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Karen Gross
New York Law School

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RE-VISION OF THE BANKRUPTCY SYSTEM: NEW IMAGES OF INDIVIDUAL DEBTORS†

Karen Gross*

AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA. By *Teresa A. Sullivan, Elizabeth Warren* and *Jay Lawrence Westbrook*. New York: Oxford University Press. 1989. Pp. xii, 370. \$85.

Robert Braithwaite Martineau, *Last Day in the Old Home*, 1862.
Tate Gallery/Art Resource.

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* Professor of Law, New York Law School. B.A. 1974, Smith College; J.D. 1977, Temple University School of Law. — Ed. There are a number of individuals I would like to thank, all of whom assisted in many different ways in making this piece better and encouraged me to pursue different and risky ideas: David Gray Carlson, Judith Greenberg, Karel Karpe, Carlin Meyer, Marie Newman, Donald Rothschild, Jeanne Schroeder, Richard Sherwin, and James F. Simon. I also want to give special thanks to my family — my parents and sister who read, and critiqued this essay and contributed greatly to what it is and what I am, and my son, Zachary, who helped me learn about feminism. Lastly, my thanks to my husband, Stephen H. Cooper, who listened to every idea, read, thought about, and edited every word more than once, and gave me his time and support in ways too numerous to list.

The term “re-vision,” as used in the title of this essay, is derived from *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHOD AND MORALS* (L. Code, S. Mullet & C. Overall eds. 1988) [hereinafter *FEMINIST PERSPECTIVES*]. In the introduction to that work, re-vision is defined as “a painstaking scrutiny and explication of the reasons for the hegemony of certain theoretical principles, and an exploration of how structures of thought and action might be trans-

INTRODUCTION

A. *Thinking About Images*

Robert Braithwaite Martineau's portrait of a Victorian family in debt, *The Last Day in the Old Home*, is striking.¹ The matriarch is weeping as she hands the auctioneer the keys to the family home. In contrast, her roguish son, whose own gambling excesses most likely were the cause of the family's misfortune,² appears unfazed by the financial debacle going on around him. With his arm raised and drink in hand, he seems smugly optimistic about his future. Her grandson, while still radiating youthful innocence, adopts his father's cavalier pose and, with drink in hand, gazes out the window with the sense of one who anticipates a future filled with opportunity. The rogue's wife, slumped between her husband and mother-in-law, looks weary and uncertain as to what will happen to her and her family. She reaches out to her husband but fails to touch him, physically or emotionally. Their young daughter, nestled between her mother and grandmother, seems traumatized and clutches her doll as if afraid that it too will be taken with the family's other possessions.

One cannot tell from the painting alone whether Martineau was depicting a real-life debtor family in the Victorian era or, assuming its historical accuracy, whether the picture is representative of Victorian debtor families generally.³ At a minimum, however, the painting reflects a symbolic reality for one individual, the artist, and it may represent broadly shared societal perceptions or even a quantifiable depiction of reality.⁴

formed if they were considered from a radically different perspective." *Id.* at 3. The authors suggest that the term re-vision was introduced into the lexicon of feminist jurisprudence by Adrienne Rich in A. RICH, *When We Dead Awaken: Writing as Re-vision*, in ON LIES, SECRETS, AND SILENCE (1979). FEMINIST PERSPECTIVES, *supra*, at 10 n.1. Rich's characterization of the term is equally descriptive of a leading purpose of this essay. For, as she states, "Re-vision — the act of looking back, of seeing with fresh eyes, of entering an old text from a new critical direction — is for women . . . an act of survival." A. RICH, *supra*, at 35; see also Scheppelle, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095 (1987).

1. The use of pictorial imagery in this essay was inspired by several sources, most prominently B. WEISS, *THE HELL OF THE ENGLISH: BANKRUPTCY AND THE VICTORIAN NOVEL* (1986). Ms. Weiss' book includes the Martineau painting as well as a brief description of it, and she places the painting in the larger context of the Victorian treatment of debtors in the arts. I was also influenced by Curtis & Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987), and Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges*, 61 S. CAL. L. REV. 1877 (1988). In the latter work, the visual imagery used to depict the anthropomorphication of Justice serves to underscore the inherent difficulties in defining justice from a purely theoretical perspective. See also Werner, *Dis-Covering Our Cover*, 1 YALE J.L. & FEMINISM 1 (1989). In the context of *As We Forgive Our Debtors*, visual imagery is a way of humanizing empirical data, enhancing factually rich but emotionally barren data.

2. Examples of horseracing, the apparent cause of the family's demise, are visible everywhere in the Martineau painting. See B. WEISS, *supra* note 1, at 51.

3. Barbara Weiss suggests that the Martineau painting, like the Victorian novels she discusses in her book, has some historical accuracy. See generally B. WEISS, *supra* note 1.

4. The reality of the painting may be a reified image of what an individual believes. See F. NIETZSCHE, *On Truth and Falsity in Their Ultramoral Sense*, in 2 THE COMPLETE WORKS OF

The risk of confusing perception with reality has been of particular interest to feminist scholars. Simone de Beauvoir suggests that the male's mythical perceptions of the ideal woman do not comport with real women.⁵ Although one might expect that men would change their idealizations to mirror reality, de Beauvoir's point, in the feminist context, is that the opposite occurs. She states: "If the definition provided for this concept is contradicted by the behavior of flesh-and-blood women, it is the latter who are wrong: we are not told that Femininity is a false entity, but that the women concerned are not feminine."⁶

In the bankruptcy context, if we treat our images as correct and "reality" as wrong, then the treatment of individual debtors by the bankruptcy laws will be based on what we believe debtors should be, not what they really are. A bankruptcy system formulated primarily, if not solely, on myths — whether on the part of only a few or of society as a whole — can produce distortions. If these myths conflict with reality, then we must reconsider the system produced by myths. But, the issue is more complex than that. Even if we were to decide to eliminate stereotypes, how are we to determine what debtors are "really" like? To the extent we look only to objective as distinguished from perspectival data, we again may produce distortions.

It does not necessarily follow that we would want a legal system based solely on some quantifiable depiction of reality as opposed to our perceptions of reality or our ideals. Indeed, it may be preferable to design a system on the basis of a subjective or idealized understanding. We may prefer our mythical image over either a subjective or objective reality and would prefer to push debtors toward this image rather than adapt the law to their reality. But that conclusion presupposes that we

FRIEDRICH NIETZSCHE: *EARLY GREEK PHILOSOPHY AND OTHER ESSAYS* (O. Levy ed. & M. Mücke trans. 1964). Indeed, there may be no such thing as an "objective" reality. Since everyone has his/her own images, there is no single and pure "objective" reality; there are only individual realities. However, there may be ways of describing more objectivity-enhancing realities. See also C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* (1923).

For a discussion of the distinction between perception and reality in the bankruptcy context, see *Perception and Reality: American Bankruptcy Institute Survey on Selected Provisions of the 1984 Amendments to the Bankruptcy Code* (ABI 1987), reprinted in *The American Bankruptcy Institute Survey: Hearings on S. 1626, S. 1358, S. 1863 & S. 2279 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 79-218 (1988) [hereinafter *Perception and Reality*]; LoPucki, *The Demographics of Bankruptcy Practice*, 63 AM. BANKR. L.J. 289 (1989).

The role myths play in the formation of legal doctrine has been probed in substantive areas other than bankruptcy. See, e.g., Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQUALITY 33 (1987) (discussing the tort of seduction). While I disagree with some of Professor Sinclair's conclusions regarding the changing myth of the ideal woman, his suggestion that we respond to ideals rather than reality is compelling. *Id.* at 98-99. As he states, "It is not social reality that legislatures and courts respond to, but social ideals. The prevailing myth, not the prevailing fact, is the motor of change." *Id.* at 98.

5. S. DE BEAUVOIR, *THE SECOND SEX* 237-47 (1952).

6. *Id.* at 237.

know who debtors really are.⁷ Determining preferences suggests that, at least in the first instance, we can distinguish between image and reality. It assumes that we have access to objective and perspectival data. Only then can there be a meaningful comparison.

Looking at *The Last Day in the Old Home* makes one wonder what would be depicted in a painting of a debtor family in 1990 America. Would the family group, or its individual members, bear any similarity to the images depicted by Martineau? Would such a painting reflect only what the artist imagines individual debtors to be — creating a symbolic/emotional reality — or could it be a painting grounded in a more broadly shared reality? The answers affect how we⁸ think about the formulation and operation of our current bankruptcy system as it applies to individual debtors.

In *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*, Teresa Sullivan, Elizabeth Warren, and Jay Westbrook⁹ undertake the dual task of eradicating existing myths about individual debtors and their creditors while painting what they believe is a realistic portrait of the participants in the bankruptcy process. As to the first goal, the authors are very successful. Through empirical data collected from a study of 1529 individual debtor cases¹⁰ filed in three states in 1981, Sullivan, Warren, and Westbrook reveal how stereotypes of debtors and creditors do not accurately describe actual debtors or creditors (pp. 17-20, 242-43). As to the second goal, the authors significantly advance the development of an understanding of who our debtors and creditors are. With clarity and readability — a remarkable accomplishment when dealing with vast quantities of numbers — the authors reveal important and sometimes pathbreaking data about actual debtors and creditors. However, the latter effort does not yet complete the painting. As the authors acknowledge, there is a great deal yet to be learned before we can paint with confidence a portrait of debtors and creditors. Part One of this essay describes the ways in

7. In speaking of "debtors" in this essay, I am specifically referring to persons who are the subject of a "case" under the Bankruptcy Code. See 11 U.S.C. § 101(12) (1988). I am not speaking of individuals with debts who have not sought protection and relief under the Bankruptcy Code. Further, when I speak of the "bankruptcy system" or the "bankruptcy laws," I am specifically addressing those provisions of the Bankruptcy Code relating to individual debtors. I am not addressing bankruptcy for corporations or other nonindividual debtors.

8. "We" is a troubling term, and I use it throughout this essay with caution. The term "we" falsely implies homogeneity. It suggests that everyone speaks with the same voice and shares the same perspective. "We" also suggests that there is a distinguishable "they" and that "we" may be better than "they." See Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

9. Elizabeth Warren is a Professor of Law at the University of Pennsylvania Law School. Jay Lawrence Westbrook is Andrews & Kurth Professor of Law at the University of Texas Law School. Teresa Sullivan is a Professor of Sociology and Law at the University of Texas.

10. The study actually looked at 1547 cases; the usable number of cases is 1529. Since more than half of the cases involved joint filings, the authors studied a total of 2409 individuals in bankruptcy. P. 17.

which the authors accomplish the two above described tasks and evaluates their success in doing so.

Part Two of this essay explores the consequences that flow from annihilating stereotypes¹¹ and thereafter developing a bankruptcy system more grounded in reality — that part of reality we now know something about and that which we have yet to discover. This is a task not undertaken by Sullivan, Warren, and Westbrook. *As We Forgive Our Debtors* ably describes the data collected and then carefully places that data in the context of existing bankruptcy policy debates. Adopting this more limited approach was not haphazard (pp. 10, 335, 338). Apart from the obvious limitations of space, the more theoretical analysis could have undermined, at least in the authors' minds and perhaps in the minds of a significant portion of their readership, the bona fides of their data collection, assembly, and reportage. However, asking the unasked questions, moving into new spheres, and creating the dialogue that has not existed is what I seek to accomplish with the data.

To these ends, I focus on women debtors. I pick up from where Sullivan, Warren, and Westbrook leave off, moving from their data about women debtors into hypotheses about data yet to be uncovered and the theoretical implications of existing and future data (pp. 147-65). It is, without question, a risky and speculative venture to attempt a re-vision of the bankruptcy system.¹²

Part Two of this essay is distinctly feminist. By using the word "feminist," I do not want to enter the debate among feminist theorists as to the meaning of the term.¹³ Rather, I want to consider the exper-

11. Marsha Hanen expresses this point in her essay, Hanen, *Feminism, Objectivity, and Legal Truth*, in FEMINIST PERSPECTIVES, *supra* note *, at 29. She states: "Merely to break down rigid and unproductive systems of classification will not, by itself, lead to the more humane and co-operative forms of knowledge, which is ultimately what we need, rather than just to new or altered frameworks. But the questioning of the categorizations, and the serious consideration (and even trying) of some alternatives, probably represents a necessary first step . . ." *Id.* at 44.

12. The notion of risk-taking is consistent with the feminist approach described *infra* notes 14, 47 and accompanying text. See C. HEILBRUN, *WRITING A WOMAN'S LIFE* (1988); West, *Love, Rage and Legal Theory*, 1 YALE J.L. & FEMINISM 101 (1989). As Carolyn Heilbrun expresses at the end of her book on writing women's biographies and autobiographies, "[W]e should make use of our security, our seniority, to take risks, to make noise, to be courageous, to become unpopular." C. HEILBRUN, *supra*, at 131. Heilbrun makes a similar point in her work *Reinventing Womanhood*. C. HEILBRUN, *REINVENTING WOMANHOOD* (1979). She states, "The past is male. But it is all the past we have. We must use it, in order that the future will speak of womanhood, a condition full of risk, and variety, and discovery: in short, human." *Id.* at 212.

13. A long and growing literature addresses the conflicts among feminists. See generally E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Minow, *Feminist Reasoning: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Resnik, *supra* note 1; Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. (forthcoming 1990); Sunstein, *Feminism and Legal Theory* (Book Review), 101 HARV. L. REV. 826 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). For a

iences of women in the bankruptcy system¹⁴ as single and joint filers and as the nonfiling ex-wives, homesharers, and daughters of male debtors.¹⁵ I investigate the significance that gender¹⁶ has played in shaping the bankruptcy system. I believe, as more fully developed, that the bankruptcy system has been developed and applied based on a prototypical debtor who is male. If this prototype is proved inaccurate — by describing male debtors erroneously and failing to consider women debtors at all — then the system created around the prototype is unresponsive to real debtors. This then raises for me the larger issue of whether the povertization of debtors — women debtors in particular — mirrors the povertization of these individuals outside the bankruptcy system or whether, and by far more troubling to my mind, the bankruptcy system as developed, applied, or experienced actually contributes to that povertization.

As We Forgive Our Debtors is not a "feminist" book. It does provide, however, the empirical basis for beginning a theoretical inquiry, and in this way, the book opens the door for serious dialogue about the bankruptcy system. It provides an impetus to improve the lives of

general discussion of the feminist movement "taken as a whole," see Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

14. This approach is adapted from Lucinda Finley's articulation of the feminist perspective. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 42 n.1 (1989). Considering the experiences of women also suggests a different methodological approach. The value of women's experiences has been expressed elegantly by Mari J. Matsuda:

In developing feminist theory, women are increasingly willing to critique mainstream theory and to sing unheard of songs. An important element of this project is the rejection of existing abstractions that constrain our vision. Abstraction is the key methodology in mainstream jurisprudence The refusal to acknowledge context — to acknowledge the actual lives of human beings affected by a particular abstract principle — has meant time and again that women's well-grounded, experiential knowledge is subordinated to someone else's false abstract presumptions.

Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 618-19 (1986). My methodology, then, I consider feminist in that it both considers the experiences of women and asks different questions from those which a man would ask in the same situation. I also seek to raise consciousness and improve the lives of women debtors. For what precisely constitutes a feminist methodology and whether my approach is distinctly feminist, see FEMINISM & METHODOLOGY (S. Harding ed. 1987) and Bartlett, *Feminist Legal Method*, 103 HARV. L. REV. 829 (1990). See also Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 195-97 (1990); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990).

15. This larger inquiry entails considerable historical, theoretical, narrative, empirical, and legal analyses, work which has not been completed as yet. See *infra* notes 90-93 and accompanying text.

16. I am using this term in the broadest sense, not solely in terms of issues of sameness and difference based on gender. I also propose to consider, within the rubric of "gender," issues of socioeconomic class and ethnicity as well. See Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989). I also recognize that not all feminists have a common view as to the meaning of gender and that many nonfeminists and some feminists equate the word "gender" with the word "sex." See D. RHODE, *JUSTICE AND GENDER* 5 (1989); see also Minow, *supra* note 13; West, *supra* note 13; Williams, *supra* note 13.

individual debtors in general and women debtors in particular.¹⁷ Creating the opportunity to consider these issues, perhaps more than anything else, is the book's greatest strength.

PART ONE

A. *The Modern Painting*

At first impression, it might seem an easy task to create a realistic painting of a contemporary American debtor family, given the literally hundreds of thousands of debtors who enter the bankruptcy system yearly.¹⁸ And, in view of the recent overhauls of the federal bankruptcy system, particularly its treatment of the individual debtor, one might suppose that legislators have a very good sense of who our debtors and creditors actually are. However, if that objective reality had not been available to or perceived by them, one wonders what images legislators had when they created the elaborate network of legal norms

17. This goal is also voiced by Marcia Millman and Rosabeth Moss Kanter. Millman & Kanter, *Introduction to Another Voice: Feminist Perspectives on Social Life and Social Science*, in FEMINISM & METHODOLOGY, *supra* note 14, at 29, 35; *see also* Minow, *supra* note 13, at 49.

18. There has been a significant increase in bankruptcy filings since the passage of the Bankruptcy Reform Act of 1978. The filing figures from the past several years, as reported by the Administrative Office of the United States Courts, demonstrate this unequivocally:

<u>Year</u>	<u>Total Filings</u>
1984	344,275
1985	364,536
1986	477,856
1987	561,278
1988	594,567
1989	642,993

The overall increase in filings for 1989 is primarily attributable to individual debtor (*i.e.*, nonbusiness) filings. In 1989, nonbusiness filings represented 90% of all filings. It is anticipated that filings will rise to 850,000 by 1991. *See* Szczebak, *Challenges Facing the Bankruptcy Court System in the 1990's*, 9 ABI NEWSLETTER, Jan./Feb. 1990, at 6.

Criticism of these statistics has been leveled at the Administrative Office of the United States Courts. For example, it has been suggested that the filing rates may be somewhat inflated due to the methodology employed by the Administrative Office. There also has been concern as to the criteria employed to define business and nonbusiness filings. *See* p. 13 n.2; *see also* Sullivan, Warren & Westbrook, *The Use of Empirical Data In Formulating Bankruptcy Policy*, LAW & CONTEMP. PROBS., Spring 1987, at 195. However, the Administrative Office remains the only official source for filing data and hence its figures, even if troubling, provide us with a starting place.

The number of debtors tells only part of the story of bankruptcy's impact. For every debtor, one must also consider all of the debtor's dependents and others within the debtor's immediate (and remote) family. For example, in *As We Forgive Our Debtors*, Sullivan, Warren, and Westbrook indicate that the family income of debtors entering the bankruptcy system is spread among more dependents than is the family income of those outside the bankruptcy system. *See* pp. 65-66. The mean family size of debtors was one person more than that of nondebtors. P. 66.

Sullivan, Warren, and Westbrook also reveal that for every debtor, there are a considerable number of creditors. The 1529 debtors included in the Sullivan, Warren, and Westbrook study identified 23,426 creditors of varying sorts, and there is every reason to believe that this number is artificially low since debtors may choose not to list creditors they intend to repay in full. P. 68.

and rules that balance the dramatically competing interests of individual debtors and their creditors.

As remarkable as it may seem to nonlawyers and many nonbankruptcy lawyers, we have developed a personal bankruptcy system based principally on who we imagine individual debtors and their creditors to be, while remaining remarkably ignorant about who they really are.¹⁹ Empirical data, while not a panacea, would provide the foundation for a clearer picture of reality.²⁰ However, the vast majority of empirical studies have been narrow in scope, subjected to criticism, and, in some cases, simply not taken seriously enough.²¹ What

19. Some studies have looked at the bankruptcy system and issues involving individual debtors in particular. For a sample of the available empirical work, see generally CREDIT RESEARCH CENTER, KRANNERT GRADUATE SCHOOL OF MANAGEMENT, PURDUE UNIVERSITY CONSUMER BANKRUPTCY STUDY (1982) [hereinafter PURDUE STUDY] (a study that provided much of the ammunition for passage of the Consumer Credit Amendments and was resoundingly critiqued by Sullivan, Warren, and Westbrook in Sullivan, Warren & Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, and Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333 (1984)); GENERAL ACCOUNTING OFFICE, CONTROLLER GENERAL OF THE UNITED STATES, NO. 83-54, BANKRUPTCY REFORM ACT OF 1978 — A BEFORE AND AFTER LOOK (1983) (Report to the Chairman, Committee on the Judiciary of the House of Representatives) GAO/GGD 83-54 (a nationwide mailing to 804 debtors of whom approximately half responded, plus analysis of approximately 2250 case files) [hereinafter GAO REPORT]; D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (1971) (looking at the bankruptcy system before The Reform Act was even drafted); Bermant & Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181 (1989); Boyes & Faith, *Some Effects of the Bankruptcy Reform Act of 1978*, 29 J.L. & ECON. 139 (1986); Herbert & Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Proceedings Closed During 1984-1987*, 22 U. RICH. L. REV. 303 (1988); Herrmann, *Families in Bankruptcy — A Survey of Recent Studies*, J. MARRIAGE & FAM. 324 (1966) (each of the surveyed studies looked at limited geographic areas and antedated The Reform Act of 1978 by more than a decade); *Perception and Reality*, *supra* note 4 (looking solely at the perceptions of participants in the bankruptcy process in response to legislative change); Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419 (1984); Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288 (1983) [hereinafter Shuchman, *The Average Bankrupt*]; Shuchman, *New Jersey Debtors 1982-1983: An Empirical Study*, 15 SETON HALL L. REV. 541 (1985) (looking at a sample group of 186 debtors) [hereinafter Shuchman, *New Jersey Debtors*]; Shuchman & Rhorer, *Personal Bankruptcy Data for Opt-Out Hearings and Other Purposes*, 56 AM. BANKR. L.J. 1 (1982) (a close examination of filings from a sample of approximately 525); Siporin, *Bankruptcy Debtors and Their Families*, SOC. WORK, July 1967, at 51 (detailing two studies involving families in Kansas City and New Orleans). There are other data but some of them have not been published. For example, VISA has conducted a study of women debtors seeking relief under Chapter 7 in the Los Angeles area in 1988. (Correspondence and data from Irene Rutherglen, Risk Management and Security VISA U.S.A. Inc. to Karen Gross (Apr. 14, 1989) (on file with the author)).

20. Data collection, like other scientific enterprises, is designed to produce objective results. But caution is required even with this more "objective" reality. Like a photographic image, empirical data do depict a reality; but it is not necessarily a complete reality. Even data collected consistent with accepted social science methodology is subject to interpretation. There are interpretive issues concerning what was selected (or omitted) for study, what questions were asked (or not asked), and how conclusions should be drawn. Thus, a photograph can be a "real" depiction but what was chosen to be photographed may not represent the larger "reality."

21. See *supra* note 19 (discussing some of the prior empirical work). Sullivan, Warren, and Westbrook are understandably critical of much of the previous empirical work. Pp. 16-17; see also Sullivan, Warren, & Westbrook, *supra* note 19; Warren, *supra* note 19. Some of the work has sought purely economic explanations, an approach also critiqued by Sullivan, Warren, and

we have, then, is a legal system based upon an artist's impressions (*i.e.*, a painting) of the individual debtor rather than more accurate material. These artist's impressions are important, however. They explain how we constructed the bankruptcy system we have; they give us a starting point. But what we need and do not have is a more accurate and representational portrait of individual debtors in contemporary America.

In *As We Forgive Our Debtors*, Sullivan, Warren, and Westbrook gathered "hard" empirical data from actual case files of debtors in Illinois, Pennsylvania, and Texas (pp. 17-20). Their study yielded almost a quarter of a million separate pieces of information about individual debtors (p. 20). *As We Forgive Our Debtors* provides us a basis for more than supposition about the people and institutions touched by the bankruptcy system.

Some of the information culled by Sullivan, Warren, and Westbrook is new and dramatic,²² uncovering distortions in the bankruptcy system that require us to reevaluate some of our basic assumptions about how that system operates — both practically and theoretically.²³ These data also serve to explain why some of the anticipated consequences of the Reform Act of 1978²⁴ were never realized. Other findings revealed in *As We Forgive Our Debtors* are not shocking; they comport with what many of us would have anticipated,²⁵ indicating that, in some respects, our imagery is consistent with a quantitative version of reality. But the fact that these findings are not startling does not diminish their significance.

B. *What the Data Reveal: Images of Individual Debtors*

Sullivan, Warren, and Westbrook suggest that we have two dis-

Westbrook in *As We Forgive Our Debtors*. Ch. 13; see also Boyes & Faith, *supra* note 19. Some of the work is dated or drawn from relatively small samples. And, some of the work is incomplete in that it relies on purely hard (quantitative) as opposed to soft (qualitative) data or the converse.

However, the prior empirical work is considerably more valuable than Sullivan, Warren, and Westbrook let on. First, one can compare the findings in *As We Forgive Our Debtors* with findings from the foregoing studies. Many of the findings in the early works are *confirmed* by Sullivan, Warren, and Westbrook's work. This is significant in and of itself, for it demonstrates the validity of the earlier work, even if that validity is limited. It also reflects that not all of Sullivan, Warren, and Westbrook's findings are new. The similarity in findings also demonstrates another point made by the authors, namely, the remarkable degree to which we have not taken empirical work seriously in bankruptcy. Pp. 15-17.

Some of the information in the earlier studies can and should be compared with Sullivan, Warren, and Westbrook's data. To the extent that the Sullivan, Warren, and Westbrook findings differ from those of the earlier works, Sullivan, Warren, and Westbrook should provide some explanation. For example, are any differences due to different research methodologies or do they reflect markedly different views of what is happening in the bankruptcy system?

22. See *infra* notes 30, 36-37, 71-80 and accompanying text.

23. See *infra* text accompanying notes 40-42.

24. See *infra* note 86.

25. See *infra* note 31.

tinct mental images of individual debtors: the unemployed unfortunate member of the lower class who legitimately seeks relief from the overwhelming burden of debt through a bankruptcy discharge and the middle (or even upper) class scoundrel who carefully manipulates the opportunities afforded by the bankruptcy laws for his own advantage.²⁶ *As We Forgive Our Debtors* tells us that neither stereotype is an accurate description of all debtors.²⁷

In many respects, the individual debtors examined by Sullivan, Warren, and Westbrook appear remarkably similar to the rest of us. The vast majority were employed. Indeed, only 7% of the debtors stated specifically that they were unemployed,²⁸ which is remarkable considering that during 1981, the national unemployment rate was 7.6% (p. 86). They held a diverse range of jobs (pp. 86-91) and the "prestige"²⁹ of the jobs held was not strikingly lower than that applicable to most workers.³⁰ Like the general population, over half of the debtors owned a home (p. 129). The average home value for debtors was \$50,000, compared to an average value of \$56,100 for Americans generally (p. 129). Most of the debtors used credit cards, which is not surprising in an economy in which 572.2 million credit cards were outstanding in 1981 (2.5 cards for every adult and child in the United States) (p. 178). Stated simply, debtors live and work alongside the rest of us.

But something is missing, because otherwise it is hard to explain why these debtors are in bankruptcy and the rest of the population is not. Debtors may have held jobs in the same industries as the general population, but they earned one third less in those jobs than

26. Pp. 63, 102. Throughout this essay, the masculine pronoun is frequently used to represent all debtors. Since one of the purposes of this essay is to unsilence women debtors, this choice of pronoun requires explanation. First, the use of the male pronoun emphasizes the existing implicit assumption that all debtors are male. Moreover, the treatment of the so-called rogue debtor exemplifies the masculinity of the Bankruptcy Code, *see infra* notes 131-33 and accompanying text, and hence the use of the male pronoun is particularly apt in this particularized context.

27. For purposes of this review, I assume that the data collected and appearing in *As We Forgive Our Debtors* are not materially flawed. *See infra* note 83. I should also point out that in describing debtors and creditors based on these data, I am recounting 1981 data, which may not be equally applicable today. *See infra* notes 57, 83-87 and accompanying text.

28. The number of unemployed debtors increases to 17% of the surveyed group if one includes all those who responded ambiguously to questions regarding employment. Pp. 85-86.

29. Prestige measures the "social standing" of a particular job. There is a range from 0 to 100, with street sweepers ranking 11 and Supreme Court Justices ranking 84. Pp. 89-91 (referring to the work of D. TREIMAN, OCCUPATIONAL PRESTIGE IN INTERNATIONAL PERSPECTIVE (1977)). Feminists and critical legal studies scholars would obviously have certain explanations for why jobs are ranked as they are and whether a ranking should even exist.

The issue of prestige is associated with the issue of power or, in the case of women, the lack of power. *See infra* note 95 and accompanying text; *see also* C. MACKINNON, FEMINISM UNMODIFIED (1987); *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 20-28 (1985) [hereinafter *A Conversation*].

30. Pp. 89-91. This is an example of where the findings of Sullivan, Warren, and Westbrook in *As We Forgive Our Debtors* differ from earlier studies. *See* Herrmann, *supra* note 19, at 325.

nondebtors.³¹ Debtors may have owned homes, but they had higher mortgages than homeowners outside the bankruptcy system and less income with which to repay them.³² Almost one third of the debtors who had been permitted to incur a second mortgage had done so, compared to 9.8% of homeowners in the general population (p. 134). The debtors may have had credit made available to them like the rest of the population, but 13% of the debtors owed more than half a year's income on credit card debt and almost a third of the debtors owed at least three months' income on credit card debt (pp. 183-84).

The authors chronicle other financial disparities. Twenty-five percent of the debtors, compared to 12.5% of the general population, lived below the poverty level (p. 65). The average income of the debtors was \$15,800 compared to a mean income of \$25,800 for those outside of bankruptcy (pp. 64-65). Debtors had substantially fewer assets than nondebtors and nearly twice the amount of debt (pp. 66, 68). In terms of net worth, one third of the general population had a net worth under \$5000 while 84% of the debtors had a net worth below that level (p. 71). In terms of debt-to-income ratios, debtors had debts (excluding mortgages) equal to almost two years' income; among the general population, only 5% owed more than 20% of yearly income in nonmortgage debt (p. 75).

Other indicia suggest the distinct circumstances of debtors. The average size of the debtor family was almost one person larger than families outside bankruptcy (pp. 65-66). Many debtors experienced job interruptions, which meant that, while generally employed in the same industries and jobs as nondebtors, they earned less doing the same tasks (pp. 95-102). Thus, debtors had less money to spread among more people. But creditors continued to extend credit to debtors, even to those who had experienced income volatility (pp. 316-19).

As We Forgive Our Debtors reveals other facts about debtors that nullify our stereotypes. Most debtors had not experienced crushing medical expenses that precipitated filing.³³ Very few debtors were repeat filers, with only 3.7% of them having received more than one

31. P. 91. Sullivan, Warren, and Westbrook treat this finding as "key." P. 103. It is, but they are not the first to have noted it. See Herrmann, *supra* note 19, at 325; Shuchman, *New Jersey Debtors*, *supra* note 19, at 544. Sullivan, Warren, and Westbrook do develop their findings to a much greater extent than prior work, and they are dealing with a much larger sample. However, by dismissing earlier empirical work so summarily, Sullivan, Warren, and Westbrook fail to recognize one of the points they themselves make, namely, that empirical work is often not taken as seriously as it should be. P. 235; see *supra* note 21 and accompanying text.

32. Pp. 131-34. This finding is contradicted by the findings of Professor Shuchman. See Shuchman, *New Jersey Debtors*, *supra* note 19, at 575-77. The difference between these findings merits an explanation since the debtors studied by Professor Shuchman were from cases filed in 1982-1983, a time period proximate to that studied by Sullivan, Warren, and Westbrook.

33. P. 170. This is another finding noted by Professor Shuchman. See Shuchman, *New Jersey Debtors*, *supra* note 19, at 570-71.

discharge.³⁴ Many debtors were self-employed and their financial failure could be correlated in major respects to their business failure,³⁵ demonstrating a heretofore largely undocumented link between small business and personal failure.³⁶ Most debtors were not capable of fully repaying their creditors in either liquidation or reorganization, a finding contrary to a major empirical work that previously provided much of the impetus for stricter creditor protections.³⁷ At most, 9% of the debtors in Chapter 7 could pay their creditors in full over a three-year period³⁸ and 16% of the Chapter 13 debtors could repay creditors in full in the same period (p. 214). Debtors did not enter into the bankruptcy system casually; their decisions were motivated by a host of factors (pp. 243-54). Few debtors appeared to be true abusers of the bankruptcy process (pp. 184-88). Many debtors were women (p. 149) and most of these women were poorer than their male counterparts.³⁹

C. *The Consequences of Destroying Stereotypes*

The annihilation of stereotypes has material consequences. Legislators formulating the Bankruptcy Code, judges interpreting that Code, and individuals affected by the bankruptcy process appear to have been guided by mistaken images of debtors.⁴⁰ Complaints about

34. P. 194. This finding is enlightening since Congress enacted a new provision in 1984, as part of the Consumer Credit Amendments, specifically to curb the many perceived repeat filings. See 11 U.S.C. § 109(g) (1988).

35. For a recent article looking at dischargeability of individuals for debts arising in a small business context, see Scott & Leonard, *The Special Case of the Small Businessman*, 63RD ANNUAL MEETING OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES, 5-37 (Professional Educ. Systems Inc. ed. 1989) [hereinafter NATL. CONF. OF BANKR. JUDGES].

36. Pp. 111-12, 118-21. This link was previously observed by Professor Shuchman, who stated with respect to his study of 753 personal filings: "A significant number of personal bankruptcy filings are obviously the result of small business failures. The filings are labeled personal, however, because the proprietors were personally liable for debts of the business and most of these business failures were of self-employed persons and couples engaged in a variety of very small commercial enterprises and occupations." Shuchman, *The Average Bankrupt*, *supra* note 19, at 288; see also Shuchman, *New Jersey Debtors*, *supra* note 19, at 544 (observing that 11% of filings were business-related).

37. Pp. 199-224; see PURDUE STUDY, *supra* note 19. Despite the criticisms leveled at it, the Purdue Study has been influential. See *Perception and Reality*, *supra* note 4; Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 76-81 (1986).

38. P. 212. Three years is the standard length of a Chapter 13 reorganization plan, although a court can extend the time to not more than five years. Pp. 25-37; see 11 U.S.C. § 1322(c) (1988).

39. Pp. 151-55. The women debtors were either the wives of male debtors or single-filing debtors. Sullivan, Warren, and Westbrook note that women debtors appeared in 74% of the cases studied. P. 150. Professor Shuchman also observed the large number of women debtors. See Shuchman, *New Jersey Debtors*, *supra* note 19, at 544. For a detailed discussion of the findings regarding women debtors, see *infra* notes 70-82 and accompanying text.

40. This point is made in more sweeping fashion by Richard Sherwin who suggests that if we take our personalized discourse as the only voice, we close ourselves off to the other voices and communities. See Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. (forthcoming 1990).

Our perceptions have served to create the current system at two levels. First, they account

the bankruptcy system and its operation become easier to understand once it is recognized that at least one of the reasons is not that the bankruptcy law is, per se, inadequate,⁴¹ but that, in many respects, it has been designed to deal with problems and people that were imagined to exist but do not, in fact, exist (or at least not in the way they were imagined). These conclusions necessitate that we reimagine the painting of debtors. A more persuasive image of debtors, based on increased data, calls for a re-vision of bankruptcy policy — as it is formulated and applied.

A central myth struck down by Sullivan, Warren, and Westbrook's data is our perception of only two types of debtors — the scoundrel and the genuinely impoverished person.⁴² In fact, the data demonstrate that debtors, while they share certain characteristics (e.g., they owe substantial percentages of their income to creditors), are far from homogeneous (pp. 49-59). This heterogeneity enriches our vision of debtors,⁴³ but it makes us uncomfortable.⁴⁴ It makes easy categoriza-

for the schism in the bankruptcy laws between individual and business filings. Individual debtors are treated differently from corporate debtors, and individual debtors with consumer debts are treated differently from individuals with business debtors. See Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165 (1990). Second, our perceptions affect how the system has treated individual debtors themselves. They have shaped the choices available to individual debtors within the bankruptcy system.

For an overview of the options available to individual debtors, see generally R. AARON, *BANKRUPTCY LAW FUNDAMENTALS* (1990); *BANKRUPTCY PRACTICE AND STRATEGY* (A. Resnick ed. 1987); R. GINSBERG, *BANKRUPTCY* (1989); J. KOSEL, *BANKRUPTCY DO IT YOURSELF* (1987); H. SOMMER, *CONSUMER BANKRUPTCY LAW AND PRACTICE* (3d ed. 1988); E. WARREN & J. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES AND PROBLEMS* (1986).

41. There may be other, external reasons for failure in the bankruptcy system. See *Perception and Reality*, *supra* note 4.

42. In operation, the Bankruptcy Code is not as simplistic as our perceptions of debtors. The Code is drafted to recognize that not all debtors fall into these two categories. Some debtors can be "part" rogue. The Code's sensitivity to this is revealed in its compromises, the choices as to what obligations are dischargeable, and what type of priority should be accorded what type of creditor. 11 U.S.C. §§ 507, 523, 727 (1988).

43. Professor Spelman raises this point in the context of feminist theory. If we stoop to our lowest common denominator (i.e., women are biologically different from men), we undervalue our differences. "Indeed, positing an essential 'womanness' has the effect of making women inessential in a variety of ways. First of all, if there is an essential womanness that all women have and have always had, then we needn't know anything about any woman in particular." E. SPELMAN, *supra* note 13, at 158.

44. Again, Professor Spelman makes this point with clarity and sensitivity in her book *Inessential Woman*, where she draws on the problems of Uncle Theo in Iris Murdoch's novel, *The Nice and the Good*. Uncle Theo is troubled by the multiplicity of the pebbles on the beach. He would rather reduce the plurality to one. See *id.* at 1-2. The absence of multiple images has also been a problem in feminist thought. As Spelman states, "[M]uch of dominant Western feminist thought has shared Uncle Theo's dismay and discomfort with manyness, [and] has been uneasy about the enormous variety of women and women's experiences." *Id.* at 160; see also Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 HARV. C.R.-C.L. L. REV. 1 (1989). Professor Minow notes that by avoiding focusing on differences among individuals and subgroups, feminists have become locked in a battle over gender differences. It is only if we focus on our multiplicity that we can begin to envision and achieve social change. Ruth Sidel suggests

tion impossible.⁴⁵ It becomes harder to develop legislation that works.⁴⁶ Homogeneity in the bankruptcy context also has helped us to escape a moral dilemma. It is easier for us to live with ourselves if we can blame some debtors (e.g., the scoundrels) for their own financial predicament while feeling sorry for others (i.e., the impoverished person) who got into their predicament through events they could not control. In both cases, it is a way of denying that we too might be debtors — that would be too frightening because it would suggest that bankruptcy could happen to any of us (p. 103). Confronting heterogeneity makes us confront ourselves.⁴⁷

The structure of the bankruptcy system, in terms of the options available to individual debtors also appears to have been shaped by the stereotypic dyad of the scoundrel and the impoverished unfortunate. Bankruptcy offers individual debtors two basic choices: liquidation and reorganization.⁴⁸ An underlying premise for cases involving individual debtors is that the impoverished debtor should be allowed to liquidate and start afresh; this unfortunate but honest person will be unable to reorganize because he is unemployed or earning very little.⁴⁹

that we dehumanize because then it is easier for us to deal with others. R. SIDEL, *WOMEN AND CHILDREN LAST* xvi-xvii (1986).

It is interesting to note that several authors, in a recent paper, have attempted to explain corporate bankruptcy based on the mathematics of chaos — perhaps another way of dealing with the lack of simple explanations for bankruptcy and the lack of homogeneity in the system. Utilizing this approach recognizes the multiple variables that need to be considered. It allows one to see patterns within apparent chaos. See M. MacDonald, M. MacDonald & C. McLeod, *Pictures Are Worth a Thousand Words: Understanding the Chapter 11 Process Through Models and Simulations* (1989) (unpublished paper on file with the author). Their work, like this review, relies on visual imagery to explain their thesis.

45. The inherent problems of classification have been a concern of feminist scholars. See Hanen, *supra* note 11; Scales-Trent, *supra* note 16. An example of an effort at categorization is revealed by the oft-repeated statement that bankruptcy relief is available to the "honest but unfortunate" debtor. This term and its history are described in greater detail in Gross, *supra* note 40. This phrase mirrors our image of debtors: we want to help poor, unemployed debtors (supposedly because we feel sorry for them), but we do not believe bankruptcy should help the well-to-do manipulator of the bankruptcy system (supposedly because what he is doing is morally repugnant). The problem is that the phrase is functional only if we assume — lock, stock, and barrel — that we can recognize which debtors are honest and which are not. At a fundamental level, there is also an assumption that the very categorization itself is correct.

46. For a discussion of the need for a pluralistic vision in another legal area, see Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

47. Another way of articulating the consequences of declassifying is that it empowers individuals to define themselves. It reveals a refusal to accept old definitions and asserts that some new order must be reckoned with. For an application of this in the feminist context, see Scales-Trent, *supra* note 16, at 42-44; see also Bender, *supra* note 13. A corollary is that homogeneity moves us toward greater objectivity while heterogeneity moves us toward greater subjectivity. Robin West suggests, consistent with this point, that feminists should not be afraid to speak subjectively, not only to express their own experiences but to express their unspoken (but felt) rage. See West, *supra* note 12; see also Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

48. Chapter 7 is the liquidation chapter and Chapter 13 is the reorganization chapter most utilized by individuals. See Gross, *supra* note 37; Gross, *supra* note 40.

49. This assumption is embodied in Chapter 7, the liquidation chapter of the Code. 11

There is a further assumption that this individual has only limited assets. Therefore, he is allowed to exempt his necessities, although there is a sense that there will not be much to exempt in any event.⁵⁰

In contrast, the scoundrel should only be permitted to reorganize, as the liquidation option would provide too easy a way out of his obligations.⁵¹ It is assumed that the scoundrel, who is fortunate and dishonest, can and should repay his creditors (pp. 5-7). Indeed, the bankruptcy laws are designed to discourage the scoundrel from avoiding the preferred scenario, reorganization, by seeking to liquidate. This is accomplished by setting the level of exempt property so that the liquidating debtor must give up more of his assets⁵² and by making reorganization more attractive by expanding the scope of the reorganization discharge.⁵³ By these means, the scoundrel, who would ostensibly have a greater amount of property that is nonexempt and a greater percentage of debt that is nondischargeable,⁵⁴ is presumably discouraged from liquidating.

An effort to go even further and preclude the availability of the

U.S.C. §§ 701-766 (1988). We permit the Chapter 7 debtor to retain future earnings so he can have a fresh start. 11 U.S.C. § 541(a)(6) (1988). This is based, I suspect, on the assumption that these future earnings will not be high. In contrast, Chapter 13 debtors cannot keep their future earnings. 11 U.S.C. § 1306(a)(2) (1988). This is because, at least in part, there is an assumption that Chapter 13 debtors will have a sizable income with which to pay creditors. These assumptions also account for the marked antipathy of courts, creditors, and commentators to zero repayment plans in Chapter 13. See Note, *Good Faith and the Zero Repayment Plan in Chapter 13*, 69 KY. L.J. 327 (1981); Comment, *Good Faith Inquiries Under the Bankruptcy Code: Treating the Symptom, Not the Cause*, 61 U. CHI. L. REV. 795 (1985).

50. 11 U.S.C. § 522 (1988). For a detailed account of exemption law, see R. AARON, *supra* note 40; J. BERG & S. JENSEN-CONKLIN, *CONSUMER BANKRUPTCY* (1989); R. GINSBERG, *supra* note 40; J. KOSEL, *supra* note 40; Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22 (1983).

51. This is because a liquidation discharge would permit him to keep all of his future earnings. See 11 U.S.C. §§ 523, 541, 727 (1988). Moreover, the exemptions are, at least in some jurisdictions, quite generous so that the liquidating debtor is able to retain a large portion of his assets. See R. GINSBERG, *supra* note 40; J. KOSEL, *supra* note 40; 7 COLLIER ON BANKRUPTCY: EXEMPTIONS (15th ed. 1979 & Supp. 1989).

52. There is an assumption in this: altering exemption levels will alter debtor behavior. This assumption has been placed in considerable doubt by Sullivan, Warren, and Westbrook and others. See pp. 232-34; Shuchman & Rhorer, *supra* note 19. But see Woodward & Woodward, *Exemptions as an Incentive to Voluntary Bankruptcy: An Empirical Study*, 88 COM. L.J. 309 (1983).

In a reorganization case, in contrast to a liquidation case, the debtor does not have to divest himself of any of his property. Although exemptions technically apply in Chapter 13, their relevance is principally to determine whether a Chapter 13 plan can be confirmed. 11 U.S.C. § 1325 (1988).

53. 11 U.S.C. § 1328 (1988). Under Chapter 13, the debtor is permitted to discharge a host of debts that are nondischargeable under Chapter 7. This is accomplished by limiting the applicability of § 523 of the Bankruptcy Code.

54. This assumption is based on the fact that in Chapter 7, debt incurred through false pretenses or in a fraudulent manner is nondischargeable. 11 U.S.C. § 523(a)(2), (4) (1988). A scoundrel, in all likelihood, would have incurred his obligations fraudulently and hence, would want a bankruptcy chapter that could relieve him of these obligations. Section 1328 accomplishes just that. See 11 U.S.C. § 1328 (1988).

liquidation option to the scoundrel debtor was made in 1984 through two distinct changes to the Bankruptcy Code. The first further limited exemptions on the theory that this would inhibit filing altogether⁵⁵ and the second specifically empowered the court to dismiss the case of a debtor who substantially abuses the bankruptcy process, with abuse being judicially interpreted to include seeking to liquidate when one is capable of reorganizing.⁵⁶

Neither of the 1984 amendments discussed above could be directly studied by Sullivan, Warren, and Westbrook because the cases they evaluated were filed in 1981 and the amendments did not go into effect until three years later. Subsequent empirical data do demonstrate that at least the addition of section 707(b) appears not to have reduced the level of filings nor shifted debtor filings from Chapter 7 to Chapter 13.⁵⁷ This result is not surprising, though, when it is recognized that the changes to the Bankruptcy Code were based on mistaken assumptions as to who our debtors are and how they behave.⁵⁸ There are certainly debtors who are impoverished, and some who are scoundrels,

55. Narrowing the exemptions was accomplished by the 1984 amendments, which amended § 522(b), (d)(3), and (d)(5). 11 U.S.C. § 522(b), (d)(3), (d)(5) (1988). As noted earlier, there had been some early work suggesting that limitations on exemptions would curtail debtor access to relief. See pp. 232-33 (criticizing this work and suggesting that simple economic models do not work); Note, *Bankruptcy Exemptions: A Full Circle Back to the Act of 1800?*, 53 CORNELL L. REV. 663 (1968). However, some empirical data have suggested just the opposite. See *supra* note 52.

56. This is also reflected in the 1984 amendments by the passage of § 707(b) and the addition of § 1325(b). 11 U.S.C. §§ 707(b), 1325(b) (1988); see Breitowitz, *New Developments in Consumer Bankruptcy: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 60 AM. BANKR. L.J. 33 (1986); Gross, *supra* note 37, at 85-140. Although the term "substantial abuse" has not been defined by the Code, courts have increasingly utilized the term to mean that debtors who could repay their creditors in a Chapter 13 filing but elect not to do so cannot be permitted to liquidate and obtain a discharge. For a compendium of cases, see Gross, *supra* note 37; Gross, *supra* note 40. Several recent cases have also taken this expansive view. See *In re Krohn*, 886 F.2d 123 (6th Cir. 1989); *In re Kelly*, 841 F.2d 908 (9th Cir. 1988); *In re Walton*, 866 F.2d 981 (8th Cir. 1989). But see *In re Braley* 103 Bankr. 758 (Bankr. E.D. Va. 1989); *In re Wegner*, 91 Bankr. 854 (Bankr. D. Minn. 1988); see also p. 221.

57. Gross, *supra* note 40; *Perception and Reality*, *supra* note 4, at 68-69, reprinted at 152-53; see also *supra* note 18 (revealing the rise in filing rates). Sullivan, Warren, and Westbrook also note this failure. Pp. 199-270.

58. Less obvious examples of the consequences of lumping debtors into simplistic categories on the basis of false assumptions can be found. The bankruptcy laws operate from the premise that the only debtors who should reorganize are individuals with regular income (scoundrels) because "poor" debtors are not working or not earning enough to reorganize. See 11 U.S.C. §§ 109(e), 101(29) (1988). But the facts show this is not true. Some but not all debtors are that poor, and some debtors may want to reorganize even if they do not have regular income.

Another example is the assumption that the only debtors who will seek joint relief will be a husband and wife, thus accounting for the limiting language in 11 U.S.C. § 302 (1988) which permits joint petitions only among married couples. While various courts have overridden this explicit statutory provision under the guise of interpretation, other courts have felt constrained by its limitations. See *In re Lam*, 98 Bankr. 965 (Bankr. W.D. Mo. 1988); *In re Pipes*, 78 Bankr. 981 (Bankr. W.D. Mo. 1987); *In re Malone*, 50 Bankr. 2 (Bankr. E.D. Mich. 1985). Considering the changing nature of the family, it is time the Bankruptcy Code began to keep pace. See *The Changing Role of the Family in the Law*, 22 U.C. DAVIS L. REV. 689 (1989); see also Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (gay life partner of

but there are many who do not fall into either category.⁵⁹

Moreover, the distinctions between Chapter 7 and Chapter 13, and the option accorded the debtor to choose between the chapters or stay outside the bankruptcy system altogether, also assume that we can easily identify the scoundrels who do exist and that debtor behavior is motivated by a single factor, such as the level of exemptions.⁶⁰ *As We Forgive Our Debtors* demonstrates that both of these assumptions are incorrect.

For example, while there is no definition of "scoundrel," there is a perception that many of the "scoundrels" abuse credit card debt. They spend beyond their means and then choose not to repay. Using various definitions of credit card abuse,⁶¹ Sullivan, Warren, and Westbrook are unable to identify characteristics of or predict who will be abusers (pp. 187-88). Moreover, even if identified, few scoundrels can fully repay creditors in a Chapter 13 plan; and such plans appear to be hardly the be-all and end-all, given their marked rate of failure.⁶²

Sullivan, Warren, and Westbrook also demonstrate that while it might appear that exemption levels would dictate debtor behavior (pp. 233-34, 240-42), debtor behavior cannot be explained simplistically

deceased rent-controlled tenant entitled to succeed to leasehold as "family member" of deceased).

Professor Dowd expresses the risks of stereotyping with clarity.

[T]he workplace structure incorporates a rigid conception of the family. That conception is one of a patriarchal family: a male wage earner in the paid workforce married to a stay-at-home female spouse who performs the unpaid housework and childcare. However, only a minority of families, fewer than ten percent, conform to this pattern and are served by the existing benefit structure.

The great majority of families are characterized by enormous diversity and fluidity. This diversity includes single parent, blended, unmarried and homosexual families. The dominant earner patterns in the workforce are now dual-earner and single-parent/single-earner families. . . .

Yet, the workplace structure makes no allowance for this diversity and unduly burdens the majority of families.

Dowd, *supra* note 46, at 105-06 (footnotes omitted).

59. There may be other reasons for the failure of the 1984 amendments to accomplish what at least the credit industry and some members of Congress thought they would achieve, such as judicial temperament or regional bias. It is also possible that the 1984 amendments were never intended to accomplish what some expected them to achieve, but were adopted with an underlying assumption that they were doomed to failure, solely to appease the demands of a special interest group whose acquiescence to other desperately needed legislation was essential. The latter obviously presents a rather cynical view of the legislative process.

60. Sullivan, Warren, and Westbrook suggest that this approach can be identified as the "economic model." This model assumes that debtors are economic maximizers who will respond to economic incentives and disincentives. Pp. 230-34.

61. Pp. 184-87. One method is to look at disproportionate credit relative to income. Another is to look at debt composition, defining an abuser as an individual with at least \$100 in credit card debt and which debt represents at least 75% of the total unsecured debt. The third method is to look at the debtors reporting the largest credit card use. *Id.*

62. Pp. 213-17. Failure of Chapter 13 cases involved those which were converted to Chapter 7 or dismissed. Troubled Chapter 13 cases were those in which either no plan was confirmed or there were signs of trouble (e.g., motion to dismiss or convert). Thirty-two percent of the Chapter 13 cases had failed and 31% were troubled. Pp. 215-17.

(pp. 254-55). Like the heterogeneity among debtors, there is a host of factors affecting debtor behavior — economic variables, social-demographic variables, and local legal cultures (pp. 242-52). We are confronted with complexity and a lack of easy answers.⁶³

The data assembled by Sullivan, Warren, and Westbrook thus demonstrate that no single painting premised in reality could depict a prototypical individual debtor family. Indeed, these data provide the palette for a variety of paintings, each representing a differing (albeit accurate) version of the family in debt. The collection would be like a child's flip book — a series of different pictures of the same scene, all of which create a moving image of the debtor. But these data also provide material for other images that are largely ignored by the Martineau painting, a vast panorama of people and entities that are integrally involved in the bankruptcy process — creditors (pp. 9, 12, 273).

D. *Completing the Picture: The Image of Creditors*

Sullivan, Warren, and Westbrook argue that, just as we have stereotypes of debtors, we have stereotypes of creditors (p. 273). In particular, we have viewed creditors monolithically, ignoring the diversity that exists among them (pp. 273-76). This, too, has distorted our perspective of bankruptcy.

As We Forgive Our Debtors looks at three distinct groups of creditors: commercial (business) lenders, consumer lenders, and reluctant lenders (pp. 274-76). A better understanding of who creditors actually are allows us to ascertain whether our basic bankruptcy premise that, with limited exceptions, all creditors should be treated alike is a sound one and whether it has produced desirable results.⁶⁴

Sullivan, Warren, and Westbrook's data reveal that entrepreneurial debtors have debts more than three times as great as those of wage-earners (p. 283). Although commercial lenders lend more to entrepreneurs than to wage-earners (p. 284-88) and business loans present greater risks than consumer loans (p. 288), these lenders have not obtained added collateral that might have improved their position in the bankruptcy context.⁶⁵ It may be that commercial lenders

63. Sullivan, Warren, and Westbrook provide a wonderful diagram which, even for those unaccustomed to dealing with statistical material, reveals the complexity of the factors to be taken into account when addressing debtor behavior. P. 257. I find it striking, though, that a variable missing from this chart is gender. For more on the implications of this omission, see *infra* notes 103-06, 142-45, and accompanying text.

64. Pp. 279-80. For an overview of the treatment of creditors in bankruptcy, see generally M. BIENENSTOCK, *BANKRUPTCY REORGANIZATION* (1986 & Supp. 1989); L. LOPUCKI, *STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS* (1988 & Supp. 1989); P. MURPHY, *CREDITORS' RIGHTS IN BANKRUPTCY* (1987); R. ROSENBERG & M. LUREY, *COLLIER LENDING INSTITUTIONS AND THE BANKRUPTCY CODE* (1986).

65. Pp. 288-89. The entitlement of secured creditors in bankruptcy is ably explained in M. BIENENSTOCK, *supra* note 64, at 159-236.

are willing to take added risk with entrepreneurial borrowers because, on balance, they derive more profit from these borrowers (p. 289).

The consumer credit industry accounts for the greatest percentage of debt — approximately 87% (p. 303). Approximately two thirds in dollar amount of this debt was categorized by debtors as “secured,” a significant portion of which would be repaid by debtors themselves or through the proceeds of the collateral (pp. 303-04). The unsecured debt arises from uncollateralized extensions of credit and the under-secured portion of the secured creditors’ claims.⁶⁶ Credit card issuers, credit unions, and gasoline companies totalled a surprisingly low 9% of the total debt due the consumer credit industry. Credit cards, the supposed cause of most individuals’ financial woes, constituted a mere 3% of the credit industry debt (p. 306). The bulk of the consumer debt was due to banks, mortgage companies, retail stores, and finance companies (p. 306). While some of these creditors asked for security, others did not. Many of those who did get security found that it was worth far less than the debt (pp. 306-12). Most creditors, both secured and unsecured, did not continue to seek information about their debtors on an ongoing basis, a practice that might have enabled them to make better judgments about whether and to what extent to continue extending credit (pp. 313-19). While the credit industry has been vocal in demanding greater bankruptcy reforms to remedy its losses from individual bankruptcies,⁶⁷ Sullivan, Warren, and Westbrook point out that the total bankruptcy loss is similar to what it cost the credit industry in postage in 1981 to send monthly statements to every credit card holder (p. 320).

Reluctant creditors (such as tort victims, ex-spouses, hospitals, the Internal Revenue Service, public utilities, and the like) are very different from commercial lenders and the consumer credit industry (p. 293). Most reluctant creditors never intended to enter into a debtor/creditor relationship with the debtor, but landed there by circumstance or government regulation (pp. 293-94). Among reluctant creditors, tort victims, while small in number, were owed the highest per-debtor amount (a mean of \$15,100) (pp. 295-96). Surprisingly, only 2% of the amount due reluctant creditors consisted of arrearages for alimony and child support.⁶⁸ More than half the wage-earner debtors

66. A secured creditor is only secured to the extent of the value of the collateral in which he has an interest. 11 U.S.C. § 506(a) (1988). Therefore, a secured creditor whose collateral is worth less than the loan value has an unsecured claim to the extent of the deficiency.

67. See, e.g., Gross, *supra* note 37, at 61-62.

68. P. 296. All the data presented by Sullivan, Warren, and Westbrook assume that what the debtor lists on his schedules is accurate. For example, the data assume that the debtor has accurately reported his income. When the numbers generated from the data produce conclusions that run counter to what many of us would expect in light of other empirical data, however, it is time to question the accuracy of what the bankruptcy files show. Obviously, the extent to which inaccuracies exist alters the conclusions we can draw.

An example of this is alimony and child support. Since there is a growing number of separa-

owed some health care debts, although the amounts reported were small (p. 297). Only 20% of the debtors owed back taxes (p. 297). In view of the preferred status of secured creditors and the statutory priorities among unsecured creditors — for which reluctant creditors (save the government) do not qualify,⁶⁹ there is little possible recovery for this category of claimant (pp. 299-300). Reluctant creditors are, at least arguably, a group that merits more sympathy than other creditors who could have better controlled their destiny but failed (either intentionally or negligently) to do so. Perhaps, then, consideration should be given to according special priorities for reluctant creditors.

These descriptions further illuminate the picture of the individual debtor in bankruptcy. There is no single Scrooge-like creditor exacting the last penny from his impoverished debtor. There is a range of creditors, some sophisticated, some aggressively incautious, and some involuntary. Our sympathies are not (and in my view should not be) the same for all of them. The data reported by Sullivan, Warren, and Westbrook allow us to reconsider the treatment we have accorded creditors, and to consider variations in the risk that different creditors bear in extending credit, as well as the extent to which we want to preserve an economy with relatively easy access to credit.

E. *Women Debtors — Breaking the Silence*

The foundation for an analysis of bankruptcy from a feminist perspective can be found within Chapter Eight of *As We Forgive Our Debtors*, which is devoted entirely to women debtors (pp. 147-65). The authors accomplish what has never been done before on a comprehensive scale — they consider the experiences of women debtors within the bankruptcy system.⁷⁰ They break the silence that has for so

tions and divorces, it is worth asking whether debtors underreport their obligations in this area. P. 296. If there is such underreporting, is it because the debtors intend to pay these obligations despite bankruptcy? Or are debtors hiding the obligations to prevent their spouses/ex-spouses (usually women) from finding out about the filing and thereby depriving them of payments they would continue to get under applicable bankruptcy law? The latter would not be an absurd possibility. Cf. R. SANDERS, CHILD SUPPORT AND ALIMONY: 1981 (Advance Report) (Bureau of the Census, Current Population Reports, Special Studies, Series P-23, No. 124 1983); Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DEN. L.J. 21 (1979).

69. 11 U.S.C. § 507 (1988).

70. Addressing issues of women debtors is not altogether new. Some data on women debtors have appeared in the writings of Professors Shuchman and Herrmann. See Herrmann, *supra* note 19; Shuchman, *The Average Bankrupt*, *supra* note 19; Shuchman, *New Jersey Debtors*, *supra* note 19. However, these works are not as comprehensive as that of Sullivan, Warren, and Westbrook. At the same time, it would have been valuable had Sullivan, Warren, and Westbrook compared their findings with the existing data.

In a recent symposium reviewing *As We Forgive Our Debtors*, Zipporah Batshaw Wiseman addresses the topic of women debtors in an article titled *Women in Bankruptcy and Beyond*. Wiseman, *Women in Bankruptcy and Beyond*, 65 IND. L.J. 107 (1989). The actual discussion of women debtors is brief — 10 pages. Professor Wiseman suggests that we still need to ask, "What

long disempowered women.⁷¹

The data on women debtors are among the most dramatic of those presented in *As We Forgive Our Debtors*. Women debtors comprise a surprisingly high number of those who seek relief. Twenty-six percent of all filings studied were by single-filing men⁷² and seventeen percent were by single-filing women (pp. 149-50). Fifty-seven percent of all filings were joint.⁷³ Stated differently, seventy-four percent of all cases involved a woman debtor, compared to eighty-three percent of the cases which involved a male debtor, and forty percent of debtors filing singly were women. Reflecting upon the Martineau painting for a moment, it is clear that in the United States today, the portrait could well be painted without a male debtor; indeed, a woman might be found standing in the place of the rogue-like son.⁷⁴

The single-filing women were predominantly unmarried (p. 150). Their financial position was, in a word, horrendous. Family income of households with a working male debtor averaged approximately \$18,000.⁷⁵ Family income of households with a single-filing woman debtor averaged \$10,600.⁷⁶ These data are consistent with studies

would a woman-centered view of bankruptcy look like?" *Id.* at 119. Among others, I hope this is one of the issues I begin to answer in this piece. See *infra* notes 94-219 and accompanying text.

71. Recognizing and curing the silence of women has been one of the themes of the feminist movement and one of its contributions to legal and nonlegal scholarship. See, e.g., Harding, *Introduction: Is There a Feminist Method?*, in *FEMINISM & METHODOLOGY*, *supra* note 14, at 1, 6-7; C. GILLIGAN, *IN A DIFFERENT VOICE* (1982); N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS* (1984); Bartlett, *supra* note 14; Bender, *supra* note 13; Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Houston, *Gilligan and the Politics of a Distinctive Women's Morality*, in *FEMINIST PERSPECTIVES* *supra* note *, at 168-89; Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Resnik, *supra* note 1; Sunstein, *supra* note 13.

It is striking that despite the prevalence of bankruptcy, there is also something like a conspiracy of silence surrounding it. In a status report on women in 1988-1989, there is not a single reference to bankruptcy, although there are hosts of references to the povertization of women. See *THE AMERICAN WOMAN 1988-1989* (S. Rix ed. 1988).

72. The term "single" filer does not refer to marital status; rather, it is used to distinguish between individuals filing alone rather than jointly.

73. The prevalence of joint filings also needs to be investigated further. Most married individuals seem to file jointly. Since many couples who filed jointly only had a single income, we have to question whether they each were similarly indebted. Moreover, we have to consider whether the joint filing was necessary from the wife's perspective. See *infra* note 80 and accompanying text.

74. There has been some suggestion that the rate of filing among single-filing women debtors has increased. See p. 147; Shuchman, *The Average Bankrupt*, *supra* note 19, at 289. Remarkably, data on the number of male and female debtors have not been maintained by the Administrative Office of the United States Courts. Requests by this author to the Administrative Office to collect this data either prospectively and retrospectively have not been granted. See Letter from L. Ralph Mecham to Karen Gross (May 22, 1989) (on file with author).

75. This figure is applicable to all male debtors, whether filing singly and jointly. P. 151, Table 8.1.

76. P. 152. Professor Shuchman also observed that women debtors earned less than their male counterparts. See Shuchman, *New Jersey Debtors*, *supra* note 19, at 550. His data show that male debtors earned an average of \$14,725, compared to women debtors who earned on

outside the bankruptcy field demonstrating that women earn less than men.⁷⁷ If one omitted all income from other sources and considered only the income of the primary earner in a family, the gap between male and single-filing female debtors narrowed but remained large (p. 152). Single-filing women debtors earned sixty-five cents for every dollar earned by male debtors (p. 152), remaining close to the 1981 federal poverty line of \$9300 (p. 65).

The income disparity is highlighted by the fact that male and single-filing female debtors had markedly different employment. Women debtors generally had jobs associated with higher prestige than those of male debtors (pp. 152-53). However, the single-filing women debtors had lower income (p. 153). These women debtors also had very different wages than their male counterparts within the same occupation (p. 153). These findings, again, reflect similar data outside the bankruptcy system: women generally have less earning power than their male counterparts.⁷⁸

Other financial data revealed that single-filing women debtors had fewer debts (but more unsecured debt) than their male counterparts but fewer assets with which to repay those debts (pp. 153-55). Single-filing women debtors had median assets of \$6400, compared to \$25,500 for joint filers. Single-filing women owed approximately \$20,000, compared to joint filers who had twice that amount of debt (pp. 153-55).

As We Forgive Our Debtors concludes that women debtors are at the bottom end of the debtor financial spectrum, yet seek relief under the Code when they are in positions of financial collapse comparable to male debtors (p. 155). However, it would appear that, in the case of the single-filing woman debtor, a small unanticipated expense might put women debtors over the edge, while single-filing male debtors and joint filers could withstand more of life's unexpected events (p. 156). For single-filing women, receiving or not receiving supplemental in-

average \$10,269. *Id.* What is remarkable, however, is how Professor Shuchman characterizes what, even in his data as opposed to Sullivan, Warren, and Westbrook's, is a 20% differential. He states that women debtors earned "somewhat" less than male debtors. A differential in this amount hardly qualifies as "somewhat" different! In empirical work, a difference of this sort is dramatic.

77. P. 152. See generally *THE AMERICAN WOMAN 1988-1989*, *supra* note 71 (containing numerous charts setting forth empirical data about the status of women); A. KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED* (1981). The status of women has also been a topic in the popular press. The *New York Times*, for example, published a three-part series of articles in 1989 titled *Women's Lives: A Scoreboard of Change*. See Dione, *Struggle for Work and Family Fueling Women's Movement*, N.Y. Times, Aug. 22, 1989, at A1, col. 1; Cowan, *Women's Gains on the Job: Not Without a Heavy Toll*, N.Y. Times, Aug. 21, 1989, at A1, col. 1; Belkin, *Bars to Equality of Sexes Seen as Eroding, Slowly*, N.Y. Times, Aug. 20, 1989, at A1, col. 1; see also D. RHODE, *supra* note 16, at 162-63.

78. P. 153; see *supra* note 77 and accompanying text. Professor Rhode devotes an entire chapter (titled *Equality in Form and Equality in Fact: Women and Work*) in her book to these issues. See D. RHODE, *supra* note 16, at 161-210.

come may be the difference between seeking bankruptcy relief and staying outside the bankruptcy system (p. 156). And more women single filers than their male counterparts may be too poor to seek relief in the first instance — they may be unable to retain counsel and/or pay the requisite filing fee.⁷⁹

The information about jointly filing women is even more startling. Married families in bankruptcy were one-income families (*i.e.*, only one spouse working) in much greater proportion than in the general population.⁸⁰ In joint filings, many of the wives who did work did not do so full time, explaining why the average income of debtor-wives was \$6000 compared to \$8557 for wives in the general population (p. 157). It would not be inconceivable, in view of other lobbying efforts of the consumer credit community, for this group to seek enhancement of recoveries from married debtors by suggesting limitations on discharge unless both spouses work (pp. 158-59).

The remaining finding about women in the bankruptcy system revealed by *As We Forgive Our Debtors* involves indebtedness for health care benefits. Single-filing women had a higher ratio of medical debts to income than any other category of debtor (p. 171). While the fact that women have higher medical expenses than men may account partially for the higher level of medical debt for women,⁸¹ a more likely cause is their lack of health care coverage as compared to that of other debtors. It appears that women worked in industries with lower fringe benefits; as a result, many of their medical expenses were not covered by insurance.⁸² For many women, bankruptcy becomes the health insurer of last resort (pp. 174-75).

79. P. 158. It is somewhat ironic that bankruptcy is one legal proceeding which cannot be filed *in forma pauperis*. See *United States v. Kras*, 409 U.S. 434 (1973). The filing fees are not low, and Congress recently authorized increases from \$90 to \$120 for Chapters 7 and 13, which change became effective December 21, 1989. Commerce, Justice, State and Judiciary Appropriations Act, H.R. 2991. Pub. L. No. 101-162, § 406(a), 103 Stat. 988, 1016. In addition, the amount of the fee could govern debtor choice. Chapters 7 and 13 are the least expensive chapters; Chapter 11 is the most costly.

One other new fee deserves special attention because of its potential adverse impact on women — the new \$60 filing fee for relief from the automatic stay. Commerce, Justice, State and Judiciary Appropriations Act, Pub. L. No. 101-162, § 406(a). This new fee creates an added cost to nonfiling individuals (predominantly women) whose former spouses have sought bankruptcy relief. Nonfiling individuals will now have to pay a "user" fee of \$60 to go back to state court to seek increased alimony or child support. They might also need to pay the fee to recover unpaid alimony or child support from property of the estate which is not within the § 362(b) exceptions to the stay but which is nondischargeable under § 523. See 11 U.S.C. §§ 362(b)(2), 523(a)(5).

80. P. 156. There is no evidence that in joint filings there was an effort to omit a spouse's income. All this suggests is that debtor families, more than nondebtor families, do not have dual incomes. Stated differently, debtor families are more "traditional."

81. See *ECONOMICS AND HEALTH CARE* 140 (J. McKinlay ed. 1981): "The constant positive sign on the sex variable . . . suggests that females demand more or have a higher utilization rate than males."

82. Pp. 171. The study does not reveal whether or to what extent pregnancy-related medical expenses account for any of these medical debts, or whether the reduced employment and income levels of single women are a principal factor.

F. Questioning Completeness

In two respects, however, I question the degree to which we can infer that Sullivan, Warren, and Westbrook's data present a realistic and complete painting of a debtor family *today*.⁸³ My first concern goes to whether the data is current; my second concern goes to reliance on hard data. As to the first concern, the authors recognize the problem but are confident that even though they used cases filed in 1981, the data generated are equally applicable today (pp. 19-20). In fact, they refer to another empirical study (for which I served as the Reporter)⁸⁴ to support their conclusion that data from 1981 remain accurate today.⁸⁵

I recognize that the process of hard data collection and interpretation is extremely time-consuming. The delays cannot be blamed on anyone. But the absence of fault does not eliminate the fact that 1981 data are not current. Since 1981, the Bankruptcy Code has twice been amended in material respects, and both of these amendments (the consumer credit amendments and the 1986 amendments) affect the treat-

83. These criticisms are not directed at methodology. As I am only too well aware, it is very easy to take potshots at empirical work. One can always question the methods of data collection. Indeed, these very concerns may discourage scholars from undertaking empirical work in the first place. See Sullivan, Warren & Westbrook, *supra* note 18. Instead, I am expressing concern over how the data can be used and what conclusions can be drawn from the data presented. This is a different order of criticism.

For the sake of completeness, however, it is worth noting that some methodological criticisms can be leveled at *As We Forgive Our Debtors*. Of those that I note, I do not consider any to be serious flaws. Several examples suffice. *As We Forgive Our Debtors* utilizes cases from three states — Illinois, Pennsylvania, and Texas. An effort was made to look at both urban and rural areas within each state. Sullivan, Warren, and Westbrook are confident that these three states present a representative sample of debtors nationally and thus are willing to extrapolate national norms from data generated in these three states. Pp. 18-19. This is tricky stuff. As noted at length in *Perception and Reality*, *supra* note 4, bankruptcy law appears to be practiced very differently in different parts of the country. Individual debtors may also be different in different parts of the country. There has been some evidence to this effect. See Miller, *Consumer Planning for Bankruptcy Relief*, in NATIONAL CONFERENCE OF BANKRUPTCY JUDGES, *supra* note 35, at 5-5, 5-12. Thus, while *As We Forgive Our Debtors* is broader in scope and more comprehensive than virtually any preceding study, caution is needed before assuming that we now have a complete national picture of individual debtors.

I also suspect that the authors underplay the importance of what their study does *not* show. They recognize that the critical time period in evaluating debtors may be the two-year period *before* relief is actually sought under the Bankruptcy Code. Pp. 98-102. What this really means is that we may find some of the most significant learning in data not yet examined. Professor Shuchman has attempted to look at some of this data. See Shuchman, *New Jersey Debtors*, *supra* note 19, at 557-59. For example, these data suggest that one third of the debtors unsuccessfully tried to work out their problems outside the bankruptcy system. *Id.* at 559.

84. See *Perception and Reality*, *supra* note 4.

85. Pp. 19-20. The conclusions of this study do indicate, as noted by Sullivan, Warren, and Westbrook, that the 1984 amendments did not change consumer bankruptcy practice in major ways. P. 19. However, that does not necessarily mean that debtors also remained unchanged. Debtors could have changed substantially and the bankruptcy system could have proceeded without taking these changes into account. Indeed, it seems more probable to me that the bankruptcy system proceeded without recognizing the changing character of debtors than that debtors remained the same over the years between 1981 and 1990.

ment of individual debtors.⁸⁶ In addition, a broad range of other societal changes may have had an impact on the bankruptcy process. We must consider broad changes in the national economy (e.g., the shift from a manufacturing to a service economy with concomitant changes in the demand for manual versus white-collar labor), rates of interest on consumer debts, unemployment levels, increased access to and use of credit by women, altered family structure and work patterns, decreases in governmental spending on social welfare programs, nonindexing of minimum wage and social security payments, increasing drug abuse, no-fault divorce laws, changing views of the morality of bankruptcy relief (particularly in light of well-publicized corporate filings), and the quality and personal biases of the many new judges appointed to the bankruptcy bench, to name but a handful. Therefore, it seems not just possible but likely that individual debtors today *are* different from those of 1981. We cannot know for sure until 1990 data becomes available. Until then, we should be cautious about extensive reliance on 1981 data.⁸⁷

My second concern is that Sullivan, Warren, and Westbrook primarily focus on quantitative (or "hard") data.⁸⁸ As expressed poignantly by Ruth Sidel: "Statistics . . . are 'people with the tears washed off.'"⁸⁹ Sullivan, Warren, and Westbrook have tried to humanize their story of debtors and creditors by giving us portraits of different

86. The entire bankruptcy system was revised with the passage of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at scattered sections of 11 U.S.C. and 28 U.S.C.); see Chatz, Costello & Gross, *An Overview of the Bankruptcy Code*, 84 COM. L.J., June/July 1979, at 259. The Reform Act has been amended twice in major respects. See The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended in scattered statutes in 11 U.S.C. and 28 U.S.C.), and the Bankruptcy Judges, United States Trustees and the Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986) (codified as amended in scattered statutes in 11 U.S.C. and 28 U.S.C.). The Reform Act has also been amended, though in less far-reaching ways, on other occasions since 1978. See, e.g., The Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (1988); An Act to Amend the Bankruptcy Law to Provide for Special Revenue Bonds, and for Other Purposes, Pub. L. No. 100-597, 102 Stat. 3027 (1988); see also Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse,"* 59 AM. BANKR. L.J. 327 (1985); Breitowitz, *supra* note 56; Cornish & Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge*, 47 LA. L. REV. 47 (1986); Herbert, *Once More Unto the Breach, Dear Friends: The 1986 Reforms of the Reformed Bankruptcy Reform Act*, 16 CAP. U. L. REV. 325 (1987); Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments of 1984*, 27 WM. & MARY L. REV. 91 (1985).

87. Professor Schuck has most recently articulated the cry for more empirical data. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989). Professor Schuck suggests nine factors for the paucity: inconvenience, lack of control, tedium, uncertainty, ideology, resources, time, tenure, and training. *Id.* at 331-33.

88. The authors did not interview individual debtors and creditors systematically. They did, however, interview some of the key participants in the bankruptcy process — lawyers, judges, trustees. Pp. 351-52. These participants are, however, not the primary characters and in this sense, their stories do not supplant those of the *actual* people for whom bankruptcy is an experience only they can describe.

89. R. SIDEL, *supra* note 44, at xvi.

individuals (pp. 49-62). They recognize that numbers can obfuscate the emotions of debtors and their creditors (p. 5). Numbers cannot tell us everything; they cannot quantify the moral choices confronting debtors or the pain of not being able to succeed (pp. 8-9). Therefore, as the authors recognize, the portrait they paint is not complete.

To me, among the most striking features of the Martineau painting are the faces of the family members and, in particular, the differences among the faces of the men on the one hand and the women on the other. The faces give the painting its passion. In many respects, for all its strengths, the pictures painted by *As We Forgive Our Debtors* are faceless, because faces cannot be painted with only the data from case files. We need perspectival data.⁹⁰ Among other things,⁹¹ we need detailed interviews with debtors and creditors, interviews that probe a range of psychological issues, such as how debtors feel about being in debt, how they feel about accessing the bankruptcy system, how they feel during the progress of their cases, and how they feel when the cases are finished. These data are difficult to obtain,⁹² as individuals are no doubt reluctant to divulge their personal feelings and, indeed, may have difficulty identifying or articulating them. However, in the limited situations where it has been attempted, the results have provided unique insights.⁹³

This added perspectival data, together with current quantitative data, would lead to a richer and more objectivity-enhancing portrait of debtors. But, my two criticisms do not eradicate the import of Sullivan, Warren, and Westbrook's study. The authors have given us a significantly more complete painting than we had before. It is an important painting. But we need others. Part Two of the essay begins the analysis of what new paintings might look like and the consequences that flow from their possible creation.

90. A further benefit of perceptual data is that it can be gathered more quickly than quantitative data and perhaps less expensively as well. See *Perception and Reality*, *supra* note 4, at 6-7 (original report), *reprinted* at 90-91. The importance of perceptual data has been recognized by other bankruptcy researchers. See Shuchman, *New Jersey Debtors*, *supra* note 19, at 541.

91. There is also a need for more empirical data about what happens to debtors before filing under the Bankruptcy Code and what happens to them after filing. Consider, for example, how important it is to the fresh start policy to know how many debts a debtor actually reaffirms (formally or informally) or voluntarily repays.

92. David Stanley and Marjorie Girth did conduct interviews of debtors and gathered some information about their reaction to the bankruptcy process. D. STANLEY & M. GIRTH, *supra* note 19. This information is obviously dated, and the amount of data gathered is limited. Interviews were also used in the PURDUE STUDY, *supra* note 19, and questionnaires were sent to debtors in the GAO REPORT, *supra* note 19. Professor Shuchman also did some interviewing and recognized the difficulty of obtaining responses. Shuchman, *New Jersey Debtors*, *supra* note 19, at 542-43. Sullivan, Warren, and Westbrook conducted some interviews as well; however, these interviews were only of the bankruptcy professionals. Pp. 351-53.

93. See Siporin, *supra* note 19, at 55-60 Many wives reportedly turned against their husbands, finding them inadequate. *Id.* at 59. Many family members expressed feelings of intense rage, exhaustion, and defeat *before* filing. *Id.*

II. RE-VISION: BANKRUPTCY FROM A FEMINIST PERSPECTIVE

A. *Thinking About Women Debtors*

Sullivan, Warren, and Westbrook's data about women debtors underscore the povertization of women generally or, as characterized by some, the feminization of poverty.⁹⁴ Women debtors are living on the edge. Bankruptcy is a symptom of this much larger problem. The data collected by Sullivan, Warren, and Westbrook suggest that a partial explanation of the poverty of single-filing women debtors is their absence of power.⁹⁵ This lack of power leads women into jobs that do not generate substantial income and include few fringe benefits. The difference between survival and failure for many of these women debtors is supplemental income, derived in many instances from former spouses, again making women economically dependent.

The dramatically revealing data about women debtors appearing in *As We Forgive Our Debtors* has made me think about how the bankruptcy system treats women generally. At present, we lack the empirical data to answer that inquiry. This is where the theorizing and hypothesizing come in. What I suggest in this essay are various avenues of inquiry in respect to women debtors and a framework within which to consider these issues on a go-forward basis. I also seek to concretize my theoretical suggestions, applying theory to practice.⁹⁶

We have to investigate whether the bankruptcy system is not sim-

94. See Parnas & Cermak, *Rethinking Child Support*, 22 U.C. DAVIS L. REV. 759 (1989); Pearce, *Welfare Is Not For Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412 (1985); Williams, *supra* note 13, at 798, 824-27. Ruth Sidel suggests that the phrase was first coined by Diana Pearce. R. SIDEL, *supra* note 44, at 15. In defining "feminization of poverty," Diana Pearce states: "Whether as widows, divorcees or unmarried mothers, women have always experienced more poverty than men. But in the last two decades, families maintained by women alone have increased from 36 percent to about 50 percent of all poor families. That is the feminization of poverty." Pearce, *supra*, at 412.

95. See Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Williams, *supra* note 13. In explaining the wage gap between men and women, Joan Williams explains that the gap reveals an "integrated system of power relations that systematically disadvantages women." *Id.* at 826. Catharine MacKinnon also states this point in her writings. As expressed in her conversation with other feminists at a symposium at Buffalo Law School, "[T]he problem of inequality is the problem of the subordination of women and not the inaccurate differentiation between people on the basis of sex Gender becomes a question of how people who do not have power are going to get some, and how people who do not have a voice are going to be able to speak in anything other than a male voice in a higher register." *A Conversation*, *supra* note 29, at 27-28.

96. In the literature to date, the application of feminist theory to doctrinal law has been primarily concerned with noncommercial areas such as family law, rape law, discrimination law, and tort law. See, e.g., S. ESTRICH, *REAL RAPE* (1987); Bender, *supra* note 13; Chamallas & Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990); Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Finley, *supra* note 14; Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). There are a growing number of exceptions. See, e.g., Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317 (1990); Simpson, *Feminist Theory, Crime, and Justice*, 27 CRIMINOLOGY 605 (1989). The mismatch between theory

ply mirroring the condition of women outside of bankruptcy but also is contributing to that condition. It is necessary to see first whether, as applied, the Bankruptcy Code perpetuates women's povertization.⁹⁷ But I think we have to look beyond any disparate impact the Code may evidence. We have to look at the fundamental principles underlying the system to ascertain whether by excluding the experiences of women from bankruptcy jurisprudence, we have created a bankruptcy system that is phallogentric. If the bankruptcy laws are premised on a male model, then the Bankruptcy Code may reinforce the condition in which women debtors find themselves.⁹⁸

A major caveat is in order. Discussions of women debtors to date have been silent as to certain additional (albeit not unique) characteristics of women debtors that would both enrich and complicate the analysis. To date, there has not been a systematic analysis of male and female debtors on the basis of race or religion.⁹⁹ Although there is some suggestion that there may a higher percentage of minority debtors than nonminority debtors,¹⁰⁰ this topic has never been the subject of detailed and broad-based study. Since the status of black women is generally more bleak than that of white women,¹⁰¹ the observations about povertization of debtors becomes more acute for black women debtors. Any complete discussion of women debtors would have to account for a much more varied portrait than that uncovered in *As We Forgive Our Debtors*. In some respects, simply talking about women debtors as a group runs afoul of the concern of recent feminists that when we talk about women generally, we are usually thinking only about white, middle-class, Protestant women and, as such, fail to account for the subjective, personal circumstances of many other women.¹⁰² Many of the women debtors about whom I now write would have a different background from mine and hence may rightly question my ability to speak for them.

There is no simple way of approaching these complex issues in-

and practice is a troubling one in legal academia. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989).

97. Diana Pearce makes this point in the context of programs designed to assist the poor (e.g., welfare, unemployment, AFDC). Interestingly, bankruptcy is never mentioned as such a program. In explaining the inadequacies of the current program, Pearce states: "First, women's poverty is fundamentally different from that experienced by men and second, women are subjected to programs designed for poor men. Poor women find these programs are not only inadequate and inappropriate, but also lock them into a life of poverty." Pearce, *supra* note 94, at 413.

98. See *supra* note 26.

99. Some discussion of race (not correlated to gender) appears in White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1 (1987); see also Shuchman, *New Jersey Debtors*, *supra* note 19, at 546-47.

100. Shuchman, *New Jersey Debtors*, *supra* note 19, at 546.

101. See, e.g., THE AMERICAN WOMAN: 1988-1989, *supra* note 71; Scales-Trent, *supra* note 16. The failure to hear the voices of black women appears most recently in Angela Harris' powerful article, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

102. See E. SPELMAN, *supra* note 13.

volved women debtors. I suggest we think about women debtors at three stages — before, during, and after a bankruptcy filing. There is some overlap of issues in these three stages but they provide a way of addressing a broad range of concerns. The most manageable task is to look at what happens to women debtors during a bankruptcy case. In that context, we must look initially at how a facially gender-neutral statute, the Bankruptcy Code, is applied.¹⁰³ For example, we must consider whether women debtors are treated in the same way as their male counterparts when a bankruptcy court determines legal issues. In addition, we must look at how the Code is interpreted, and consider whether the judicial definitions of statutorily undefined terms in some way affect women debtors adversely.¹⁰⁴ Then, we must look beyond the law, as applied and interpreted, and examine how judges and the U.S. Trustees speak to and treat women debtors when they meet them in person.¹⁰⁵ We must look at the words employed and the kind of narrative discourse followed in the judges' opinions.¹⁰⁶ We must look at the stories told by the debtors themselves in the documents they have filed with the court. And, we must look at the stories those documents do *not* tell; we have to investigate the gaps in those docu-

103. The fact that a statute is facially gender-neutral gives us small solace when the statute in question lends itself to discriminatory application and, in fact, is discriminatorily applied. Obtaining neutrality was the task of stage-one feminists. See Scales, *supra* note 13. An example of this type of problem appears in employment law and the application of affirmative action principles, a topic which has obviously generated considerable debate. See D. RHODE, *supra* note 16; Law, "Girls Can't Be Plumbers" — *Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45 (1989); Williams, *supra* note 13.

104. See *infra* note 180. A striking example of this problem is rape law. As Susan Estrich points out, the problem with rape law is not only the statutes but how courts have defined the operative terms used in those statutes (e.g., "consent"). See S. ESTRICH, *REAL RAPE*, *supra* note 96. (1987). In describing Estrich's work, Kim Scheppelle terms it "re-visionary." See Scheppelle, *supra* note *, at 1100. What makes Estrich's work re-visionist is her suggestion that we should begin to see things differently. For example, we should define "no" not from the male perspective but from a female perspective. If this is accomplished, the scope of what constitutes real rape will extend beyond physically forced sexual intercourse between two strangers. *Id.*

105. For a discussion of gender bias by the judiciary, see *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 1 (1986); Resnik, *supra* note 1; Schafran, *Gender Bias in the Courts: An Emerging Focus of Judicial Reform*, 21 ARIZ. ST. L.J. 237 (1989). In a statement for the hearings on The Federal Courts Study Committee, Professor Judith Resnik noted the bias in courtrooms. She also objected to the Committee's effort to create a small, elite federal judiciary. Under the Committee's proposal, bankruptcy judges would not be elevated to article III status while tax court judges would. Moreover, Title VII cases would be decided by article I rather than article III judges. Statement of Judith Resnik for the hearings on The Federal Courts Study Comm. (1990) (copy on file with author). This leaves the distinct impression that the people's problems are not significant enough for the elite federal judiciary who do not want, in Justice Scalia's words, to be burdened with the routine. For women debtors, this is another example of their problems not being considered important.

106. There is a wealth of literature on the importance of the stories told. See generally J.B. WHITE, *HERCULES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* (1985); J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Scheppelle, *supra* note 8; Shervin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Story Telling*, 87 MICH. L. REV. 543 (1988).

ments.¹⁰⁷ Finally, we have to look at whether the stereotyped images of the male debtor are transferred to women debtors, creating a bankruptcy system unrecognizing of the experiences of many who seek its benefits.¹⁰⁸

But what happens to women debtors *during* a case tells only part of the story. We must look at women debtors before they file because this is where their story actually begins.¹⁰⁹ We must consider whether single women debtors are using the bankruptcy system in the same way male debtors are. I am not referring to whether the Code is, as a legal matter, equally available to male and female debtors. It is. I am asking first whether single women are as aware as men of the availability of bankruptcy as an option to assist them, whether they have been educated about the possibilities of bankruptcy relief.¹¹⁰ In addition, I am asking whether women, even if aware of the bankruptcy option, are socially, morally, or psychologically as able as men to partake of whatever benefits it has to offer. Stated simply, do women think about debt (and its avoidance) in the same way as men?¹¹¹ And, if not, do women think about debt (and its avoidance) in a manner that discourages their participation in the bankruptcy process?

Looking at women in debt before filing and during a case is not enough, however. We must look at women debtors *after* discharge, the legal mechanism for providing a fresh start. We must look at whether women debtors are actually experiencing a fresh start.¹¹²

107. Sullivan, Warren, and Westbrook suspect that many of the case files they investigated did not contain *all* of the information regarding those cases. Pp. 68, 134-35, 169, 296; *see also supra* note 68. Debtors frequently omitted information. It is possible that single-filing women debtors select what information they want to list and omit key creditors from their schedules since any nonlisted creditor will not be discharged. 11 U.S.C. § 523(a)(3) (1988). To date, no formal interviews of women (or men) debtors have been conducted to determine the extent to which these speculations are accurate.

108. Of course, we should be concerned if male debtors are also subjected to particular treatment based on erroneous stereotypes of them. *See supra* notes 26-31, 40-42, 56-58 and accompanying text.

109. *See supra* notes 83, 102 and accompanying text. Determining where the story begins is also a concern of those interested in legal storytelling. *See* A. DANTO, *NARRATION AND KNOWLEDGE* (1985).

110. *See infra* notes 118-24 and accompanying text.

111. *See infra* notes 126-27 and accompanying text.

112. The Code has several discharge provisions. *See, e.g.*, 11 U.S.C. §§ 523, 727, 1141, 1328 (1988). The discharge in Chapter 7 is narrower than the Chapter 13 discharge. Although there has been a growing literature about the theoretical underpinnings of the fresh start policy in individual bankruptcy cases, the topic has not as yet, in my view, received sufficient analysis. As suggested here, we must begin by defining what kind of fresh start we are talking about. For current literature on the theoretical aspects of the fresh start policy, *see* T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and Interpretive Theory*, 21 RICH. L. REV. 49 (1986); Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987); Jackson, *The Fresh-Start Policy in Bankruptcy*, 98 HARV. L. REV. 1393 (1985). *See also* Wiseman, *supra* note 70, at 118-19. She states, "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

This fresh start can be experienced at several levels. A debtor can be legally excused from existing financial commitments.¹¹³ But legal excuse does not mean the debtor is psychologically excused. To have a real fresh start, one needs to be relieved of one's sense of obligation to one's creditors. A fresh start also means (or at least should mean) that the debtor will have a new opportunity for self-realization.¹¹⁴ If bankruptcy does not provide that opportunity, then the fresh start obtained may be illusory.¹¹⁵

Even the three-stage analysis of women debtors before, during, and after filing, however, is by itself insufficient.¹¹⁶ There are whole categories of women who have *not* been represented in this analytic framework.¹¹⁷ These are the women whose names do not appear on petitions as either single or joint filers. These are the women who are the wives, ex-wives, homesharers, lovers, and daughters of debtors. They experience bankruptcy without being official participants. But bankruptcy affects them directly; bankruptcy judges make decisions that affect the way they will live. Data about them does not appear in *As We Forgive Our Debtors* or any other empirical work. Nor are they mentioned in the academic literature. Their needs and concerns and the impact of a bankruptcy on them must be evaluated. They have been truly silenced.

B. Before the Filing

1. A Lack of Knowledge

The ability of women (and men) to use the bankruptcy system hinges, at least in part, on their awareness of the benefits the bankruptcy system can offer them. Although we do not have data on women's knowledge of bankruptcy in particular, there is considerable empirical work suggesting that women are generally less aware than men of the legal options available to them.¹¹⁸ There are also data indi-

lives." *Id.* at 118. However, as I suggest, economic relief is only a piece of the broader quest of women for a true fresh start. See *infra* notes 213-19 and accompanying text.

113. 11 U.S.C. §§ 727, 1328 (1988).

114. In her criticism of the poverty programs now in existence, Pearce observes that they reinforce the disadvantaged position of women. Pearce, *supra* note 94, at 415; see also Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36 (1971).

115. This aspect of the analysis also applies to how we think about the debtor before and during the case. See *infra* notes 118-212 and accompanying text.

116. A legitimate consideration throughout this analysis is whether male debtors are freed of stereotypes. We have not investigated the male debtor's fresh start either, to give one example. Therefore, although it is certainly beyond the scope of this essay, some consideration should be given to broadening our inquiry into the debtor/creditor relationship.

117. The analysis has also not taken account of other factors affecting women debtors such as minority status and religion. See *supra* notes 99-102 and accompanying text.

118. Women's ignorance of the legal system can be attributed to the "maleness" of the system and the easy access men have had to the system — as lawyers, judges, and legislators. See

cating that women are generally less knowledgeable about financial matters and less comfortable in dealing with such matters than their male counterparts.¹¹⁹ Indeed, data suggest that women handle money differently from men.¹²⁰ There also is an acknowledged link between money and power.¹²¹ In contemporary American society, women have less power than men.¹²² Perhaps this means most women have less money than men. Or, perhaps it is the other way around. Because most women have less money than men, they also have less power.

In terms of knowledge of bankruptcy in particular, a preliminary analysis of several popular legal guides specifically designed for women readers suggests that bankruptcy is *not* an encouraged option for them.¹²³ It is possible that the absence of knowledge about bankruptcy and lack of encouragement to seek relief *before* one is in extremis is an issue extending beyond the bookstore literature. Even though we cannot now quantify this knowledge base, the bookstore literature at least raises the possibility that women may not be aware of or encouraged to use the bankruptcy option.¹²⁴ Moreover, even if aware of the bankruptcy option, women may be unaware of the two alternatives within the bankruptcy system — liquidation and reorganization — and how to evaluate their choices.¹²⁵

Menkel-Meadows, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

119. See generally P. CHESLER & E. GOODMAN, WOMEN, MONEY & POWER (1976); Wernimont & Fitzpatrick, *The Meaning of Money*, 56 J. APPLIED PSYCHOLOGY 218 (1972).

120. P. CHESLER & E. GOODMAN, *supra* note 119.

121. As expressed by Phyllis Chesler and Emily Goodman, "Money is the thirteenth power. Money is human energy trapped and counted in measures of gold, silver, and paper. Money is love. Money is sex. Money is life — or time." *Id.* at 249-50.

122. See C. MACKINNON, *supra* note 29; Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989).

123. One legal guide for women recommends bankruptcy only when a debtor is in really bad trouble. Vogel, *Contracts and Credit*, in EVERYWOMAN'S LEGAL GUIDE 3, 25-26 (B. Burnett ed. 1983). Another guide addressing separation and divorce referred to bankruptcy only in relation to a woman's husband and the consequences of such a filing on a wife. Nowhere does the author consider the possibility of the wife filing for relief. N. HARWOOD, A WOMAN'S LEGAL GUIDE TO SEPARATION AND DIVORCE IN ALL 50 STATES 25 (1985). There is a striking exception to this. One of the leading popular guides to bankruptcy is written by a woman and does use examples of women debtors — single- and joint-filing debtors. See J. KOSEL, *supra* note 40. These guides also recognize the moral problem many debtors may feel in considering bankruptcy. *Id.* at 1. However, guides on bankruptcy are only useful if an individual has sufficient knowledge and money to consider buying the book in the first instance. If bankruptcy is not one of the considered options, a book about it is not likely to be useful.

124. The possibility of women availing themselves of the bankruptcy system in greater numbers suggests that the knowledge curve is increasing. See *supra* note 74; Shuchman, *New Jersey Debtors*, *supra* note 19; Shuchman, *The Average Bankrupt*, *supra* note 19. However, there are no recent data to confirm this.

125. As previously noted, see *supra* note 118, men may also be ignorant of the legal options of bankruptcy. Even if men are ignorant of the opportunities accorded by bankruptcy, it is likely that women are even more ignorant.

2. *The Fresh Start Mentality*

I suspect that even if women are aware of bankruptcy as an option, they may not view the discharge of debt in the same way male debtors do.¹²⁶ Women debtors may not be as willing as male debtors to leave their creditors in the lurch.¹²⁷ Maybe women are, then, uncomfortable with at least a major premise underlying the fresh start policy.

The attitude toward discharge within the Bankruptcy Code is complicated and returns us to the stereotypes that Part One of this essay showed are inconsistent with the empirical data, but still pervasive in our thinking.¹²⁸ For the poor, unfortunate debtor, discharge seems to be an accepted way of permitting an individual to be freed from his obligations with society recognizing the debtor's plight. It is society's way of relieving the debtor of responsibility.¹²⁹ However, the attitude toward discharge for the rogue debtor is different. For this debtor, we adopt the dominant stereotype of masculinity, namely the independent, selfish, autonomous, self-actualizing individual of the classical liberal school of thought.¹³⁰

However, for both stereotypic debtors, discharge requires that the debtor adopt a "screw-you" approach to his creditors.¹³¹ A debtor who meets the statutory requirements can liquidate his or her assets (keeping exempt property) and basically say "screw you" to his or her creditors. This debtor can then begin anew. For the impoverished debtor, it is an acceptable "screwing" while for the rogue debtor, it is not. For all debtors, it assumes the rogue masculine mentality.

This approach to discharge is particularly troubling for women debtors who, while closer to the stereotypical poor debtor, may think of themselves or may be perceived by others as closer to the stereotypical rogue.¹³² For this category of debtor, the masculine "screw-you"

126. A full discussion of the reasons for this position appears *infra* at notes 132-46 and accompanying text.

127. See *infra* text accompanying note 146.

128. See *supra* notes 20, 26-43, and accompanying text.

129. One way of seeing this is the inapplicability of 11 U.S.C. § 707(b) (1988) to this category of debtor.

130. For a discussion of this view, see West, *supra* note 13.

131. The characterization of the bankruptcy discharge in this manner is mine. However, the description is keyed to an appreciation of what happens to creditors in bankruptcy. What I am suggesting is the underlying but unarticulated essence of bankruptcy in its rawest form. The term "screw you" has sexual connotations, and they are intended. The power that men can exert over women in a relationship involving intercourse frequently places women in a subordinated position. Therefore, it is men who can screw women and men who can screw their creditors. Women, on the other hand, are generally perceived and referred to in the sexual context as those who get screwed. And, relative to men, they are screwed. For women to adopt the "screw you" approach inherent in pursuing a bankruptcy discharge requires their integration of an essentially male value system.

132. Indeed, what is and is not a rogue debtor is not altogether clear. Rogue could mean someone who partakes of the opportunities offered by the Code; it could also mean someone who has systematically defrauded creditors. The debtor who seeks discharge by liquidating rather

approach may not work because the underlying assumption is that either stereotypic category of debtor seeking discharge is comfortable saying "screw-you" to creditors. It is presumed that the debtor is willing to break from their creditors with a large measure of emotional and moral impunity. Or, perhaps the debtor must be willing to break with his or her creditors and withstand the sense of failure and self-worthlessness that may follow.

It is useful, in this context, to return to the Martineau painting. The painting clearly depicts a rogue-like father and son who are comfortable with the bankruptcy discharge. They do not seem concerned with losing the family home. They also do not appear concerned about their creditors. Indeed, they seem to feel relieved; they can begin afresh. Their expressions exhibit optimism. In contrast, the females in the picture are hardly optimistic. The liquidation of their assets and the severance of their relationships with creditors hardly seem a boon to them; they seem far less able to break apart from their past. The wife, positioned between her eager husband and her distraught mother-in-law and young daughter, appears torn apart.¹³³

Indeed, if I were to paint a picture of individual debtors today, not only would many of them be women but their facial expressions, as the manifestation of their feelings, would differ from that of the rogue-like son in Martineau's painting. The single-filing woman debtor would not necessarily have her hand raised, delighted at the thought of starting over. I suspect she would look much like the wife in Martineau's painting — torn with conflict and fearful of what the future holds for her. She would be uncomfortable with and perhaps threatened by her "fresh start."

The possibility of differing perceptions of the fresh start offered by bankruptcy hinges, at least in part, on an awareness that bankruptcy, at its root, involves a moral dilemma.¹³⁴ As Sullivan, Warren, and Westbrook suggest, bankruptcy calls into question moral values (pp. 8-9), forcing us to think about the circumstances under which individuals ought to be relieved of their financial obligations.¹³⁵ At what

than reorganizing when capable of repaying creditors can also be viewed as a rogue. It is no small wonder that women might define themselves as rogues based on their own sense of responsibility rather than the Code's or society's less harsh categorization.

133. This difference in approach is consistent with the work of a number of feminist scholars including Nel Noddings, Carrie Menkel-Meadow, Judith Resnik, Barbara Houston. See N. NODDINGS, *supra* note 71; Houston, *Gilligan and the Politics of a Distinctive Women's Morality*, in FEMINIST PERSPECTIVES, *supra* note *, at 168; Menkel-Meadow, *supra* note 71; Resnik, *supra* note 1.

134. It is interesting that the word "bankrupt" has also been used to suggest being bereft of morals. Joan Williams states: "Do such phenomena mean that feminists' traditional focus on gender-neutrality is a bankrupt ideal?" Williams, *supra* note 13, at 799. This view of bankruptcy as moral emptiness may account for at least some reluctance to participate in the bankruptcy process.

135. In a sense, bankruptcy involves notions of breach of contract, the morality of which has evoked a rich literature. See C. FRIED, *CONTRACT AS PROMISE* (1981); Kronman, *Paternalism*

point are we willing to elevate the personal needs of debtors above the commercial needs and expectations of their creditors? Once we are within the realm of moral issues, we must address the possibility that women and men think about and handle moral dilemmas differently.¹³⁶

My suggestion that men and women have different moral perspectives has its roots in Carol Gilligan's now well-known work *In a Different Voice*¹³⁷ in which she concluded that boys and girls respond differently to moral problems.¹³⁸ Stated most simply, Gilligan concluded that boys approach moral issues from a perspective of rationality and impartiality (linear thinking), while girls view such issues from a perspective of caring, responsibility, and interconnectedness (relational thinking). In this and her later work, she goes on to suggest that while relational thinking may suggest dependency, it can also be seen as a source of empowerment.¹³⁹

An abundance of criticism has been directed at Gilligan's work.¹⁴⁰ Some of these critics suggest that Gilligan's observations of difference are based on biological factors; others assert that they are based on societal factors. Still others believe Gilligan to be simply wrong. In-

and the Law of Contract, 92 YALE L.J. 763 (1983); Rosenfeld, *Contracts and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769 (1985); *Proceedings and Papers of the Conference on Contract Law: From Theory to Practice*, 1988 ANN. SURV. AM. L. (symposium issue on contract law). For an introductory discussion of the interrelation between bankruptcy and contract, see Gross, *supra* note 40.

136. At this juncture, I am suggesting that women may address moral issues differently from the way men do. I am not suggesting that women have, as yet, developed an entire moral philosophy distinct from existing moral philosophy. Such a theory may ultimately be developed but, at present, it appears to be only in the formative stages. See Baier, *What Do Women Want in a Moral Theory*, 19 NOÛS 53 (1985).

137. C. GILLIGAN, *supra* note 71.

138. Gilligan's work is a response to the hierarchy of moral values established by Kohlberg. See 1 L. KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in *MORAL DEVELOPMENT AND BEHAVIOR* (T. Lickona ed. 1976). Kohlberg's system of moral development generally placed girls lower on the scale than boys. This result was, according to Gilligan, based on Kohlberg's sense of what was the morally "right" way to analyze moral problems. C. GILLIGAN, *supra* note 71, at 18-19. For a readable account of the differences between Gilligan and Kohlberg, see Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472 (1988). A more recent attempt to address these issues appears in *MAPPING THE MORAL DOMAIN* (C. Gilligan, J. Ward & J. Taylor eds. 1988).

139. Gilligan states: "Being dependent, then, no longer means being helpless, powerless, and without control; rather, it signifies a conviction that one is able to have an effect on others, as well as the recognition that interdependence of attachment empowers both the self and the other, not one person at another's expense." Gilligan, *Remapping the Moral Domain: New Images of Self in Relationship*, in *MAPPING THE MORAL DOMAIN* *supra* note 138, at 3, 16.

140. Examples of this critical literature include E. SPELMAN, *supra* note 13; *A Conversation*, *supra* note 29; Greeno & Maccoby, *How Different Is a Different Voice*, 11 SIGNS 310 (1986); Scales, *supra* note 13; Sunstein, *supra* note 13; Walker, *In a Different Voice: Cryptoseparatist Analysis of Female Moral Development*, 50 SOC. RES. 665 (1983); Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, 55 CHILD DEV. 677 (1984); West, *supra* note 13; Williams, *supra* note 13.

deed, Gilligan appears to have clarified her position in recent years,¹⁴¹ suggesting that not all girls think one way and all boys another, and that there is no single "right" way to address moral problems. She has also taken the view that the ethic of caring does not necessarily damn women to a life of subordination.¹⁴²

Whatever the criticism of Gilligan, I believe she has something significant to say. It is what makes at least some of us more sympathetic to the feelings of the wife than to those of the husband in the Martineau painting. Gilligan's work demonstrates first that there can indeed be a heterogeneity of views on issues of morality. Therefore, a legal (or indeed nonlegal)¹⁴³ system that assumes that a single perspective is the only legitimate perspective is misguided.¹⁴⁴ Second, Gilligan's work reveals that at least one part of that heterogeneity is comprised of the voices of women. The assumption that all women think as all men do is, as Gilligan observes, inaccurate. Not all men think alike, nor do all women.

In the bankruptcy context, Gilligan's approach suggests — indeed implores — that we consider the possibility that we have formulated the bankruptcy system based on a one-gender (male) image of debtors¹⁴⁵ and with an unsophisticated approach to the moral dilemma confronting individuals who cannot repay their creditors. For certain debtors, particularly women, who are uncomfortable with the abrupt disruption of the debtor/creditor relationship, the liquidation ("screw you") option accorded by Chapter 7 of the Code may simply be unpalatable, exacting a moral and psychological price too high to bear.¹⁴⁶ This may be particularly relevant when a debtor's creditors play an important role in the debtor's life — the doctor, local pharmacy, grocer, cleaner, child-caretaker, and hardware store. These are not faceless corporate creditors where personal interaction is irrelevant.

What options are there, then, for such debtors? My more pragmatic colleagues present the question this way: What are the consequences of my suggestion that some people perceive the debtor/creditor relationship differently from others? Am I suggesting an

141. See *supra* note 138.

142. See *A Conversation*, *supra* note 29, at 41-42; Nedelsky, *Reconceiving Autonomy*, 1 YALE J.L. & FEMINISM. 7 (1989).

143. E.g., an economic, political, or social system.

144. This seems to be what Martha Minow describes as stage-three feminist scholarship. See Minow, *supra* note 44, at 2-4.

145. The absence of a single image of debtors is established at *supra* notes 26-31 and accompanying text.

146. I think we also need to explore how, in a capitalistic and success-oriented society, men feel about their failures and whether the bankruptcy experience is for them a form of emasculation. Barbara Weiss observes that at least in the Victorian literature, some men turned the experience of failure into an opportunity for rebirth. See B. WEISS, *supra* note 1.

overhaul of the entire bankruptcy system? Am I suggesting that we need a separate bankruptcy system for women?

3. *The Consequences of Difference*

The consequences that flow from differing images of debtors and their perspectives on debt and its extinguishment cover a broad spectrum. At one extreme, we could contemplate abolishing the fresh start altogether. This seems too dramatic and indeed unnecessary, unless we want to suggest that relief from indebtedness has no place at all within our bankruptcy system. Given the long and valuable historical and religious significance of the fresh start policy and the fact that some debtors can partake of the fresh start and benefit from it, it does not make sense to abandon it on a wholesale basis.

Another possibility is to limit the applicability of the fresh start, a controversial approach that is currently being pursued through implicit restrictions on access to Chapter 7¹⁴⁷ and the encouragement of the use of Chapter 13.¹⁴⁸ Applying the current statutory and judicial approach to differing debtor perspectives, we are left to encourage those debtors who are uncomfortable with the Chapter 7 "screw you" mentality to proceed under Chapter 13 and repay their creditors over time. Indeed, we currently reward the antipathy toward the "screw you" mentality by expanding the scope of the discharge in Chapter 13, a consequence with a degree of irony given that those utilizing Chapter 13 may be uncomfortable with the idea of discharge in the first place.¹⁴⁹ In sum, the reorganization as opposed to liquidation mode is more accommodating to those who want to continue their relationships with creditors.

This suggestion has some merit but there are several obstacles in the way of its success and several philosophical concerns about its application. Encouraging reorganization as opposed to liquidation assumes that reorganization cases generally succeed, a result that Sullivan, Warren, and Westbrook's research suggests is doubtful at best (pp. 214-17). It also assumes that those debtors desiring to use Chapter 13 will be eligible for its benefits. This also is problematic in that Chapter 13 is available to only those debtors with regular income.¹⁵⁰ Regular income requires that a debtor's income be "sufficiently stable" to make plan repayments.¹⁵¹ Many debtors,

147. 11 U.S.C. § 707(b) (1988).

148. See Gross, *supra* note 37; Gross, *supra* note 40.

149. Moreover, this incentive works only if the debtor has nondischargeable debts in a Chapter 7 proceeding that would be dischargeable in a Chapter 13 proceeding. Another possible and perhaps more likely scenario is that the debtor is not affected by the expanded discharge — at least not to a significant degree.

150. 11 U.S.C. § 109(e) (1988).

151. 11 U.S.C. § 101(29) (1988).

particularly single-filing women debtors, may not have stable income. They may not work regularly and their child support and alimony payments, while designed to be regular, are erratic. Although some courts have made an effort to construe this requirement broadly by, for example, indicating that Aid to Dependent Children payments constitute regular income,¹⁵² there may be many debtors who prefer to proceed in a reorganization mode but are ineligible to do so.¹⁵³

Several other features of Chapter 13 limit its appeal. The reorganization plan is restricted to three years (five years under special circumstances),¹⁵⁴ which may not be long enough for certain debtors. If a debtor is willing to repay over more than three years, why shouldn't he or she be permitted to do so?¹⁵⁵ Moreover, even if payments over this extended period were minimal, creditors might still get more than in a Chapter 7 proceeding or, at the least, no less.¹⁵⁶ Debtors making only minimal payments may well be operating in good faith.¹⁵⁷ Thus, an expanded Chapter 13 could make bankruptcy's fresh start more acceptable, at least from a psychological standpoint, with no net economic loss to creditors.

Encouraging increased use of current Chapter 13 or expanding access to Chapter 13 itself is, however, very troubling from another perspective. If most single-filing women debtors were to opt for an expanded or more flexible Chapter 13, then a feminist perspective on bankruptcy, although morally and psychologically preferable, would lock women debtors into what might well be economically worse positions than men debtors who would be liquidating under Chapter 7. They become slaves to their creditors while men obtain freedom from their creditors.¹⁵⁸ The debate about difference would, then, encourage

152. See *In re Hammonds*, 729 F.2d 1391 (11th Cir. 1984).

153. Pearce suggests, albeit in a different context, that unemployment benefits, which are perceived to be less socially stigmatized than welfare payments, do not help women. This is because these programs assume a male wage-earner who lost his job due to unfortunate circumstances. Women are frequently ineligible for such programs because they do not meet the threshold entry requirements. That leaves women with the poverty programs designed for the "undeserving." Pearce, *supra* note 94, at 414; see also M. ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN* 291-98 (1988); Becker, *supra* note 122.

154. 11 U.S.C. § 1322(c) (1988).

155. One possible objection, which I have raised in a different context, is that if the debtor is not freely choosing to work for this extended period (*i.e.*, if the debtor is being coerced in some way), the result is something akin to peonage. See Gross, *supra* note 40. Moreover, we may have paternalistic concerns about debtors being tied into relationships with their creditors for too long a period before being able to begin anew. See Kronman, *supra* note 135.

156. Chapter 13 requires that creditors get at least as much as they would get in a Chapter 7 case. 11 U.S.C. § 1325(a)(4) (1988). Unfortunately, from my perspective, courts have objected to zero repayment plans, not because they fail under 11 U.S.C. § 1325(a)(4) (1988) but because they demonstrate a lack of good faith under 11 U.S.C. § 1325(a)(3) (1988). See *infra* notes 184-88 and accompanying text.

157. Indeed, there is a narrow definition of good faith which could be expanded to allow debtors to use a reorganization chapter in more circumstances.

158. See Gross, *supra* note 40.

women to remain economically deprived while their creditors benefited and male debtors began afresh. Adapting the system to give greater weight to the ethos of caring and interrelationships would mean that women might not gain from our having heard and heeded their different voice; instead, they might be harmed.¹⁵⁹

Given that predicament, several alternative approaches present themselves. First, we could encourage those debtors who are uncomfortable with the existing fresh start policy to overcome or rise above their discomfort. This solution, while diminishing the adverse impact of an expanded Chapter 13, would undermine the importance of differences. It would devalue caring and concern for interrelatedness. This alternative pursues homogeneity in a male image and hence is unacceptable. It also places women debtors in a bind. Expanding Chapter 13 to accommodate caring and interrelatedness perpetuates subordination and encourages more people to say "screw you" to creditors by filing for relief under Chapter 7, diminishing the import of caring and preserved relationships.

This bind exists only if we consider too narrow a range of solutions. Several "long-term" solutions exist.¹⁶⁰ We could seek systemic eradication of a social structure that leads to the impoverishment of women, that deprives them of the power men have.¹⁶¹ We could consider regulating creditors and the extension of credit so that materialistic aspirations do not destroy people's lives.¹⁶² We also could consider an alternative to the existing bankruptcy process — perhaps pursuing mediation rather than the existing adversarial process.¹⁶³

159. Joan Williams states: "More astonishing, difference feminists celebrate a women's culture that encourages women to 'choose' economic marginalization and celebrate that choice as a badge of virtue. The notion that women 'choose' to become marginalized (nonideal) workers clouds the fact that all workers currently are limited to two unacceptable choices: the traditional male life pattern or women's traditional economic vulnerability. Wage labor does not have to be structured that way." Williams, *supra* note 13, at 801.

160. Detailed analysis of these and other possible solutions will have to await another day.

161. We would look, then, to empower women by increasing their ability to earn money, to recover alimony and child support from former spouses upon whom they had been dependent, to hold the same jobs as men, and to obtain adequate housing, health care benefits, insurance, and child care. See C. MACKINNON, *supra* note 29; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in FEMINISM AND METHODOLOGY, *supra* note 14, at 135.

162. See E. WARREN & J. WESTBROOK, *supra* note 40. This would entail reconsidering our credit system, the access individuals have to that system and the ways in which credit is promoted. At an even more fundamental level, we, as a society, have to consider the level at which we want individuals to live and the level for which we want individuals to strive.

163. This would arguably promote increased compromise by removing bankruptcy from the control of judges and permitting debtors to meet with their creditors face to face outside the courtroom. It would diminish the patriarchal overtones of a system dependent on judges rather than the parties themselves. This is not as dramatic a solution as some might suggest in that bankruptcy already encourages compromise, at least in the corporate context. See Curtin, Gross & Togut, *Debtors-Out-Of-Control: A Look at Chapter 11's Check and Balance System*, 1988 ANN. SURV. BANKR. L. 87. Counseling was also suggested by the Commission to study Bankruptcy Reform in the late sixties and early seventies. See REPORT OF THE COMM. ON THE

Let me propose a shorter-term solution that can be stated very simply: we should attempt to humanize the bankruptcy process. The simplicity of this statement should not be taken to mean that the implementation of the solution is simple or, for that matter, that the proposal is simple-minded. Personal bankruptcy involves a broad range of human emotions. Owing money is, for many debtors, not just a matter of dollars and cents. Many debtors with financial problems are also experiencing very real personal problems — many, but not all, caused by their financial condition. These are problems that cannot be addressed in the bankruptcy system as presently configured.

Consider the possibility of providing individual debtors with counseling — both with respect to money management and other personal problems.¹⁶⁴ The absence of any social service input within the existing bankruptcy system is conspicuous.¹⁶⁵ This suggestion would be a costly endeavor, and its efficacy hinges on both the availability and quality of social services for debtors and their families.¹⁶⁶ It also hinges on a willingness to expend limited governmental resources in this way. But, looked at long-term, we have to assess whether the cost of debtors to society as a whole under the current system, by virtue of debtors' inability to begin afresh, is higher than any alternative program we might propose.

There are other ways of humanizing the bankruptcy process. Debtors currently may not feel that they have a chance to tell their

BANKRUPTCY LAWS OF THE UNITED STATES at 11, 13, 122, reprinted in 2 A. RESNICK, BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY doc. 21. Moreover, it may prove less costly than the existing system by cutting back on the use of the court system, with all of its related costs.

Although the mediation option has been suggested by some feminists, it has not been universally endorsed. See Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Menkel-Meadow, *supra* note 71; Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984).

164. One possibility is to consider conditioning discharge on a debtor's utilization of counseling services.

165. Such an approach exists in other legal areas. We attempt to provide counseling to rape victims; we have begun to humanize the legal process that affects them, seeking to treat them as very real victims and not criminals. We seek substance abuse programs for drug and alcohol offenders and even some categories of other criminals. In some jurisdictions, mandatory counseling is a prerequisite to a decree of divorce; in other states counseling is mandatory in child custody matters. See Brown, *Divorce and Family Mediation: History, Review, Future Considerations*, CONCILIATION CTS. REV., Dec. 1982, at 1, 18; Morris, *Mandatory Custody Mediation: A Threat to Confidentiality*, 26 SANTA CLARA L. REV. 745 (1986).

166. If we think about possible funding sources, one immediately comes to mind. We could "tax" the consumer credit industry, which would have to contribute a certain dollar amount to a fund for the benefit of debtors every time a new credit card is issued. No doubt, this "tax" would be passed on to all credit card users through increased annual rates or interest charges. Then, we are balancing whether society is better served by these short-term cost outlays spread among the general population for the long-term goal of better utilization of credit (achieved through the counseling) or by letting debtors flounder in perpetuity, a cost also borne by society as a whole.

story — either in writing or orally — in their own voice.¹⁶⁷ They may feel that the papers filed with the court do not adequately explain what has happened to them. Their story may just not fit within the little boxes on the official forms employed in bankruptcy cases. Moreover, in the one instance where debtors speak, namely the meeting of creditors,¹⁶⁸ debtors are asked questions in the formal examination conducted under oath and recorded.¹⁶⁹ This is hardly the time for a debtor to bare her soul. Indeed, with the streamlined procedure for handling individual cases, many debtors never personally appear in court or, if they do appear, their case is handled in a mass discharge proceeding where all debtors are treated alike.¹⁷⁰

It is difficult to fathom implementing any of these suggestions except at great cost and loss of efficiency. Our current bankruptcy system depends, at least in theory, on quick resolution of the thousands of cases filed annually. For example, introducing a magistrate to hear the debtor is one possibility, but it would add yet another layer of administration to an already burdened system.¹⁷¹ Another possibility is to alert the U.S. Trustee's Office¹⁷² to these issues and encourage greater sensitivity among its personnel so that they could serve as a buffer between the debtor and the court. A third possibility is to encourage greater sensitivity on the bankruptcy bench to these issues.¹⁷³

At a minimum, what my proposal seeks is to have people think differently about the bankruptcy process — to approach the resolution of debtors' financial and personal problems in a more interrelated and caring manner. My suggestions could cause an increase in filings by women debtors. This may trouble those already concerned about high

167. Indeed, when debtors speak, they speak largely through counsel. See pp. 250-52. There is also the possibility that women debtors would feel more comfortable with women lawyers. As in other areas of private practice, the overwhelming majority of bankruptcy lawyers are male. See LoPucki, *supra* note 4, at 298. Additionally, women bankruptcy lawyers were more prevalent in large firms, and such firms tend to do far less individual debtor work. *Id.*; see also *Perception and Reality*, *supra* note 4, at 110.

168. 11 U.S.C. §§ 341, 343 (1988). This meeting is colloquially known as the "341 meeting."

169. For a detailed description of the 341 meeting and its related procedures, see J. BERK & S. JENSEN-CONKLIN, *supra* note 50, at 56-57 & app. F.

170. Section 524(d) of the Code provides that the court "may hold a hearing . . ." 11 U.S.C. § 524(d) (1988). Many courts have dispensed with the hearing altogether. See J. BERK & S. JENSEN-CONKLIN, *supra* note 50, at 144.

171. The federal district courts use this approach and it is worth investigating their experience with it. See, e.g., Comment, *Is the Federal Magistrate Act Constitutional After Northern Pipeline?*, 1985 ARIZ. ST. L.J. 189.

172. The U.S. Trustee program, implemented on a pilot basis in 1978 and on a virtually nationwide basis in 1984, is intended to oversee the administration of bankruptcy cases. The program was instituted so that bankruptcy judges could handle only adjudicated matters. There has been considerable debate concerning the efficacy of this program and the role of the trustees. See *Perception and Reality*, *supra* note 4, at 87-89, reprinted at 171-73; Curtin, Gross & Togut, *supra* note 165, at 93-94; Pearson, FitzSimon & Picard, *Sed Qui Custodet Ipsos Custodes*, in NATL. CONF. OF BANKR. JUDGES, *supra* note 35, at 7-5.

173. See Schafran, *supra* note 105, at 269-71.

filing rates.¹⁷⁴ Indeed, the system is already stressed by the continual influx of new bankruptcy cases.¹⁷⁵ However, increasing filing rates for women debtors¹⁷⁶ is already a concern; it suggests an increasing inability of debtors generally to satisfy their creditors. Blaming increased filing rates on accessibility to bankruptcy relief seems to miss the point; we should focus on why people need such relief.¹⁷⁷ For women, the answer appears, at least in part, in *As We Forgive Our Debtors*. Women debtors, more than their male counterparts, are living on the edge of poverty. The bankruptcy system, while not the initial cause of the situation, is certainly in a position to attempt to break the cycle of poverty.

C. During the Case

As previously noted, a variety of issues affecting women debtors can arise during a bankruptcy case.¹⁷⁸ What happens during a case also is important to women who, although they have not filed themselves, are affected by the bankruptcy of someone close to them. These examples serve several functions. First, they demonstrate how a gender-neutral statute adversely impacts on women.¹⁷⁹ They also suggest, although they do not irrebuttably prove, that women perceive debt and its discharge differently from their male counterparts, reinforcing the earlier discussion.

Let me suggest four issues — two that affect filing women, one that affects nonfiling women, and one that can affect both.¹⁸⁰ These issues

174. See *supra* note 18.

175. The government has projected 850,000 new filings by 1991, the vast majority of which will involve individual debtors. Szczebak, *supra* note 18.

176. It must be remembered that, at present, we know little about how many women as opposed to men actually file. See *supra* note 74.

177. See *supra* notes 75-78, 161-62 and accompanying text.

178. See *supra* notes 126-53 and accompanying text.

179. For an analysis of the social security system from a feminist perspective, see Becker, *supra* note 122.

180. There are several other examples that could have been used. First, § 522(a)(10)(D) permits a debtor to exempt alimony, but only to the extent reasonably necessary for support. 11 U.S.C. § 522(a)(10)(D) (1988). Since it is primarily women who receive alimony, this provision permits bankruptcy courts to revisit decisions reached by family law courts; and women may, then, be deprived of income they found hard to get from former spouses. Section 523(a)(5) can lead to similar consequences. This section prohibits a debtor (the male debtor will usually be the one seeking discharge) from discharging alimony and child support. 11 U.S.C. § 523(a)(5) (1988). However, like § 522(a)(10)(D), a court can reevaluate whether what the debtor is paying is properly characterized as alimony and child support. If recharacterized as a property settlement, the debtor's obligation is dischargeable, again creating a second bite at the apple — most frequently to the detriment of women debtors. (One can ask, though, whether the converse is true. Can a woman debtor object to a former spouse's discharge of a property settlement on the theory that it is really in the nature of alimony?) Another example of possible disparate impact involves § 522(f)(1) which permits a debtor to eliminate judicial liens that impair a debtor's exemption. 11 U.S.C. § 522(f)(1) (1988). In a divorce settlement, one spouse can obtain such a lien to preserve an interest in a homestead, to ensure that the other spouse does not sell the home free and clear. Since many debtors are male, the male debtor could use § 522(f)(1) to eliminate

are: (1) the application of section 1325(a)(3) in conjunction with section 1325(b);¹⁸¹ (2) the questions asked in the Statement of Affairs required to be filed by the debtor under section 521(1); (3) the definition of "reasonable equivalent value" within section 548(a); and (4) the meaning of joint filings in section 302.

On its face, the Bankruptcy Code provides that a Chapter 13 plan can be confirmed if the requirements of sections 1325(a) and (b) are satisfied.¹⁸² Section 1325(b), which was added in 1984 as part of the consumer credit amendments, requires that where a debtor's plan does not provide for paying creditors in full (and creditors object), the debtor must allocate all of his disposable income to plan payments.¹⁸³ Section 1325(a)(3) provides that a plan must be proposed in good faith.¹⁸⁴ Recent cases have debated whether the Code permits zero payment plans under which debtors with no disposable income give their creditors nothing but still get the expanded Chapter 13 discharge.¹⁸⁵

Prior to 1984, these zero payment plans engendered considerable controversy,¹⁸⁶ and although the 1984 amendments may have been intended to eliminate them, one can make a very good argument that they, in fact, validated them.¹⁸⁷ The argument for eliminating these plans is that even if the debtor allocates all of his disposable income to plan payments, thereby satisfying section 1325(b), but has no disposable income, a zero payment plan does not constitute a plan proposed in good faith. Therefore, section 1325(a)(3) is not satisfied. Stated differently, the issue is whether, assuming section 1325(b) is satisfied, a plan that contemplates paying nothing to one's creditors is one of the factors to be considered in determining good faith or is *per se* bad faith.

If it is considered beneficial to expand the use of Chapter 13,¹⁸⁸

his former spouse's interest. All of these sections are deserving of further analysis to determine whether, in application, they have a disparate impact on women debtors.

181. This topic was suggested by a student paper on zero repayment plans written by New York Law School student Raymond Selig. R. Selig, "Zero Plans": Still Alive and Well in Chapter 13 (1990) (unpublished manuscript on file with author).

182. See generally Cornish & Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47 (1986); Gross, *supra* note 37; Nimmer, *Consumer Bankruptcy Abuse*, LAW & CONTEMP. PROBS., Spring 1987, at 89; Note, *The Effect of the Disposable Income Test Under Section 1325(b)(1)(B) Upon the Good Faith Inquiry of Section 1325(a)(3)*, 5 BANKR. DEV. J. 267 (1986).

183. 11 U.S.C. § 1325(b) (1988).

184. 11 U.S.C. § 1325(a)(3) (1988).

185. See, e.g., *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987).

186. Comment, *supra* note 49; Note, *supra* note 49; Note, *Good Faith, Zero Plans, and the Purpose of Bankruptcy Code Chapter 13: A Legislative Solution to the Controversy*, 61 B.U. L. REV. 773 (1981).

187. See 5 COLLIER ON BANKRUPTCY ch. 1325 (15th ed. 1988); Comment, *Section 1325(b) and Zero Payment Plans in Chapter 13*, 4 BANKR. DEV. J. 449 (1987).

188. See *supra* notes 147-59 and accompanying text.

then debtors who comport with section 1325(b) by allocating all disposable income to creditors — even if the amount is zero — should be deemed to satisfy the section 1325(a) good faith standard. This assumes, of course, that there are no other factors such as fraud, misrepresentation, or omission of financial data that would militate against confirmation.¹⁸⁹

Since many women debtors have little or no disposable income,¹⁹⁰ the elimination of zero payment plans would have an adverse impact on them. These women debtors, who might be more comfortable within Chapter 13 and its more conciliatory approach (even where the net result is the same for creditors), will find themselves unable to obtain a Chapter 13 discharge. This scenario is an example of the consequences that can ensue when a facially gender-neutral statute is interpreted in a manner that affects debtors of one gender more particularly.

The second example involves the Official Forms. Official Form 7, captioned *Statement of Financial Affairs for Debtor Not Engaged in Business*, must be filed by individual debtors pursuant to section 521 of the Bankruptcy Code.¹⁹¹ Debtors are asked to respond to a series of questions about their finances during the prior year. Completion of the statement presupposes the maintenance of good financial records. For example, the debtor is asked: "What payments in whole or in part have you made during the year immediately preceding filing of the original petition herein on any of the following: (1) loans; (2) installment purchases of goods and services; and (3) other debts?"¹⁹²

Response to this question posits that most debtors pay by personal check. However, I suspect that many poor debtors do not pay by check; I suspect many women debtors pay by cash and even if they did receive receipts for their payments, I doubt they retained those receipts over a period of a year. Just being asked the question is intimidating to many debtors; their inability to prove what happened to them only reinforces their sense of inadequacy and failure. Indeed, a debtor can be denied a discharge for failing to keep and preserve records.¹⁹³

The debtor is also asked: "Have you suffered any losses from fire, theft, or gambling during the year immediately preceding or since the

189. There are factors other than the amount of repayment to creditors to be considered. See *In re Okoreeh-Baah*, 836 F.2d 1030 (6th Cir. 1988); *In re Chaffin*, 816 F.2d 1070 (5th Cir. 1987); Ordín, *The Good Faith Principle in the Bankruptcy Code: A Case Study*, 38 BUS. LAW. 1795 (1983); Winters, *Good Faith Under 1325(a)(3): Debtor's Choice or the Court's Dilemma?*, 92 COM. L.J. 95 (1987).

190. As indicated *supra* at notes 75-76 and accompanying text, women debtors typically barely have enough to make ends meet.

191. 11 U.S.C. § 521(1) (1988); 11 U.S.C. app.—Bankruptcy Rule 1007(c) (1988).

192. 11 U.S.C. app.—Bankruptcy Rules, Official Form 7, 11(a) (1988).

193. 11 U.S.C. § 727(a)(3) (1988).

filing of the original petition herein?"¹⁹⁴ The debtor is asked to supply names, dates, and places. Suppose a debtor is a compulsive gambler. Suppose the debtor's spouse (e.g., her husband with whom she is filing jointly) is a compulsive gambler. Is the debtor likely to admit either of these things? Indeed, being able to admit to compulsive gambling activity presupposes that one is on the road to recovery. It also presupposes that a debtor in a joint case has no fear in disclosing something of this nature about a spouse. Moreover, how many gamblers, whether frequent or occasional, can remember exactly when, where, and how much they gambled? Most gamblers would also be unwilling to disclose the identity of their bookmakers. Yet the sanctions for failure to comply with the request for information are severe. A debtor can be denied a discharge for failing to explain satisfactorily any loss of assets.¹⁹⁵

In some respects, I can see parallels between women debtors and the victims of rape. By making this parallel, I am not suggesting a woman's bankruptcy is equivalent — morally, legally, or emotionally — to rape. However, in both instances, a woman is, or at least may feel like, a victim and yet be treated by the "system" as if she were the wrongdoer. Moreover, what the "system" expects of women victims may not comport with what real victims would do. For example, the need to preserve evidence of a rape may not be sufficiently paramount on a victim's mind; she might want to wash away all traces of the rape by immediately bathing.¹⁹⁶ To expect an impoverished, dependent, and overwhelmed woman to maintain detailed and complete financial records is similarly unrealistic. It is the product of a legal system that fails to recognize emotional realities.

Moreover, the questions asked of debtors may make many women feel alienated. Their ingrained sense of powerlessness may render them less capable than their male counterparts to stand up to the additional stresses imposed on them, particularly if they have to deal with both their own sense of failure and fear of retribution from a spouse who may not favor personal disclosure of the sort demanded. Like rape victims who are reluctant to tell their story, particularly to men, women debtors may be emotionally dissuaded from describing to complete strangers their impoverishment, the struggle they encounter when they are abandoned emotionally and financially by men. Like rape victims, they may feel blamed for a situation for which they do not bear responsibility.¹⁹⁷ Indeed, women debtors often do not get a

194. 11 U.S.C. app.—Bankruptcy Rules, Official Form 7, 14(a) (1988).

195. 11 U.S.C. § 727(a)(5) (1988); see *In re Dolin*, 799 F.2d 251 (6th Cir. 1986).

196. See C. ROBERTS, *WOMEN AND RAPE* 88 (1989).

197. There is one further level of similarity. Rape victims are often accused of "causing" their own rape by dressing in a certain manner or acting toward a man in what is perceived as a provocative and inviting manner. Women debtors may be similarly accused in that they spent beyond their means, they accepted credit from creditors, they participated in their downfall.

chance to tell their story,¹⁹⁸ they must have it written. The people doing that writing are, for the most part, their lawyers; and these lawyers are predominantly men.¹⁹⁹

An example of a Code provision primarily involving nondebtor spouses involves judicial interpretation of fraudulent conveyance law.²⁰⁰ The prototypical fraudulent conveyance described in legal texts and treatises is the transfer by a debtor husband to his nondebtor wife of all major family assets.²⁰¹ On the theory that such a transfer either evinces actual intent to defraud the husband's creditors or is constructively fraudulent as against them,²⁰² the transaction may be voided.²⁰³ The transferred assets (other than those that are exempt under the Code) are then available to the husband's creditors.

There has been remarkably little discussion of why such a transfer to a nonfiling spouse deceives creditors of the filing spouse or why that spouse, usually the wife, has not given "reasonable equivalent value."²⁰⁴ It is assumed that the receiving spouse (the wife) gave nothing in return for the transferred assets because traditionally, little value, economic or otherwise, has been placed on a woman's work within the home.²⁰⁵ Recent studies have demonstrated that if a spouse's efforts at home were measured in purely economic terms (*i.e.*, what it would cost to buy the services a wife normally performs "for free"), they would have a value of thousands of dollars annually.²⁰⁶ Certainly, de-

This attitude toward women debtors treats creditors and society as blameless. It essentially punishes women for living in a culture that sanctions and perpetuates their powerlessness.

198. See *supra* notes 167-70 and accompanying text.

199. See *supra* note 167.

200. Two Code sections deal with fraudulent conveyances: 11 U.S.C. §§ 544(b), 548 (1988). Section 544 draws state fraudulent conveyance law into a bankruptcy case. For a general overview of fraudulent conveyance law, see 4 COLLIER ON BANKRUPTCY, *supra* note 187, at chs. 544, 548; R. GINSBERG, *supra* note 40.

201. See R. AARON, *supra* note 40, at § 10.07[1]; V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 135 n.4 (1974); see also Pedlar, *When Transfers Between Husband and Wife Are Fraudulent*, FAM. ADVOC., Winter 1983, at 32.

202. Under the new Uniform Fraudulent Transfer Act, relatives are defined as insiders, and transfers to insiders reveal actual fraud. U.F.T.A. §§ 1(7)(i)(A), 4(b)(1) (1989).

203. 11 U.S.C. § 550 (1988).

204. See *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983); *United States v. West*, 299 F. Supp. 661 (D. Del. 1969); Pedlar, *supra* note 203.

205. See P. CHESLER & E. GOODMAN, *supra* note 119, at 207: "Women's work is not valued. Our society honors what is paid for, which is not female labor." See also A. KESSLER-HARRIS, *supra* note 77; D. RHODE, *supra* note 16, at 30-31; WOMEN'S CONSCIOUSNESS: WOMEN'S CONSCIENCE (B. Anddolsen, C. Gudorf & M. Pellauer eds. 1985); see also Becker, *supra* note 122.

206. In 1972, Chase Bank computed the value of a wife's work, considering all her tasks: nurse, cook, chauffeur, and the like. It came to \$13,391.56 annually. However, the bank did not take into account other compensable activities of wives as teachers, secretaries, sexual and emotional companions, or therapists, which would have increased the figure substantially. P. CHESLER & E. GOODMAN, *supra* note 119, at 98. Given inflation, other studies have placed the value of women's work within the home considerably higher. Granat, *Couples: The High Price of Acrimony*, Wash. Post, Feb. 26, 1982, at D5, col. 1.

acades of marriage and the continuation of these services prospectively would seem to entitle a wife to an interest in her husband's property (particularly property that is used in the family home or the home itself) *if* her household work is valued. The wife "paid" for these items, even though she never received a paycheck and title does not appear in her name.²⁰⁷

One final example is useful since it looks at the impact of the Bankruptcy Code for filing and nonfiling women. Section 302 permits joint filing only by a husband and wife.²⁰⁸ This section fails to recognize that many women debtors have no spouse; they are the head of the household.²⁰⁹ However, many of these women live with others with whom they have a shared financial relationship (daughters, mothers, lovers). This is a relationship which the bankruptcy law does not recognize, notwithstanding the growing literature on the changing nature of the American family.²¹⁰ Section 302 fails, then, for being underinclusive. It also fails by presuming that husbands and wives share financially, maintaining joint accounts and joint ownership of property and having joint creditors. This may simply not be true.²¹¹ Yet, the availability of the section with its procedural benefits and its frequent use²¹² suggest that lawyers and debtors alike assume women debtors will be better off filing jointly with their spouses. That presumption is one that merits further consideration.

The various examples of the treatment of women during a case suggest that we have some hard thinking to do about whether we emotionally perceive debtors as villains or victims. Our bankruptcy system sends a mixed message: come and get a discharge (be a villain, say "screw you" to your creditors), but be prepared, particularly if you are a woman, to feel humiliated, inadequate, dependent while you are doing so (*i.e.*, be a victim). This does not occur because of anything intentional on the part of legislators enacting the Code or the participants in the bankruptcy process. However, our unconscious assumptions and motives often are more powerful than what we actually say.

207. Some state laws accomplish this result through community property laws or other laws entitling spouses to ownership interests in property acquired during the marriage. See W. MCCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* (1982); Wadington, *Uniform Marital Property Act Symposium*, 21 HOUS. L. REV. 595 (1984); see also J. DUKEMINIER & J. KRIER, *PROPERTY* 351-58 (2d ed. 1988). However, community property notions are not the be-all, end-all for women debtors.

208. 11 U.S.C. § 302 (1988); see *supra* note 58.

209. See *supra* note 58.

210. See *supra* note 58.

211. See Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 380-82 (1990).

212. See *supra* note 73 and accompanying text.

D. *After the Case*

I have already suggested that a legal fresh start is not enough for debtors.²¹³ A fresh start requires an emotional component as well as a real sense that there is some possibility of rebuilding. I suspect that many women debtors cannot get a fresh start at any of these three levels, although perhaps empirical data will prove me wrong. First, as already noted, many debtors do not list all their debts.²¹⁴ Unlisted debts cannot be discharged.²¹⁵ Moreover, many debtors reaffirm their debts (pp. 32, 319), even with the increased standards for reaffirmation added in 1984.²¹⁶ Reaffirmation means that a debtor's future is encumbered. One can only wonder how many debtors voluntarily agree to repay their creditors, particularly creditors with whom they have frequent contact and emotional ties.²¹⁷ Certainly, empirical work looking at whether men and women debtors reaffirm (formally and informally) at the same rate would prove useful.

The ability to handle a fresh start emotionally may be particularly difficult for women debtors.²¹⁸ We do not have statistics on whether women are using Chapter 13 more frequently than Chapter 7, just because of discomfort with the "screw you" posture inherent in Chapter 7. However, by far the more critical issue to me is the realization that many women in debt will not be helped by a bankruptcy discharge. Relieving themselves of the immediate pressures of debt payments and impending lawsuits may ease their stress, but it may be a temporary palliative at best. Many women will continue to remain poor. They will not have equal access to the same educational and vocational opportunities available to men. Instead, they will continue to have significant financial, emotional, and temporal responsibilities for their children and, increasingly, their parents.²¹⁹

Sullivan, Warren, and Westbrook's data underscore the reality of women's povertization. The cure cannot be found in the bankruptcy system. But, bankruptcy appears to be more than a mirror. In addition to providing us with a vision of what is happening outside of bankruptcy, bankruptcy perpetuates that vision by operating in a manner that reinforces women's poverty. The Bankruptcy Code, as a phallogocentric creation, perpetuates rather than resolves the feminization of poverty.

213. See *supra* text accompanying notes 114-15.

214. See *supra* note 68.

215. 11 U.S.C. § 727(a)(3) (1988).

216. 11 U.S.C. § 524(c), (d) (1988); see also Boshkoff, *supra* note 114.

217. 11 U.S.C. § 524(9) (1988).

218. See *supra* notes 132-46 and accompanying text.

219. Lewin, *Aging Parents: Women's Burden Grows*, N.Y. Times, Nov. 14, 1989, at A1, col. 4; *Mothers Bearing a Second Burden*, N.Y. Times, May 14, 1989, at A26, col. 1.

CONCLUSION

With their data, Sullivan, Warren, and Westbrook have laid out the issues, inviting the rest of us to take up where they left off. This essay has attempted, first, to suggest the significance of getting the data. The portrait of debtors and their creditors in 1981 provides an invaluable starting point. There was no real starting point before. Now we can discard our stereotypes and begin the process of really seeing. Re-vision can only begin by looking with fresh eyes. I have suggested, however, that the job of discovering our debtors is not complete. Debtors today may not look like the debtors of 1981, and there is a great deal of data yet to be uncovered.

We also need to expand the scope of our empirical inquiry. We need to look at those who are not official debtors but who experience the bankruptcy process nonetheless, namely, the spouses, ex-spouses, lovers, companions, and children of debtors. These people are important but as yet unstudied participants in bankruptcy. Most importantly, in addition to objective, quantitative data drawn from case files and analysis of debtors before and after filing, we need subjective, qualitative perceptual data; we need to consider how debtors, particularly women debtors, feel. Without addressing the emotive side of bankruptcy, we fail to understand its complexity. We fail to give bankruptcy its moral dimension.

I have also tried to establish a framework for thinking about issues in bankruptcy from a feminist perspective. Indeed, I have attempted to use a feminist methodology throughout this essay, both in evaluating the data presented in *As We Forgive Our Debtors* and in articulating an agenda for thinking about the bankruptcy system. This feminist perspective permits us to recognize more fully the heterogeneity among debtors and to identify the consequences of that diversity. A feminist perspective requires that we focus on women debtors and their experiences before, during, and after a bankruptcy case; it also suggests that we have had a singularly narrow, male-oriented approach to bankruptcy issues. It is time to expand our horizons. But the feminist perspective enables us to recognize, above all else, that bankruptcy is a symptomatic expression of and contributor to a much larger problem for women debtors, namely, povertization.

This essay began with a painting, an image of a Victorian family in debt. I would like to end with my painting of the family in debt today. This painting can serve as a way of experiencing visually what has been said in this essay. It is also intended to set out the parameters of the issues I plan to address in the future. It sets my table and hopefully invokes others to join me. It is my re-vision.

I want to start by stating that my painting is not complete. That is its first feature. It is incomplete because we still do not know a great deal about individual debtors. I am not sure a painting like this can

ever be finished. It also does not contain images of creditors, and they form an essential part of bankruptcy imagery. Further, my painting cannot be painted on a single panel because there is no one image of the debtor family. Any single image would leave out too much. So I am painting a triptych — a series of three panels that together comprise one painting.²²⁰ My painting style is realism but with overtones of surrealism; there is intensive attention to detail, to things and people.

One panel would show a woman debtor with several children. No man would be present; there is a surreal image of a man at play in an upper corner. The mother and children would not live in a seeming mansion, as depicted by Martineau. They would be living in a run-down neighborhood in a tiny, sparsely furnished apartment. They would not be dressed in elegant clothes; they would be dressed for work and school. The closets would not contain a lot of clothes. The kitchen pantry would not be well-stocked. The mother would look tired and emotionally drained. She would appear to be stretched thin — torn between her responsibilities for work and family. There would be no glass uplifted to toast the future. The background would be grey and foreboding.

The next panel would depict a husband and wife and their children. They would be outside their small home, looking at it. An aging car would be parked in the driveway. The couple would not be holding hands. The mailbox would be filled with bills, together with offers of new credit cards and installment sales promotions. The husband would be dressed in a tie and jacket, ready for work. The wife would be dressed in a housecoat. The children would be playing on the grass, more or less oblivious to what may happen to them. One child looks sickly. The father looks worried but resolved; the wife looks tired and forlorn.

A third panel would depict a man. He is outside the family home. He is returning home from work, holding what appears to be a pink slip. He is anxious and weary. Through a window, one can see his mother, wife, and daughter seated around the kitchen table. They are talking together about their lives, their problems, their concerns. The kitchen appliances appear old and worn; they need replacement. The house needs painting. But there is food on the stove. There is sewing in a corner. There are magazines piled up, magazines depicting a much richer and easier life. There is stationary and a pen with a stack of envelopes at one end of the table, suggesting that the wife is trying to contact creditors, to connect with them and explain the family

220. It would have been possible, and fully consistent with this essay, to paint three different panels, depicting debtors before, during, and after the bankruptcy case. I have tried, however, to combine aspects of the "before, during, and after" approach within each of my panels.

problems. The late afternoon sunlight angles sharply through the window.

In each panel, I would hide little images of the devil to raise the moral concerns individuals may feel about debt and that we, as a society, may feel. The viewer would have to search for them. I would also hide religious symbols throughout the painting, wondering what role religion plays in our perceptions of debt. Additionally, hidden in each painting would be the sun with a smirking, sinister-like social expression, suggesting the deceptive nature of the fresh start bankruptcy allegedly provides. Some of the walls of the homes would have portraits, as a way of reminding us of our past.

The triptych would also have images of the bankruptcy process that is impending. The first panel would contain, above the image of the debtor, an authoritarian man behind a desk with several other men with papers at their sides. They would all have their fingers raised, as if scolding the woman in the painting. The second panel would reveal, below the painting of the debtors, an overheated, dark cavern filled with papers and little gnomes rushing forward and backward. Dodging the gnomes, there would be people with sunken faces and hollow eyes who appear lost. Finally, the third panel would contain, off to the side, an image of two women, each clambering on opposites of a heavy, carved wooden door — one woman seeking to get in, the other to get out.

The combined tableau would overwhelm a viewer with its density of detail; some of the panels would seem too crowded. But there would be richness, and a sense of our world with all of its complexity, its ordinariness, and its ugliness brought to the foreground. It is a tableau to make us reckon with the world as it is, to sort out life's pieces, to confront our manyness. It is a tableau that may enrage, but that anger may help us see debtors differently and search for solutions to make the bankruptcy system better for all debtors. It is a feminist painting.