of In re Gilmore in III(B).
100. And this sentiment is not likely to end soon. See, e.g. Anne Helen Petersen, “Don’t Cry for Ivanka – Fear Her,” BuzzFeed (8 Nov. 2016), https://perma.cc/ETE6-EG9K.
III. FALLEN WOMEN

A. How Substantial Abuse Became a Presumption of Abuse

In 1978, the prohibition of “abuse” (originally “substantial abuse”) was introduced into bankruptcy to prevent consumers from obtaining Chapter 7 relief under certain circumstances. One of the most substantial changes for consumers with the passage of BAPCPA was amending the dismissal standard for “primarily consumer” debts in 11 U.S.C. § 707(b) from “substantial abuse” to abuse, with a presumption of abuse granted in certain circumstances. As an alternative to dismissal, the BAPCPA amendments allow those consumers presumed to be in abuse to have their Chapter 7 petitions converted to the less-favorable Chapter 13 (though this was already common practice prior to the amendments).

Rather than looking for particular wrongful conduct, such as deception, courts have determined “abuse” by evaluating the totality of the circumstances, including the debtor’s financial situation. As demonstrated in the cases below, this totality of the circumstances approach is not about evaluating the means or even purpose of bankruptcy for the consumer debtor, but rather their “lifestyle” and how it contributed to their filing. And, as consumers, their “lifestyle” is mostly evaluated by: (1) the purchases they make in proportion to their income; and (2) their conformity with certain gender roles, such as mother or wife. This stands in sharp contrast to the “aspirational model” of Pinterest where consumers are not limited to actual purchased commodities and are able to curate their own gendered identity, rather than having one assigned to them based on income and a judge’s idea of normative gender roles.

Pre-BAPCPA case law is still used in the determination of abuse, suggesting that the difference between the former “substantial abuse” and the current standard of “abuse” is about magnitude. While totality of the circumstances is still evaluated, BAPCPA inserted a stumbling block before that evaluation: the presumption of abuse.

In essence, the presumption of abuse is determined by having the debtor create a hypothetical Chapter 13 plan and, after deducting allowed expenses, the monthly income multiplied by sixty is either: (1) greater than or equal to $7,700 or 25 percent of the debtor’s nonpriority unsecured debts, whichever is greater; or (2) greater than or equal to $12,850. If the debtor cannot rebut the presumption, their case is either dismissed or converted to Chapter 13 using their “hypothetical”

102. Id.
103. Id.
104. See In re Witty, No. 15-10258(1)(7), 2016 Bankruptcy LEXIS 4, at *8 (Bankruptcy W.D. Kentucky 2016).
105. See discussion of In re Baird and In re Gilmore in III(B).
107. Id.
Chapter 13 plan. To illustrate, consider Consumer A, who has $51,401 in nonpriority unsecured debts. The court would determine that 25 percent of Consumer A’s nonpriority unsecured debts is $12,850.25, so a presumption of abuse would require an amount greater than or equal to $12,850. If Consumer A has $29,000 in nonpriority unsecured debts, 25 percent of Consumer A’s nonpriority unsecured debts would be $7,250, so a presumption of abuse would be triggered with an amount greater than or equal to $7,700. And if Consumer A has $31,000 in nonpriority unsecured debts, 25 percent of Consumer A’s nonpriority unsecured debts would be $7,750, so a presumption of abuse would require an amount greater than or equal to $7,750. In other words, the court will cap it at $12,850 if higher, at $7,700 if lower, or will use whatever 25 percent of the nonpriority unsecured debts is if between $7,700 and $12,850. There is disagreement between courts as to whether an unrebutted presumption of abuse: (1) requires conversion or dismissal; or (2) simply permits the court to convert or dismiss.\textsuperscript{108}

The legislative history of BAPCPA provides some assistance in determining why the standards for abuse were changed so drastically for, and limited to, consumers. One law school professor, who is affiliated with the Cato Institute and has been identified as one of “[t]he [s]cholars [w]ho [s]hild for Wall Street,”\textsuperscript{109} testified before Congress and framed consumer bankruptcy as being as ethically reprehensible as theft:

[S]hoplifting is wrong; bankruptcy is also a moral act. Bankruptcy is a moral as well as an economic act. There is a conscious decision not to keep one’s promises. It is a decision not to reciprocate a benefit received, a good deed done on the promise that you will reciprocate. Promise-keeping and reciprocity are the foundation of an economy and healthy civil society.\textsuperscript{110}

Congress believed that bankruptcy was abused, and that “the present bankruptcy system has loopholes and incentives that allow and sometimes even encourage opportunistic personal filings and abuse.”\textsuperscript{111} But these assumptions

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\textsuperscript{108} In re Jenkins, No. 12-50413, 2012 Bankruptcy LEXIS 3018, at *5 (Bankruptcy W.D. North Carolina 2012) (“the text of Section 707(b)(1) permits bankruptcy courts to exercise discretion”); but see Justice v. Advanced Control Solutions, Inc., 2008 U.S. Dist. LEXIS 81046, at *13 (W.D. Arkansas 2008) (the only discretion is “as far as deciding which of two options [conversion or dismissal] should be exercised in a case where the presumption of abuse arises and is not rebutted.”), affirmed In re Maura, 491 B.R. 493 (Bankruptcy E.D. Michigan 2013).


\textsuperscript{110} United States Congress, Bankruptcy Reform: Joint Hearing Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary and the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, 106 Congress 98 (1999) (statement of Todd Zywicki, Professor, George Mason University School of Law).

\textsuperscript{111} United States Congress, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
were applied *ex post facto* as an explanation for increases in consumer bankruptcy filings and debt. Professor J.W. Mason notes the majority of what is legally considered “consumer debt” is spent on assets: mortgages, auto loans, and student loans.\textsuperscript{112} Particularly these are all assets that “are strongly linked to the household’s reproduction as a social and wage-earning unit.”\textsuperscript{113} In addition, these assets are correlated with a reduction rather than an increase in consumption because they generally require down payments.\textsuperscript{114}

Unfortunately, Congress failed to look as deeply into the economics, trusting the more pathos arguments of Professor Todd Zywicki on behalf of creditors and then-Professor Elizabeth Warren on behalf of debtors.\textsuperscript{115} The actual evidence mattered little after more than a decade of creditors waging a concerted campaign to stigmatize consumers, most infamously with the newspaper ads asking, “What Do Bankruptcies Cost American Families?” and the strategic soundbite of four hundred dollars for every American family or a “month of groceries.”\textsuperscript{116} Advocates for BAPCPA strategically employed the voices of institutions more sympathetic than the big banks or credit card companies like the Credit Union National Association. However, influence of the hearings lingered on the 1978 Code, particularly ideas of “credit morality” as coined by the National Consumer Finance Association:

\textsuperscript{112} J.W. Mason, *Income Distribution, Household Debt, and Aggregate Demand: A Critical Assessment*, 4 (forthcoming). While student loans are not usually classified as financing assets, Mason makes the case that college degrees function with substantive similarity to assets.
\textsuperscript{113} Id. at 6.
\textsuperscript{114} Id. at 7.
\textsuperscript{115} United States Senate, *Bankruptcy Reform*, 109 Senate Report 1014, at 22-42 (10 Feb. 2005), https://perma.cc/4THK-6MM6; see also Skeel, see note 40, at 188 (“Unlike the bankruptcy technocrats of the 1970 commission, [Chair Brady] Williamson and Warren became vigorous partisan advocates, in keeping with the ideological tone of the overall debate.”). This is not to say that there was no testimony regarding the economics of bankruptcy. Rather, testimony was provided by institutional actors, who provided a shallow analysis. For example, the National Association of Federal Credit Unions provided statistics about how bankruptcy contributed to decreased loan revenue, but also stated (without citation or evidence) that “[t]he full discharge of debts provided by Chapter 7 is a carryover from the last century, when most credit was secured by tangible assets. Today’s consumer-based economy is built on unsecured revolving credit with the promise that debtors will pay from future income.” Id. at 150. Not only is this statement false today, but it was false then: in the United States, housing has been the major source of consumer debt by a large margin. Mason, see note 112. Perhaps this reality is why the National Association of Realtors and the Institute of Real Estate Management did not mention the means test or presumption of abuse at all in their own testimony. See Skeel, see note 40, at 153-54.
\textsuperscript{116} Skeel, see note 40, at 203. This phrasing was strategic because it provided a readily understandable quantity and evoked the gendered nature of consumption: the vast majority of grocery shopping is still done by women. GfK Custom Research North America, *Today’s Primary Shopper*, PLMA Consumer Research Study (2013), https://perma.cc/BK43-6F2Q. And this gendered realm of consumption is often scrutinized by those making moral judgments of the working class. See, e.g. Joe Soss, “Food Stamp Fables,” *Jacobinmag.com* (16 Jan. 2017), https://perma.cc/W26Y-SQ7P.
[T]here remains a fundamental obligation to the people of this country to maintain and preserve a sense of public morality in connection with the extension of credit. We choose to call it “credit morality” . . . Society will continue to teach and demand that contractual obligations be honored lest we undermine or even destroy the principles upon which the credit industry was built.\textsuperscript{117}

\section*{B. How Courts Have Applied the Standard}

It is important to consider the implications of this conceptualization of abuse because it invites harsh treatment at the intersection of feminine consumption—what is proper behavior based on the class and gender of the debtor. The court’s holding in \textit{In re Baird} provides an example of differentiating the “primarily business” debts in Chapter 7 from the primarily consumer.\textsuperscript{118} Dr. Baird was a successful OB/GYN practitioner in Kentucky, and he and Mrs. Baird were able to afford a lavish lifestyle: a luxury boat, luxury cars, and frequent vacations.\textsuperscript{119} The court notes that Mrs. Baird spent more than $30,000 on clothes in 2006 (the dollar amounts of the boat, cars, and vacations are not given), and that she justified this expense as necessary “to present an image commensurate with her status as a doctor’s wife.”\textsuperscript{120}

Dr. Baird left his OB/GYN practice and tried to run a Bariatric Medicine practice with Mrs. Baird.\textsuperscript{121} They were unsuccessful and quickly exhausted their previous savings, as well as being forced to sell their boat and home.\textsuperscript{122} Dr. Baird returned to OB/GYN practice, but was unsuccessful and moved with Mrs. Baird to Florida.\textsuperscript{123} At the time of the case, Dr. Baird made $20,160 per month.\textsuperscript{124} They had $259,678.64 in assets and total debts of $869,208.32.\textsuperscript{125} The Bairds had “significant expenses that [were] not reasonably necessary for their maintenance or support,” including a monthly mortgage payment of $1,649.00 on the Kentucky property they no longer resided in, $1,434 per month in vehicle expenses for a BMW and a Hummer, and a $26,433.25 payment to their counsel post-petition.\textsuperscript{126} In the words of the court, it was “the quintessential abusive situation” and yet because the debts were primarily business, rather than consumer, the court’s hands were tied.\textsuperscript{127} Spending by businesses, even when spending is for personal expenses of the officers or owners, does not generally face the harsh judgment reserved for

\begin{thebibliography}{99}
\bibitem{117} Skeel, see note 40, at 191.
\bibitem{118} \textit{In re Baird}, 456 B.R. 112, 119 (Bankruptcy M.D. Florida 2010).
\bibitem{119} Id. at 114.
\bibitem{120} Id.
\bibitem{121} Id. at 114-15.
\bibitem{122} Id. at 115.
\bibitem{123} Id.
\bibitem{124} Id.
\bibitem{125} Id. at 115-16.
\bibitem{126} Id. at 120.
\bibitem{127} Id. at 121.
\end{thebibliography}
consumers in bankruptcy.\textsuperscript{128}

Compare the treatment of Mrs. Baird’s purchases to sustain “her status as a doctor’s wife” with the treatment of Mindy Sloop.\textsuperscript{129} Unlike the Bairds, Ms. Sloop primarily held consumer debt, and she was unmarried.\textsuperscript{130} She also tried to manage some of her credit card debt by refinancing her home. The court even admitted that her budget was “somewhat reasonable,” but found that her phone, medical, dental, and “miscellaneous” expenses were not.\textsuperscript{131} The court looked for whether the debtor was trying to get a “head start” rather than a “fresh start,”\textsuperscript{132} and particularly found the former because of Ms. Sloop’s “affinity for shopping” and $2,554 scuba diving lessons.\textsuperscript{133} Ms. Sloop spent $5,000 on clothes, and the court notes that it was because she had “gained over twenty-three pounds.”\textsuperscript{134} And for that, her Chapter 7 filing was dismissed.\textsuperscript{135}

The contradiction of praising consumption while stigmatizing consumers comes out in the holding of \textit{In re Witty}.\textsuperscript{136} The key difference between Alisha Witty and Mindy Sloop is that the latter is a weight-gaining, low-income woman with an “affinity for shopping,” whereas Alisha Witty is “a high wage earner” with “a ‘penchant for shopping at luxury retailers’ to purchase clothing and furniture.”\textsuperscript{137} Whereas Sloop’s shopping was characterized as out of control, Witty’s shopping is “commensurate with her lifestyle” and “to the creditors’ benefit [so] that Debtor [can] continue to maintain her current position and rate of pay. Her expenses are in line with achieving these ends.”\textsuperscript{138} This case illustrates the central economic concern of bankruptcy: renewing the circulation of capital when it has become stagnated at the stage of transformation. Abuse is attenuated

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\item \textsuperscript{128} Id. at 121; see also \textit{In re J&J Oilfield Services}, 2015 Bankruptcy LEXIS 1924, at *31 (Bankruptcy D. North Dakota 2015) (Chapter 11 Debtor’s personal expenditures included home insurance, a vehicle, electric bills, clothing, pharmaceuticals, and restaurant bills, which the Court did not find to be made in bad faith); \textit{In re Brenda’s Rentals, L.L.C.}, 2014 Bankruptcy LEXIS 1918, at *12 (Bankruptcy N.D. Alabama 2014) (personal expenses which would normally be “of grave concern” forgiven because of lack of counsel); \textit{In re Heath}, 551 B.R. 877, 882 (Bankruptcy D. Colorado 2016) (a $669,000 home was not considered to be a luxury because it was “critical to the continuation of [Debtor’s] business”). Compare with \textit{In re Navin}, 548 B.R. 343, 350 (Bankruptcy N.D. Georgia 2016) (court took a harsher perspective when business expenses were unpaid taxes); \textit{In re Davis}, 2015 Bankruptcy LEXIS 196 (Bankruptcy S.D. Georgia 2015) (debtor liable for abuse because she failed to convince the court that mortgage was for “spec home” rather than a family residence).
\item \textsuperscript{129} Id. at 14; \textit{In re Sloop}, 2006 Bankruptcy LEXIS 4166 (Bankruptcy M.D. North Carolina 2006).
\item \textsuperscript{130} \textit{In re Sloop}, 2006 Bankruptcy LEXIS 4166, at *2-4.
\item \textsuperscript{131} Id. at *3; id. at footnote 3; id. at *10.
\item \textsuperscript{132} Id. at *6. Interestingly, the court misstates the standard as the older “substantial abuse,” though it also seems to recognize the changes that BAPCPA made to the law.
\item \textsuperscript{133} Id. at *4; id. at *12.
\item \textsuperscript{134} Id. at *12.
\item \textsuperscript{135} Id. at *18.
\item \textsuperscript{136} \textit{In re Witty}, 2016 Bankruptcy LEXIS 4, at *9 (Bankruptcy W.D. Kentucky 2016).
\item \textsuperscript{137} \textit{In re Sloop}, 2006 Bankruptcy LEXIS 4166, at *4; \textit{In re Witty}, 2016 Bankruptcy LEXIS 4, at *5.
\item \textsuperscript{138} \textit{In re Sloop}, 2006 Bankruptcy LEXIS 4166, at *4; \textit{In re Witty}, 2016 Bankruptcy LEXIS 4, at *8.
\end{itemize}
from its common definition; after all, Sloop demonstrably made efforts to pay her debts before resorting to bankruptcy whereas no such efforts are detailed in In re Witty. The framing of the circuit is enough for the court not to consider her consumption to be an abuse: to repay her debt, she must accumulate capital, and to accumulate capital, she must spend it. The wage-impeding restrictions of Chapter 13 would impede this cycle. But this cycle is not recognized for all consumers because it is Witty’s high income that makes her a worthy consumer. And as a worthy consumer, the court denied to the motion to dismiss her Chapter 7 filing.\textsuperscript{139}

Thus far we have seen the feminized consumption of “shopping” for clothing excused for a high-income professional and their wife, but denied for a low-income woman. But how do the courts respond to a wife and mother engaging in non-feminized consumption? In re Gilmore illustrates the converse side of In re Witty.\textsuperscript{140} Mrs. Gilmore was not a profligate shopper. Rather, she had gone back to school to get a nursing degree to “increase her family’s future income.”\textsuperscript{141} At first glance it may seem that Mrs. Gilmore and Mrs. Witty were in the same position, both asking the court to refrain from considering certain expenditures as abuse because they would lead to capital accumulation over time. Yet, the court not only found abuse and dismissed the Gilmores’ bankruptcy, but it also held that Mrs. Gilmore’s expenditures on nursing school were “extreme.”\textsuperscript{142} In addition, the court found Mrs. Gilmore’s education expenses to be a direct cause of the Gilmores’ childcare costs. The obligation to the children, despite the Gilmores still being married, was placed solely on Mrs. Gilmore. Mrs. Witty could shop for clothing to accumulate capital, but Mrs. Gilmore’s pursuit of education\textsuperscript{143} was not

\textsuperscript{139} In re Witty, 2016 Bankruptcy LEXIS 4, at *9; see also In re Brown, 376 B.R. 601, 609-11 (Bankruptcy S.D. Texas 2007) (going against neighboring courts’ strict rejection of timeshares as an unnecessary expense and approving it in heterosexual married debtors’ Chapter 13 plan because it was “not some far-off exotic beach resort”); Perlin v. Hitachi Capital Am. Corp. (In re Perlin), 497 F.3d 364, 374 (3d Cir. Pennsylvania 2007) (approving two Lexus luxury cars and a $5,000 per month private school tuition under this lifestyle theory); In re Hardigan, 490 B.R. 437, 449, n. 10 (Bankruptcy S.D. Georgia 2013) (citing In re Attanasio, 218 B.R. 180, 196 (Bankruptcy N.D. Alabama 1998)) (“Can a court create an equal playing field for application of 707(b) unless all are required to live the same lifestyles and all have the same level of living expenses? Should one debtor be allowed to drive a bigger or more expensive car than another?”). The courts in both cases answers these questions with the “lifestyle” doctrine.

\textsuperscript{140} See In re Gilmore, 2010 Bankruptcy LEXIS 1811 (Bankruptcy N.D. Ohio 2010).

\textsuperscript{141} Id. at *7.

\textsuperscript{142} Id. at *12.

\textsuperscript{143} Because of the non-dischargeability of student loans through bankruptcy, education expenditures occupy a somewhat unique position in these evaluations. See generally Alexei Alexandrov & Dalíé Jiménez, “Lessons from Bankruptcy Reform in the Private Student Loan Market,” 11 Harvard Law & Policy Review 175 (Spring 2017). Women in particular have often appeared in court over the issue. See, e.g. In re Robinson, 560 B.R. 352, 355 (Bankruptcy D. Colorado 2016) (citing BAPCPA’s “more stringent restrictions” to justify student loans as abuse). See generally In re Jones, 556 B.R. 327 (Bankruptcy E.D. Michigan 2016); In re Lowe, 561 B.R. 688, 691 (Bankruptcy N.D. Illinois 2016) (foregoing a determination as to whether student loan payments are a luxury and finding ability to pay sufficient for abuse); In re Ferreira, 549 B.R. 232 (Bankruptcy E.D. California 2016); In re Haskins, 2015 Bankruptcy
allowed—especially when it was viewed as shirking her implicit duty as a mother. 144

Immediately following the passage of BAPCPA, the presumption of abuse was controversial enough to produce a number of studies to see the effect of the law, many of which declared with varying degrees of certainty that the presumption would not change much. 145 At first glance this appears to be true because the number of dismissals due to the means test have steadily decreased:

However, previous studies and the data above leave out the possibility that the presumption of abuse has made debtors preemptively turn to Chapter 13 or even another form of relief outside of bankruptcy. Indeed, consumer Chapter 7 filings have never reached their pre-BAPCPA height, and while they rose during the Great Recession, they have subsequently been on a steady decline. 147 When

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144. Throughout U.S. history, gender roles and notions of motherhood have influenced judicial decision-making. See, e.g. Bradwell v. State, 83 U.S. 130, 141 (1873) (“The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”). While bankruptcy judges may not be so bold as to consider their opinions on proper gender roles to be “divine ordinance,” they still push women into “the domestic sphere” as the “domain and functions” of motherhood.

145. See, e.g. Robert M. Lawless et al., “Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors,” 82 American Bankruptcy Law Journal 349, 385 (Summer 2008) (“[the] income-based screen . . . failed: there is no differentiation based on income, either for the sample as a whole or for the division of families into Chapter 7 and Chapter 13.”)


the average rates of change for abuse dismissals and overall filings post-recession are compared, they are nearly identical (-12.21 percent and -13.94 percent, respectively). This means that the percentage of filings that are dismissed for abuse has remained stable.

But it is a mistake to look only at the effect of BAPCPA through dismissals and not to look at whether consumers sought relief through Chapter 13 or outside of bankruptcy altogether. A more nuanced metric would require an estimate of decreases in Chapter 7 consumer filings due to BAPCPA to be added to the dismissals; this would yield a net amount of affected consumers. Unfortunately, records from the Administrative Office of the U.S. Courts only trace Chapter 7 consumer filings back to 1997. Even this limited data reveals that the scope of the presumption of abuse is not accurately calculated by looking at only the dismissals, even as a percent of Chapter 7 consumer filings. The two filing decreases prior to BAPCPA are 1998-1999 at -6.1 percent and 1999-2000 at -9.1 percent, as compared to the five consecutive decreases from 2010-2015 at an average of about -13 percent. The rate has also become far more volatile, with the standard deviation after BAPCPA being about twice as high as before BAPCPA. None of this data is enough to calculate the desired net number of consumers affected because seven years of data is insufficient for building a historical trend. Any future studies measuring BAPCPA’s effect must look at the range of possible effects, which the Did Bankruptcy Reform Fail? study failed to do.

Whether or not filing for bankruptcy is a moral act, its application for women consumers reveals moral judgments beyond the simple meaning of “abuse.” A low-income, single woman and a mother returning to school are found to be abusing bankruptcy, whereas a wife of a doctor and a woman maintaining her high-income lifestyle with luxury goods are not found to be in abuse. But this standard alone does not fully illustrate what abuse means in modern consumer bankruptcy, because certain consumers are provided a safe harbor from such a presumption.

IV. NO SAFE HARBOR FOR TENUOUS LABOR

A presumption of abuse does not apply to all Chapter 7 consumer bankruptcies. Debtors can be granted safe harbor if the current monthly income of the debtor and their spouse multiplied by twelve is less than or equal to the

148. Id. (author’s calculations).
149. Id. (author’s calculations). Pre-BAPCPA (1997-2004) σ=105355.3 and post-BAPCPA (2006-2015) σ=204882.2. Note that the year 2005 has been left out because the spike in filings from the rush to file prior to BAPCPA’s implementation would skew either set of data.
150. Some judges are not hesitant to state as much, with Judge Robert A. Gordon evoking Tennyson’s “The Rime of the Ancient Mariner” in describing debtors’ real property as “albatross-like.” In re Fox, 521 B.R. 520, 525 (Bankruptcy D. Maryland 2014).
applicable state family median income.\textsuperscript{152} Safe harbor has also been interpreted to preclude using an alternative test to find abuse.\textsuperscript{153} For example, consider a two-person debtor household in New York. The New York median family income for a two-person household as of 2015 is $62,377 per year,\textsuperscript{154} or $5,198.08 per month. In other words, this two-person household is making a combined thirty dollars per hour at full time hours. Current monthly income (CMI) is “the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on [the last day of the month bankruptcy was filed].”\textsuperscript{155} Part of this definition has a significant impact on women: contrary to its name, it is not “current” but rather the income of the past six months that is used for determinations.

CMI especially impacts women because of divorce and job turnover. There is substantial literature on the consideration of a spouse’s income in the BAPCPA framework.\textsuperscript{156} Judicial decisions have focused on whether incomes of a married couple should be considered together when only one spouse is filing for bankruptcy.\textsuperscript{157} But gender disparity also arises in the context of computing CMI when a divorce occurs within the six-month period prior to filing.\textsuperscript{158} In \textit{Westbrook v. Westbrook}, the debtor faced dismissal for abuse because the creditor alleged that her ex-husband’s income was not included in the computation of CMI. While the court ruled in her favor and denied the motion to dismiss, the decision is troubling because it is based on the debtor providing evidence that she was separated from her ex-husband prior to the six-month period, rather than that she was a single mother with only Social Security as income.

Sporadic or otherwise unstable income caused by turnover will make the debtor’s CMI greater than their actual income (and thus able to pay for a Chapter 13 plan). This is especially troubling because job turnover has begun to approach the levels it reached at the start of the Great Recession:

\begin{itemize}
  \item \textsuperscript{152} Collier, Volume 6, (16th ed.), see note 29, at 707.04.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Department of Justice, \textit{Census Bureau Median Family Income by Family Size} (2015), https://perma.cc/SR29-YMXD.
  \item \textsuperscript{155} 11 U.S.C. § 101(10A) (2012).
  \item \textsuperscript{158} \textit{Westbrook v. Westbrook}, 2014 Bankruptcy LEXIS 4635 (Bankruptcy N.D. Ohio 2014).
\end{itemize}
On average, women tend to have higher turnover rates than men for various reasons. One study suggests that this disparity is due in part to women’s tendency to secure but then leave jobs as part of their job search, as well as for the more often noted family-based reasons. However, this analysis is less concerned with why women have higher turnover rates than with how that disparity effects the calculation of CMI, especially in conjunction with the inclusion of nontaxable income.

Using a two-person New York household hypothetical, assume that the household is a mother and her child. This woman had a job with a salary of $85,000, but on November 30th she lost her job. She was paying bills with credit cards and her debt was piling up. And like many future debtors in bankruptcy, she had a medical emergency (debilitating chronic pain in her spinal cord), which increased her debt while limiting her ability to secure employment. Her aunt paid her $1,600 rent for her that month, but she knew she could not last long like that. Unable to secure a job with a salary comparable to her previous one, she took a

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A FRESH START FOR A WOMEN’S ECONOMY

job that paid fourteen dollars per hour on January 1st. Nevertheless, she defaulted on her debts and, worried about her future, filed for Chapter 7 bankruptcy on January 30th. Is she eligible for safe harbor?

Debtor’s CMI is equal to the average monthly income of the past six months before February 20th. During the first four months of this period she had a job and a monthly income of about $7,083. In December, she only had the $1,600 gift from her aunt and in January she had a monthly income of $2,426.67. Her CMI was thus $5,393.11, which was $195.03 higher than the $5,198.08 cutoff. If her actual current income were used for the calculation, it would put her $2,771.41 below the cutoff, comfortably within the safe harbor meant to protect low-income debtors like her.

This hypothetical only shows one possible situation where using CMI rather than actual current income would place someone out of the safe harbor from a presumption of abuse. Considering the higher turnover rates for women, further investigation is warranted to see if the empirical data reflects the possibility of women being disproportionately left out of the safe harbor from presumption of abuse. However, the gendered implications of BAPCPA are not always veiled by a facially neutral disparate impact: divorce and childcare reveal more explicitly gendered considerations and, consequently, a more conspicuous gender bias.

V. FIRST IN LINE FOR NOTHING

One of the fierce debates that occurred in Congress leading up to BAPCPA was whether to change the prioritization of child support creditors from seventh priority to first priority.162 By focusing on single mothers as child support creditors, the issue of prioritization was abstracted from the holistic reality of these women’s lives and instead concentrated on children. As then-First Lady Hillary Clinton said about the debate, “I have no quarrel with responsible bankruptcy reform, but I do quarrel with aspects of the bill that would force single parents to compete for their child support payments . . . The welfare of our children must come first.”163 “[R]esponsible bankruptcy reform,” the adoption of punitive measures against debtors, was acceptable but an attack on “our children” was not. It is worth noting the gender neutrality of Clinton’s statement (“parents” rather than “mothers”) for an issue that, in terms of both disparate impact and political discourse, is inescapably gendered. And even in neutrality, it is not the harm to single mothers as debtors but as creditors in service of their children that creates the “quarrel.” They only become “our” children when their welfare depends on punishing and not on protecting debtors. When then-Senator Clinton worked on bankruptcy reform in 2001, she stated that “While we have yet to achieve the kind of bankruptcy reform I believe is possible, I have worked with a number of people over the past three years to make improvements that bring us closer to our goals,

162. Kalsem, see note 13, at 1204.
particularly when it comes to child support.  

Absent from the legislative record are the experiences of single mothers with their children’s father in bankruptcy, or any proof at all that bankruptcy was significantly impeding the ability of divorcees to secure child support. In fact, amendments proposed by Representative Schiff to evaluate the effect of child support prioritization changes were removed. Opponents of the amendment chose to focus on how the reprioritization would put those due child support first in line for nothing. And while studies have not narrowed specifically on whether bankruptcy prioritization has an impact on child support payments, studies do show that when men have more income and stable employment they are more likely to pay their child support. Men in Chapter 7 consumer bankruptcy, especially after the presumption of abuse was implemented, are generally there because of their lack of income, stable employment, or both. There is not much, if anything, to liquidate and so single mothers do not stand to gain much from the receipt of what results. In the closing of 90 percent of Chapter 7 cases in 2015, no funds were collected and distributed. 

Single mothers are deemed worthy of protections as creditors through their children, but those same mothers as debtors are not treated so mercifully. While the “good mother” is prioritized with child support payments, the ex-wife often has her court-ordered equitable distribution of property estopped. But this differentiation only exists in fiction: the “good mother” owed child support (viewed like a creditor) and ex-wife seeking equitable distribution (viewed like a debtor) are often the same person. And support for children outside of the formal court-mandated order is not only unprotected but can be the reason to find “abuse” in bankruptcy.

Home schooling and ice skating lessons are probably not what jumps to the mind of most when considering abuse in consumer bankruptcy, and yet those purchases were exactly what the court in In re Stout identified as abuse. Like many debtors, Mr. Stout entered bankruptcy due to the costs of child support ($970

164. Id. at 545.
166. Kalsem, see note 13, at 1205.
171. See, e.g. In re Gourley, 549 B.R. 210, 217-218 (Bankruptcy N.D. Iowa 2016) (finding abuse where braces for children were not deducted from available disposable income in Chapter 13 plan).
172. See In re Stout, 336 B.R. 138 (Bankruptcy N.D. Iowa 2006). But see Martinson v. James (In re James), 186 B.R. 262 (Bankruptcy D. Montana 1995) (court protects trust where income is for the benefit of the debtor’s children). However, there is a lack of post-BAPCPA rulings on trusts for children, so it is unclear whether such protection is still good law.
a month for both his children) and divorce. Ironically, custody changed because Stout’s daughter refused to continue living with her mother. At the time of the proceeding, the debtor’s daughter had been taking ice skating lessons for three years, spending eighteen to twenty-one hours per week ice skating. While she had problems with all of her classes in school, she excelled at ice skating and won several competitions—it was the focus of her life. And at $500 per month, it was not unusually high for discretionary expenses (as compared to the luxury clothes and furniture in In re Witty). Yet the Court called it an “extravagance” and “luxury,” comparing it to cases of abuse such as payments of $900 per month for private school tuition (an expense with a free alternative) or payments for a child’s country club dues. The Court ruled that the debtor under Chapter 7 would essentially have the unsecured creditors paying for the lessons.

This continues to be an issue for judges who wish to enforce BAPCPA according to the restrictive precedent but have “discomfort with stating that parents who want the best education for their child have abused the law.” In fact the reprioritization has created the odd circumstance where $500+ in scheduled discretionary payments for the debtor’s child are seen as abuse, but $500+ in child support payments are allowed without any further analysis. BAPCPA is riddled with such contradictions, most jarringly of which is the conversion of financial education for consumers into a punitive measure.

VI. TAMING THE INGÉNUE

Credit counseling and financial education are generally an important part of mitigating the harm that consumers face from debt, especially the more predatory forms of credit like payday loans. But the credit counseling requirement


174. In re Stout, 336 Bankruptcy at 143. When the assets are liquidated by Chapter 7, the proceeds go to creditors based upon several rules of priority, including that all secured creditors are paid before any remaining proceeds go to unsecured creditors. But in this case, the debtor has $95,000 in credit card debt (which is unsecured)—his secured creditors were paid by the sale of a business prior to filing for bankruptcy. The holding does not give the total number of creditors or the assets that would be liquidated under Chapter 7. But even without that information it seems at odds with the purpose of Chapter 7 to discharge debts that cannot be paid while maintaining a reasonable lifestyle for the debtor and their dependents. While the Trustee is obligated to secure the maximum amount possible for the creditors, the court is under no such obligation, even post-BAPCPA.

175. See In re Savoie, 2006 Bankruptcy LEXIS 472, at *8 (Bankruptcy E.D. Pennsylvania 2006). Note, however, that this case is asking for a far higher monetary cost of private school education ($15,000 per year) than the debtor in In re Stout asks for his daughter’s ice skating lessons.

176. See In re Richardson, 2008 Bankruptcy LEXIS 5134, at *38 (Bankruptcy W.D. Virginia 2008). While the specifics of the child support payment obligation were not detailed, generally child support in Virginia is calculated based on gross income. Virginia Code Ann. § 20-108.2. As such, it is possible that were the debtor in In re Stout paying for his daughter’s ice skating through a child support payment, it would not have been ruled an abuse.

177. Consumer Financial Protection Bureau, Financial Literacy Annual Report, at 21 (July 2013): The recent economic downturn raised awareness about the importance of individual
imposed by BAPCPA has been harmful and counterproductive to the purpose of making bankruptcy decisions as informed as possible. In its function as a gatekeeper to filing Chapter 7, the credit counseling requirement provides a vehicle for the bias of judges. Reflected in that bias is the intent of BAPCPA: to infantilize those consumers who do not meet the bourgeois and patriarchal notions of a sympathetic debtor.

This infantilization can be seen in the many attempts to pass a bankruptcy reform law before 2005. One of the more explicit examples comes from a statement in opposition to a pro-consumer amendment by House Majority Leader Dick Armey:

We all teach these lessons to our children about accepting your responsibilities and fulfilling your responsibilities. Let the bankruptcy laws of this great land be a complement to the teachings we give our children and an encouragement to that, and let our children know the standards of compliance that are expected of them under the law.\textsuperscript{178}

The House Majority Leader began with a typical “think of the children” plea but then transformed the child into the debtor, from “a complement to the teachings we give our children” to “let our children know the standards of compliance . . . under the law.”\textsuperscript{179}

In pertinent part, BAPCPA created a requirement that the debtor must receive credit counseling from an approved nonprofit group 180 days before filing for bankruptcy.\textsuperscript{180} This is not a full credit counseling, but rather a briefing conducted over the phone or internet sharing available credit counseling and budget analysis options.\textsuperscript{181} While it is merely an introduction, it is key to filing for bankruptcy. Courts have concluded as a matter of law that failure to comply with this requirement establishes cause for dismissal under 11 U.S.C. § 707(a).\textsuperscript{182} However, a minority of courts have granted some flexibility for the waiver of parts of this requirement.\textsuperscript{183} To access such waiver there must be a showing of special circumstances evincing that the debtor made sufficient efforts to comply with the “spirit” of 11 U.S.C. § 109(h).\textsuperscript{184}

The \textit{In re Alvarado} case illustrates how this law has been applied in a punitive context.\textsuperscript{185} The case involved two debtors: Gilda Alvarado and Reyna

\begin{flushright}
\textsuperscript{178} Jensen, see note 163, at 527.
\textsuperscript{179} Id.
\textsuperscript{181} Id.
\textsuperscript{182} See, e.g. \textit{In re Alvarado}, 496 B.R. 200, 210 (N.D. California 2013).
\textsuperscript{183} See id. (citing \textit{In re Warren}, 568 F.3d 1113, 1118 (9th Cir. 2009)).
\textsuperscript{184} Id. at 209 (citing \textit{In re Bricksin}, 346 B.R. 497, 502 (Bankruptcy N.D. California 2006)).
\textsuperscript{185} See generally id.
\end{flushright}
Alvarado, Gilda’s mother. Both debtors completed credit counseling, but they did so outside of the 180-day requirement (224 days and 235 days respectively). The trustee moved to have both cases dismissed for failure to comply with 11 U.S.C. § 109(h) and the bankruptcy court agreed, though they admitted that requiring the Alvarados to take additional credit counseling sounded “crazy.” The women filed for appeal, arguing that the bankruptcy court abused its discretion when it refused the Alvarados a waiver permitted under the law. The defendants relied on a previous case, *In re Bricksin*, where the debtors also completed credit counseling outside of the 180-day requirement but their case was not dismissed by the court.

But the court ruled against the Alvarados, declaring the reasoning of *In re Bricksin* incorrect in light of another case, *In re Gibson*, which held that anyone who failed to comply with the 180-day window for credit counseling was not entitled to bankruptcy. The Court also distinguished the Alvarados from the debtors in *In re Bricksin*, because the latter completed a debt repayment plan within the 180-day window and the Alvarados had not.

There was an additional difference between the Alvarados and the debtors in *In re Bricksin*: the latter were a married, heterosexual couple. Unlike *In re Alvarado*, where little description was given of the financial circumstances and efforts to repay debts, the story in *In re Bricksin* is full of empathy for the debtors:

Debtors’ financial difficulties began when, sometime in 2004, David Bricksin lost a relatively high-paying job. As a result of this unexpected calamity, Debtors were no longer able to afford their then-current lifestyle. Concerned about their mounting debts, David Bricksin contacted Consumer Credit Counseling Services (“CCCS”). Debtors sought the professional assistance of CCCS to evaluate their options . . . They provided all of their financial information to CCCS, including their current income, living expenses, assets and liabilities. CCCS then analyzed the information and provided Debtors with customized recommendations. Based on this information, CCCS advised the Debtors that they did not have sufficient resources to repay their debts and recommended that they file for bankruptcy protection. Debtors were determined, however, to make an effort to repay their creditors without the aid of a bankruptcy filing.

This story illustrates the narrow definition of “good debtors:” heterosexual, married, formerly high-income, and full of internalized shame about filing for bankruptcy.

186. Id. at 204.
187. Id. at 208-10 (citing *In re Bricksin*, 346 B.R. at 502).
188. Id.
189. Id. at 209 (citing *In re Gibson*, 2011 Bankruptcy LEXIS 5084, at *3 (9th Cir. Bankruptcy App. Panel 2011)).
Similarly, lenience in the credit counseling requirement was granted to a male debtor who had “a reasonable explanation” for not properly fulfilling the requirement: that he thought his child support payment debt was not consumer debt for the purposes of the requirement.\textsuperscript{191} Another married heterosexual couple with two minor children were dismissed but allowed to refile within ninety days with a waiver of the filing fee because of their “sympathetic circumstances.”\textsuperscript{192} Still, another married heterosexual couple’s “reasonable explanation” was that they were trying to sell their home to avoid bankruptcy.\textsuperscript{193} Conversely, a single female debtor who found out that her home was being foreclosed on only two days before it was scheduled had her petition dismissed for failure to complete credit counseling.\textsuperscript{194} The judge determined that such imminent foreclosure was “not extraordinary” and thus was not sufficient to “grant an extension of time” to complete counseling.\textsuperscript{195} These cases\textsuperscript{196} illustrate that even when there is majority support for a formalistic interpretation of 11 U.S.C. § 109(h), judges still make exceptions. While some may perceive bankruptcy law to be composed of clear, bright-line rules, the truth is that judges exercise discretion in the bankruptcy context just as they do when sentencing criminal defendants or making custody determinations in a family matter.\textsuperscript{197} Because the use of discretion is not expressly outlined by statute, they will save the exceptions for debtors who meet their moral standards rather than the debtors most in need.\textsuperscript{198} But even with the bias in enforcement, mandated financial counseling could reduce the volume of bankruptcy filings. While that causal relationship would be difficult to evaluate, the Executive Office for United States Trustees did study whether the financial counseling components of BAPCPA were helping consumers. While they found that consumers overwhelmingly liked the program, they concluded that there was no “substantial improvement in [participants’]

\textsuperscript{191} In re Manalad, 360 B.R. 288, 308 (Bankruptcy C.D. California 2007).
\textsuperscript{192} In re Crawford, 420 B.R. 833, 841 (Bankruptcy D. New Mexico 2009).
\textsuperscript{193} See In re Enloe, 373 B.R. 123, 132 (Bankruptcy D. Colorado 2007).
\textsuperscript{194} See In re Falcone, 370 B.R. 462, 464, 467 (Bankruptcy D. Massachusetts 2007).
\textsuperscript{195} Id. at 466.
\textsuperscript{196} See also In re Stinnie, 555 B.R. 530, 536 (Bankruptcy W.D. Virginia 2016); In re Ramey, 558 B.R. 160 (6th Cir. Bankruptcy App. Panel 2016) (woman received credit counseling after case dismissal demonstrated ineligibility for waiver of credit counseling by disability or incapacity); Bristol v. Ackerman (In re Bristol), 2009 U.S. Dist. LEXIS 7107, 9-10 (E.D. New York 2009) (incarcerated debtor denied waiver); In re Hubbard, 333 B.R. 377, 385 (Bankruptcy S.D. Texas 2005) (two single women debtors were denied waivers while trying to stop the repossession of cars); In re Tomco, 339 B.R. 145 (Bankruptcy W.D. Pennsylvania 2006) (single mother debtor with three children denied waiver); In re Borges, 440 B.R. 551 (Bankruptcy D. New Mexico 2010) (married heterosexual debtors partially granted waiver; husband granted waiver because he had a stroke, but wife denied waiver even though she had to care for him after the stroke).
\textsuperscript{197} For analysis and examples of judicial bias based on economic class, see Michele Benedetto Neitz, “Socioeconomic Bias in the Judiciary,” 61 Cleveland State Law Review 137 (2013).
\textsuperscript{198} See id. at 144 (“A judge who adjudicates cases based on the implicit assumption that all persons are situated similarly to that judge is not properly assessing or investigating the facts of a given case.”).
knowledge and financial practices, likely due to pre-existing knowledge regarding the topics measured.” The report further suggested that lack of financial knowledge may not be the cause and that instead their problems were due to “an unanticipated crisis (e.g., illness, job loss, or divorce).” Another study found that the average person seeking counseling had an average income of $26,873 and unsecured debt of $38,472, making bankruptcy “the best option.” Despite this fact, the study also found that about 12 percent of those who sought counseling had not filed for bankruptcy as of the study’s publication, and speculated that they may be putting off filing because of the 180-day period provided to them. Only 15 percent of the sessions took place in person, and while the study noted the difficulty of measuring whether “distance” credit counseling (by phone or internet) is effective, it points to studies of other online sixty- to ninety-minute trainings where 56 percent of companies found “lack of interactivity” to be an obstacle.

The courts, on the one hand, require credit counseling of questionable value to encourage consumer debtors to put off bankruptcy as long as possible by looking at alternatives, but on the other hand, apply 11 U.S.C. § 109(h) in a way that encourages debtors to file earlier so as to be within 180 days of receiving credit counseling. This is one of the great dangers created by BAPCPA: rather than being provided relief, consumers are being put into limbo. The refiling limitation also causes consumers to put off filing for Chapter 7 bankruptcy, while increasing the probability that consumer debtors will need to refile. This combination reduces the number of debtors in bankruptcy in the short term, but only by ensuring their return at a later date.

VII. ATHENA SHRUGGED

If BAPCPA was meant to infantilize consumers in bankruptcy, then its increase of the wait period for refiling for Chapter 7 bankruptcy from six to eight

200. Id. at 5.
201. Noreen Clancy & Stephen J. Carroll, Prebankruptcy Credit Counseling, 2 (2007), https://perma.cc/J2HR-MZXH. This report was sponsored by the National Institute of Justice at the request of the Executive Office for U.S. Trustees and was conducted within the auspices of the Safety and Justice Program within RAND Infrastructure, Safety, and Environment.
202. See id. at 11.
203. This pun references Atlas Shrugged, a novel by Ayn Rand, founder of a philosophical system known as “objectivism.” Ayn Rand, Atlas Shrugged (Random House, 1st ed., 1957). Rand’s philosophy was a modern take on Social Darwinism; she espoused the belief that the greatest common good is only possible through individuals maximizing their own benefits through self-interest. The novel’s title in turn references the Greek myth of the Titan Atlas who, as punishment for fighting the Olympian gods, was made to hold up the entirety of the sky—or in some tellings, the entire world. The connotation is that it is the great individual who holds up the world, not the collective. By replacing Atlas with Athena, I mean to emphasize that women, especially as consumers, hold up the economy, and that limitations on consumer bankruptcy may allow this weight to crush them—to the detriment of the whole economy.
years,\textsuperscript{204} is a perverse kind of “time out.” The limitation has grave consequences for female consumers and for the economy.

This change by BAPCPA does not seem as drastic as those previously illustrated; after all, it is merely an increase of two years.\textsuperscript{205} However, any increase in a chronological refiling limitation is significant for consumers because debt, with few exceptions, increases exponentially when the debtor’s payments do not cover accrued interest.\textsuperscript{206} As such, each year, the amount of interest due itself increases. Here is an example of this effect:\textsuperscript{207}

<table>
<thead>
<tr>
<th>Year</th>
<th>Original borrowed capital</th>
<th>Debt at end of year</th>
<th>Interest due at year end</th>
<th>Money in circulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$100</td>
<td>$106.00</td>
<td>$6.00</td>
<td>$100</td>
</tr>
<tr>
<td>2</td>
<td>$100</td>
<td>$112.36</td>
<td>$6.36</td>
<td>$100</td>
</tr>
<tr>
<td>3</td>
<td>$100</td>
<td>$119.10</td>
<td>$6.74</td>
<td>$100</td>
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<tr>
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<td>$100</td>
<td>$126.25</td>
<td>$7.15</td>
<td>$100</td>
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<td>$100</td>
<td>$133.82</td>
<td>$7.47</td>
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<td>$100</td>
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</tr>
<tr>
<td>20</td>
<td>$100</td>
<td>$320.71</td>
<td>$18.15</td>
<td>$100</td>
</tr>
<tr>
<td>30</td>
<td>$100</td>
<td>$574.35</td>
<td>$32.51</td>
<td>$100</td>
</tr>
</tbody>
</table>

The interest due on year four is $7.15, while the interest due on year five is $7.57. Interest alone can deepen a consumer’s indebtedness over a time period like an additional two years spent waiting to refile for Chapter 7 bankruptcy. The effect is even more overwhelming at higher amounts. Consider the debtor in \textit{In re Stout} who had $95,000 in credit card debt,\textsuperscript{208} and assume the debt is split evenly between two credit cards with average APRs of 15.07 percent. Also assume that, before incurring this debt, the debtor had received a discharge under Chapter 7 and therefore cannot refile for relief for eight years despite not having income to pay the debt. Every year, even though no new credit is taken on, the interest is inflating the total debt by over $14,000, then over $16,000, etc. until another year without relief can add almost $5,000 in interest, with the total interest rising to over $33,000. The figures below reflect the rate of increase of this hypothetical debt, per my calculations.


\textsuperscript{206} Consumer debt can continue to rise even if a borrower is making minimum payments because interest not only accrues on remaining balances, but it will continue to be added if new debts are incurred. That is, where Interest x New Debt Added + Interest of Total Debt > Minimum Payment.


\textsuperscript{208} \textit{In re Stout}, see note 150, at 143.
However, not all relief is precluded in this eight-year period. Consumer debtors still have the option of Chapter 13 bankruptcy if they have the income to create a payment plan. Not surprisingly, since the 2005 amendments, the share of consumer bankruptcies under Chapter 13 has increased and the percentage of Chapter 13 debtors with prior filings has also increased, albeit after a brief lull due to the influx of first-time filers created by the Great Recession.

<table>
<thead>
<tr>
<th>Year</th>
<th>Credit Card 1 Debt</th>
<th>Credit Card 2 Debt</th>
<th>Total Debt</th>
<th>Total Interest Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
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<td>47500</td>
<td>95000</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>54658.25</td>
<td>54658.25</td>
<td>109316.5</td>
<td>14316.5</td>
</tr>
<tr>
<td>3</td>
<td>62895.24828</td>
<td>62895.24828</td>
<td>125790.4966</td>
<td>16473.99655</td>
</tr>
<tr>
<td>4</td>
<td>72373.56219</td>
<td>72373.56219</td>
<td>144747.1244</td>
<td>18956.62783</td>
</tr>
<tr>
<td>5</td>
<td>83280.25801</td>
<td>83280.25801</td>
<td>166560.516</td>
<td>21813.39164</td>
</tr>
<tr>
<td>6</td>
<td>95830.59289</td>
<td>95830.59289</td>
<td>191661.1858</td>
<td>25100.66976</td>
</tr>
<tr>
<td>7</td>
<td>110272.2632</td>
<td>110272.2632</td>
<td>220544.5265</td>
<td>28883.3407</td>
</tr>
<tr>
<td>8</td>
<td>126890.2933</td>
<td>126890.2933</td>
<td>253780.5866</td>
<td>33236.06014</td>
</tr>
</tbody>
</table>

209. *Collier, Volume 8*, (16th ed.), see note 30, at 1300.01.
If this growth continues at the average rate of the last five years (2.3 percent), more than 50 percent of those filing Chapter 13 bankruptcy will have a prior filing by 2021.  

Bankruptcy in general has become less frequent, and gradually the distribution of filings has shifted; whereas, in the past, a majority of filings were under Chapter 7, now a majority of filings are under Chapter 13.  


U.S. Bankruptcy Courts – Judicial Business 2015, United States Bankruptcy Courts, (last accessed 27 Nov. 2016), https://perma.cc/8K3V-NBHS. Note however that total filings have failed to decrease below the level of 2007, the start of the Great Recession. In the process of writing this article, data emerged that December 2016 to January 2017 was the first back-to-back consumer bankruptcy increase since the Great Recession, which seems to confirm that the refiling limit is displacing rather than reducing bankruptcy as this increase came exactly eight years after the initial spike of bankruptcies in 2009. Wolf Richter, “Consumer bankruptcies posted back-to-back increases for the first time since the aftermath of the financial crisis,” Business Insider (6 Feb. 2017), https://perma.cc/8G9K-MG7N. However, the hypothesis will be more firmly confirmed if there is a mirroring in the trend of bankruptcy filings between the 2009-2012 period and the 2017-2020 period: a peak in the second year (2010 and 2018) followed by a decrease (2011 and 2019) and ending with the trend stabilizing (2012 and 2020, until the next trend in 2025).  

does not liquidate and discharge like Chapter 7; it is a secured payment plan based on the debtor’s income and intended to give the creditors full recovery. 214 Chapter 13 may certainly be the more appropriate option for debtors with regular and sufficient income, but it is inappropriate for many who would qualify for pre-BAPCPA Chapter 7. This is especially true of those in such dire circumstances that they need to refile. Since, as of 2014, women still make seventy-nine cents to the dollar of men, an income-dependent relief will disproportionately disadvantage women. 215

What purpose is served by limiting access to Chapter 7 in this way? Brian Calandra suggests that, since women will be “[f]acing debts and bills they cannot pay, [they] will have to use credit to make ends meet, and the cycle begins anew. Credit card companies are eager to afford these women new streams of credit, emboldened because women will try harder to repay and the bankruptcy code allows lenders to collect from women who quickly return to insolvency for eight years before these women can get Chapter 7 relief.” 216 The 2016 rise in credit card debt after its post-Great Recession lull, 217 while not conclusive, certainly should prompt more research into whether the unavailability of Chapter 7 relief due to refiling limits (as well as conversion to Chapter 13 by “abuse”) is creating a consumer credit debt bubble as predicted by economist William Dunkelberg. 218 Steps must be taken, both immediately and in the long term, to mitigate the next recession—which many analysts and economists with similar concerns predict will happen in the next two years. 219

214. _Collier, Volume 8_, (16th ed.), see note 30, at 1300.02.
219. See Katie Darden, _Camp Kotok less worried about economy than weak US leadership_, SNL (10 Aug. 2017), https://perma.cc/2YN6-LPNL (“Cumberland Advisors Vice Chairman and Chief Monetary Economist Bob Eisenbeis sees risk in low- or no-down payment mortgages and subprime auto loans, saying their systemic interconnectedness and derivative footprints are unclear. DiMartino Booth said credit has already turned, sounding a note of caution on consumer credit, commercial real estate, the potential flightiness of foreign money in U.S. real estate and bank commercial real estate exposure. . . The next recession is likely to begin in 2019, according to more than a third of attendees surveyed online. The remaining responses were almost evenly split between 2018 and 2020 or later.”).
VIII. FINDING HERLAND

And how did those women meet it? Not by a ‘struggle for existence’ which would result in an everlasting writhing mass of underbred people trying to get ahead of one another—some few on to . . . They said, ‘With our best endeavors this country will support about so many people, with the standard of peace, comfort, health, beauty, and progress we demand.’

In an obscure story not widely recognized until after her death, author Charlotte Perkins Gilman created a land inhabited only by women who reproduce asexually. Herland is described as utopian by the men who accidentally intrude upon it; Gilman used this extreme to show the full possibility of what women could accomplish in a society not dominated by masculinity. Particularly, Herland does not have a capitalist economy, and the women there do not understand the natural law of “survival of the fittest” that men try to explain to them.

But the “natural law” of “survival of the fittest” is well understood in the United States and has even colored the judgments of the nation’s highest court, most infamously in the *Lochner* decision. The Supreme Court overturned a New York regulation on bakeries because it infringed on the fundamental right to contract, as applied to the states by the Fourteenth Amendment. Highlighting the decision’s incongruence to other regulations that more directly infringed on the rights of an average person than of a business owner, Justice Holmes’s dissent in *Lochner* notes that “various decisions of this court [have held] that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.”

He illustrates this previous interference with prohibitions on lotteries, public schools, the post office, vaccinations, and most applicable here, usury laws. In conclusion, Justice Holmes states that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.” While the courts have all but expressly overruled “liberty to contract” as one of the fundamental liberties guaranteed under due process, a specter of *Lochner* is haunting all of the courts—the specter of libertarianism.

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221. Id. at 53-54.
223. Id. at 75 (Holmes, dissenting).
224. Id.
225. Id.
The “fresh start” of bankruptcy was supposed to be a check on the “survival of the fittest” standard of economic life in the United States. But bankruptcy’s purpose is to promote economic growth, not to provide charity or serve the public interest. BAPCPA made this clear by sectioning off consumer debtors for further exploitation under the guise of cracking down on the irresponsible, and, implicitly feminine, consumption. But this desire to increase net profits for creditors at the expense of debtors has macroeconomic consequences that will affect everyone.

The following are short-term proposals to mitigate the harmful effects of BAPCPA:

1. More demographic research: Much of the information in this paper comes from publicly posted statistics, the publication of which is prescribed by 28 U.S.C. § 159(c). While this information is valuable, it mostly ignores demographic information such as age, gender, and race. 28 U.S.C. § 159(c) should be amended to include statistics on this information and, until this is accomplished, nonprofits and universities should conduct court observations and surveys to collect the demographic information themselves for public release.

2. Eliminate the “presumption of abuse:” in 2007, 62.1 percent of bankruptcies were caused by medical debt. In 2013, the Center for Consumer Recovery found a different culprit: 78 percent of consumers surveyed filed bankruptcy due to debt collection litigation, 94.9 percent of which reported that they were being pursued by a debt buyer. And as previously detailed, the presumption favors increasing corporate bankruptcies and business expenditures while punishing low-income consumers with largely medical or housing debts. There is no rational reason to presume abuse, and doing so pushes consumer debtors, especially women, into Chapter 13 or causes them to delay filing. Women do not view bankruptcy as a way to game the system or even as a last resort but rather as “a failure that may borderline on the immoral . . . [which] helps explain why women frequently wait to file bankruptcy, and arrive worse off than if they had filed sooner.” Presumption of abuse must be ended in favor of the previous substantial abuse standard.

3. Practice credit counseling and financial education as harm reduction, not as punishment: public monies should fund preventative efforts—financial education in public schools and partnerships between local government regulators, community banks, credit unions, and

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227. Himmelstein, see note 80, at 742.
229. Id. at 192.
community organizations—rather than forced credit counseling and financial education for those who are already in or soon to be in bankruptcy. This practice has already had success at both the federal and local levels.230

4. Identify the role of bankruptcy and consumer debt in financial crisis: Unfortunately, the current political climate231 makes many of these changes, at least at the federal level, unlikely to happen in the near future—certainly not before the next economic downturn. That downturn will be an opportunity to more broadly propagate information about the macroeconomic role of bankruptcy and consumer debt. In the absence of such systemic explanations, many consumers blamed either “greedy and reckless banks” or “ignorant and spendthrift individuals” for the mid-2000s financial crisis.232 The next downturn will have people asking why, and there need to be accessible and clear explanations made publicly and prolifically available.

Beyond these short-term goals, there must be an interrogation of our economic and legal systems’ internal contradictions and gendered disparities in their treatment of consumers. Bankruptcy is a necessary counter-tendency to facilitate the circulation of capital: but what if those factors that make it necessary (the improvident extension of credit, a constant growth economy, commodity fetishism, cyclical economic downturns) were eliminated? Bankruptcy certainly would not be necessary in a world like Herland, where ideas of communal motherhood and sisterhood promote prioritizing cooperation and empathy over the “survival of the fittest.” In the end, reformers like Elizabeth Warren may never be able to achieve the kind of bankruptcy reform they believe is possible by changing the way that bankruptcy works. No change could be more beneficial for female debtors than the elimination of the problems that create the need for bankruptcy. That change will only come by bringing together a feminist empathy with a macroeconomic perspective. A consciousness like Gilman describes in Herland:

To them the country was a unit—it was theirs. They themselves were a unit, a conscious group; they thought in terms of the community. As such, their time-sense was not limited to the hopes and ambitions of an individual life.233

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233. Gilman, see note 220, at 67.