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Women in Bankruptcy and Beyond

ZIPPORAH BATSHAW WISEMAN*†

Empirical research into the effects of particular laws is crucial for formulating policy and for making and changing laws. It is also expensive, time-consuming and often undervalued in the legal academy.¹ Not surprisingly, legal scholars rarely undertake it.² Thus policy makers and scholars owe a real debt to the authors of *As We Forgive Our Debtors*,³ Teresa Sullivan, Elizabeth Warren and Jay Westbrook, for this gracefully written, careful, mammoth book on consumer bankruptcy. They have skillfully taken mountains of data from 1,529 bankruptcy files involving 2,409 petitioners⁴ who filed bankruptcy in 1981 in Illinois, Pennsylvania and Texas⁵ and used the window of bankruptcy to frame pictures of the economic workings of contemporary American society. Viewing bankruptcy as a safety valve, they look at the points in the American economy where the pressure builds up. One of the pressure points, and one of their most dramatic

* Professor of Law, University of Texas Law School; Professor of Law Emeritus, Northeastern University. LL.B., 1954, Yale University; B.A., 1950, McGill University. This essay is dedicated to Vern Countryman who taught me what I know about bankruptcy and has given me a model of a life in the law, combining rigorous scholarship and an uncompromising pursuit of justice. My gratitude to Martha Minow, Anne Goldstein, Fred Wiseman, Isabel Marcus, Daniel Schaffer, and Anne Mandelbaum for their comments, thoughts and encouragement; to Cynthia Dill, Fern Greenberg and Joy Plunkett for helpful research and editorial assistance; and to Mary French for typing, always with good humor.

† At the request of the author, the *Indiana Law Journal* has not followed the rules regarding citation of author name for books and periodicals as set forth in *A Uniform System of Citation*.

1. "[T]he legal academy has followed the enchantments of text rather than the Brandeisian imperative of disciplined examination of context." Marc Galanter, *Outside, Inside: Jewish Justices in the Homeless Society*, 14 *LAW & SOC. INQUIRY: J. AM. B. FOUND.* 507, 523 (1989). That imperative is quoted by Professor Galanter: "[N]o law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied." Louis D. Brandeis, *The Living Law*, 10 *ILL. L. REV.* 461, 467 (1916); see Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 *J. LEGAL EDUC.* 323 (1989); Lawrence Friedman, *The Law and Society Movement*, 38 *STAN. L. REV.* 763, 766 (1986); John Henry Schlegel, *American Legal Realism and Empirical Social Science*, 28 *BUFFALO L. REV.* 459, 585-86 (1979) (on law schools' negative view of empirical research).

2. The last broad empirical study of bankruptcy was done almost twenty years ago at the behest of the federal judiciary at the Brookings Institute. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971). This study was one of the early steps in a process that resulted in the complete rewriting of bankruptcy law in the Bankruptcy Code of 1978.

3. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* (1989) [hereinafter AWFOD].

4. *Id.* at 17. More than half of the bankruptcy petitions were filed jointly by husbands and wives.

5. *Id.* at 18. Geographic choices, units of analysis and sampling methods are explained in the Appendix. *Id.* at 342-53.

pictures, is of the economic dependency and vulnerability of women who are the heads of households in the United States today.⁶

In an apt analogy, the authors describe bankruptcy as a financial hospital for people sick with debt.⁷ The authors seek to discover from the data who the patients are; whether they are really sick—honest debtors using the system fairly; why consumer bankruptcy and consumer debt have more than doubled in less than a decade;⁸ and, most importantly, what the implications of the responses to these questions are for bankruptcy law.⁹ I will focus on

6. *Id.* at 147-65; see also *id.* at 49-62 (describing bankrupt couples).

7. *Id.* at 6, 329.

8. *Id.* at 3, 6.

9. The book is based on the Consumer Bankruptcy Project designed by the authors and carried out over a five year period from 1981 to 1985, the most extensive empirical study of bankruptcy ever undertaken. *Id.* at 4. The context of the book is a debate over the substantial increase in bankruptcy filings in the last decade since the enactment of the 1978 Bankruptcy Code, which significantly liberalized the requirements for consumer bankruptcy. *Id.* at 5, 16. The authors dispute the arguments made by the credit industry and some law and economics academics that this increase reflects abuse of the bankruptcy system and that the new Code made bankruptcy too easy. *Id.* Thus, these critics argue, a proper mix of economic incentives and disincentives would deter consumer bankruptcy filings. *Id.* at 5, 16, 201.

By 1984, thirty-four states and Congress had imposed serious restrictions on consumer bankruptcy based on the economic incentive analysis. Principally, the federal amendments restricted the assets a debtor could shelter from the bankruptcy process and the states restricted debtors to their generally more limited state exemptions. *Id.* at 233; see 11 U.S.C. § 522(d) (1988); see also 11 U.S.C. §§ 707(b), 1325(b) (1988).

The authors' ultimate aim is to challenge the widespread use of "simplistic and untested" economic models as a guide to legislative action. AWFOD, *supra* note 3, at 9, 234-56. In their first chapter they write that their purpose is to present the facts as "clearly and objectively" as they can. *Id.* at 10. They make a point of telling us that they wrote their introduction and conclusion last, not first. They do acknowledge that the questions they asked and the way they framed them "were influenced" by their own views. *Id.* Gunnar Myrdal, discussing the influence of values on research, observed that "[v]aluations are always with us. . . . Prior to answers there must be questions. There can be no view except from a viewpoint. In the questions raised and the viewpoint chosen, valuations are implied." Gunnar Myrdal, *Utilitarianism and Modern Economics*, in *ARROW AND THE FOUNDATIONS OF THE THEORY OF ECONOMIC POLICY* 273, 275 (George Feiwel ed. 1987).

Their 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. AWFOD, *supra* note 3, at 12-13.

I leave for technical experts an evaluation of the book's quantitative methodology. See Marjorie Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 *IND. L.J.* 17 (1989). However, it would have been more effective to present the economic thesis and a statement of its failure at the beginning of the book. Moreover, I would prefer to have met some of the debtors through interviews rather than only from the bankruptcy files. The authors did interview judges, trustees and clerks to gain insights into the bankruptcy process. AWFOD, *supra* note 3, at 351-53. Some interviews with debtors would have provided flashes of insight as the authors suggest in their account of the results of the interviews by the General Accounting Office with five debtors cited by the consumer credit industry as debtors who could have paid their debts and were therefore abusing the bankruptcy process. *Id.* at 200-01. Interviews with some of the chief actors in the bankruptcy drama would have been appropriate to a book seeking to explode the myth of the human as rational maximizer of economic gain.

one group of "patients" pictured in the book, women in bankruptcy—particularly women who filed alone.¹⁰ The authors compare the economic situation of these women to that of women not in bankruptcy and in so doing they present the larger picture of the marginal economic situation of women generally.¹¹

The economic vulnerability of American women has been well documented and analyzed by scholars in other fields.¹² In 1985, Professor Lenore Weitzman argued convincingly that if the well documented income disparity between women and men and the economic consequences of divorce for women continued without change, we would soon arrive at a "two tier society" with an underclass of women with children.¹³ The portrait of women in this study who filed petitions in bankruptcy court in Illinois, Pennsylvania and Texas in 1981, vividly illustrates women's disproportionate position at the bottom of the economic ladder from the vantage point of bankruptcy.

In chapter 8 of *As We Forgive Our Debtors*, the authors present the information that they have unearthed from the files on women in bankruptcy

10. Married women may file—as may married men—either jointly with a spouse or alone. 11 U.S.C. § 302 (1988). The term "single-filing" woman or man does not necessarily mean the filer is unmarried; it means the individual has filed alone.

11. Two hundred and sixty-one women in the consumer bankruptcy study filed bankruptcy alone. They were largely single or soon to be single. They constituted 40% of the individual filings and 17% of all the cases. Eight hundred and fifty-eight women filed with their husbands. Thus, women debtors were petitioners in 74% of the cases in the study. AWFOD, *supra* note 3, at 149-50.

12. See, e.g., DANIEL PATRICK MOYNIHAN, *FAMILY AND NATION* 95 (1986) (The term "feminization of poverty" gets only halfway to the point which is that children, slightly more than half of them male, are now disproportionately poor in the United States.); Diana Pearce & Harriette McAadoo, *Women and Children, Alone and in Poverty*, Women's Research and Education Institute (1981); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* xiv (1985); Mary Jo Bane, *Politics and Policies of the Feminization of Poverty*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 381 (Margaret Weir, Ann S. Orloff, Theda Skocpol eds. 1988); Jane Roberts Chapman & Gordon R. Chapman, *Poverty Viewed as a Woman's Problem—The U.S. Case*, in *WOMEN AND THE WORLD OF WORK* 153 (Anne Hoiberg ed. 1982); Barbara Ehrenreich & Frances Fox Piven, *The Feminization of Poverty: When the Family Wage System Breaks Down*, 31 *DISSSENT* 162 (1984); *Household Composition and Poverty*, in *FIGHTING POVERTY* 209 (Sheldon H. Danziger & Daniel H. Weinberg eds. 1986); NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, *FINAL REPORT: THE AMERICAN PROMISE: EQUAL JUSTICE AND ECONOMIC OPPORTUNITY* (September 1981); Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 *URB. & SOC. CHANGE REV.* 28 (1978).

13. L. WEITZMAN, *supra* note 12, at 355. She acknowledges that the two tiers are not static; they are not totally segregated by sex, and ethnic background plays an important part. *Id.* at 355-56. She points out that the current statistics on divorce and its economic effects on female-headed families suggest that a significant proportion of the current generation of American children will live in poverty. *Id.* at 352. In August 1980, the National Advisory Council on Economic Opportunity reported that "the 'feminization of poverty' has become one of the most compelling social facts of the decade." NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, 12th Rep. 147 (1980). At the current rate, the poverty population of the United States by the year 2000 will be composed solely of women and children. *Id.* at 148; see also VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 75-93 (1988).

as a compelling commentary on the economic plight of American women who head households. The book has chapters entitled Occupations and Financial Portraits of Debtors, Entrepreneurs, Homeowners, Medical Debt, Commercial Lending, Credit Card Junkies, Repeaters, the Consumer Credit Industry and Reluctant Creditors; the economic situation of women is not its primary focus. Yet its most dramatic conclusion is that the difference between the average single woman heading a household who goes bankrupt and the one who does not, is not the money earned by each woman. The difference is the additional income they receive from men—child support and alimony—and from government support programs.¹⁴ Thus, this study reveals systemic gender-linked patterns behind women's economic dependency, rather than an image of periodic and randomized economic insolvency.

I. BANKRUPTCY: ITS OPERATION AND ITS PLACE IN WOMEN'S LIVES

A. *How Bankruptcy Works*

To appreciate the significance of the pictures of women in bankruptcy in *As We Forgive Our Debtors*, a general sketch of how bankruptcy works is necessary.¹⁵ According to the sponsor of the first national bankruptcy bill in the 6th Congress in 1800, bankruptcy has two objectives:

[I]n the first place, to support mercantile credit, by protecting the rights of creditors . . . and secondly to encourage fair industry and prudent conduct, by enabling honest debtors reduced by misfortune, to give up their property, free themselves entirely from their debts, and begin the world anew, which no man will ever have the courage to do, while a load of old debts is hanging on him.¹⁶

These objectives remain the goals of our federal bankruptcy laws today—and extend now to women too. Consumer bankruptcy accomplishes these goals by paying creditors a percentage of the debts owed them from some of the debtor's assets and wiping out, or "discharging," the remainder of the bankrupt's debts.¹⁷

Any individual or married couple, partnership or corporation may "begin the world anew," in Bayard's eighteenth century phrase, by filing bankruptcy under Chapter 7, the liquidation chapter of the Bankruptcy Code.¹⁸

14. AWFOD, *supra* note 3, at 156, 164.

15. The authors devote most of one chapter to a clear and accessible explanation of the consumer bankruptcy process. *Id.* at 20-45.

16. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 165 n.19 (1935) (citing Letter by Robert G. Harper (May 15, 1800), reprinted in *Papers of James A. Bayard*, AMER. HIST. ASS'N REP. II, 101-02 (1913)). This bill was applicable only to merchants and dealers. The first national bankruptcy act similar to our present law, the bankruptcy law, was passed in 1898. *Id.* at 140-41, 143, 178.

17. 11 U.S.C. § 524 (1988).

18. *Id.* §§ 109(b), 701-728.

Chapter 7 discharges the bankrupt from most of her debts,¹⁹ and establishes a system under which the bankruptcy trustee assembles a bankrupt's non-exempt assets and distributes the proceeds pro rata among creditors who have been notified of the bankruptcy, and who have filed claims.²⁰

Some assets remain "exempt" under state or federal law; the debtor may keep them and the trustee may not reach them on behalf of the creditors. Typically, exempt property, often with a value limitation, includes the debtor's home, car, furniture, clothing and the tools of her trade.²¹

Individual debtors, including couples, who have a regular income have an additional choice. If they owe less than \$100,000 in unsecured debt and less than \$350,000 in secured debt, they may file under Chapter 13 of the Bankruptcy Code, "Adjustment of Debts of an Individual with Regular Income." Chapter 13 permits debtors to propose a payment plan under which they agree to pay a percentage of their debts over a three to five year period.²² If the court approves the proposal and the debtor succeeds in making the payments to the court under the plan, the debtor receives a discharge of the portion of the debts that the debtor did not propose to pay in the plan.²³ The debtor then may make a fresh start at the end of the period. If the debtor's economic circumstances worsen or the payment plan was overly optimistic the debtor may modify her payment plan,²⁴ apply for a hardship discharge²⁵ or ask her lawyer to move to convert the case to a case under Chapter 7.²⁶ The debtor must then pay an additional filing fee²⁷ and additional lawyer's fees.²⁸

The authors observe that bankruptcy performs the essential function of a safety valve in a volatile, free market, sophisticated capitalist economy. It serves as an escape for debtors drowning in debt and at the same time, it protects society against the social unrest that might well result if these debtors could not be relieved of their debt.²⁹ The book suggests, though, that some kinds of economic disasters are not simply episodic economic

19. The exceptions include debts to the government for taxes and educational loans and to a present or former spouse or child for alimony, support or maintenance. *Id.* § 522(b).

20. *Id.* §§ 721-728.

21. *Id.* § 522(d).

22. *Id.* §§ 109(e), 1301-1330 (1988); see William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 *IND. L.J.* 85 (1989).

23. 11 U.S.C. § 1328.

24. *Id.* § 1329.

25. *Id.* § 1328(b).

26. *Id.* § 1307.

27. The filing fee is now \$90.00. 28 U.S.C. § 1930 (Supp. V 1987). It may be paid in installments but it may not be waived. *FED. R. BANKR.* P. 1006.

28. The mean basic lawyer's fee in the consumer bankruptcy study was \$500.00. AWFOD, *supra* note 3, at 43 n.19. All legal fees must be disclosed and approved by the court and one of the duties of the United States Trustee's Office is monitoring lawyers' fees. 11 U.S.C. § 329 (1988); *FED. R. BANKR.* P. 2016(b); 28 U.S.C. § 586(a)(3) (1982 & Supp. V 1987).

29. AWFOD, *supra* note 3, at 334.

volatility, randomly affecting individuals, but instead are systemic defects. These defects produce the marginalization of households headed by women—and thus households of women and children. Until recently, these and other women did not turn to bankruptcy. But increasingly, they now do.

B. *Women in Bankruptcy: Who Are They?*

The last broad study of bankruptcy, done in 1971 at the request of the federal courts, looked at the ethnic backgrounds of the debtors and at the percentage of black debtors as compared with the black population of the relevant federal court district,³⁰ but did not look at the few women who had filed bankruptcy alone. In two of his pioneering studies of smaller samples of debtors in the last decade, Professor Philip Shuchman documented the dramatic rise in the number of women heads of households who filed bankruptcy alone.³¹

As noted earlier, the most startling finding made by Sullivan, Warren and Westbrook about the woman who files bankruptcy alone is that there is very little difference between the wages she earns and the wages of a woman householder who does not go bankrupt.³² The median annual earnings of both groups hover around the 1981 federal poverty line, \$9,300 for a non-farm family of four.³³ But those women householders who do not avail themselves of bankruptcy receive an additional amount equal to one-third of their total income from ex-husbands or the government, raising their total income above the danger line.³⁴ The economic dependence of all single women is illuminated by this fact. Common and predictable disruptions—a temporary layoff, a husband stops paying child support, a government program is cut—can push a woman instantly into poverty, for her debts, like life, do not stop.

For the single woman householder the Bankruptcy Code provides an effective remedy for overwhelming debt. But it is not a long term solution and it does have its own immediate costs. After bankruptcy she will no

30. D. STANLEY & M. GIRTH, *supra* note 2, at 46.

31. In one study, 24% of 186 debtors filing bankruptcy in New Jersey were women. Philip Shuchman, *New Jersey Debtors 1982-1983: An Empirical Study*, 15 SETON HALL L. REV. 541, 551 (1985). In a larger study of filings from October, 1979 through 1981, 31% of 753 bankruptcy petitions filed by debtors in nine states were filed by women alone. Philip Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Persons Filing Bankruptcy in Nine States*, 88 COM. L.J. 288, 289 (1983).

32. AWFOD, *supra* note 3, at 151-52, 329.

33. *Id.* at 65, 80 n.11. The poverty line is a level of real income (varying by family size and residence) that the Bureau of the Census considers sufficient to provide a minimally adequate standard of living. It is adjusted annually for changes in the cost of living. David T. Ellwood & Lawrence H. Summers, *Poverty in America: Is Welfare the Answer or the Problem*, in FIGHTING POVERTY 79, 80 (1986).

34. AWFOD, *supra* note 3, at 156.

longer be harassed by lawsuits and wage garnishments but she will probably find it difficult to buy on credit, and she may not be able to get medical services or clothing or other necessities without cash.³⁵

Women filing alone were the poorest bankrupts in the study. They earned an average of \$8,000 less per year than the men who filed alone. They appeared to have less access to credit than bankrupt men or than couples at the same income levels.³⁶ Their medical debt was a much higher percentage of their total debt than that of bankrupt couples or single men.³⁷ The data do not reveal whether, as I suspect, this medical debt was incurred on behalf of young children in the women's custody.

Married women filed joint petitions in bankruptcy with their husbands in 57% of the cases in the study.³⁸ The median annual income of these bankrupt families was less than two-thirds of the median income of nonbankrupt families. In addition, bankrupt families were larger so their lower incomes had to be stretched farther.³⁹ Far more bankrupt couples (in comparison to the general population) are living on the husband's income alone or in combination with the wife's part-time wages. This confirms the need for two incomes in order for most contemporary families to make it. It also underlines the near impossibility for a single parent family headed by a woman to make it, given that women's incomes are smaller than men's. In fact, 1983 data indicated that only half of all full-time women workers could support two children without additional support from the children's fathers or the government.⁴⁰

The authors emphasize who these bankrupt women are not. They are not the poorest women in our society, those whose median annual income is far below the federal poverty line of \$9,300. The income of the poorest women is neither regular enough nor large enough to give them access to credit or assets that would be worth something to creditors. If they have a low-paying job and consequently access to some credit,⁴¹ their property is probably insubstantial and their wages too low for garnishment. In addition, poor women tend not to know about the availability of consumer bankruptcy

35. See *infra* note 45.

36. Schuchman, *supra* note 31, at 289.

37. Interviews with women debtors in New Jersey suggested that they do not schedule medical debts but continue to pay them to be sure they will continue to have access to medical treatment. *Id.* at 295 n.34. Thus the medical debt is probably higher than it appears in the bankruptcy records. See other studies supporting this conclusion and one to the contrary. AWFOD, *supra* note 3, at 175 n.1.

38. AWFOD, *supra* note 3, at 149-50.

39. *Id.* at 65-66.

40. L. WEITZMAN, *supra* note 12, at 351; Pearce & McAdoo, *supra* note 12, at 6, 8.

41. In 1981, there were 2.5 credit cards for every man, woman and child in the United States. By 1987, the total number of credit cards had increased by 50%. AWFOD, *supra* note 3, at 12.

or, if they do, not to have the money to pay the fee of a bankruptcy lawyer.

C. Stories

As We Forgive Our Debtors gives us data about the women who go into bankruptcy. But this book is no mountain of dry numbers. It also gives the reader a sense of the pain and the deprivation of those in debt, including the women of Illinois, Pennsylvania and Texas who filed bankruptcy petitions alone.

The authors provide glimpses, based on the bankruptcy files, of some individuals behind the statistics they collect. For example, we learn about Mrs. Dover, a mother of six children aged five to thirteen.⁴² She is on twenty-four hour call for her job as a factory inspector. She is called an average of three days a week, and earns \$758 a month. She also receives \$377 monthly from the Social Security Administration and under \$200 from her disabled husband from whom she is "not yet separated." She owes \$2,300 to a hospital, a doctor, a funeral home and a cemetery; \$476 to a bank; and \$700 to the local hardware store. The papers give no further explanation beyond these bare facts. She pays \$250 per month on her biggest asset, a home,⁴³ and failed in her payments on her four-year-old Chevy which was her only way to get to work. She apparently filed bankruptcy in an attempt to keep her car. The form of her bankruptcy petition reeks of poor legal advice, since she proposed under Chapter 13 to pay 100% of her debts, an entirely unrealistic attempt that failed. Mrs. Dover did not appear to explain and her lawyer asked the court for permission to withdraw from the case. The paper trail ends there. She faces having her case dismissed, losing her car and being pursued by her creditors once again.

Another story the authors tell is about Ms. Marvin whose 1980 income was \$7,000 and who paid approximately one month's income to her lawyer to receive a discharge of \$2,700 of debt.⁴⁴ Under Illinois exemption law she was able to keep her few household goods, her car, which still secured a \$200 loan, and \$10,000 of her homestead, on which she still owed \$20,000 on her mortgage. Her debts, which she no longer has to pay, were for a new stove, clothing and medical care. So far, it looks like precisely the solution the bankruptcy system was designed to achieve. But will she be

42. *Id.* at 54-56.

43. The data showed more than half of the debtors own their homes when they file in bankruptcy. *Id.* at 141.

44. *Id.* at 148.

able to get any credit from anyone after her bankruptcy? A certain answer is impossible, but there is a good possibility that she will not.⁴⁵

II. WHERE DO WE GO FROM HERE?

As We Forgive Our Debtors describes the ills of the American consumer credit system and suggests some specific and general prescriptions. I hope it will trigger debate about both the bankruptcy system and the societal problems it reflects. In the spirit of that hope, I offer some prescriptions of my own. These include a concrete proposal for a change in legal education as well as some proposals for ways to make bankruptcy a more effective remedy for consumers overwhelmed by debt, and suggestions, which some may regard as Utopian, for measures to improve the lives of the women and children who are now found disproportionately among the poorest group of Americans.

A. Good Lawyering for Consumer Debtors in Bankruptcy

There have been many studies recently on discrimination against women both as litigants and as lawyers.⁴⁶ None of these has turned its attention to the minimal part women play as judges, trustees or counsel in the bankruptcy system. No systematic examination of the treatment of women debtors—either as a consequence of the absence of women in these roles, or independent of that fact—has been undertaken. These are areas worth exploring with a view to determining what could be done to increase women's participation as lawyers in the bankruptcy system and to reduce any discriminatory treatment of women bankrupts.

45. For example, utilities, such as an electric company, gas supplier or telephone company with a monopoly in the area, may not "alter, refuse, or discontinue service to, or discriminate" against a debtor "solely" on the basis of an unpaid pre-bankruptcy debt or the filing in bankruptcy. 11 U.S.C. § 366(a) (1988). However, within 20 days of the filing the debtor must furnish "adequate assurance of payment, in the form of a deposit or other security." The court may modify the assurance demanded. *Id.* § 366(b); see also 2 COLLIER ON BANKRUPTCY ¶ 366.03 (15th ed. 1979); HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 132-35 (3d ed. 1988).

46. See, e.g., REPORT AND RECOMMENDATION ADOPTED BY THE ABA HOUSE OF DELEGATES, ABA COMM'N OF WOMEN IN THE PROFESSIONS (August 1988); GENDER BIAS STUDY, COMMONWEALTH OF MASS., MASS. SUPREME JUDICIAL COURT (1989); *Final Report of the Massachusetts Gender Bias Study: Gender Bias in Courthouse Interactions*, 74 MASS. L. REV. 50 (1989) (this article contains the *Introduction* and Part V of the report entitled *Gender Bias in Courthouse Interactions*); NEW YORK TASK FORCE ON WOMEN IN THE COURTS, NEW YORK OFFICE OF COURT ADMINISTRATION (1986) and *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 15 (1986-87); THE SECOND REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (1986); see also Sandy Karlan, *Towards the Elimination of Gender Bias in the Florida Courts*, 11 NOVA L.J. 1569 (1987); Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280 (1987) (on the New York and the first New Jersey report).

Whether or not women lawyers act as counsel for debtors, good lawyering for consumer debtors remains a question. The story of Mrs. Dover who filed in Chapter 13 is one illustration of the problem.⁴⁷ The authors describe Mrs. Dover's decision to file under Chapter 13 and Mrs. Dover's proposal of an unrealistic payment plan.⁴⁸ Where is the lawyer in this story? This seems to me a mischaracterization of how decisions are really made in such a situation. Mrs. Dover went to a lawyer to get advice about her options. There is little likelihood that she knew anything about the alternatives available to her in bankruptcy. She would have been entirely dependent on his advice. She did not—in any meaningful way—decide or propose.⁴⁹ Her lawyer “advised” her what to decide or propose. From what we know, his advice was terrible.

Mrs. Dover's proposed budget in her Chapter 13 petition—allocating \$100 a month to clothe herself and six children and \$25 for uninsured medical expenses—required her entire monthly income of \$1,335. She calculated \$5 for incidental expenses for the family, which included three teenagers.⁵⁰ Additionally, she proposed to repay 100% of her debts at a rate of \$145 a month.⁵¹ The bankruptcy forms do not explain where this additional money was to come from. It is hardly surprising that this unrealistic plan failed, and that after paying a lawyer and a filing fee, ultimately Mrs. Dover lost her car and her creditors were able once more to pursue her for repayment.

How can lawyers for consumer debtors give more effective representation? Where do we find the lawyers who know bankruptcy law and understand its implications for these “small” debtors, many of whom are women heads of households who file alone? Such lawyers are difficult to find; we must train new lawyers in law schools for this purpose. Most law schools teach bankruptcy, generally as a traditional law school course. Bankruptcy courses could easily include an optional clinical component to give students training in handling bankruptcies for consumer debtors. This could either be done in a Consumer Bankruptcy Clinic set up in the law school or in a local legal services office or voluntary lawyers' project. The pedagogical benefits should be obvious; the students would learn by practicing under supervision, while also providing a service. And it should be quite simple to develop such a program because a superb manual already exists. Designed both to teach novices and to be used by experts, Henry Sommer's work, published

47. AWFOD, *supra* note 3, at 54-56; *see infra* notes 50-53 and accompanying text.

48. AWFOD, *supra* note 3, at 55-56.

49. Elsewhere, the authors recognize that debtors decide whether to file in Chapter 7 or 13, and suggest even whether to file in bankruptcy, on the basis of their lawyer's advice. *Id.* at 244, 250-52; *see* Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFFALO L. REV. 177, 248-50 (1986); Whitford, *supra* note 22.

50. AWFOD, *supra* note 3, at 55, 226 n.14.

51. *Id.* at 55.

by the National Consumer Law Center, gives detailed and understandable guidance to the practice and the theory of consumer bankruptcy for every step of the process, from client intake to discharge and attorney's fees.⁵² It provides the basic materials for such a clinical course.

Creating such a clinical course could begin to address the very real problem law schools face in attracting students who are interested in representing non-traditional client populations—minorities, women, AIDS victims⁵³—to courses such as bankruptcy in law school. Such students routinely perceive these courses as part of the “business curriculum” and therefore of no interest to poverty lawyers-to-be. Creating a consumer bankruptcy clinic as part of a bankruptcy course will attract these students and show them that commercial law is essential to their ideal clients. Fuller explanation of the content and goals even of a traditional, non-clinical, bankruptcy course in descriptions in law school course catalogues might also help to correct this costly misunderstanding.

The authors note that consumer bankruptcy cases are too complex for overworked legal aid attorneys.⁵⁴ I respectfully but vigorously disagree. I believe that lawyers in legal aid, legal services and volunteer lawyers' projects are precisely the people who should be representing the poorest consumer debtors such as the women heads of households described in this book. I suspect many consumers who should be using bankruptcy as a remedy sadly are deterred by the \$500 lawyer's fee⁵⁵ added to the \$90 filing fee, even though the actual saving to them might well result in their being able to keep their car, their home or their job. Representing small debtors in bankruptcy is clearly not a lucrative law practice, but it provides a remedy that can bring immense emotional as well as legal relief. As part of any practice—large or small, private or public—bankruptcy is a manageable service that should be provided by lawyers with good training who are interested in these clients, and who will bring bankruptcy relief within their financial reach.

It should be noted that making bankruptcy more accessible to large numbers of consumer debtors might well increase the pressure on the safety valve and send a stronger social and political message that something is systemically wrong with our economy. For women and their children, now

52. HENRY J. SOMMER, *CONSUMER BANKRUPTCY LAW AND PRACTICE* (3d ed. 1988).

53. AIDS victims who anticipate being unable to work or who are no longer able to work and therefore cannot pay their debts are a group for whom bankruptcy may be the best way to prevent loss of housing, income, a car or utility services. The legal staff of the AIDS project at the Legal Services Institute in Boston report filing an increasing number of bankruptcy petitions in the last 12 months for AIDS victims. Interview with James Rowan (Sept. 21, 1989).

54. AWFOD, *supra* note 3, at 23.

55. *See supra* note 28.

disproportionately represented among the poor, that would be a result much to be desired.

B. *Women After Bankruptcy*

Even the best legal representation, free or at a low cost, for women in bankruptcy will not address the more fundamental issues of the economic straits of women's lives. That problem may not be as insoluble as it seems. Consider how much of the problem could be resolved if there were state-supported access to health care and day care.

In the United States, it appears that bankruptcy has become a medical insurer of last resort.⁵⁶ In the other industrialized nations the woman head of the household is not forced into debt if she does not have a job that provides medical insurance, because there are systems of universal health care. Using bankruptcy as a substitute for health insurance places the cost for the absence of a universal health care system on the medical practitioners, the hospitals, and of course, in part, on the individuals and institutions who are able to pay their "share" of these costs. It also places the cost on those mothers and children who do not seek or are not able to get the medical care they need when they need it. It is hard to imagine a less efficient way to manage health care, let alone a way to give dignity to the women and children involved. There is currently some basis for believing that we may change this situation and that medical debts will be eliminated as a major burden for women heads of households as well as for all other Americans.⁵⁷

However, we have barely begun to address an equally pressing set of questions whose answers also play a significant part in the economic situation of women householders. Who cares for children while their mother works to support the family? Who looks after the elderly parent who may need as much care as a child? Who provides for the basic needs of the family while the breadwinner has a child and recovers from childbirth?⁵⁸ Other countries have structures that do not treat these questions as problems for the individual mother to either solve successfully or slide into poverty and debt. Here again, because of an absence of a national policy, the safety valve of bankruptcy is utilized and the costs of the absence of such a policy are randomly distributed among whomever a particular woman's creditors happen to be.

56. AWFOD, *supra* note 3, at 173-74.

57. Marie Winn, *The Legacy of Dr. Koop*, N.Y. Times, Oct. 9, 1988, § 6, part 2 (The Good Health Magazine), at 26, 28.

58. See *Symposium: Legislative Approaches to Work and the Family*, 26 HARV. J. ON LEGIS. 295 (1989), for various views of possible answers; see also EDWARD F. ZIGLER & MERYL FRANK, *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* (1988).

Recent studies have documented the policies of Western European countries directed to insuring a moderate standard of living for single parent families.⁵⁹ Sweden, for example, has developed an integrated family-work policy that includes substantial economic support in the form of tax breaks, supplemental family allowances, housing allowances and preferences for child care for single parents.⁶⁰ Other countries, such as Norway,⁶¹ accomplish this end by generous support for single mothers who care for children at home, or for all families with children by a system of family allowances, as in France,⁶² Austria, West Germany and Finland.⁶³ All of these countries implement their policies by varying combinations of some or all of the means used by Sweden.

Our bankruptcy system rescues women heads of households only from debt, not from their long term economic dilemmas which are so often Catch-22 situations created by low wages, caretaking obligations and the expenses of health care for which they are frequently uninsured.⁶⁴ The importance of comparison with the laws of other countries is to highlight the fact that these economic straits are not an inevitable result of the workings of a sophisticated, Western economy. Changes in our health care and day care systems have the potential to affect the economic status of these women and even possibly to rescue them from their slide into the poorest groups in our society.

C. Bankruptcy Through a Feminist Lens

There remains an additional step to take after examining the treatment of women more generally in this society. What would a woman-centered view of bankruptcy look like? It would require us to acknowledge the enormous economic contributions made by women who are now treated as debtors—the contribution of their unpaid labor. What if we put a monetary value on what is often rhetorically referred to as “society’s debt,” for women’s unpaid work as homemakers and caretakers of children and the

59. E.g., SHEILA B. KAMERMAN & ALFRED J. KAHN, *MOTHERS ALONE* 70-103 (1988); Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311, 311 n.2 (1989) (citing works on policies of other countries that focus on parental leave).

60. Dowd, *supra* note 59, at 331, 335; KAMERMAN & KAHN, *supra* note 59.

61. KAMERMAN & KAHN, *supra* note 59, at 78-86.

62. *Id.* at 86-88; Dowd, *supra* note 59, at 331-35.

63. KAMERMAN & KAHN, *supra* note 59, at 90-95. The authors note that the model for the programs of the latter four countries was developed by Hungary in the 1960's. It was the first country to develop a paid maternity leave for working women that permits mothers to care for children up to three years old at home. See *infra* notes 65-67 and accompanying text.

64. AWFOD, *supra* note 3, at 172, 176 n.10 (citing 1981 census data showing that in 1980 only 45% of women workers (as compared with 61% of male workers) had group health insurance).

elderly?⁶⁵ Characterizing women's unpaid labor as society's debt is fair because society would have to pay the costs if women did not perform these services without pay. This conception would transform many women from debtors into creditors, once their debts are balanced against their unpaid contributions. Of course, this approach envisions a radically different system in which a monetary value is given to "women's work," thus changing her economic dependency on men, and her social and economic situation.

This is indeed an Utopian notion. It could well lead to a very different society than our current one, one that could shift woman's place, and as a result, much else.⁶⁶ But even if this conception remains unachievable, it provides a vantage point from which to criticize the current system and justify reforms, not as charity, but as a matter of fundamental fairness. From that vantage point, reforms of health care and day care and other measures that integrate family and work policies with more support being given to the family look far less radical.

III. BEYOND

Women are among the debtors pictured in *As We Forgive Our Debtors* who are using the consumer bankruptcy system for the purposes for which it was designed—relief from overwhelming debt and a fresh start. Better and more widely available legal representation in bankruptcy at a cost these women can afford would relieve many of the burden of debt and give them bankruptcy's fresh start.

But that fresh start will not bring these women any long term relief from their economic straits. There are changes in our present system—changes in health care and day care policies that have been successful in other industrialized countries—that might contribute to the reversal of this systemic blight.

65. A survey by the Institute of Social Research at the University of Michigan in 1975-76 calculated that the average white married woman between the ages of 25 and 44 with two children, one under five years old, spent 1,756 hours annually doing housework and 676 hours caring for children. V. FUCHS, *supra* note 13, at 90.

66. HESTER EISENSTEIN, *CONTEMPORARY FEMINIST THOUGHT* xiii-xiv (1983). This is not to suggest that women's range of choices should be limited by forcing them to remain in traditional "women's work" if they do not choose it. On the contrary, the payment would be designed to give women a real, rather than illusory, choice. See Jane Leur, *Feminism and Welfare*, in *WHAT IS FEMINISM* 97 (Juliet Mitchell & Ann Oakely ed. 1986); Martha Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 Wis. L. REV. 789, 833 (discusses the idea that caring for children forms the basis for economic rights); Ann Vanderpol, *Dependent Children, Child Custody and the Mothers' Pensions*, 29 Soc. PROBS. 221 (1982) (on mothers' pensions circa 1900 based on the recognition of the mothers' performance of a valuable social function). Cf. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1539 (1983).

The book's consideration of women debtors confirms that American women who head households risk descending into the most marginal economic straits and consequently, the urgent need for such changes. Thus we have—from a new and unexpected quarter—another corner from which to emerge as scholars, as women, as citizens to create and to fight for ways to reverse this situation which flies directly in the face of the myth of America as a child-centered, fair and just society.

