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# Foreword

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# SYMPOSIUM

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## *As We Forgive Our Debtors*

### Foreword

FRANK R. KENNEDY\*

In a recent issue of the *Journal of Legal Education*, Professor Peter Schuck asks *Why Don't Law Professors Do More Empirical Research?*<sup>1</sup> He argues that the professorial neglect of this kind of scholarship has had unfortunate effects on law teaching and notes how “the two newest classroom orthodoxies” in law schools—law and economics and critical legal studies—undervalue factual data.<sup>2</sup> Professor Wiseman, in her contribution to this symposium, likewise laments the reluctance of legal scholars to undertake empirical research but focuses more directly on the unfortunate consequences of this neglect for policy formulation that underlies legislation.<sup>3</sup> Professor Schuck attempts to explain academic reluctance to pursue empirical research by identifying nine disincentives and proposes a remedy in the form of enhancement of academic rewards.<sup>4</sup> One is tempted to point out that the empirical study that is the focus of this symposium demonstrates the unreliability of assumptions as to the effectiveness of incentives to steer large numbers of people into particular courses of conduct,<sup>5</sup> but an incentive

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1. 39 J. LEGAL EDUC. 323 (1989).

2. *Id.* at 326.

3. Wiseman, *Women in Bankruptcy and Beyond*, 65 IND. L.J. 107 (1989).

4. Schuck, *supra* note 1, at 331-33. The nine disincentives discouraging empirical research are: (1) inconvenience, (2) lack of control, (3) tedium, (4) uncertainty, (5) ideology, (6) resources, (7) time, (8) tenure and (9) training. The remedial proposal would make appropriate allowances and adjustments in the making of tenure decisions to reward scholarly endeavor in empirical research projects. *Id.*

5. T. SULLIVAN, E. WARREN & J. WESTBROOK, *AS WE FORGIVE OUR DEBTORS* 335, 339 (1989) [hereinafter AWFOD].

program may nevertheless be worthwhile without regard to the number of people induced thereby to change their behavior.

The Bankruptcy Reform Act of 1978 and its 1984 amendments were designed by Congress to steer debtors in their choice of statutory relief. Both Congress and its critics, however, have relied on untested empirical assumptions. And as the number of consumer debtors seeking relief under the Bankruptcy Code increased from slightly less than 200,000 in 1979 to 473,000 in 1987,<sup>6</sup> the opportunity and need for empirical exploration became increasingly pressing. Thus both the policy makers and legal scholars are deeply indebted to the authors of *As We Forgive Our Debtors (AWFOD)* for their monumental study of consumer bankruptcy, the most ambitious such project ever completed.

Sullivan, Warren and Westbrook acknowledge that they wanted to challenge the use of simplistic and untested economic models and the illusion of the human as a rational maximizer of economic gain as guides for legislative action.<sup>7</sup> More concretely, they sought to undermine the preachments of the consumer credit industry and the law-and-economics guild that bankruptcy was being exploited by individuals well able to pay their debts and that the gates should be closed or made harder to climb over. The authors do not deny that their views influenced the questions they asked and the conclusions they drew. As Professor Wiseman summarizes,

[t]heir conclusions, based on their data, are that the explosion of consumer credit and the increased volatility in the American economy are the primary systemic factors in the increase in bankruptcy filings and that the economic model was an incomplete and invalid predictor of how flesh and blood men and women debtors would behave in a bankruptcy context.<sup>8</sup>

This symposium is the beginning of the dialogue that Sullivan, Warren and Westbrook's work will stimulate. The diversity of the articles and commentary in this issue reflect not only the richness of the data they have collected, but its widespread implications.

#### THE ROLE OF EMPIRICAL DATA IN DEVELOPING BANKRUPTCY LEGISLATION FOR INDIVIDUALS

MARJORIE GIRTH

Professor Girth's contribution to this symposium is an evaluation of the role of empirical data in the formulation of legislation, with particular

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6. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 527 (Table No. 866) (1989).

7. AWFOD, *supra* note 5, at 234-36, 243-54, 340.

8. Wiseman, *supra* note 3, at 108 n.9.

reference to the utility of the data gathered by Sullivan, Warren and Westbrook for the purpose of informing Congress about possible reforms in consumer bankruptcy laws. It is sometimes said that the principal product of an empirical research project is identification of the mistakes made in its design and the procedures followed and that its principal benefit is to provide guidance for further research. Professor Girth does not repeat that put-down of the worth of empirical research, but she does highlight limitations on the utility of the findings and conclusions presented in *As We Forgive Our Debtors* and reminds us of how much we still do not know. Professor Girth speaks out of extended experience in the conduct and use of empirical research in connection with the development of sound legislative policy for bankruptcy, having served as one of the two principal researchers and authors of the Brookings study, *Bankruptcy: Problem, Process, Reform*.<sup>9</sup> This study was an important source of empirical data about the operation of the bankruptcy system under the Act that was repealed in 1978.

Sullivan, Warren and Westbrook explain in *As We Forgive Our Debtors* why data sampled from the three states of Illinois, Pennsylvania and Texas appeared to be well chosen,<sup>10</sup> and most readers, contemplating the alternatives, probably resolved any doubts in favor of the authors. Nevertheless, Professor Girth levels at this choice the unsmiling observation that “[t]here is no way to know from these data whether these three states in fact represent the experience of bankrupt individuals nationwide.”<sup>11</sup> While acknowledging that “rigorous data processing procedures”<sup>12</sup> were used and that extensive findings were reported in great detail, Professor Girth characterizes the findings as of three kinds: “(1) those for which the reported data are ‘quite firm’; (2) those based upon the authors’ explicit assumptions affecting the data, [i.e.,] . . . ‘artificial’; and (3) those ‘invalid’ conclusions . . . based upon data whose defects have unacknowledged consequences.”<sup>13</sup>

Professor Girth declares all the factual findings of *AWFOD* questionable because the authors decided to limit their data to information provided by the debtors on their schedules.<sup>14</sup> She points out that as a result critics may discount the data completely, but she rejects that approach, apparently acknowledging the practical necessity of using self-reported data and the unacceptability of “a total factual vacuum.”<sup>15</sup> Instead, she advises legislators

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9. D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971). See *infra* notes 37-40 and accompanying text.

10. *AWFOD*, *supra* note 5, at 18-19.

11. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 *IND. L.J.* 17, 17 n.5 (1989).

12. *Id.* at 17-18.

13. *Id.* at 18.

14. *Id.* at 19.

15. *Id.* at 20.

to make discriminating use of the findings and conclusions with due regard to the firmness of the underlying data.<sup>16</sup>

Professor Girth sets out 13 conclusions<sup>17</sup> for which the data were "quite firm," including, for example, that the generosity of a state's exemption laws did not have a significant effect upon an individual debtor's choice of Chapter 7 or Chapter 13. The last conclusion in this group is that "reluctant" creditors must be analyzed separately from the "voluntary" participants in the consumer industry. Professor Girth opines without explanation that "when further amendments to the 1978 Code are considered," it is important to recognize the differences between these classes of creditors.<sup>18</sup>

In her discussion of conclusions for which the data are "explicitly artificial," Professor Girth includes the conclusion that bankrupt individuals are "'pretty close to a cross-section' of American workers," since the information relied on was provided by only 73% of the sampled petitioners.<sup>19</sup> Findings based on scheduled asset values are said to be flawed because standards relied on by petitioners were unknown.<sup>20</sup> The points seem not to be major.

Professor Girth criticizes the authors' conclusions regarding the ability of nonentrepreneurial Chapter 7 debtors to pay all or substantial portions of their debts as based on unverifiable assumptions regarding asset values. Girth finds the authors' conclusions that reluctant creditors would receive very little payment even if 20% of the income of nonentrepreneurial debtors was mandated for debt repayment more than plausible but based on artificial numbers. She categorizes the authors' conclusions about the incidence of income interruption and volatility among nonentrepreneurial debtors as based on tenuous or "sketchy" data.<sup>21</sup> The authors themselves admit that their effort to demonstrate that no more than 10% of nonentrepreneurial Chapter 7 debtors could pay 100% of their debts in a Chapter 13 proceeding if they lived on a "low household budget" could be subject to the criticism that their analysis required a highly artificial series of assumptions.<sup>22</sup> Professor Girth concludes after her survey of the conclusions based on artificial assumptions that legislators should use such results very cautiously.<sup>23</sup> However, she comments that "we obviously know much more than we did before,"<sup>24</sup> and guardedly suggests that a legislator might say that the burden rests on those who believe missing data would significantly change our

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16. *Id.*

17. *Id.* at 20-29.

18. *Id.* at 29.

19. *Id.* at 29-30 (quoting, in part, AWFOD, *supra* note 5, at 85).

20. *Id.* at 30-31.

21. *Id.* at 33-35.

22. *Id.* at 36.

23. *Id.* at 37.

24. *Id.*

understanding of the bankruptcy process for individuals—a formidable burden because of its cost.<sup>25</sup> Her final comment respecting these conclusions is that a legislator could well say “that data whose limits are clearly revealed constitute a step forward from the total factual vacuum that would otherwise surround the legislative process.”<sup>26</sup>

Professor Girth's severest and most extended criticisms are directed at the authors' characterization of Chapter 13 debtors as victims who “bought a bill of goods”<sup>27</sup> and “were cheated by a system that made unjustified promises of successful repayments and reestablished creditworthiness”<sup>28</sup> and who “paid money they could ill afford for advice to file bankruptcy in a way that was likely to bring them nothing but grief.”<sup>29</sup> Her characterization of the authors' evidence marshaled “for this stinging assessment” as “not impressive”<sup>30</sup> strikes this commentator as fair and well substantiated. She points out that the only firm data for the 32% of the cases that failed were snapshots taken at the time of the data collection. The projection of 67% ultimate failure involved acceptance of interviewees' surmises. Since we do not know from the data what the success rate would have been if the sampled cases had been followed to their conclusion, she charges that “[t]o imply otherwise in a study of this magnitude risks creating a seriously misleading basis for future bankruptcy policy debates.”<sup>31</sup>

Professor Girth then offers the contrasting results of an empirical study conducted in the Buffalo Division of the Western District of New York that extended over seven to nine years.<sup>32</sup> She notes that although the authors predicted only a 33% success rate, 60% of the confirmed plans were “successfully” completed. In reaching these figures, Professor Girth acknowledges that her standard of success was less exacting than the total repayment requirement contemplated in *AWFOD*. She also points out that the median repayment proposal in the Buffalo study was between 25 and 29%, whereas the median of the proposed payments in the cases in the *AWFOD* study was 45%.<sup>33</sup> Professor Girth persuasively argues that the persistence of the Buffalo debtors in fulfilling their plan commitments suggests that a significant number of individuals find the resulting stress is preferable to sale of nonexempt assets or selective repayment following liquidation. At any rate, bankruptcy policy makers should attempt to learn more about why so many debtors choose the Chapter 13 option and stick

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25. *Id.*

26. *Id.* at 38.

27. *Id.*

28. *Id.*

29. *Id.* at 38-39.

30. *Id.* at 39.

31. *Id.* at 40.

32. *Id.* at 40-48.

33. *Id.* at 42-43.

with it before accepting as proven the verdict of the three authors that Chapter 13 is a snare and a delusion.

In a final section Professor Girth considers three possible legislative strategies: (1) additional fine-tuning of the 1978 Code; (2) modifying the Code's incentives for debtors and creditors; or (3) deferring consideration of proposed amendments in recognition of the need to know more.

She concludes that notwithstanding the conscientious efforts of Sullivan, Warren and Westbrook to provide bankruptcy policy makers with information needed for evaluating the operation of the system as it applies to consumer debtors, the data provided are uneven in quality and in large part impressionistic.<sup>34</sup> She concedes, however, that the resources required to achieve significant improvement in quality are probably unavailable.<sup>35</sup> Professor Girth appropriately summarizes significant findings that are firm and irrefutable:

[1] The proportion of additional "can pay" debtors who might be identified among those who filed Chapter 7 proceedings is so low that the yield would not be worth investing significant additional resources in the effort.

[2] Neither total debt/income ratios nor exemption levels provide effective ways of predicting petitioners' current choices between Chapter 7 and Chapter 13 as bankruptcy remedies. . . .

[3] Similarly, currently available data on occupation and industry do not readily identify the potential bankrupts within the American workforce. . . .

[4] Very few "true repeaters" who use bankruptcy as often as it becomes available can be identified.<sup>36</sup>

The conclusion of this commentator is that the research of Sullivan, Warren and Westbrook is a magnificent contribution to our knowledge of the way the bankruptcy system operates with respect to consumer debtors, and all of us who are interested in its improvement owe them an awesome debt of gratitude for their devotion to the project that produced *AWFOD*. The authors of *As We Forgive Our Debtors* try too hard to discredit the thrust of the Purdue study in the direction of steering more Chapter 7 debtors into Chapter 13. Their bad-mouthing of the use of Chapter 13 is a case of overkill, but that criticism does not diminish the overall value of their monumental work.

#### *AS WE FORGIVE OUR DEBTORS IN THE CLASSROOM*

DOUGLASS G. BOSHKOFF

Professor Boshkoff's disquisition on the teaching and study of bankruptcy after the publication of *As We Forgive Our Debtors* is required reading,

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34. *Id.* at 64.

35. *Id.*

36. *Id.* at 63.

along with the text of *AWFOD*, for all teachers of this subject. As he reminds us, teachers of an earlier generation were blessed with the publication in 1971 of the Brookings study, *Bankruptcy: Problem, Process, Reform*, by Stanley and Girth.<sup>37</sup> The Brookings study was broader in scope than the study that was the basis for *AWFOD*. It contained more empirical data about the functioning of the bankruptcy system than had previously been available, and its primary focus was on possibilities for reform of bankruptcy administration. Publication of the Brookings study coincided with the commencement of the study of the Commission on Bankruptcy Laws, and the Brookings study provided teachers and students with a valuable source for supplementing casebooks, treatises, and law reviews with information about the actual operation of the system that was undergoing congressional review. The recommendations of the Brookings report for the transfer of bankruptcy administration (except of Chapter X cases) from the courts to an administrative agency<sup>38</sup> engendered a storm of protest from the bankruptcy bar,<sup>39</sup> but the report undoubtedly was a factor in Congress' partial acceptance of the proposals of the Commission on Bankruptcy Laws for the extrication of bankruptcy judges from non-judicial functions.<sup>40</sup>

During the 70's the teaching of bankruptcy took on a tentative cast by virtue of the prospect for overhaul of the bankruptcy laws. Since 1978 the study of bankruptcy has required an intensive examination of the Bankruptcy Reform Act and the plethora of opinions of courts construing the Act. Professor Boshkoff now suggests that the "[p]ublication of *AWFOD* should mark the beginning of a period in which more academic attention is focused on all aspects of the consumer bankruptcy process."<sup>41</sup> For one who during his years of teaching debtors' and creditors' rights always devoted a generous portion of time and attention to consumer bankruptcy, this prediction is gratifying and, it is hoped, accurate.

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37. See D. STANLEY & M. GIRTH, *supra* note 9.

38. "Under the new bankruptcy system that we recommend: I. All bankruptcy cases except reorganizations of corporations would be handled by a newly established administrative agency using the most effective modern procedures." *Id.* at 4.

39. See, e.g., Kruger, *Book Review*, 73 COLUM. L. REV. 381 (1973); Levit, *Bankruptcy Administration and the Brookings Report—A Critical Analysis*, 77 COM. L.J. 179 (1972); Margolis, *Bankruptcy and the Brookings Institution*, 74 CREDIT AND FIN. MGMT. No. 9, 8, 28 (Sept. 1972); see also Cyr, *The Abandonment of Judicial Proceedings: A Commitment to Consumer Disservice*, 78 COM. L.J. 37 (1973); Goodwin, *Updating the Bankruptcy System in the U.S.*, 74 CREDIT AND FIN. MGMT. No. 9, 22, 22-23 (Sept. 1972); Lavien, *Water a Myth and Watch it Grow!*, 79 COM. L.J. 116 (1974).

40. The United States Trustee system now established by 28 U.S.C. §§ 588-589(a) (1982 and Supp. V. 1987) falls short of fully implementing the recommendations of the Commission in its two-volume report. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93rd Cong., 1st Sess., pt. I, ch. 5, at 103-56 (1973); *id.* pt. II, ch. III, at 51-65.

41. Boshkoff, "As We Forgive Our Debtors" in the Classroom, 65 IND. L.J. 65, 82-83 (1989).



In Part I of his article Professor Boshkoff briefly surveys the organization of courses and materials available for the teaching of bankruptcy in American law schools. He notes that three routes are taken: (1) the first allows no more than passing attention to bankruptcy in a course devoted primarily to secured transactions; (2) the second divides attention fairly evenly between Article 9 of the U.C.C. and bankruptcy; and (3) the third concentrates on bankruptcy. Teachers and casebook editors who take the second and third routes are oppressed by the burden of dealing with a new body of bankruptcy law that includes the chapters on rehabilitation.<sup>42</sup> Although the Bankruptcy Act had more rehabilitative chapters than the current code, in recent years the number and proportions of petitioners for rehabilitative relief have increased to such an extent that a course featuring only liquidation bankruptcy would be seriously incomplete. Professor Morris Shanker has recently published an argument that bankruptcy should be a required law school course because of the opportunity it affords students and teacher to interrelate other fields of law in a single course.<sup>43</sup> Professor Boshkoff points out that this opportunity also exerts hydraulic pressure on the teacher as she endeavors to cope with the demands of a well designed course within the tight time limits of three semester hours. I recall that during my last few trips through debtors' and creditors' rights I was beset by a constant temptation to lecture lest significant issues and aspects be neglected.

Professor Boshkoff does not comment on the riches provided by *AWFOD* for classrooms where courses in consumer law or consumer credit regulation are still being offered. The *A.A.L.S. Directory of Law Teachers 1988-89* lists more than 100 members of law school faculties that classify themselves as teachers of Consumer Law.<sup>44</sup> The amount of classroom time and space in the published course materials that are devoted to consumer bankruptcy, including Chapter 13, varies considerably, but the information now available in *AWFOD* about consumer debtors in distress and what happens to those who seek relief under the Bankruptcy Code opens new vistas for teachers and students interested in consumer law. The subject appears to have declined in importance as a curricular concern during the last decade, as it has also received less attention from Congress, state legislatures, administrative agencies, and the courts. To Professor Boshkoff's optimism about

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42. Professor Boshkoff refers in footnotes to 19 coursebooks used in the teaching of bankruptcy. *Id.* at 66 nn.6-8. He does not mention a recent addition, A. COHEN & L. FORMAN, *BANKRUPTCY, ARTICLE 9 AND CREDITORS' REMEDIES: PROBLEMS, CASES, MATERIALS* (2d ed. 1989). This work clearly fits in the group of materials following the third route. One half of its pages are allocated to nonbankruptcy law. Two chapters of the bankruptcy half of the work deal with Chapters 13 and 11, but they take up only 12% of the total pages.

43. Shanker, *Why the Bankruptcy Course Ought to be Mandatory*, 39 J. LEGAL EDUC. 299 (1989).

44. ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE DIRECTORY OF LAW TEACHERS 1988-89* (1988).

the influence of *AWFOD* in raising the level of attention to consumer bankruptcy in bankruptcy courses, I add my expectation that this seminal study will energize teachers and students of consumer law to take greater interest in the problems of consumer debtors.

In the second division of his article, Professor Boshkoff discusses ability to pay and the choice between Chapter 7 and 13 as possible foci of classroom discussion. He suggests that classroom attention may more wisely be directed to a consideration of how to go about determining the facts needed by a legislature in formulating consumer bankruptcy policy than to the factual findings of *AWFOD*.<sup>45</sup> He acknowledges some disappointment with his own efforts to follow this suggestion—a not surprising reaction in view of the difficulty of channelizing the discussion and developing confident conclusions within the time reasonably available.<sup>46</sup> He regards the findings of *AWFOD* as to the distribution of debtors between Chapter 7 and 13 so surprising and disturbing that he can hardly believe “that Chapter 13 can retain its current prominent status in the bankruptcy world.”<sup>47</sup> His query whether classroom consideration of Chapter 13 should not be sharply reduced appears to give more weight to *AWFOD*'s animadversions on the reasons debtors use Chapter 13 than to the trends and extent of actual use of the chapter. His conclusion that the roles of lawyers and judges in bankruptcy administration deserve classroom exploration is less debatable.

In a final, brief section Professor Boshkoff observes that the *AWFOD* findings regarding the low level of prebankruptcy debt collection activity suggest that casebook editors should devote less space and time to non-bankruptcy remedies of creditors. The near-demise of prejudgment remedies following in the wake of *Sniadach v. Family Finance Corp.*<sup>48</sup> renders that subject one of largely historical interest only, but recently enacted federal regulation of several aspects of debtor-creditor relations easily fills any gaps created by the passing of attachment and prejudgment garnishment. I remain one of the old guard with Professors Countryman, Riesenfeld, and King<sup>49</sup> who believe that an understanding of the functioning of state creditors' remedies is a prerequisite to a satisfactory understanding of the interrelationship between state and federal law in the application of the Bankruptcy Code. I am gratified to note that the most recently published casebook in this field devotes two chapters and a substantial number of pages to nonbankruptcy law governing debt creation and collection.<sup>50</sup>

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45. See Boshkoff, *supra* note 41, at 72.

46. *Id.* at 73 n.68.

47. *Id.* at 75.

48. 295 U.S. 337 (1969).

49. Boshkoff, *supra* note 41, at 69 & nn.35-37.

50. See A. COHEN & L. FORMAN, *supra* note 42.

Professor Boshkoff's conclusion that "[i]n view of the tension 'between the statute's complexities and the small amounts at stake,' it is entirely appropriate to devote a greater amount of classroom time to coverage of matters more likely to be encountered by attorneys for individual debtors"<sup>51</sup> is not controvertible.

### HAS THE TIME COME TO REPEAL CHAPTER 13?

WILLIAM C. WHITFORD

The authors of *As We Forgive Our Debtors* conclude that their findings are both reassuring and troubling:

The data suggest that the present bankruptcy system works, at least in the sense that it gives debtors in trouble some chance to start over. . . .

But bad news comes with the good. The data show a bankruptcy system that poorly serves many who seek its protection. . . .

. . . In the short run, we look for changes in the widespread love affair with Chapter 13 among the professionals who do not actually have to live with the budgets and payoff plans.<sup>52</sup>

The principal supports for the conclusion that the system works poorly appear to be that (1) the incentives provided in Chapter 13 to induce debtors able to pay significant portions of their indebtedness to choose that chapter rather than Chapter 7 have not been effective, because the characteristics of Chapter 7 and Chapter 13 debtors studied in the course of the survey are pretty much indistinguishable; and (2) the 67% failure rate of Chapter 13 plans in the districts studied is fairly positive proof that the system is not working.<sup>53</sup>

Neither the characteristics of Chapter 11 debtors nor the failure rate of Chapter 11 petitions was examined or compared. The failure rate for Chapter 7 debtors was not considered; presumably, a Chapter 7 discharge would not have been classified as a failure merely because creditors did not receive any distribution. Denials of discharge in Chapter 7 cases might conceivably be classified as failures of a kind, but presumably such failures would not be chargeable to an operational inadequacy of the bankruptcy system.

Nevertheless Professor Whitford picks up the ball put in play by authors Sullivan, Warren and Westbrook and runs with it. The arresting title to Professor Whitford's contribution is not merely a come-on to curious readers or a tongue-in-cheek rejoinder to the proponents of a compulsory Chapter 13 of the Bankruptcy Code. He believes that many debtors are inveigled into taking on the burdens of a protracted, costly, and ultimately frustrating

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51. Boshkoff, *supra* note 41, at 82 (footnote omitted).

52. AWFOD, *supra* note 5, at 340.

53. See Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 92 (1989).

regimen when Chapter 7 better meets their needs. His point of view is strictly that of the debtor and the debtor's family; his calculus does not include the creditors' interests, the national economy, or the proper role of government as a regulator of credit and commerce generally. Thus he makes no reference to the amount of payments of debts made by Chapter 13 debtors.

He identifies and then attacks eight supposed benefits to debtors who opt for Chapter 13: (1) the chapter provides a mechanism that enables a debtor to repay some debts "for reasons of personal morality or in order to maintain continuing relations with some creditors"; (2) it responds to a debtor's desire to avoid the stigma of bankruptcy; (3) it affords relief to a debtor who wants to avoid a burdensome liability that is dischargeable only in a Chapter 13 case; (4) it enables a debtor who is precluded from obtaining a discharge by the six-year bar of section 727(a)(8) to receive a discharge in a Chapter 13 case; (5) it enables a debtor to avoid repossession of a necessary asset (other than a home) and to avoid default by stretching out payments to a secured creditor; (6) it enables a debtor who has fallen behind in payments on a mortgage on the debtor's home to obtain a stay of foreclosure and to cure the default; (7) it enables a debtor to keep nonexempt property; and (8) the debtor may obtain protection of a cosigner from execution until she can pay.<sup>54</sup>

Professor Whitford considers the superdischarge granted to Chapter 13 debtors a sacrifice of the interests of the holders of claims not dischargeable in Chapter 7 cases for the benefit of other creditors who will collect more in Chapter 13 cases.<sup>55</sup> He does not note that the holders of the claims affected by the superdischarge are included in the group of distributees under the confirmed Chapter 13 plans, nor does he cite any evidence to show that holders of claims not discharged in Chapter 7 cases fare better than creditors of Chapter 13 debtors who complete payments under confirmed plans. Professor Whitford suggests that it would be a more defensible policy for Congress to pay the holders of claims not dischargeable under Chapter 7 out of the public purse than to confer the benefit of discharging their claims only on those Chapter 13 debtors who fully perform their confirmed plans.<sup>56</sup> He regards the operation of the superdischarge as a punishment of the debtors who cannot (or at least do not) choose Chapter 13 and an allocation of its proceeds to one creditor.<sup>57</sup> The further implication of Professor Whitford's argument is that if Congress followed his suggestion by repealing Chapter 13, it would make the benefits available to all (or at least most) debtors, and that result would be desirable because it would

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54. *Id.* at 94-104.

55. *Id.* at 96-97.

56. *See id.* at 97.

57. *See id.*

eliminate the unhappy encounters many debtors are having by filing for relief under Chapter 13 before discovering its perils and frustrations.<sup>58</sup>

Professor Whitford's article is a welcome and wry antidote to the arguments for a compulsory Chapter 13 or for restricting consumer debtors' access to relief under Chapter 7.<sup>59</sup> The article is nevertheless unrealistic in supposing that if the special benefits of Chapter 13 were eliminated, Congress would be disposed to extend them to debtors generally. The article does not suggest that the administrative burden of handling Chapter 13 cases jeopardizes or has a detrimental effect on the administration of relief under other chapters. Professor Whitford sees the enthusiasts for Chapter 13 in the areas of the country where it has been extensively used as exploiters of vulnerable debtors, who should be protected against the wiles of the "local bankruptcy elite" who promote Chapter 13.<sup>60</sup>

Professor Whitford concludes that "[a]ny reasonable utilitarian calculus emphasizing the greatest good for the greatest number of debtors is likely to come down on the side of repeal."<sup>61</sup> However, he does not try to argue that a reasonable utilitarian calculus emphasizing the greatest good for greatest number of debtors and creditors and society at large would come down the same way. He does not concede that Congress may weigh interests other than the material interests of uninformed debtors in the utilitarian balance.

It is the conclusion of this commentator that the authors of *As We Forgive Our Debtors* have made the convincing case that Professor Whitford highlights, namely, that Chapter 13, as presently enacted does not serve well the needs of uninformed consumer debtors without regular, disposable income. However, Professor Whitford's argument for repeal of Chapter 13 would be more persuasive if it recognized the appropriateness of a broader perspective.

## WOMEN IN BANKRUPTCY AND BEYOND

ZIPPORAH BATSHAW WISEMAN

As the title indicates, Professor Wiseman's contribution focuses on the women who have been debtors in the 1,502 cases examined by Sullivan, Warren and Westbrook. In the first section of her article, Wiseman highlights Chapter 8 of *As We Forgive Our Debtors*, entitled "Women and Bankruptcy," for its "compelling commentary on the economic plight of American women who head households."<sup>62</sup> She identifies as the book's "most dramatic conclu-

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58. *Id.*

59. See Eisenberg, *Bankruptcy Law in Perspective*, 28 U.C.L.A. L. REV. 953, 967-89 (1981); White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 51 (1987-88).

60. Whitford, *supra* note 53, at 105.

61. *Id.*

62. Wiseman, *Women in Bankruptcy and Beyond*, 65 IND. L.J. 107, 109-10 (1989).

sion" the fact "that the difference between the average single woman heading a household who goes bankrupt and the one who does not, is not the money" women themselves earn but "the additional income they receive from men—child support and alimony—and from government support programs."<sup>63</sup> She also finds it noteworthy that "[w]omen filing alone were the poorest bankrupts in the study."<sup>64</sup>

In the second section of her article, Professor Wiseman provides suggestions for improving the economic position of women in our society. Initially, she proposes increasing women's participation as lawyers in the bankruptcy system in order to reduce discriminatory treatment of women bankrupts. More concretely she proposes that law schools offer clinical courses or opportunities for students to gain clinical experience in handling bankruptcy cases for consumer debtors, including minorities, women and AIDS victims. She acknowledges, however, that accessible legal representation for women in bankruptcy will not address the more fundamental issues arising out of the economic straits of women. *AWFOD* observes that bankruptcy has become a medical insurer of last resort by discharging medical debt and shifting the cost to practitioners, hospitals and the patients who pay their way,<sup>65</sup> but as Professor Wiseman points out, the economic plight of women householders struggling to care for children and other dependents and holding down jobs that take them out of their homes goes beyond the difficulty of paying medical bills and other obligations dischargeable in bankruptcy. While the United States leads the world in affording a fresh start to debtors who resort to bankruptcy, the policy of Western European countries, as Professor Wiseman points out, is to afford economic support to single-parent families that relieves them from incurring overwhelming debt burdens for health care and day care.

She closes with a brief proposal for a "woman-centered view of bankruptcy."<sup>66</sup> She suggests that women should be compensated for the contributions they make (as homemakers and caretakers) to society. If women were paid for their labor, many would be transformed from society's debtors to society's creditors. For such dispensation the collection and distribution of the debtor's estate and the debtor's fresh start, which are the hallmarks of bankruptcy in this country, would be largely irrelevant. Although Professor Wiseman admits that her suggestion is utopian, she argues that it may serve as a vantage point from which other reforms can be evaluated.

#### A SOCIOLOGICAL PERSPECTIVE ON BANKRUPTCY

LISA J. MCINTYRE

Professor Lisa McIntyre adds the perspective of a sociologist to this symposium. Her article focuses on the significance of the publication of *As We*

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63. *Id.* at 110.

64. *Id.* at 113.

65. See *AWFOD*, *supra* note 5, at 173-75.

66. Wiseman, *supra* note 62, at 119-20.

*Forgive Our Debtors* for sociological research. One gratifying result she predicts is that at least for sociologists, Sullivan, Warren and Westbrook will render passé Charles Warren's descriptions of bankruptcy as "a gloomy and depressing subject" and "a dry and discouraging topic."<sup>67</sup> Two other anticipated results are that (1) some sociologists at least will bring their research to bear on the questions of whether bankruptcy law, its workings, and consequences make any sense; and (2) many sociologists will inquire into the social and psychological underpinnings of debtor-creditor relations.<sup>68</sup>

Picking up on the numerous references in *AWFOD* to the "social pathology" or "social problem" of the current rate of bankruptcy filings, she wonders whether the rate may not signify social health rather than malaise.<sup>69</sup> Her comment echoes observations made to the Commission on Bankruptcy Laws by Professor J. Fred Weston in 1971 at a conference of economists that, contrary to popular opinion, the rate of resort to bankruptcy was arguably too low.<sup>70</sup> Whether rising hospital admissions and crime rates indicate greater social sensitivity or a deterioration of social conditions has been the subject of extended consideration by sociologists and members of other disciplines and legislative policy-makers.<sup>71</sup> Sullivan, Warren and Westbrook's findings go far to undermine the myth that bankruptcy is being exploited as a hideaway for debtors able to pay their debts. Professor McIntyre appropriately suggests that sociologically oriented research could investigate further the theory that bankruptcy is a symptom of social pathology. She highlights the emphasis by Sullivan, Warren and Westbrook of their findings that bankrupt debtors are "part of mainstream America"<sup>72</sup> and draws attention to the implications of the increasing accumulation of debt—not only of economic vulnerability but also of "the degree to which Americans increasingly have come to participate in their economy."<sup>73</sup> She even tentatively suggests that "to the degree that . . . risk of failure is distributed equally throughout society, bankruptcy could be considered . . . 'normal' for capitalistic society and not a symptom of pathology."<sup>74</sup>

This suggestion invites reference to the debate that has flourished during the last few years about whether business debtors should be allowed to resort

67. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 123 (1989).

68. *Id.* at 123-24.

69. *Id.* at 124.

70. TRANSCRIPT OF CONFERENCE OF ECONOMISTS CONVENED BY THE COMMISSION ON BANKRUPTCY LAWS OF THE UNITED STATES, AT BROOKINGS INSTITUTION, WASHINGTON, D.C. 22 (August 23, 1971).

71. See, e.g., A. COCHRANE, EFFECTIVENESS AND EFFICIENCY: REFLECTIONS ON HEALTH SERVICES (1972); A. DONABEDIAN, MEDICAL CARE CHARTBOOK 17, 48, 58, 69 (8th ed. 1986); Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

72. McIntyre, *supra* note 67, at 127 (citing *AWFOD*, *supra* note 5, at 141).

73. *Id.*

74. *Id.*

to the bankruptcy laws for reasons characterized as business strategy without proving insolvency.<sup>75</sup>

Professor McIntyre then notes the evidence adduced by Sullivan, Warren and Westbrook that the risk of bankruptcy is distributed unevenly, with particularly unfortunate effects on single-women and single-income families. She recognizes that although this evidence is revealed by the authors' study of the operation of the bankruptcy system, policy-makers need to consider solutions broader than reform of the bankruptcy laws.<sup>76</sup>

Professor McIntyre discusses at some length the role of stigma as a more effective determinant of debtor behavior than the economic incentives provided by the bankruptcy laws. Early in the two-year life of the Commission on Bankruptcy Laws, it received numerous communications, including a stack of correspondence from Shelbyville, Indiana, urging the Commission to restore the stigma to bankruptcy. The Commission did not implement this recommendation and indeed eliminated the word "bankrupt" from its draft of a proposed new Bankruptcy Act—a recommendation followed by Congress in the Bankruptcy Reform Act of 1978. Nevertheless, it appears from the study of Sullivan, Warren and Westbrook that bankruptcy stigma survives with a life of its own, and that Chapter 13 debtors who complete performance of their plans do so largely out of a sense that nonpayment will be perceived as betrayal of a trust. Professor McIntyre concludes from the data presented by these authors that although the consumer credit industry is willing to accept the benefits from the prevalence of bankruptcy stigma, professional creditors do not regard consumer-debtor default as evidence of moral blameworthiness or shameful conduct. Their concern is focused on considerations of cost-effectiveness and profitability. Their reliance is principally placed on objective calculations of probabilities of payment by the whole body of debtors rather than on investigations and determinations of personal morality of the debtors as individuals.

As Professor McIntyre concludes, "Sullivan, Warren and Westbrook have opened up a new window on an increasingly important social relation."<sup>77</sup> A change in the social view of credit, about which more needs to be learned, may have dramatic effects on debt-payment behavior and resort to bankruptcy.

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75. See Cifelli, *Management by Bankruptcy*, FORTUNE, Oct. 31, 1983, at 69; DiPietro & Katz, *Chapter 11 of the Bankruptcy Code—Use or Abuse?*, 57 CONN. B.J. 418 (1983); Kennedy, *Creative Bankruptcy? Use and Abuse of the Bankruptcy Law—Reflection on Some Recent Cases*, 71 IOWA L. REV. 199, 202-04 (1985); Note, *Manville: Good Faith Reorganization or "Insulted" Bankruptcy*, 12 HOFSTRA L. REV. 121 (1983); Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability?*, 56 TEMP. L.Q. 539, 564-67 (1983).

76. McIntyre, *supra* note 67, at 127-28.

77. *Id.* at 139.



