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## **WHAT IS A WOMEN'S ISSUE? BANKRUPTCY, COMMERCIAL LAW, AND OTHER GENDER-NEUTRAL TOPICS**

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# WHAT IS A WOMEN'S ISSUE? BANKRUPTCY, COMMERCIAL LAW, AND OTHER GENDER-NEUTRAL TOPICS

ELIZABETH WARREN\*

The 2001 Annual Report of the NOW Legal Defense and Education Fund celebrates the achievements of this premier women's organization and charts the organization's agenda for the year to come.<sup>1</sup> Topics in the report range from the announcement of a lectureship to honor Justice Ruth Bader Ginsburg to a discussion of legislative initiatives supported by the organization. The twenty-four-page brochure mentions only one politician by name: Senator Joseph Biden, a Democrat from Delaware. He not only is singled out in the text of the report, but he is also featured in a photograph standing shoulder to shoulder with a dozen women cele-

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\* Leo Gottlieb Professor of Law, Harvard Law School. J.D., Rutgers University, 1976; B.S., Houston University, 1970. I express my appreciation to the Fellowship Program at the Radcliffe Institute for Advanced Study. The Institute made completion of this manuscript possible by providing the time to write—a gift of immeasurable significance. I also thank Elizabeth Schneider, Amelia Warren Tyagi, Jay Lawrence Westbrook, and Brady Williamson, each of whom offered many thoughtful comments on earlier drafts of this Essay, and Teresa Sullivan and Deborah Thorne, who generously offered help on the data calculations.

Some of the data cited in this Essay are from the Consumer Bankruptcy Project III, 2001, an empirical study of 1250 families filing for bankruptcy during 2001 in five judicial districts around the country. The Consumer Bankruptcy Project III was funded through grants from the Ford Foundation, the Harvard Law School, and New York University Law School. The enthusiastic support and assistance of many bankruptcy judges, bankruptcy clerks, Chapter 7 and Chapter 13 trustees, and attorneys also contributed significantly to this work. The principal investigators express our gratitude to the organizations that provided financial support and to each of the judges, clerks, trustees, and lawyers who made this research possible. None of the sponsors is responsible for the content of this Essay.

No project of this kind could be put together without the contribution of a number of people. Consumer Bankruptcy Project I in 1981 and Consumer Bankruptcy Project II in 1991 were the work of Professors Teresa A. Sullivan, Jay Lawrence Westbrook, and myself. All three of us have continued our work into Consumer Bankruptcy Project III. In addition, Professors David Himmelstein, Bruce Markell, Michael Schill, Susan Wachter, and Steffie Woolhandler have shared in the design and development of the 2001 study. John Pottow, Katherine Porter, and Deborah Thorne served as Project Director at different times, participating in the design of the study and managing much of the data collection. Cathy Ellis and Ann de Ville provided extraordinary administrative support, and Alexander Warren designed and managed all the coding databases. I am grateful for the contributions of each of these people in creating a database that permits analysis from so many different perspectives.

More details about the project are available in Elizabeth Warren, *Bankrupt Children*, Appendix I, 86 MINN. L. REV. (forthcoming 2002) (information about the project can be found in Appendix I).

<sup>1</sup> NOW LEGAL DEFENSE AND EDUCATION FUND, 2001 ANNUAL REPORT (2001).

brating the renewal of the Violence Against Women Act. With his presidential aspirations growing,<sup>2</sup> Senator Biden must be delighted with his starring role in the Annual Report and with the halo effect that suggests that he is one public official politically active women can trust.

Of course, not all of Senator Biden's legislative agenda is reflected in the Annual Report. Missing, for example, is a picture of Senator Biden standing shoulder to shoulder with the CEOs of the credit industry, co-sponsoring legislation to increase restrictions on consumer and small business bankruptcy.<sup>3</sup> His energetic work on behalf of the credit card companies has earned him the affection of the banking industry and protected him from any well-funded challengers for his Senate seat.<sup>4</sup> This important part of Senator Biden's legislative work also appears to be missing from his Web site and publicity releases.<sup>5</sup>

Like his support for the Violence Against Women Act, Senator Biden's efforts on behalf of the credit industry to increase restrictions on bankruptcy bear particular relevance to NOW Legal Defense and Education Fund's annual report. The annual report focuses on economic and social issues that will affect women and establishes the organization's legislative agenda. The group that will be most affected by the changes in the bankruptcy legislation Senator Biden so forcefully supports will be women, particularly women heads of household who are supporting chil-

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<sup>2</sup> See, e.g., Howard Fineman, *Wanted: A Senate 'Solomon,'* NEWSWEEK, June 18, 2001, at 26 ("among other possible [presidential candidates]: Joe Biden, Evan Bayh, Joe Lieberman, Hillary Rodham Clinton, Chris Dodd and Dick Durbin").

<sup>3</sup> Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001). A very similar bill was introduced in the House. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001). Both bills have passed their respective chambers and are now in conference between the House and the Senate while legislators try to iron out the differences between the bills.

<sup>4</sup> See, e.g., Rob Blackwell, Michele Heller & Nicole Duran, *Biden Challenger?*, AM. BANKER, July 16, 2001, at 3. ("Sen. Biden is particularly popular with the financial services industry these days because he is an active proponent of legislation to overhaul the nation's bankruptcy laws and, more important, because he is expected to be named to a conference committee to reconcile the differing bankruptcy bills the House and Senate passed in March. His presence would tilt the committee in favor of the industry-backed measure.").

<sup>5</sup> See Official Senate Site of Joseph R. Biden at <http://www.senate.gov/~biden>. This absence is particularly notable because of his extensive work on the bankruptcy issue and his insistence on being named to the House-Senate conference on bankruptcy even after he left the Judiciary Committee (which has jurisdiction over the bankruptcy bill) for the Foreign Relations Committee (which has no special interest in the bill). For a discussion of the process of appointing Senator Biden to the conference committee to resolve the differences between the House and Senate versions of the bankruptcy bill, see Pamela Barnett, *Despite Possible Advantage, GOP Balks at Bankruptcy Conference*, CONGRESS DAILY, May 1, 2001, LEXIS, News Library, Cngdly File; *Daschle Ready to Appoint Bankruptcy Overhaul Conferees*, BULL.'S FRONTRUNNER, June 20, 2001 available at LEXIS, News Library, Frntrn File; *All Things Considered: Stalled Bankruptcy Bill* (National Public Radio broadcast, June 21, 2001); *Biden to Be Named Conferee on Bankruptcy Reform Bill*, CONGRESS DAILY, July 9, 2001, LEXIS, News Library, Cngdly File.

dren. Indeed, women are now the largest demographic group in bankruptcy, outnumbering men by about 150,000 per year.<sup>6</sup>

Based on projected figures, more than a million women will find their way to the bankruptcy courts next year<sup>7</sup>—more women than will graduate from four-year colleges,<sup>8</sup> receive a diagnosis of cancer,<sup>9</sup> or file for divorce.<sup>10</sup> Women who file for bankruptcy and women whose ex-husbands file for bankruptcy will be affected by any change in the bankruptcy laws. The impact of the bill will be felt both by women as debtors and women as creditors. Twenty-nine women's groups—a diverse collection that includes the Y.W.C.A., Hadassah, American Association of University Women, Church Women United, and the Feminist Majority—have publicly opposed the pending bankruptcy legislation.<sup>11</sup> Notably, one of the groups most actively opposing the legislation, precisely because of its effects on women and children, has been the NOW Legal Defense and Education Fund.

Senator Biden's starring role in the NOW Legal Defense and Education Fund's annual report and his work on the pending bankruptcy legislation comes into even sharper focus in light of his aggressive response to the concerns women have raised about the bankruptcy bill. When confronted with data showing the disproportionate impact of the proposed bankruptcy legislation on women, Senator Biden has gone on the offensive, stating flatly that “this bill actually improves the situation of women and children.”<sup>12</sup> How does the Senator explain the opposition of women's groups? He dismisses their concerns as “based on the vague and unarticulated fears that women will be unfairly disadvantaged.”<sup>13</sup> Not a single women's group that has spoken publicly about the bankruptcy bill agrees with him, but his public position as a champion of women seems untarnished.

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<sup>6</sup> See Table 3: Households Filings for Bankruptcy, 2001, *infra* note 40.

<sup>7</sup> See *id.*

<sup>8</sup> U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 2000, at 152 tbl.241 (2000) [hereinafter 2000 STATISTICAL ABSTRACT].

<sup>9</sup> See 2000 STATISTICAL ABSTRACT, *supra* note 8, at 143 tbl.228.

<sup>10</sup> See 2000 STATISTICAL ABSTRACT, *supra* note 8, at 104 tbl.150.

<sup>11</sup> See Letter from National Women's Law Center; National Partnership for Women & Families; ACES, Association for Children for Enforcement of Support, Inc.; American Association of University Women; American Medical Women's Association; Business and Professional Women/USA; Center for Law and Social Policy; Center for the Advancement of Public Policy; Center for the Child Care Workforce; Church Women United; Coalition of Labor Union Women (CLUN); Equal Rights Advocates; Feminist Majority; Hadassah; National Association of Commissions for Women (NACW); National Black Women's Health Project; National Center for Youth Law; National Council of Jewish Women; National Council of Negro Women; National Organization for Women; National Women's Conference; Northwest Women's Law Center; NOW Legal Defense and Education Fund; Wider Opportunities for Women; The Woman Activist Fund; Women Employed; Women Work!; Women's Institute for Freedom of the Press; YWCA of the U.S.A. (Sept. 17, 1999) (on file with author).

<sup>12</sup> 147 CONG. REC. S2417 (daily ed. Mar. 15, 2001) (statement of Sen. Biden).

<sup>13</sup> 146 CONG. REC. S11462 (daily ed. Nov. 1, 2000) (statement of Sen. Biden).

Of course, Senator Biden cannot guarantee passage of the bankruptcy bill by himself. He has received substantial help from both parties in the Senate and in the House of Representatives. The primary sponsors of the bankruptcy legislation are Senator Charles Grassley (R-Iowa) and Congressman George Gekas (R-Pa.). The bill passed both houses of Congress by huge margins with virtually unanimous support from the Republicans and substantial support among the Democrats. Even Senator Biden's women colleagues have quietly voted for the bill.<sup>14</sup> At this moment, the bill is in conference as a committee from the Senate and the House attempt to reconcile the differences between the two versions so that the bill can be presented to the President for his signature. But Senator Biden's role, as the credit industry has noted, has been crucial.<sup>15</sup> The Senator is variously described as "the linchpin" to passage,<sup>16</sup> "a staunch supporter,"<sup>17</sup> "pivotal,"<sup>18</sup> "a strong proponent,"<sup>19</sup> "the only Democratic true believer,"<sup>20</sup> "possibly the bankruptcy bill's staunchest defender,"<sup>21</sup> and "the most ardent Democratic supporter of bankruptcy legislation."<sup>22</sup> The American Bankers Association describes itself as "lucky to have Biden on the conference."<sup>23</sup> Without his sponsorship, it is widely believed a hard-to-explain bill that favors big banks over families in terrible financial trouble would be dead.<sup>24</sup> More importantly, because Senator Biden has expressly rejected concerns raised about the bill's ef-

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<sup>14</sup> S. 420, 107th Cong. (2001), available at [http://www.senate.gov/legislative/vote1071/vote\\_00036.html](http://www.senate.gov/legislative/vote1071/vote_00036.html). The only woman in the Senate to vote against the bill was Senator Kay Bailey Hutchison (R-Tex.) who objected to the provision that would hurt Texas and Florida millionaires by capping the amount of equity in a home they could keep if they filed for bankruptcy. Senator Hutchison has made this defense quite visible to her home-state constituency. See, e.g., Christopher Lee, *Homestead Exemptions Seems Safe; New Bankruptcy Laws May One Day Abolish Texas Provision*, DALLAS MORNING NEWS, Nov. 18, 2001, at 8A; Pamela Yip, *Bills Would Drain Protections in Some Personal Bankruptcy Cases*, DALLAS MORNING NEWS, Aug. 6, 2001, at 1D; *Bankruptcy Bills Lurch Forward*, NAT'L ASSOC. ATTYS GEN. BANKR. BULL., July 2001, at 1.

<sup>15</sup> Barnett, *supra* note 5 ("Biden's presence on the conference committee is considered crucial by bill supporters.").

<sup>16</sup> Carl Weiser, *Congress to Finalize Bankruptcy Reform*, GANNETT NEWS SERV., Aug. 28, 2001 (quoting a lobbyist source).

<sup>17</sup> Barnett, *supra* note 5.

<sup>18</sup> Pamela Barnett, *Sources Say Addition of Biden Increased Its Size*, CONG. DAILY, July 23, 2001, available at LEXIS, News Library, Cngdly File (citing unnamed sources).

<sup>19</sup> *Legislative Update*, AM. BANKER, July 12, 2001, at 7.

<sup>20</sup> Lisa Freeman, *Bankruptcy Reform Bill Faces Multiple Delays in Senate*, CREDIT UNION J., June 25, 2001, at 16 (quoting the Credit Union National Association's Gary Kohn).

<sup>21</sup> Pamela Barnett, *Bankruptcy Conference Faces Filibuster*, CONG. DAILY, June 19, 2001, LEXIS, News Library, Cngdly File.

<sup>22</sup> *Bankruptcy Overhaul Unlikely to be Enacted This Year*, BULL.'S FRONTRUNNER, Oct. 10, 2001, available at LEXIS, News Library, Frntrn File.

<sup>23</sup> Weiser, *supra* note 16 (quoting a representative of the Delaware Bankers Association).

<sup>24</sup> See, e.g., *Daschle Ready to Appoint Bankruptcy Overhaul Conferees*, *supra* note 5 ("a Senate Republican aide 'said that excluding Biden from the conference would likely doom the bill'").

fect on women, he has shielded his colleagues on both sides of the aisle from being branded as anti-women for their support of this legislation. He is simply the most visible example of legislators who daily weigh the effect of proposed legislation on women and on other interest groups, deciding when to stand up for women and when to take a pass.

Senator Biden's support of legislation that helps women and his even more vigorous support of legislation that hurts women poses a serious question: what constitutes a women's issue? Some issues tied to physical differences between the sexes—abortion, birth control, sexual assault, breast cancer—are clearly labeled women's issues. Other issues close to the hearts of many women—child abuse, child care, elder care, child custody, women in poverty—also make it to the top of the list. Economic issues focusing on equality—equal pay for equal work, equal employment opportunity, equal educational opportunity—all find their champions as well. But business and economic topics are often overlooked. Even when women's groups become involved, these issues never seem to become a priority. Moreover, when business topics are on the agenda there is often a well-funded business group pressing for its own interests, drowning out the voices of women.<sup>25</sup>

It is fitting that on the twenty-fifth anniversary of a journal dedicated to promoting discussion of issues affecting women that we ask what constitutes a women's issue. A survey of the *Harvard Women's Law Journal's* article topics for the last twenty-five years reveals what kind of topics are traditionally considered "women's issues." The topics that receive the most attention include domestic violence, sexual harassment, and reproductive rights, rather than facially neutral issues such as bankruptcy.<sup>26</sup> Is Senator Biden right? Is bankruptcy simply not a women's issue? On financial topics, are women, as his words seem to suggest, unable to understand what helps them and what hurts them? If, as this Essay suggests, bankruptcy is an issue of great economic importance to women, then why has it not become a popular women's issue? Why isn't Senator Biden in trouble with grassroots women's groups all over the country and with the millions of women whose lives will be directly affected by the legislation he sponsors?

The answers to these questions raise a troubling specter of women exercising powerful political influence within a limited scope, such as rape laws or equal educational opportunity statutes, but wielding little

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<sup>25</sup> See discussion *infra* notes 84–91 and accompanying text.

<sup>26</sup> See, e.g., G. Kristian Miccio, *A Reasonable Battered Mother?: Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (1999); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35 (1990); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987). But see, e.g., Barbara A. Mikulski & Ellyn L. Brown, *Case Studies in the Treatment of Women Under Social Security Law: The Need for Reform*, 6 HARV. WOMEN'S L.J. 29 (1983).

influence in business or other supposedly gender-neutral areas that profoundly affect many women.<sup>27</sup> This Essay discusses why business issues have not become rallying points as women's issues or even attracted much attention among politically active women. A number of factors, stretching from the disproportionate power of a narrowly focused business lobby to the continued perception of commercial law as an area dominated by men, have acted to place business issues outside the scope of women's issues. Moreover, as a group that has some highly visible issues, women face the problem of politicians who flaunt their support of one or two issues that prominently bear the label "women's issue," believing they have assured themselves of women's support regardless of what they do on a range of dull, economic issues.<sup>28</sup> As women set their agenda for the next twenty-five years, the question of how to define a women's issue should be a matter of first concern.

### I. BANKRUPTCY IS A WOMEN'S ISSUE

Two years ago, I was paging through some computer runs to verify that a multi-state sample of households in bankruptcy that my co-authors and I had drawn was statistically representative.<sup>29</sup> All the data points were matching up nicely when I noticed that nearly 40% of those filing for bankruptcy were divorced or single women. My 1981 study with Dr. Teresa Sullivan and Professor Jay Westbrook had laid the foundation for a demographic analysis of who filed for bankruptcy, providing data about how many women had filed for bankruptcy years earlier. I knew something had to be wrong. Some quick calculations showed that if the number in the 1999 sample was accurate, then bankruptcy filings by women had grown by nearly 800% in less than two decades. This seemed unimaginable, and all I could do was curse. Something had to be wrong with my sample selection to create this apparent distortion.

This discovery triggered a search that ranged far outside the bankruptcy statistics for information that would explain the financial circum-

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<sup>27</sup> The implications of economic vulnerability are beyond the scope of this essay, but I note one powerful connection between economic vulnerability and violence against women. For victims of domestic violence, economic dependence on their batterers often provides a significant hurdle to leaving an abusive relationship. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 77 (2000) (noting that "[m]any women who are battered have little money, no child care, no employment; they may be financially and emotionally dependent on the men who batter them").

<sup>28</sup> Judith Resnik argues that women's issues are not separable from a host of general legal issues. Judith Resnik, *Visible on "Women's Issues,"* 77 IOWA L. REV. 41 (1991). This Essay should offer yet another piece of support for her central premise.

<sup>29</sup> That study was the 1999 Consumer Bankruptcy Project, a survey of 1496 debtors in eight judicial districts around the country. For a more detailed description of the research methods of that study, see Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 413-18 (2001).

stances of today's women. I finally understood that something was wrong, but it was not the data. Instead, the real problem is that women, particularly divorced and separated women with children, are facing a rapidly growing risk of economic collapse. The data from the bankruptcy courts document a shocking decline in the financial health of a growing group of women.

The finding is all the more surprising given these women's circumstances. The women in the bankruptcy sample, single and married, are not those mired for years in poverty. Instead, the women in bankruptcy, like the men who file for bankruptcy, are a fairly representative cross-section of the American middle class.<sup>30</sup> Their education levels are slightly higher than the population generally, with women in bankruptcy more likely to have attended college than their counterparts.<sup>31</sup> Most are

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<sup>30</sup> For a more detailed analysis based on 2001 data, showing these women's position in the middle class, see Elizabeth Warren, *What Went Wrong? U.S. Families in Bankruptcy, 1991–2001*, 48 OSGOODE HALL L.J. (forthcoming 2002). A more detailed discussion of bankruptcy as a middle-class phenomenon is available in TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 26–74* (2000) [hereinafter *FRAGILE MIDDLE CLASS*].

<sup>31</sup> In the population generally, 50.3% of all women have no education beyond high school. In the bankruptcy sample, only 43.5% of the women filing alone had no education beyond high school. In other words, a larger proportion of the women who file for bankruptcy have made it to college than women in the population generally. As Table 1 below illustrates, the educational distribution among the women who filed for bankruptcy alone is close to that of adult women in the population generally, with more women making it to college but fewer actually getting their bachelor's degrees or going on for advanced work.

Table 1: Educational Attainment of Women and Women Filing Alone for Bankruptcy

	Proportion of Women in Population Generally	Proportion of Women Who Filed Alone for Bankruptcy
No high school diploma	16.6%	16.1%
High school diploma	33.7%	27.4%
Some college	27.9%	41.4%
College diploma only	15.3%	10.4%
Advanced degree	6.5%	4.2%

\* Columns do not add up perfectly because of rounding error.

These calculations are based on data from the U.S. Census Bureau and the Consumer Bankruptcy Project III. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *EDUCATIONAL ATTAINMENT IN THE UNITED STATES 2000 3 tbl.11* (2000); Consumer Bankruptcy Project III, 2001 (unpublished) (on file with author) [hereinafter *Consumer Bankruptcy Project III*]. For more information about the project, see Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. (forthcoming 2002) (information about the project can be found in Appendix I). In the table above, the "some college" numbers were obtained by adding the "some college, no degree" and "associate degree" figures from the census data. The "college diploma only" number is based on the "bachelor's degree only" category divided by the total educational attainment of all of the categories; "associate degree" is not included in this category.

employed when they file.<sup>32</sup> They work in a representative cross-section of industries and occupations.<sup>33</sup> About half are homeowners.<sup>34</sup> By the most overt criteria, the women who file for bankruptcy are, as a group, solidly middle-class.

The women in bankruptcy are distinguished from their counterparts in the population generally by their terrible financial circumstances. The majority have had a serious interruption in income—a job loss, layoff, firing, downsizing, outsourcing, or some other work-related euphemism that has sharply cut their income.<sup>35</sup> Nearly half have had to deal with a serious medical problem—either their own or that of a child or parent for whom they provide care.<sup>36</sup> These setbacks have left them trying to cope with mortgages and car payments and, as a result, have increased their reliance on credit cards to make ends meet. By the time they file for bankruptcy, they owe, on average, more than their gross annual income in short-term high-interest debt.<sup>37</sup> On average, the people filing for bankruptcy would have to give every fifth paycheck to their creditors just to

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<sup>32</sup> At the time they file for bankruptcy, 80.1% of the women filing alone are working. While many have suffered a significant period of unemployment preceding their bankruptcy, most have been employed and are back at work by the time they file. They scramble to get by, but once they are back at work they report making a more realistic assessment of their circumstances, deciding that bankruptcy is the only way they will ever become financially stable. For a more detailed discussion of the work histories of people in bankruptcy, see FRAGILE MIDDLE CLASS, *supra* note 30, at 75–107.

<sup>33</sup> Occupational prestige scores are developed by sociologists to rank the relative prestige of different jobs. They range from a low of 9 (bootblack) to a high of 82 (physician). The data from the Consumer Bankruptcy Project III (2001), *supra* note 31, are not yet complete, but the 1991 data showed that the people who filed for bankruptcy had a median occupational prestige score of 39 for primary filers, compared with a median occupational prestige score in the nation generally of 40. FRAGILE MIDDLE CLASS, *supra* note 30 at 56–59.

<sup>34</sup> Home ownership status varied by marital status in the study as it does in the population generally. Among married women filing bankruptcy with their spouses, 70% owned their own homes. Among those filing alone, the rate was 38%. Consumer Bankruptcy Project III, *supra* note 31; Warren, *supra* note 30. This compares with a national home ownership rate in 1999 of 66.8% for all households. See 2000 STATISTICAL ABSTRACT, *supra* note 8, at 722 tbl.1213.

<sup>35</sup> More than half of the women filing alone for bankruptcy in 2001 indicated they had been unemployed or otherwise had an interruption in their incomes or cut back in their working hours within the two years preceding their bankruptcy filings. Consumer Bankruptcy Project III, 2001, *supra* note 31.

<sup>36</sup> Among women filing alone in 2001, 37.2% identified substantial medical bills or a medical problem as a reason for filing. Among the women filing jointly with their husbands, the proportion was even higher at 47.7%. *Id.* For a more detailed discussion of the relationship between medical debts and bankruptcy based on 1999 data, see generally Jacoby, Sullivan & Warren, *supra* note 29.

<sup>37</sup> The 2001 bankruptcy court record data from Consumer Bankruptcy Project III, which includes information on debts and incomes, are not yet coded and analyzed, but Ed Flynn and Gordon Bermant have provided a good estimate of the debt to income ratio for debtors in Chapter 7. In a study of 1,931 Chapter 7 no asset cases closed in 2000, they show average secured debts of \$48,416 and average unsecured debt of \$46,120; the average gross income per household is \$30,108. Ed Flynn and Gordon Bermant, *Filers Most Likely in 25–44 Age Range*, ABI J., Dec.–Jan. 2002, at 28.

pay the interest on their outstanding loans. If they could not afford to dedicate one in five paychecks to interest payments, they would discover the effect of compounded interest: they would simply owe more money even if they never bought anything else on credit.

The data developed in the 2001 Consumer Bankruptcy Project show that women are now the largest group in bankruptcy.<sup>38</sup> In 1981, women filing alone for bankruptcy had been the smallest group, just 22.1% of all those filing.<sup>39</sup> Twenty years later, they are the largest group, constituting 39.1% of those filing.<sup>40</sup> While bankruptcy filings for all groups—married

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<sup>38</sup> In 1981, the number of Chapter 7 non-business filings was 230,404, the number of Chapter 13 non-business filings was 81,913, and the number of business Chapter 13s was 4865. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 552–55 (1981) [hereinafter ADMINISTRATIVE OFFICE REPORT]. Because all Chapter 13 cases, even business Chapter 13s, are limited to individual (not corporate) debtors, this combination gives the most accurate estimate of the number of households filing for bankruptcy in 1981. These groups total 317,182 households. The number of joint petitions in these three categories totaled 141,822, or 44.7% of the 317,182 households filing for bankruptcy. *Id.* at 557–60. The Administrative Office does not collect data about the family status or the sex of the filing party. Data collected from Consumer Bankruptcy Project I in the same year shows that single filers were 60% men and 40% women. See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: CONSUMER CREDIT AND BANKRUPTCY IN AMERICA 149 (1989) (summarizing data from Consumer Bankruptcy Project I) [hereinafter AS WE FORGIVE]. Because 44.7% of filers were joint petitioners, the 60%/40% split of the 55.3% who were single petitioners means that approximately 33.2% of petitioners were men filing alone and 22.1% were women filing alone. Those calculations yield the following:

Table 2: Households Filing for Bankruptcy, 1981

	Percentage	Number
Joint Petitions, Husband and Wife	44.7%	141,822
Men Filing Alone	33.2%	105,304
Women Filing Alone	22.1%	70,097
Total*	100.0%	317,182

\* Columns do not add up perfectly because of rounding error in estimates for each subset of debtors.

These calculations are based on data from Consumer Bankruptcy Project I and the Administrative Office of the U.S. Courts. *See id.* at 149; *see also* ADMINISTRATIVE OFFICE REPORT, *supra*, at 552–60. The sample in 1981 included 17% women single filers, but the overall sample in 1981 over-represented the number of married couples, thus under-representing the number of single filing men and women. After readjusting the sample number to reflect the national average on the number of joint petitioners in 1981, the estimated proportion of women filing alone climbs to 22.1% and the estimated number of men filing alone climbs to 33.2%.

<sup>39</sup> *See* Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38.

<sup>40</sup> For the twelve-month period ending December 31, 2001, the number of households in bankruptcy (all Chapter 7 and Chapter 13 non-business filings plus all Chapter 13 business filings) was 1,456,785. The distribution among joint filers, men alone and women alone was as follows:

couples, men filing alone and women filing alone—have increased significantly, women filing alone are the fastest growing group in bankruptcy. In twenty years, the number of women filing alone for bankruptcy has increased by nearly 800%, compared with an increase of about 300% and 400% respectively for married couples and men filing alone.<sup>41</sup> The data are captured in Figure 1.

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Table 3: Households Filing for Bankruptcy, 2001

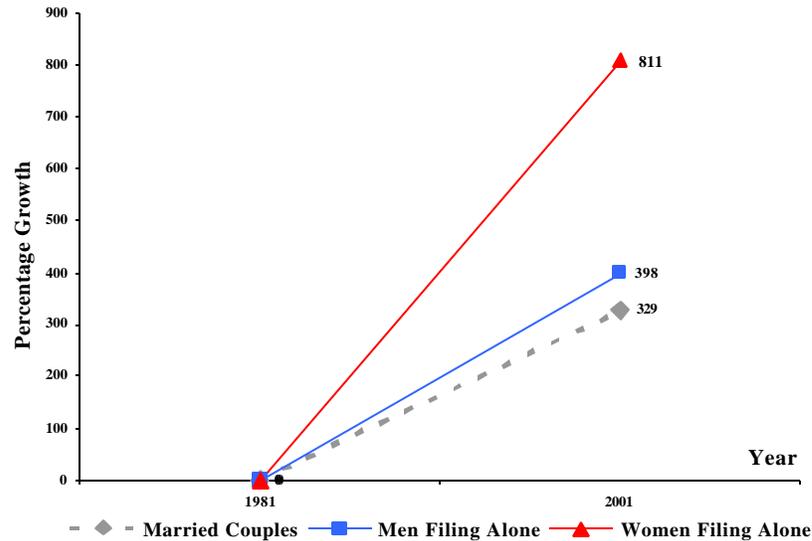
	Percentage	Number
Joint Petitions, Husband and Wife	32.0%	466,275
Men Filing Alone	28.8%	419,554
Women Filing Alone	39.0%	568,146
Total*	100.0%	1,456,785

\*Columns do not add up perfectly because of rounding error in estimates for each subset of debtors.

These calculations are based on data from Consumer Bankruptcy Project III and the Administrative Office of the U.S. Courts. *See* Consumer Bankruptcy Project III, *supra*, note 31; News Release, Administrative Office of the U.S. Courts, Record Breaking Bankruptcy Filings Reported in Calendar Year 2001, tbl.F-2 (Feb. 19, 2002) (reporting data from business and nonbusiness bankruptcy cases during twelve-month period ending December 31, 2001) at [http://www.uscourts.gov/Press\\_Releases/index.html](http://www.uscourts.gov/Press_Releases/index.html).

<sup>41</sup> Compare Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38 with Table 3: Households Filing for Bankruptcy, 2001, *supra* note 40.

FIGURE 1: PERCENTAGE GROWTH IN BANKRUPTCY FILINGS BY GROUP, 1981–2001



These calculations are based on data from the Administrative Office of the United States Courts; Consumer Bankruptcy Project I, 1981; and Consumer Bankruptcy Project III, 2001. See ADMINISTRATIVE OFFICE REPORT, *supra* note 38; Consumer Bankruptcy Project III, *supra* note 31.

Including women who file for bankruptcy alone and those who file jointly with their husbands, an estimated one million women filed for bankruptcy in 2001.<sup>42</sup> The sharp rise in the use of bankruptcy by women in financial trouble thrusts the bankruptcy system into a critical role as a safety net for the financial health of American women.

These women use the bankruptcy process to stabilize themselves financially. By declaring bankruptcy, they can discharge certain debts, principally their credit card obligations, so that they can pay the mortgage or rent, utility bills, tuition, and car payments, and buy food and clothing for themselves and their children. For homeowners, bankruptcy provides a chance to stop a foreclosure temporarily, to catch up on back payments, and to get back on track with monthly payments—giving the homeowner a chance to remain a homeowner. For those with cars, bank-

<sup>42</sup> See Table 3: Households Filing for Bankruptcy, 2001, *supra* note 40. From 1981 to 2001, the rise in the number of married women has not been as rapid as the rise in the number of single-filing women, but the increase for all women combined—jointly filing with their husbands and filing alone—is nearly 500%. Compare *id.* with Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38.

ruptcy offers the opportunity to give back the car and eliminate the remaining debt or to make payments equal to the actual value of the car.

Bankruptcy, however, is hardly a complete economic renewal. A woman who owns a home will have to make all the payments, in full, plus penalties and interest, or lose the house.<sup>43</sup> She will also have to continue making car payments if she hopes to keep her car.<sup>44</sup> Taxes and student loans must be paid in full.<sup>45</sup> Nonetheless, the ability to discharge high interest credit card debt, outstanding hospital and doctor's bills, and finance company loans is a godsend to someone so far in debt that she faces a downward spiral of missed payments, foreclosures, repossessions, penalties and compound interest from which she could never recover.

The pending bankruptcy bill is 456 pages long, containing more than a hundred proposals, all gender-neutral on their faces, applicable to men and women alike, who file for personal bankruptcy.<sup>46</sup> While some of these proposals are limited to those who earn more than the median family income in the United States,<sup>47</sup> the overwhelming majority apply to every person—regardless of economic circumstances. So, for example, requirements deliberately designed to drive up the cost of bankruptcy—such as increased paperwork and expanded attorney liability provisions<sup>48</sup>—apply to every single case. Provisions increasing payback requirements and reducing the scope of the discharge apply across the board in consumer cases, regardless of how little money the debtor makes or the reason for the bankruptcy filing.<sup>49</sup> This is not the place for an extended

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<sup>43</sup> 11 U.S.C. § 1322(b)(2) (2001); 11 U.S.C. § 524(a) (2001).

<sup>44</sup> 11 U.S.C. § 1322(b)(2) (2001); 11 U.S.C. § 524(a) (2001); 11 U.S.C. § 506 (2001).

<sup>45</sup> 11 U.S.C. § 523 (a)(8), (a)(14) (2001); 11 U.S.C. § 1328(a) (2001).

<sup>46</sup> Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001). *See supra* note 3.

<sup>47</sup> *See, e.g.*, H.R. 333, 107th Cong. § 102(h) (2001).

<sup>48</sup> *See, e.g.*, S. 420, 107th Cong. § 102(a) (2001) (increasing paperwork for *all* debtors, regardless of income level and increasing liabilities for debtors' attorneys).

<sup>49</sup> Here is a very short summary of bankruptcy law for those who are completely unfamiliar with the subject. Families in financial trouble can file a petition in bankruptcy, pay a filing fee, disclose all their assets and liabilities, and have most of their debts discharged. If they own a home or a car, they are likely to continue paying on those obligations because, even if they are no longer personally liable, they will lose the home or the car (the collateral) if they do not make their payments. Certain debts—child support, taxes and student loans are the most notable—are not dischargeable and must be repaid notwithstanding the bankruptcy.

About 70% of all debtors choose a Chapter 7, or liquidation bankruptcy, which concludes with a discharge in about six weeks. The remaining 30% file in Chapter 13, agreeing to make payments over a three- to five-year period, usually on the house, the car, and, in some cases, the credit card debt. Chapter 13 has become attractive to some debtors because it offers the debtors several incentives, such as an expanded discharge, an opportunity to strip down a lien against a car or other personal property, and a chance to catch up on mortgage payments by paying an arrearage.

Before the laws were changed in 1978, a creditor could continue to try to collect after a bankruptcy filing, but a debtor could defend himself or herself in a legal action by pleading a defense of discharge based on the bankruptcy filing. A debtor improvident enough to promise to repay after the bankruptcy would see the debt automatically revived. In 1978, greater restrictions on creditors' post-bankruptcy collection efforts were imposed,

analysis of hundreds of pages of pending legislation. For the reader who wants more detail, Professor Charles Tabb summarizes a prevalent academic view in his new article *The Death of Consumer Bankruptcy in the United States?*.<sup>50</sup>

Notwithstanding their facial neutrality, these changes will fall most harshly on women. As the largest and fastest growing group in bankruptcy, they will suffer the consequences of a meaner bankruptcy system. Some women will be forced out of the system, unable to right themselves financially, living in a permanent state of past due notices, evictions and repossessions. Other women will make their way through a deliberately more complex maze of bankruptcy rules and regulations, paying more in legal fees and forced into more negotiations with their creditors. Those who complete a Chapter 7 will find that less of their debt will be discharged, which means that their post-bankruptcy position will not be as stable as it would have been under current law. Many of those who attempt to save a house in Chapter 13 will find that they are unable to confirm a plan of reorganization, which makes them ineligible for relief,<sup>51</sup> while others will learn that they will be bound to longer repayments of larger proportions of their modest incomes. The laws are gender-neutral, and the restrictions will apply to men as well as women, but the direct effects on more than a million women a year will be especially severe.

If bankruptcy legislation passes, it is women who disproportionately will bear the brunt of higher costs, more restrictions and less protection from creditor abuses. Credit card companies that have pushed relentlessly for this legislation will collect more from women, particularly from women who are heads of their own households, trying to provide for themselves and their children. For a million women who will go to the bankruptcy courts each year, there is no more important pending federal legislation than the bankruptcy bill. The economic survival of their families may well hang in the balance.

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along with various provisions to make consumer bankruptcy operate more efficiently to discharge personal liability on most debt.

The pending bankruptcy legislation has literally hundreds of small changes to both Chapter 7 and Chapter 13, applicable to every single person who files. *See, e.g.*, text accompanying notes 59–66, *infra*, (discussing the increased nondischargeability of debt and ineligibility of debtors under Chapter 13).

<sup>50</sup> Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 *BANKR. DEV. J.* 1 (2001). Ninety-one law professors signed a letters to Congress urging them not to pass this legislation and expressing their grave concerns about the effects of the pending legislation on women and children. 147 *CONG. REC.* S2334–35 (daily ed. Mar. 15, 2001) (reproducing letter signed by ninety-one law professors) [hereinafter Letter from Law Professors to Congress].

<sup>51</sup> *See infra* note 65 (discussing the report of the National Association of Chapter 13 Trustees on the effect of the pending legislation to make approximately 20% of all debtors ineligible for Chapter 13).

## II. DIVORCE, ALIMONY, AND BANKRUPTCY

There is a second group of women that will be profoundly affected by the bankruptcy system even though they may avoid filing for bankruptcy themselves. They are the ex-wives of men who declare bankruptcy. The provisions of the pending bankruptcy legislation will affect their ability to collect alimony and child support.

Bankruptcy laws have been remarkably progressive. Since 1903, federal bankruptcy law has provided that no one may discharge an alimony or child support obligation.<sup>52</sup> Women trying to collect support obligations need not worry that what is owed to them will be discharged in their ex-husbands' bankruptcies.<sup>53</sup> The law is, of course, facially neutral on the point too; ex-wives may not discharge support or alimony obligations owed to their ex-husbands. The law also covers orders issued for child support even if the parents were never married. But among those who owe child support, the overwhelming proportion of people in bankruptcy—like the overwhelming proportion in the population generally—are ex-husbands.<sup>54</sup> Bankruptcy reflects an even stronger gender imbalance. In 2001, bankrupt men obligated to pay child support outnumbered women with similar obligations by 13 to 1,<sup>55</sup> compared with a ratio of about 8 to 1 of men to women obligated to pay child support in the population generally.<sup>56</sup> Men remain the focus of any discussion of support payments, even with the occasional reminder that the parent with the obligation could be a woman.

Men file for bankruptcy for much the same reason women file—to deal with a terrible mismatch between debts and incomes. Like their female counterparts, they discharge what debt they can, pay their taxes and students loans, and make the decision either to continue payments on the car and the house or to surrender them. But men often face an additional obligation, ongoing alimony and child support obligations. As they try to

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<sup>52</sup> Bankruptcy Act of 1898 §17(a)(2), amended by Bankruptcy Act of 1903, Pub. L. No. 57-62, 32 Stat. 797 (1903). The Supreme Court held in *Dunbar v. Dunbar*, 190 U.S. 340, 353 (1903), that Congress's passing an explicit exception to make support obligations nondischargeable did not mean that such obligation had been dischargeable before 1903. According to the Court, Congress was merely clarifying the law as it already existed. *Id.* at 352-53.

<sup>53</sup> 11 U.S.C. §523(a)(5) (2001).

<sup>54</sup> See 2000 STATISTICAL ABSTRACT, *supra* note 8 at 394 tbl.631 (reporting 7,123,000 mothers with child support awards in 1995 and 844,000 fathers with similar awards). Child support is so disproportionately received by women that some government publications simply collect data on women entitled to receive support. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN THE WELL-BEING OF AMERICA'S CHILDREN AND YOUTH 75 (1997). Not all men paying child support are ex-husbands. Support obligations are sometimes imposed on men who were never married to their children's mothers. *Id.*

<sup>55</sup> Consumer Bankruptcy Project III, *supra* note 31.

<sup>56</sup> 2000 STATISTICAL ABSTRACT, *supra* note 8, at 394 tbl.631.

stabilize themselves financially, they confront a recurrent, monthly obligation to help support their ex-wives and their children.

Because an ex-wife need not worry that an ex-husband will discharge the support obligations she enforces on behalf of herself and her children, bankruptcy takes on a very different cast for her. An ex-husband who files for bankruptcy can discharge most of the other debts that compete for his income, righting himself financially and permitting him to concentrate his future income on supporting himself and making his legally mandated support payments.

For men who owe support, a Chapter 7 liquidation makes paying those obligations easier. A man who can discharge most credit card debt, for example, is in a better position to pay his ex-wife because his disposable income increases. Bankruptcy may not make him any more eager to pay, but it makes him more able to pay. Bankruptcy has the added benefit for the ex-wife of making it easier to collect from the non-paying ex-husband. He is already in the legal system when he declares bankruptcy, which gives her a better chance of finding him and, if necessary, forcing that payment. Moreover, bankruptcy changes the post-bankruptcy incentive structure. An ex-husband owing support has no one else, except perhaps a student loan agency or the tax collector, pressing him for payment. In effect, bankruptcy gives the ex-wife a better chance to collect a share of whatever her ex-husband earns.

Chapter 13 also can help facilitate collection of support obligations. Instead of discharging most of the debt immediately in a Chapter 7, a person who files for Chapter 13 makes payments to a trustee over three to five years, receiving a discharge only at the completion of payments. Chapter 13, like Chapter 7, makes support obligations nondischargeable, so the same benefits that accrue to the ex-wife when the ex-husband gets back on his feet in Chapter 7 also apply in Chapter 13. In Chapter 13, however, an ex-wife gets additional benefits.

The law requires that a trustee supervise each case throughout the three to five year repayment period. Trustees collect payments from the debtor and disburse them to the creditors. This means that the trustee communicates regularly with the ex-spouse, follows him if he moves, and tracks his monthly payments—including his support payments. The trustee knows the debtor's source of income, how much he earns, and where he lives. If the trustee has any difficulties in collecting payments, then the trustee can easily get a court order to garnish the debtor's wages. In effect, a Chapter 13 trustee often acts as a collection agent for an ex-spouse, either by collecting the money and distributing it to the ex-wife or by supervising the ex-husband's direct payments to the ex-wife.

So long as a spouse stays in a payment plan, the trustee will see to it that he either pays his support or faces dismissal of his bankruptcy case. This supervision gives a reluctant ex-husband in Chapter 13 an additional incentive to remain current on child support payments: if he does not, he

will be dismissed from bankruptcy and receive no discharge from *any* of his outstanding debts. In Chapter 13, an ex-wife has the double benefit of seeing her ex-husband's finances straightened out while a trustee collects support payments on her behalf.

Whether an ex-husband files for Chapter 7 or Chapter 13, a functioning bankruptcy system protects women who are trying to collect court-ordered support. It helps them by giving their ex-husbands a chance to stabilize themselves financially and by reducing the competition women face for the ex-husband's post-bankruptcy incomes. In a world in which only 39% of women collect all the child support owed to them,<sup>57</sup> women need every available tool to help them collect and to help men get in a position where they can pay.

The law is not perfect by any means, but it provides a way for women collecting child support to increase their ability to collect from an ex-husband who is in financial trouble. The proposed bankruptcy legislation, pressed by the consumer credit industry, would directly undermine the legal protection now afforded ex-spouses. When their ex-husbands are denied access to the bankruptcy system, these women will find themselves trying to collect child support from men who are also trying to pay Visa and MasterCard. A single provision in the new bill illustrates a pervasive problem.

Under current law, alimony and child support, taxes and federally guaranteed educational loans all survive a bankruptcy filing without being discharged. These exceptions to discharge represent a national value judgment that certain debts stand above others, that they must be paid no matter how desperate the circumstances of the person.<sup>58</sup> They represent our collective values as a country, a concern that everyone contribute to the public fisc and that everyone meet support obligations to children and ex-spouses. They reflect our collective concern that taxing authorities, federal student loan agencies and ex-spouses are not in the business of lending—especially for the same profit motives that animate other lenders—and that they are unable to screen their debtors based on a cold calculation of creditworthiness. Taxing authorities and ex-spouses are classified legally as “creditors,” but they are fundamentally different from lenders who solicit the debtor's business; as a result, they receive the most aggressive protection under the law. The credit card companies would like more of their debt treated the same way as alimony and taxes, and the proposed legislation they support takes a major step in that direction. The result, of course, would be that the special treatment of

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<sup>57</sup> *Id.* (reporting that 39.0% of child support award recipient received full payments; another 29.4% received partial payments).

<sup>58</sup> Even student loans, which are generally nondischargeable, can be discharged if the debtor is in truly desperate circumstances. 11 U.S.C. § 523(a) (2001) (creating an exception for student loans that “will impose an undue hardship on the debtor and the debtor's dependents”).

forded taxing authorities and ex-wives would become the standard treatment given to an ever-growing group of creditors.

Currently credit card debt survives bankruptcy only if it was incurred by fraud or for the purchase of luxury goods worth more than \$1,000 within sixty days of a bankruptcy filing.<sup>59</sup> The proposed legislation would significantly expand the scope of such nondischargeable debt. Under the pending House bill, if, any time in the ninety days before filing, a debtor charged any goods or services totaling more than \$250, the debt would be presumptively nondischargeable.<sup>60</sup> If the debtor took cash advances totaling more than \$750 within seventy days of filing, those debts would not be discharged.<sup>61</sup>

The dollar amounts—\$250 and \$750—are modest, but they are merely minimum amounts that trigger nondischargeability for much larger amounts. If a debtor charges more or takes more in cash advances, the whole amount becomes nondischargeable. For example, a person who charged \$2,000 more than two months before bankruptcy would find the whole amount nondischargeable—even if he made the charges in good faith and continued to make payments on his outstanding credit card bill. Similarly, once the cash advances hit a total of \$750—even if the customer had also made regular payments—the entire amount would become nondischargeable. A family in financial trouble could easily end up with \$2,500 or more in nondischargeable credit card debt.

While \$2,500 might be manageable for many families, it constitutes more than 10% of a debtor's median annual income for those in bankruptcy, many of whom have been hard hit by unemployment.<sup>62</sup> For the debtors who do not have enough to pay \$2,500 immediately—nearly every one of them—the nondischarged creditor is entitled to collect interest and late payment fees. If the debtor had already missed a payment or two, the debtor could be facing so-called “default rates of interest,” which may run from 22% to 35% or higher, with late fees and penalties on top of that.<sup>63</sup> Of course, if the debtor had charged more than \$2,500,

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<sup>59</sup> 11 U.S.C. § 523(a)(2)(C) (2001).

<sup>60</sup> H.R. 333, 107th Cong. § 310 (2001). The proposed law exempts “goods or services reasonably necessary for the support of the debtor” from the provision of nondischargeability. *Id.* This language offers little practical protection. Because the exception is a defense, the burden appears to be on the debtor to hire a lawyer, raise the issue, and persuade the court. Until the debtor does so, the creditor seems to be free to continue to collect. Because most consumers are less familiar than most credit card companies with the provisions of 11 U.S.C. § 523, the defense is likely to have little practical effect. Even for those who used their credit cards to feed their families, most debtors cannot afford an attorney to litigate whether a purchase was “reasonably necessary.” Ironically, it will be the most financially strapped debtors who will be forced to pay regardless of the facts because they cannot afford to litigate whether their purchases were reasonably necessary for support.

<sup>61</sup> *Id.*

<sup>62</sup> Ed Flynn & Gordon Bermant, *The Class of 2000*, ABI J., Oct. 2001, at 20 tbl.1. Median net income was \$20,796 for 2000, while mean income, inflated by a few higher income debtors, was \$23,340. *Id.*

<sup>63</sup> In a recent mailing, Fleet promoted a “Titanium Visa card” and its interest-free in-

the payments and interest would simply be higher. Other provisions in the bill give creditors additional opportunities to survive a discharge.<sup>64</sup>

For the debtors who try to repay their creditors over three to five years in Chapter 13, the bill would impose even more hurdles. One restriction alone—a change in how secured debt is calculated—is estimated to make one in every five debtors who would otherwise repay debts in Chapter 13 ineligible to file.<sup>65</sup> If this bill becomes law, this provision alone would mean that 20% of the women who would have counted on a trustee to help them collect child support would find that their ex-husbands had no access to Chapter 13. Other provisions in the bill compound the problems, further reducing the number of ex-husbands who can qualify for Chapter 13<sup>66</sup>—even though the proponents of the bill say they want more people to undertake Chapter 13 repayment plans. More of the men forced out of Chapter 13 will end up either in Chapter 7—where other provisions in the pending legislation would impose stiffer eligibility requirements and shrink available protection—or be forced out of the bankruptcy system altogether.

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troductory APR, but notes on the back of the offer that if the customer is late with a payment, exceeds the credit limit, sends a check that is returned for insufficient funds, or defaults on any other obligation to Fleet such as a mortgage or car loan, Fleet will bump the interest rate on this card to 21.99%. Fleet promotional mailing (on file with author). A credit card targeted to African Americans and promoted by hip-hop star Queen Latifah imposes an interest charge of 35% on credit lines of \$300 to \$10,000 for those with a weak credit history. *Hard Charging*, CONSUMER REP., Dec. 2001, at 59.

<sup>64</sup> For example, a debtor who wishes to file for Chapter 7 must pass a complex means test. *See* H.R. 333, 107th Cong. §102 (2001). Debtors who are unable to produce the paperwork or whose incomes or expenses exceed the guidelines in the statute are denied any protection under Chapter 7. *See id.* If they have large enough incomes to qualify for a repayment plan under the new proposals, they can file in Chapter 13. *See, e.g., id.* Those who cannot qualify for Chapter 13 lose all bankruptcy protection, however, making all their debts effectively nondischargeable.

<sup>65</sup> Current law requires that the secured portion of the loan be repaid in full, but the unsecured portion can be repaid pro rata with other unsecured debt out of the debtor's disposable income—if the debtor has any disposable income. 11 U.S.C. § 506 (2001); 11 U.S.C. §1325(a)(5) (2001). The proposed bill would require that a Chapter 13 plan include payment in full on both the secured and unsecured portions of a car loan. *See* S. 420, 107th Cong. § 306 (2001). If the debtor does not have enough income to make the payment in full—secured and unsecured portions, plus penalties and interest—the debtor simply cannot confirm a payment plan. *See id.* This change would increase required plan payments substantially. In a study of families currently attempting repayment plans in Chapter 13, one in five would have been ineligible to file under this provision alone. NATIONAL ASS'N OF CHAPTER 13 TRUSTEES, RESULTS OF INFORMAL SURVEY ON IMPACT OF SECTION 306(B) OF S. 625 (May 25, 1999) (on file with author).

<sup>66</sup> The proposed legislation would require that every debtor who purchased any item subject to a security interest within a year before bankruptcy must repay the debt in full plus interest plus penalties in order to confirm a plan of reorganization. *See* S. 420, 107th Cong. §306 (2001). While the implications of the provision might not be immediately clear, anyone who shops at Sears or uses a GE Capital credit card should understand them. Both Sears and GE Capital claim a security interest in every item a customer buys, from pantyhose to paint. Any debtor who did not make enough money to repay Sears and GE in full under the new provisions would be barred access to Chapter 13. *See id.*

The cumulative effect of these changes in the bankruptcy laws on women will be harsh. In place of the carefully protected access to her ex-husband's post-bankruptcy income she now has, under the proposed legislation a woman trying to collect child support or alimony will find herself more often competing with MasterCard and Visa. She has some legal advantages: she can garnish a larger portion of his wages than MasterCard or Visa,<sup>67</sup> if her ex-husband works for a salary so that his wages can be garnished.<sup>68</sup> MasterCard and Visa have their advantages too: they have sophisticated collection departments, specialists to work with delinquents, and an expensive legal team. They also wield the ultimate weapon: they can charge interest, penalties, late fees and collection costs. Whatever the relative advantages of credit card companies and ex-wives, however, the market speaks for itself: credit card issuers collect more than 95% of everything that is owed to them on the first try.<sup>69</sup> The remaining 5% they squeeze out through late notices, dunning calls, and collection agencies. By contrast, only about 39% of all women owed child support *ever* collect 100% of what they are owed.<sup>70</sup> If the pending bankruptcy legislation becomes law, women and credit card companies will go head to head more often.

The number of men who file for bankruptcy owing child support obligations is substantial. Based on data collected for Consumer Bankruptcy Project III, an estimated 180,000 men who owed child support filed for bankruptcy during 2001.<sup>71</sup> If there were no changes in the bankruptcy system, during the next six years, more than a million child support orders would be processed through the bankruptcy system. Men would file for bankruptcy, discharge most of their other debts, make payments through a Chapter 13 trustee or be subject to post-Chapter 7 collection by their ex-wives. Under current law, credit card companies, along with finance companies, doctors, hospitals, mortgage companies and car lenders collecting deficiencies would have to step aside. If the proposed legislation were passed, in a single year, a million women—and well over a million children—would encounter a substantially altered

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<sup>67</sup> For a discussion of the use of garnishment actions to collect child support, see ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 86–91 (4th ed. 2001).

<sup>68</sup> The practical obstacles of garnishing wages of men who are self-employed, men who work for different people (such as construction workers), men who move from job to job, men who work in largely cash businesses, and men who move out of state are often insurmountable for a woman whose ex-husband does not voluntarily pay support.

<sup>69</sup> About 95.45% of all credit card bills are paid on time, without any dispute. 2000 STATISTICAL ABSTRACT, *supra* note 8, at 513 tbl.803.

<sup>70</sup> 2000 STATISTICAL ABSTRACT, *supra* note 8, at 394 tbl.631.

<sup>71</sup> Out of *all* petitioners filing for bankruptcy, 12.1% reported that they owed child support obligations. That includes 25.7% of all men filing alone and 11.7% of all married men filing with their wives. Consumer Bankruptcy Project III, *supra* note 31.

bankruptcy system with a significantly different outcome for them. If that happens, it will not be by accident, but by the decisions of those who support the pending bankruptcy legislation.

### III. HOW COMMERCIAL INTERESTS RESPOND WHEN A BUSINESS ISSUE BECOMES A WOMEN'S ISSUE

Women who file for bankruptcy and women whose ex-husbands file for bankruptcy will be affected by any change in the bankruptcy laws. Both groups—women as debtors and women as creditors—have received some attention. More than two dozen women's groups have sent letters to Congress to oppose the bankruptcy legislation specifically because it will fall hardest on women. The high proportion of women in bankruptcy has been mentioned in the media, including a front page story in *USA Today*.<sup>72</sup> The impact of the bill on both women as debtors and women as creditors has been cited by a handful of Senators in their opposition to the bankruptcy bill.<sup>73</sup>

Yet, it is fair to say, neither issue has become part of a national debate. Both have received little sustained attention in the news media and had minimal public visibility. Even among those engaged on the bill, however, the two groups of women have been treated differently: women filers, on the one hand, and the ex-wives of men filers.

The growing number of women who will be debtors—women who are trying to support themselves and their children, stay in their homes, survive a period of unemployment, deal with an uninsured medical bill, and put their lives back in order—are simply ignored. The proponents of the bill have issued news releases and discussed consumer bankruptcy at length in the extensive floor debates on the topic, but not one of the bill's supporters, including Senator Biden, has mentioned the million women who will be filing for bankruptcy this year. Instead, these women are swept in with the men in financial trouble to create a genderless group of debtors. The fact that the number of women filing for bankruptcy is increasing at an alarming rate and that the distribution of those in bankruptcy is shifting, from decidedly male in the 1980s to decidedly female in the 2000s, is a matter on which they have no comment. Similarly, the reasons for this increase in filings among women—or the larger social implications of growing economic failure among middle-class women—has never been an issue meriting the attention of those who push for increased restrictions on access to bankruptcy.

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<sup>72</sup> Christine Dugas, *Critics Say Bankruptcy Bills Threaten Child Support*, *USA TODAY*, Apr. 30, 1998, at A1.

<sup>73</sup> See, e.g., 146 CONG. REC. S11684 (daily ed. Dec. 7, 2000) (statement of Sen. Wellstone).

The ex-spouse issue has been treated differently, although with much the same practical result. When divorce and child support are on the table, it seems that a switch is triggered and the supporters of the bankruptcy bill at least feel a need to respond. After initially denying that the bill would have any effect on women, the bill's supporters amended the proposed legislation to "solve" the women's problem. They added a provision to change the order of payment in a Chapter 7 case.

This political move requires a bit of background to understand. When a debtor files for Chapter 7, secured creditors either seize their collateral or work out a payment plan with the debtor. The remaining property is dealt with in the bankruptcy. State laws permit debtors to exempt some items, a protection traditionally recognized in bankruptcy.<sup>74</sup> Any property that is not exempt is turned over to a bankruptcy trustee for sale, and the proceeds are distributed among the creditors. The law establishes a priority for payment, with all creditors of one kind paid in full ahead of the next class of creditors. Once all priority creditors are paid in full, the remaining creditors—general unsecured creditors—receive a pro rata distribution of whatever is left. Of course, if there is no creditor in a certain class because the debtor does not owe money to anyone who fits that description, then the money simply goes to the next class.

Today, the law provides that any money in a Chapter 7 estate will be paid out to creditors in this order:<sup>75</sup>

1. Administrative expenses for running the bankruptcy, including trustee's costs of sale and percentage fees
2. Post-petition business obligations in involuntary cases
3. Employees' wage claims against their employers
4. Employees' benefit claims against their employers
5. Grain producers and American fishermen with claims against grain storage facilities and fisheries
6. Security deposits held by businesses that sell or rent property
7. Alimony and child support
8. Taxes
9. Capital commitments to the FDIC on behalf of a depository institution

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<sup>74</sup> All state law exemptions are recognized in bankruptcy. 11 U.S.C. § 522(b), (d) (2001). In addition, bankruptcy law provides for federal exemptions that a debtor might choose in lieu of the state exemptions, but the federal law also permits states to deny debtors this option. *Id.* It is the patchwork of exemptions that permits debtors in Florida or Texas to exempt all of the equity in a multi-million dollar home, while a debtor in New York is limited to a home with only \$10,000 in equity. For a summary of the homestead exemption laws in all fifty states, ranging from unlimited homestead exemptions to no homestead exemptions at all, see 14 COLLIER ON BANKRUPTCY (Lawrence P. King ed., 15th ed. rev. 2001) (discussion of exemptions divided by state).

<sup>75</sup> 11 U.S.C. § 507(a)(1)–(9) (2001).

10. Pro rata payment to all the general creditors: credit cards, retail stores, medical bills, finance companies, unsecured portions of car loans and mortgages, student loans.

Obviously, the list is written generically for both business and consumer bankruptcies. Priorities two through six apply exclusively to businesses. They deal with a bankrupt company's obligation to its employees, to grain producers or fisherman who store their wares with the bankrupt company, and to customers who gave the business security deposits. While the provisions apply to all debtors as a matter of law, only businesses are likely to owe creditors who fit in categories two through six. Businesses are not ex-husbands of women trying to collect child support.

As this list shows, whether a child support obligation is listed behind priorities two through six or in front of them is irrelevant in a consumer bankruptcy case because there is no one with priorities two through six claiming any money in such cases. To move the support priority ahead of priorities two through six is mere window dressing, pretending to create a benefit that will not yield a single dollar for a single woman.

Priority one, however, covers administrative expenses for all cases. Under the current priority one, the trustee who assembles and liquidates property receives reimbursement for expenses and a portion of what is collected before anyone else is paid. The more assets the trustee finds and liquidates, the more money the trustee collects, but also the more money made available for the creditors. Without that priority, of course, no one would be willing to serve as a trustee or to incur expenses and work on behalf of a bankrupt estate.

To solve the "women's problem," the bill's proponents added a provision that would move the repayment of alimony and child support from seventh priority to first. While this is irrelevant in the practical application of priorities two through six, it has one powerful effect: under the proposed new priority scheme, women collecting child support would come ahead of the trustees who are charged with liquidating property to help pay that support. The trustees, now in priority one, would be demoted to priority two, and the women who receive distributions from the trustees would come first. The difficulty, of course, is that priority one now assures that trustees have an incentive to gather assets and liquidate them. If support recipients received the entire distribution, trustees would have no incentive to work in cases in which an ex-wife claimed support. In other words, the practical effects of the proposed change in "priority" for women trying to collect child support would be either nonexistent or detrimental.

But that is not what Senator Biden says about the provision. He describes the proposed changes in the bankruptcy laws as an "historic im-

provement in the treatment for family support payments, child support, and alimony.<sup>76</sup> Senator John Kerry (D. Mass.) had a rather different assessment: “[T]he claim of the bill’s sponsors that it ‘puts child support first’ is an example of the worst kind of Washington cynicism.”<sup>77</sup> Kathy Rodgers, President of NOW Legal Defense and Education Fund, characterized the newly improved bill as “a shameless raid on child support.”<sup>78</sup>

Not only does the change in priority not help women, its application in bankruptcy cases would be extraordinarily limited. The priority provisions apply *only* when the Chapter 7 estate has some money to distribute and *only* for the very brief time that a Chapter 7 proceeding is pending. The estate will have money only when the debtor owns some property that was not already fully encumbered by a mortgage or security interest and that exceeded state law exemptions. Yet, 96.4% of all Chapter 7 cases are no-asset cases, which means there are no assets to liquidate, no money in the estate, and nothing to distribute.<sup>79</sup>

Most debtors own very little unencumbered property. The debtors have so little that nothing is liquidated and nothing is distributed to any of the creditors—first priority, seventh priority, or general unsecured creditors. To give women a “first priority” here is to offer them a ticket to stand first in line to collect nothing. The real impact of the Chapter 7 bankruptcy law comes after bankruptcy—who can reach the debtor’s post-bankruptcy income? The credit card companies want access to a larger piece of that future income by increasing the amount of their debt that is nondischargeable, even if it means competing with women and children in the collection rush.<sup>80</sup>

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<sup>76</sup> 146 CONG. REC. S11462 (daily ed. Nov. 1, 2000) (statement of Sen. Biden).

<sup>77</sup> 146 CONG. REC. S11727 (daily ed. Dec. 7, 2000) (statement of Sen. Kerry). A bankruptcy journal noted that “the improvements Biden and others point to are window dressing on a vacant house.” *Will Bankruptcy Reform Help Women and Children?*, CONSUMER BANKR. NEWS, June 2001 at 1.

<sup>78</sup> Tish Durkin, *Where Are the Sisters When Sex Isn't the Issue?*, NAT'L J., Mar. 24, 2001, at 848.

<sup>79</sup> The Department of Justice estimated that only 3.6% of all Chapter 7 cases generated a single dollar for distribution to creditors. U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, PRELIMINARY REPORT ON CHAPTER 7 ASSET CASES 1994 TO 2000 9 (2001). Because businesses also file in Chapter 7, it is possible that most of the no-asset cases are consumer filings. If so, the proportion of Chapter 7 cases generating any money for support payments may be considerably below 3.6%.

<sup>80</sup> There is another twist in the new provisions as well. State agencies are given equal footing with women in collecting past-due child support in Chapter 13. *See, e.g.*, H.R. 333, 107th Cong. § 211 (2001). The practical significance of this can create another ironic disadvantage for women trying to support their children. When a woman is unable to collect child support but does receive state assistance, she is required to assign her child support for that time period to the state. If the ex-husband is eventually located, both the wife and the state can make him begin repaying: the ex-spouse for current support, the state for past due support. Once again, the competition is obvious. Current law forces the state to defer to the ex-wife who is collecting current support, but the pending bankruptcy bill would change that—creating yet another obstacle for the ex-wife trying to support herself and her children. *See id.* Some state officials, following the lead of MasterCard and Visa, applauded the proposed change in the law, arguing that this helped enforce child support

The decision of the sponsors of the bill to rearrange the priority of repayment in Chapter 7 was a stunningly effective public relations move. Each time someone pointed out that the bill would fall hardest on women, one of the proponents would reply that the bill *improved* women's lot by moving them from seventh priority to first priority in the collection order. Moreover, with this amendment in hand, Senator Biden went on the offensive. In his vigorous support of the bankruptcy bill, he placed a separate statement in the Congressional Record entitled "THE BANKRUPTCY BILL WILL NOT DISADVANTAGE WOMEN AND CHILDREN."<sup>81</sup> He claimed that through the bankruptcy bill, he was once again championing the cause of women. The other proponents of the bill were relieved of having to defend themselves from charges that they supported a bill harmful to women, simply standing instead in the long shadow cast by Senator Biden's support for the bill. And for every elected official who took advantage of campaign contributions from the financial services industry, Senator Biden effectively made the case that they did not need to worry, the pending bill would not harm groups they regularly supported.

Of course, in every political battle there are charges and counter-charges. Those who claim injury are often confronted by those who say that, to the contrary, whatever is proposed is *good* for the intended targets. What makes this debate different is that the claim that something will "help" in most debates fools no one. Those who support access to abortion, for example, never let someone get away with claiming that a waiting period or notice period somehow increases a woman's choice. But when bankruptcy is the issue, long time supporters of women can fall silent, nodding quietly in relief that the women's problem has been solved. Whether they do not take the time to understand because the matter is complex or whether they understand but do not care because they have adequate political cover is unclear. Either way, the result is the same.

#### IV. WHY BANKRUPTCY IS NOT ON THE LIST OF WOMEN'S ISSUES

Several women's organizations, including most notably the National Partnership for Women and Families, the National Women's Law Center and NOW Legal Defense and Education Fund, have worked hard to op-

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orders. Of course, they didn't explain that the increased enforcement meant more money for the state coffers, but nothing more in women's pockets. *See, e.g.*, Letter from Laura Kadwell, President of the National Child Support Enforcement Association, representing over 60,000 child support professionals across America, read into the Congressional Record at 146 CONG. REC. S11695 (daily ed. Dec. 7, 2000).

<sup>81</sup> 147 CONG. REC. S2416 (daily ed. Mar. 15, 2001) (statement of Sen. Biden) (capitalization in original).

pose the bankruptcy bill.<sup>82</sup> Law professors who specialize in commercial law and bankruptcy have tried to call attention to the impact of the bill on women.<sup>83</sup> A number of Senators—Paul Wellstone, Patrick Leahy, Edward Kennedy, Russell Feingold, Richard Durbin, John Kerry, and Thomas Harkin—have been outspoken critics of the bill, focusing particularly on the effects of the bill on women. Despite the fact that over a million women had to work their way through the bankruptcy system in 2001, however, bankruptcy law has not been a rallying point for even the most politically involved advocates of women's issues.

Why not? Several reasons come to mind about why bankruptcy is an unlikely candidate as a critical women's issue, despite the staggering number of women who will be affected by changes in the system. While each reason speaks specifically to the narrow issue of bankruptcy, each also offers some insight into the larger question of how women's issues are framed and the limitations on the power of women to reshape the political landscape to protect themselves.

#### A. *The Sound Bite Problem*

Bankruptcy presents devilishly complex policy issues. The law itself is counter-intuitive, a statute under which legally enforceable contracts cannot be enforced, transactions completed weeks before bankruptcy can be unwound, and tiny interest groups such as airplane engine financiers and wheat farmers can carve out special legal protection. The statute itself is loaded with cross-references and interconnections among hundreds of subsections, with highly technical provisions ungirded by broad, amorphous concepts. There are now 269 volumes of published opinions interpreting the statutory ambiguities, and the number jumps by about one volume each month. The bill pending before Congress would add yet another layer of complexity. The proposal runs more than 400 pages; the most significant effects on consumers are not contained in a single section but are an amalgamation of dozens of small, technical changes. As a result, it is hard to distill a few pithy sentences to explain exactly how women will be affected by changes in the bankruptcy laws. Moreover, the complexity means that any proponent of the bill can throw up enough verbal sand to leave a casual listener uncertain about the bill's effects.

Of course, complexity is not the unique province of bankruptcy. Education policy, welfare reform, and Title IX funding are laden with intricate details as well, but the basic ideas and terms in those areas are far more congenial to most listeners. The core factual circumstances—

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<sup>82</sup> See *supra* note 11 and accompanying text (describing letter organized by the National Partnership for Women and Children and the National Women's Law Center, sent to all members of the Senate).

<sup>83</sup> Letter from Law Professors to Congress, *supra* note 50.

how our children are educated, how the poorest families get help to pay the rent or put food on the table, and how academic and sports programs are funded in our schools—are familiar to lawyers and non-lawyers alike. Bankruptcy with its partial debt forgiveness and partial debt ratification is a difficult concept to grasp, even in its most basic form. Complexity offers an opportunity for well-funded public relations campaigns and aggressive politicians to throw up confusing or even misleading allegations to fool the casual listener. When the core ideas are complex, the details at issue in a fight over statutory revision often become a quagmire, and quagmires do not make good rallying points for public policy issues.

### *B. The Power of Single-Issue Focus*

Bankruptcy is statutory, and statutory rights can be expanded or contracted overnight by the legislature. This means the policies are subject to the influences of campaign money and political organizations. While the consumer credit industry and women's groups both have professional advocates, there is a powerful difference between the two. The credit industry focuses on just a few items, giving it the freedom to make a big push on bankruptcy.<sup>84</sup> Women's groups, by comparison, often have dozens of issues ranging from literacy to the availability of low cost breast cancer screening tests on which they must press. There is a second difference: the consumer credit lobbying effort is backed by the biggest banks, finance companies, retailers, car lenders, and home mortgage companies in the country. Women's lobbying efforts are largely supported by the contributions of individual women and a handful of foundations and corporate sponsors.

Concentrating more money on fewer issues has an effect. In 2000, for example, the credit industry was the single largest campaign contributor in Washington. During 2000 alone, the credit industry collectively spread around \$37.7 million to both Democrats and Republicans in Congress.<sup>85</sup> The campaign contributions outstripped the spending of

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<sup>84</sup> Princeton political scientists Stephen Nunez and Howard Rosenthal conducted a detailed analysis of voting patterns on the proposed bankruptcy legislation. In explaining the pattern of lobbying and political contributions to members of Congress, they began with the observation that "Financial services companies may have many fish to fry other than defaulting consumer debtors. Consequently, their contributions are poor measures of contributions directed at bankruptcy legislation. On the other hand, [a coalition of credit card issuers] placed substantial, if not total, emphasis on achieving bankruptcy 'reform.'" Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process* 13 (Jan. 18, 2002) (unpublished manuscript, on file with author).

<sup>85</sup> Bruce Shapiro, *Let the Hogfest Begin* (Mar. 12, 2001), at <http://www.salon.com/politics/feature/2001/03/12/bankruptcy/index.html> (reporting on Federal Elections Commission figures analyzed by Public Campaign, the campaign-finance reform lobby). The group reports that this amount constitutes a 75% increase from 1998. The split was 61%

every other special interest group.<sup>86</sup> MBNA, headquartered in Delaware and now the country's biggest credit card lender, through its executives and PACs and "soft money" pledges, made more contributions to George Bush's presidential campaign than any other company.<sup>87</sup> Senator Russell Feingold has called the bankruptcy bill "a poster child for the need for campaign finance reform,"<sup>88</sup> a telling assessment from a man who observes the abuses of money and influence in Washington on a daily basis. His point is a valid one: it is otherwise difficult to explain how a democratically elected legislature could favor a bill that would squeeze millions of working families in order to improve the bottom line of a small group of high profit credit providers.

Flush with money, the credit industry can hire the lobbyists to pay calls on every Senate and House staff member, prepare "information" packages for Congress and the media, make calls to reporters, organize news conferences, buy advertisements in national newspapers, hire expensive law firms to draft legislative proposals, and pay for celebrity endorsements.<sup>89</sup> Women's groups, even if they had no other issues to occupy their time and resources, cannot match this outlay. And with dozens of other urgent issues competing for their limited resources, it is nothing short of heroic for them to become as involved as effectively as they have in the bankruptcy bill.

The difference in money makes a difference in outcome. In 2000, Congress passed a bankruptcy bill that was vetoed at the eleventh hour as one of the final acts of President Bill Clinton. Two Princeton professors of political science, Stephen Nunez and Howard Rosenthal, analyzed voting records on the 2000 bankruptcy bill. "We find that money was not only statistically significant but that it made a large impact."<sup>90</sup> They were

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for Republicans, 39% for Democrats.

<sup>86</sup> In 2000, the financial services industry was the biggest contributor to both political parties. See CENTER FOR RESPONSIVE POLITICS, ELECTION OVERVIEW 2000 CYCLE, at <http://www.opensecrets.org/overview/sectors.asp?cycle=2000> (last visited Mar. 4, 2002).

<sup>87</sup> See, e.g., Robert Zausner & Josh Goldstein, *Bush's Largest Funding Source: Employees of Credit-Card Firm*, PHILA. INQUIRER, July 28, 2000, at 1 ("By orchestrating mass contributions from its employees, the Wilmington-based company has become Bush's single largest source of campaign money. MBNA employees and their families have given more than \$250,000 to the Republican's presidential bid, an Inquirer analysis found."); Christopher Schmitt, *Tougher Bankruptcy Laws—Compliments of MBNA?*, BUS. WK., Feb. 26, 2001, at 43 ("[MBNA] was the candidate's single biggest source of cash . . . . On the soft-money side, MBNA chipped in nearly \$600,000 . . . . On top of that, MBNA Chairman and CEO Alfred Lerner and his wife, Norma, each kicked in \$250,000 to the Republicans. Charles M. Cawley, CEO of MBNA's bank unit and a friend of Bush Sr., organized fund-raisers and gave \$18,660 to Bush and the GOP.")

<sup>88</sup> 147 CONG. REC. S2293 (daily ed. Mar. 14, 2001) (statement of Sen. Feingold).

<sup>89</sup> For example, the credit industry hired former Secretary of the Treasury and former U.S. Senator Lloyd Bentsen, who wrote a stirring op-ed about the need for bankruptcy reform without disclosing that he was a paid lobbyist on behalf of the credit industry. Lloyd Bentsen, *Get Tough on Bankruptcy Law*, WASH. TIMES, Sept. 19, 1997, at A19. Paul Wiseman, *Lenders Lobby for Reform of Bankruptcy*, USA TODAY, Oct. 21, 1997, at 6A.

<sup>90</sup> Nunez & Rosenthal, *supra* note 84 (manuscript at 9).

impressed by the strength of the data they uncovered, concluding that "it is rare to find such clear evidence of the effects of money."<sup>91</sup>

Focus also affects the strength of opposition. When women's groups face diffused, generic opposition, they may marshal a winning force. The Violence Against Women Act provides one example. While the law certainly had its critics, there was no multi-billion dollar industry willing to commit millions of dollars to a campaign to enlarge the rights of those who abuse women. But when women's groups face a powerful, well-organized industry that is willing to spend a great deal of money to accomplish a highly focused legislative outcome, they are badly out-matched.

### C. *Bankruptcy Stigma*

The credit industry claims that bankruptcy no longer carries a stigma, that the courts are overflowing with people who deliberately shrug off their debts as easily as they shrug off an old overcoat. Bankruptcy, by this account, smacks of moral degeneracy.

News stories about the rise in consumer debt often feature a silly woman ruefully explaining that she bought too many frills. The cover story in a recent issue of Newsweek about debt and bankruptcy began with a story illustrating a decline in financial responsibility across three generations—from grandparent, to parent, to adult child in a single family. But a more subtle point permeated the piece. The responsible older person quoted is male, while the increasingly irresponsible interviewees just happened to be female.<sup>92</sup> The second vignette in the story is of a woman who "admits that she's maxed out two of her credit cards (balance: \$9,000) but still uses the third for restaurants and weekends away. 'I've spoiled myself and I can't change my habits,' she says, ticking off unused shoes, a flat screen computer and a \$500 telescope she's bought recently."<sup>93</sup> The key visual for the story, under the blaring headline "MAXED OUT!," is an attractive young woman in a saucy pose, surrounded by cutouts of thousands of high-heeled shoes—presumably the purchases that got her in trouble. A systematic study of the image of financial irresponsibility must await another day, but attractive, single, "spoiled" women seem to receive a large share of the attention when the subject of financial trouble is on the table.

With fiscal irresponsibility as the widely promoted "cause" of bankruptcy, it is not difficult to understand a certain reluctance to embrace bankruptcy protection as a women's issue. After all, millions of women

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<sup>91</sup> *Id.* at 33.

<sup>92</sup> Daniel McGinn, *Maxed Out!*, NEWSWEEK, Aug. 27, 2001, at 34.

<sup>93</sup> *Id.* at 36.

are struggling to make ends meet. Why spend valuable political and public capital to support the profligate?

The financial industry's vision of bankruptcy centers on the question of fault. The charge is just below the surface: women file for bankruptcy because they run up bills they cannot pay, buying things they do not need and enriching themselves at the expense of their bill paying sisters who must pay higher prices to set off these losses.<sup>94</sup> Newsweek claims the problem is too much "Tommy, Ralph, Gucci and Prada."<sup>95</sup> Is the stereotype accurate? Or, like so many stereotypes, is it a product of fable and political convenience fed by an industry that can increase its bottom line if Congress will change the laws to squeeze debtors harder?

The data my co-authors and I have collected give an overview of a cross-section of the debtors filing for bankruptcy. The data show that the bankruptcy courts are serving hardworking women who are struggling to make it on modest incomes in an increasingly risky and difficult world. These women file for bankruptcy after they have been laid off from work, after they—or their children—have had serious medical problems, or after their ex-husbands have quit paying child support.<sup>96</sup> Personal interviews confirm the picture that emerges from the quantitative analysis.<sup>97</sup> Women speak of trying to keep their families together, of holding down two jobs to try to save their homes, or of losing their jobs because of the time they lost staying home to care for a seriously ill child.<sup>98</sup> They talk about health insurance they cannot afford and forgoing trips to the dentist. Is each woman who files for bankruptcy financially responsible in every possible way? Has each one been hit by setbacks beyond her control? No. Bankruptcy is no different from any other institution that serves more than 1.4 million households a year. Some of those who use the bankruptcy system are irresponsible, morally slack, perhaps contemptible. But the data strongly suggest that the overwhelming majority of women who file for bankruptcy are doing the best they can under extraordinarily difficult circumstances.

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<sup>94</sup> A typical full-page advertisement in the *Washington Post* carried the headline: "What Does Bankruptcy Cost American Families? A Month's Worth of Groceries" above a full grocery cart. WASH. POST, June 4, 1998 (on file with author). The text followed: "Today's record number of personal bankruptcies costs every American family \$400 a year," then exhorted people to endorse the pending bankruptcy legislation. *Id.* For a fuller discussion of the credit industry's proclamation that bankruptcy costs American families \$400 a year, see Elizabeth Warren, *A Market for Data*, 2002 WIS. L. REV. 1 (2002).

<sup>95</sup> McGinn, *supra* note 92, at 37.

<sup>96</sup> Consumer Bankruptcy Project III, *supra* note 31.

<sup>97</sup> *Id.* Consumer Bankruptcy Project III includes telephone interviews of approximately 900 families who filed for bankruptcy during 2001 in five major cities around the country. As I write this draft, the interview portion of the study is nearly concluded, with about 840 completed and coded interviews now in our database. Those interviews will be the source of several future reports on the families in bankruptcy.

<sup>98</sup> *Id.*

So long as bankruptcy is surrounded by the slight stink of moral culpability, the women who need it are not only likely to be stigmatized by society, they are also abandoned by other women who do not acknowledge their needs, who are not even aware of those needs. The women who are struggling the hardest to maintain some semblance of middle-class lives for themselves and their children are not always on the agenda of their most politically active sisters.

#### *D. Invisible Women*

The federal government reports data on bankruptcy *cases*—not the *people* who file. The Administrative Office of the United States Courts records how many bankruptcy cases are filed in the country each year, where they are filed, what chapter they are filed in, whether they are denominated business or non-business cases, and whether they are filed jointly (married couples) or singly.<sup>99</sup> Nowhere in these reports is there any information about how many men and how many women filed for bankruptcy, this year or any year. This means that bankruptcy is about “debtors” generically, not about “women” and “men.” With no information reported about the sex of the filers, there are no data to track the changes in the risks that men and women will file for bankruptcy.

Because there is no information about marital status other than the fact of marriage for the joint filers, there is no report on how many divorced women fled to the bankruptcy courts or how many widows sought refuge in bankruptcy. Because there is no information about the families of those in bankruptcy, there is no report on how many children were in households that declared bankruptcy or how many elderly parents were supported by daughters who ended up in bankruptcy. Because there is no information about job history, there is no report on how many women were laid off before they filed for bankruptcy. Because there is no information about support enforcement, there is no report on how many women were forced into bankruptcy when their ex-husbands ducked out on the child support payments. Because there is no information about age, there is no report about the growing risks that older women will file for bankruptcy. Because there is no information about medical histories, there is no report on how many women filed for bankruptcy when an illness struck after they had lost insurance or when they had to care for an ailing parent or a handicapped child.

Ironically, much of this information is currently reported by debtors who file for bankruptcy. Bankruptcy forms, collected from each debtor, demand considerable information under penalty of perjury and a threat of dismissal of the bankruptcy case. These data, however, are not assembled

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<sup>99</sup> See, e.g., *supra* notes 38, 40.

and publicly reported, which means that this information is not part of our nation's discourse about bankruptcy—or our discourse about women.

Every year, scholars and journalists discuss the economic health of women—how much women are earning, how many women are in the professions, how many women started medical school or took graduate degrees in the sciences, and how much money women have put away for retirement.<sup>100</sup> Researchers watch closely whether the number of women in poverty rises or falls, how many women are rearing children without a spouse, and how many women and their children have no health insurance.<sup>101</sup> The routine collection and reporting of income and educational data make possible a national dialogue on dozens of different issues important to women. Bankruptcy offers another way to measure financial distress, to track the implications of job layoffs, to document the impact of inadequate child support enforcement, and to observe the consequences of living without health insurance. But it cannot serve that function if no data are available.<sup>102</sup>

A handful of scholars, including my co-authors and myself, have collected data on all these topics.<sup>103</sup> The data reported in our collective work have helped form the basis of objections raised by women's groups

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<sup>100</sup> See, e.g., DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA (1999); LIMRA INT'L, 1999 LIFE BUYER STUDY U.S. (2001); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84 (2001).

<sup>101</sup> See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 54; HEIDI HARTMANN ET AL., EQUAL PAY FOR WORKING FAMILIES: A JOINT RESEARCH PROJECT OF THE AFL-CIO AND THE INSTITUTE FOR WOMEN'S POLICY RESEARCH (1999).

<sup>102</sup> Judith Resnik forcefully points out that what we do not ask, we cannot know. Judith Resnik, *Asking About Gender in Court*, 21 SIGNS 952 (1996). Her work with the federal courts to raise the issue of gender bias in a number of different settings is nothing short of extraordinary. She expands her inquiries in Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

<sup>103</sup> See, e.g., FRAGILE MIDDLE CLASS, *supra* note 30, at 35, 37 (reporting on the number of women filing for bankruptcy in 1981); AS WE FORGIVE, *supra* note 38, at 147–65 (reporting on the number of women filing for bankruptcy in 1991); Oliver B. Pollak, *Gender and Bankruptcy: An Empirical Analysis of Evolving Trends in Chapter 7 and Chapter 13 Bankruptcy Filings 1996–1997*, 102 COM. L.J. 333 (1998) (reporting on data collected about the number of women in bankruptcy every ten years from 1967 through 1997); Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Demographics of Chapter 7 Debtors*, ABI J., Sept. 1999, at 24 (collecting data on the number of women in bankruptcy in 1997); Teresa Sullivan & Elizabeth Warren, *The Changing Demographics of Bankruptcy*, NORTON BANKR. L. ADVISER 1 (Oct. 1999), (using Marianne B. Culhane & Michaela M. White's unpublished data on the proportion of women filing for bankruptcy in 1995; protocols for this study were reported in Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999)); letter from Thomas Neubig to Samuel J. Gerdano (July 19, 1999), *quoted in* Teresa A. Sullivan & Elizabeth Warren, *More Women in Bankruptcy*, AM. BANKR. INST. J., July 30, 1999 (unpublished data on the proportion of women filing for bankruptcy in 1997). For a longer view of the role of women in the bankruptcy system, see Karen Gross, Marie Stefanini Newman & Denise Campbell, *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1 (Jan. 1996) (reporting on the first women debtors in the United States).

about the pending bankruptcy legislation. But a few academic researchers, working episodically and without a steady source of funding, developing relatively modest samples of data are unlikely ever to penetrate the mainstream of conversation.

There is, of course, one well-funded source of data about the bankruptcy system: the credit industry. The industry has paid for its own studies, which it vigorously promotes, purporting to show that many of those who file for bankruptcy could pay their debts but are taking the easy way out with bankruptcy.<sup>104</sup> Those studies, not surprisingly, do not focus on women.<sup>105</sup>

Without a steady, independent source of information about the women who file for bankruptcy, the topic will remain an issue for specialists and those with a direct business stake in the shape of the laws. Bankruptcy will be about "debtors," about technical terms such as "cramdown," "lien-stripping," and "subordinated creditors"—not about jobs, health care financing, child support enforcement, or women.

### *E. Men, Money, and Image*

When bankruptcy cases are covered in the media, they are almost always big business cases—Chapter 11 reorganizations such as Enron rather than a run-of-the-mill consumer case. In those big cases, the lawyers, nearly all of the CEOs, the judges, the turnaround specialists, the economic analysts—in effect, all the decision makers who understand and run the system—are men.<sup>106</sup> When individuals file for bankruptcy,

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<sup>104</sup> Credit industry studies include: Ernst & Young, Chapter 7 Bankruptcy Petitioners' Ability to Repay: Additional Evidence from Bankruptcy Petition Files (Feb. 1998) (unpublished manuscript, on file with author); WEFA Group, The Financial Costs of Personal Bankruptcy (Feb. 1998) (unpublished manuscript, on file with author); *Repayment Capacity of Consumers in Bankruptcy: Testimony Before the National Bankruptcy Review Commission* (1997) (testimony of Michael Staten) (on file with author); *Repayment Capacity of Consumers Who Seek Bankruptcy Relief: Hearings before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee*, 105th Cong. (1997) (statement of Michael Staten, Director, Credit Research Center, Purdue University); *A Profile of Debt, Income and Expenses of Consumers in Bankruptcy: Testimony Before the National Bankruptcy Review Commission* (1996) (testimony of Michael Staten). The studies have been sharply criticized as unreliable both by the government and academics. See Warren, *supra* note 94.

<sup>105</sup> The credit industry made one foray into discussing women in bankruptcy, a letter to the Web site of the American Bankruptcy Institute by one of the co-authors of the credit industry study, Mr. Thomas Neubig. Letter from Thomas Neubig, Ernst & Young LLP, to Samuel J. Gerdano (July 19, 1999) *cited in* Sullivan & Warren, *supra* note 103, at 3 n.6. When a closer analysis of the data confirmed the sharp rise in the proportion of women filers, the credit industry representatives had no more to say on the subject.

<sup>106</sup> A systematic review of all the news stories on all the Chapter 11 bankruptcies will have to await another researcher, but a quick search produced two medium sized newspaper articles written by women that provided brief updates on two of the biggest pending bankruptcy cases. See, e.g., Brenda Sapino Jeffreys, *Plaintiffs Want Constructive Trust To Freeze Enron Trading Proceeds*, TEX. LAW. (Dec. 17, 2001) at 41 (identifying twenty people associated with Enron and its pending bankruptcy and ancillary law suits, eighteen

the stories that make the news are famous people: former Texas Governor and Treasury Secretary John Connally, actor Burt Reynolds, convicted financier Paul Bilzerian, real estate magnate Abe Gosman, convicted participant in the savings and loan collapse Marvin Warner, former star of *Diff'rent Strokes* Gary Coleman, Arizona Governor Fife Symington, Dallas Cowboys Quarterback Danny White, former baseball commissioner Bowie Kuhn, and country singer Willie Nelson.<sup>107</sup> Ordinary consumer bankruptcy receives relatively little media attention, so that much of what is written about bankruptcy reinforces the image of bankruptcy as a man's world. With the exception of the dithering females who cannot seem to figure out a budget,<sup>108</sup> the public image of bankruptcy remains largely male.

Consumer bankruptcies do involve a substantial number of men. In 2001, more than 1.2 million women came to the bankruptcy courts either to file their own bankruptcies or to file as creditors of their bankrupt ex-husbands. But along with those million-plus women were nearly 900,000 men.<sup>109</sup> Any changes in the laws will affect them as well. Men, like women, file for a variety of reasons. They lose their jobs, they cannot afford health insurance, they get sick, their businesses fail, they get divorced and cannot meet all their expenses, they fear that they will lose their homes and their cars. The presence of so many men in bankruptcy muddies the perception of whether bankruptcy is a women's issue.

There was a time when bankruptcy was the almost-exclusive province of men. In one of the only studies of the relative proportion of men and women predating adoption of the 1978 Bankruptcy Code, historian Oliver Pollak documented that nearly nine out of ten bankruptcy filers in 1967 and 1977 were men.<sup>110</sup> In 1978, the bankruptcy laws were amended to make bankruptcy more accessible to those in financial trouble, and men continued to dominate the bankruptcy system,<sup>111</sup> although the per-

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of whom were men); Jennifer Scott Cimperman, *LTV Corp. Names New Chairman; Former General Counsel Moran Assumes Leadership*, PLAIN DEALER, Dec. 14, 2001, at C1 (identifying twelve people associated with LTV Steel and its pending bankruptcy and ancillary business problems, eleven of whom were men).

<sup>107</sup> See, e.g., Mary Deibel, *Florida Refuge for Well-Off Debtors*, PATRIOT LEDGER, Oct. 25, 1997, at 26; Marc Peyser with Alison Samuels, *Gary Coleman Goes to the Poorhouse*, NEWSWEEK, Aug. 30, 1999, at 51; Jonathan Foreman, *The Freedom to Fail*, AUDACITY, Winter 1994, at 28; Beth Healy, *Abe Gosman Files for Personal Bankruptcy*, BOSTON GLOBE, Mar. 7, 2001 at D3; *Bankruptcy Loophole for Rich Outrageous*, WISC. ST. J., July 9, 2001, at A6.

<sup>108</sup> See, e.g., McGinn, *supra* note 92.

<sup>109</sup> There were an estimated 466,275 men filing for bankruptcies jointly with their wives and another 419,554 men filing alone. See Table 3: Households Filing for Bankruptcy, 2001, *supra* note 40.

<sup>110</sup> Oliver B. Pollak, *supra* note 103, at 338. Professor Pollak identified the sex for all the petitioners in a single district (Nebraska) in 1967, 1977, 1987, and 1996-97. *Id.* at 337.

<sup>111</sup> The adoption of the 1978 Code permitted a married couple to file jointly by paying only a single filing fee and filing only one set of papers. It is widely believed that before 1978 when married couples got into financial trouble the man, as the wage earner, filed for

centage fell back to about 80% by 1981.<sup>112</sup> Women are now the largest group in bankruptcy, with more than a million women affected by any changes that narrow the scope of the bankruptcy discharge or make Chapter 13 more inaccessible.

The sheer number of middle-class women who are in such economically desperate circumstances that they must file for bankruptcy should make bankruptcy a women's issue—indeed a preeminent women's issue. Moreover, the shift in the balance between men and women declaring bankruptcy should push bankruptcy near the top of the agenda for every politically and socially active woman. But both the perception of bankruptcy as a man's field combined with a significant number of men in the bankruptcy system make it an unlikely candidate for coverage as a pressing women's issue on *Oprah*, the *CBS Evening News*, *Time*, or the *Wall Street Journal*.

Business laws are gender-neutral. In other areas, the women's movement has fought a hard and largely successful campaign to eradicate legal barriers that are facially neutral but have a disproportionate impact on women—attacking, for example, “neutral” physical standards that bar women from police and firefighter jobs or pension rules that reduce payments to women. No serious scholar of women's rights is unfamiliar with the extensive litigation and debate of disparate impact. But with the image of bankruptcy dominated by men, and with no overt tie making it clear why women would be disproportionately at risk for bankruptcy, it is harder to make a convincing case that bankruptcy is a women's issue.

#### F. Left-Right Politics

Labels and stereotypes, however inaccurate or unfair, still matter in politics and in the way the news media cover politics. To people unfamiliar with the intricacies of the bankruptcy law, it is easy to see bankruptcy as part of a constellation of government support programs that provide a safety net for the less fortunate: welfare, medicaid, subsidized housing, food stamps. As such, its status as a political issue is not based on a realistic calculation of the economic effects on women, but rather on the larger debate about the role of the government. While this may in-

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bankruptcy and the wife, with no assets or income of her own, did not and the creditors did not bother with her. The pre-1978 records do not indicate which men were married or enough about their circumstances to determine whether a joint petition might be appropriate, so it is impossible to estimate how widespread this practice was. The high proportion of men in the system even after 1978 suggests, however, that the inability to bring wives into the system through a joint petition was not the only reason that the bankruptcy system was largely populated by men.

<sup>112</sup> See Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38. After 1978 when joint petitions were readily available for couples, men began to file with their wives. In 1981, 44.7% of the filings were husband and wife and another 33.2% were men filing alone.

crease the interest of some in bankruptcy issues, it makes the issue less appealing for conservatives. Women whose blood may run hot over issues of equal educational and job opportunities, violence against women, or divorce laws, but who are fiscal conservatives critical of an expanding economic role for the government, may see bankruptcy as just another government program in which benefits should be minimized.

The perception of bankruptcy as a “government program” is flatly wrong. Bankruptcy is about commercial debt and the allocation of losses among parties who enter into contracts voluntarily. Credit card issuers, mortgage lenders and car finance companies charge interest rates commensurate with the risks that their borrowers cannot repay. Thus far, the credit card issuers—those who stand to gain the most if the new bankruptcy law should pass—have done fairly well. Their net profits, after accounting for the cost of funds, advertising, bad debt write-offs *and* bankruptcy, have been more than twice as high as any other commercial lender.<sup>113</sup> In the past year, as the Federal Reserve has reduced interest rates so that the cost of funds for the companies has dropped, credit card rates charged to customers have not dropped nearly so quickly. The stickiness of the interest rates that credit card customers pay has created a \$10 billion windfall for the card issuers—without any change in their need to advertise for new customers or take on new risks.<sup>114</sup>

But the same credit card lenders raking in huge profits have continued to lead the charge in Congress to demand that the bankruptcy courts take a more active role in debt collection, providing the financial screening that the card issuers themselves refuse to supply. The proposed bankruptcy legislation would include a means test, requiring courts and trustees to make a highly detailed examination of each debtor's expenses and sources of income before granting the debtor access to bankruptcy relief.<sup>115</sup> The inquiry imposed on trustees and judges is far more exten-

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<sup>113</sup> Credit card lending has remained about twice as profitable as other forms of lending, even as consumer bankruptcies have climbed. The Federal Reserve Board documented the high profitability of credit card lending, noting, for example, that in the 2000 credit card banks showed a 3.14% return on assets, compared to a 1.81% return on assets reported by all commercial banks. FED. RESERVE BD., *THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 2* (2001), available at <http://www.federalreserve.gov/boarddocs/rptcongress/>. The longer-term trends for greater profitability for credit card issuers was identified in Lawrence Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249 (1997).

<sup>114</sup> Cecily Fraser, *A \$10 Billion Windfall: Credit Card Lenders Don't Pass On Full Interest-Rate Cuts*, at <http://www.cbs.marketwatch.com> (Oct. 3, 2001) (“about twenty-five percent of cards offering variable interest rates have a minimum, or so-called floors, to ensure rates don't dip below a certain price”). It seems that the fine print in many credit card agreements calls for customers to pay more as interest rates climb, but not fall below certain pre-set levels when interest rates fall. The last nine interest rate cuts by the Federal Reserve have not affected most fixed rate cards and have had only modest effects on variable rate cards. As the low Federal Reserve rates persist, the windfall for credit card issuers will grow.

<sup>115</sup> See S. 420, 107th Cong. § 102 (2001); H.R. 333, 107th Cong. § 102 (2001).

sive than any credit card company currently conducts when it issues pre-approved credit cards and increases credit limits. The costs of this additional scrutiny will not be borne by the highly profitable credit card companies that will reap the rewards; instead, the tax payers are expected to shoulder this burden.<sup>116</sup> Ironically, economists predict that if the bankruptcy laws are changed, *more* families will get into trouble with debt because consumer lenders will have even fewer incentives to weed out the riskiest customers because the lenders will know that even the weakest borrowers will have less access to bankruptcy.<sup>117</sup> In addition, the current bankruptcy bill is designed to change the bankruptcy rules for tens of millions of loans already outstanding—loans that bear interest rates set to reflect current bankruptcy laws.<sup>118</sup> The staunchest fiscal conservatives should be appalled by the way the pending bankruptcy legislation plans to shift costs from private companies to the taxpayer.

To be sure, there are connections between government programs and bankruptcy. If the government provided health insurance for children, for example, hundreds of thousands of families would never file for bankruptcy. If states offered more generous unemployment benefits, bankruptcy filings would fall off sharply. If the Federal Reserve adopted more aggressive regulations over predatory mortgage financing, tens of thousands of families that file for bankruptcy to try to save their homes from unscrupulous lenders would be spared. Because so many families file for bankruptcy after they have encountered unemployment, crushing medical bills, and deceptive home mortgages, bankruptcy can be thought of as part of America's social safety net. When other government programs and regulations fail, bankruptcy often serves as the last resort for families in trouble, a last chance to save a home or to stabilize themselves financially.

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<sup>116</sup> Currently, the bankruptcy system covers approximately half its costs from user fees, but the remaining expense must be met from general tax revenues. Memorandum from Jarilyn Dupont, Executive Director/General Counsel of the National Bankruptcy Review Commission, to National Bankruptcy Review Commission Members, Financing the Bankruptcy System, Feb. 7, 1996, at 3 (on file with author) [hereinafter Commission Memorandum]. Any new costs imposed by the pending legislation, particularly the complex means test, would presumably all come from tax revenue. The GAO scored just one portion of the bill for estimated costs. It concluded that, unlike the current system, implementation of the means test would impose \$333 million over 2000–2004, while it would decrease the government's fee receipts by \$4 million. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE, H.R. 833 BANKRUPTCY REFORM ACT OF 1999 (May 5, 1999), available at <http://www.cbo.gov/showdoc.cfm?index=1246&sequence=0&from=6>. The shortfall would be left to the taxpayer.

<sup>117</sup> See, e.g., Ausubel, *supra* note 113, at 251; David Moss and Gibbs Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311 (1999). Ausubel, Moss and Johnson argue that laws that give creditors greater leverage to collect debts reduce the lenders' incentives to screen customers carefully for repayment ability before they extend credit.

<sup>118</sup> The proposed changes would be applicable to all cases filed after the date of implementation, regardless of when the loans were actually incurred. S. 440, 107th Cong. § 1501 (2001).

But bankruptcy is the privately funded part of the social safety net. No debtor gets a handout or a government guaranteed loan from the bankruptcy court. Indeed, a large portion of the services of the bankruptcy court system today are currently paid for by user fees, minimizing the system's financial impact on the taxpayer.<sup>119</sup> The Bankruptcy Code requires that taxes and government supported student loans be repaid in full,<sup>120</sup> along with child support,<sup>121</sup> so that a family's losses in bankruptcy should fall primarily and proportionately on their voluntary creditors who had the chance to assess their financial stability before lending. The bankruptcy system helps discipline both borrowers and lenders. Bankruptcy denies lenders the opportunity to squeeze families until some give up their jobs and live on welfare or flee to the underground economy where their creditors cannot find them, but neither can the taxing authorities or those trying to collect child support. In short, bankruptcy makes sure that the effects of lending decisions are borne by the lenders themselves, not by the rest of us.

Tangling bankruptcy with left-right politics undercuts some of the political support that bankruptcy should receive, but it also illustrates a larger problem for identifying women's issues. Are all women's issues exclusively issues of the political left? Does "feminist" mean both social liberal and fiscal liberal? The political left has been quickest to embrace a host of issues important to women, but they have not had an exclusive franchise on such women's issues as education reform and safety. Bankruptcy is just one of a series of business-oriented issues that should be analyzed as women's issues but get mired instead in stylized left-right political paradigms that offer much heat but little light.

#### CONCLUSION

Senator Biden supports legislation that will fall hardest on women, particularly on women trying to rear children on their own. Why? The answer will have to come from him, if any reporter or constituent presses on this question. There is an unavoidable suspicion, however, that he supports the financial industry's legislation because there is no political disadvantage to supporting it. Bankruptcy is sufficiently arcane, sufficiently obscure that it is possible for an otherwise respected legislator to support legislation that, over the next decade, will make it more difficult for millions of women to keep their homes, feed their children, and deal with bill collectors. Senator Biden can publicly support one very visible piece of legislation on behalf of women, satisfying his duty and assuring

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<sup>119</sup> Commission Memorandum, *supra* note 116, at 3. The bankruptcy courts are far more self-sustaining than other courts in the federal system; 85.3% of all the revenues collected by the federal courts come from various bankruptcy filing fees. *Id.* at 3.

<sup>120</sup> 11 U.S.C. § 523(a)(8) (2001).

<sup>121</sup> 11 U.S.C. § 523(a)(5) (2001).

the loyal support of millions of women. He is then free to be a zealous advocate on behalf of one of his biggest contributors, the financial services industry, and still position himself as a champion for women.

This Essay notes one way in which a dull financial topic is relevant to women and how the failure to attend to its relevance will put millions of women at risk over the next decade. I have not exhausted the list. The scope of Article 9 security interests can affect recoveries by tort victims. Collective bargaining agreements can be rewritten in Chapter 11. Environmental clean-up obligations can be avoided by the careful use of asset securitization. Retirement funds can be depleted by aggressive manipulation of generally accepted accounting principles.

Women who win judgments against large corporations need to understand how to structure their payments and protect their clients from discharge in bankruptcy. Women who plan business transactions need to know how to protect employees and retirees. Women who monitor environmental compliance need to recognize how financial structuring can affect legal liability. In short, business law is not just for business, or just for men.

In my bankruptcy and commercial law classes, I have many students interested in business. Most expect to go to large law firms and practice law on behalf of large corporations; others plan to become deal makers or turnaround specialists. But the classes rarely attract more than a handful of students who are more interested in social policy questions and a career outside a corporate law firm or consulting company. Students often speak of a business/public interest dichotomy in the scholarly and career choices they make.

The dichotomy is false. It is not possible to remain ignorant of business and commercial law and become an effective advocate for social issues. Anyone attempting significant social change without a thorough grounding in business and commercial law is handicapped. To accomplish real change in many areas, advocates will need to understand the causation, implementation, and collection issues that deeply implicate business practices and commercial laws. If few students interested in women's issues train themselves in commercial areas, the effects of the commercial laws will not be diminished, but there will be few effective advocates around to influence those policy outcomes. If women are to achieve true economic equality, a far more inclusive definition of a women's issue must emerge among women's advocates.

With this issue, the *Harvard Women's Law Journal* marks twenty-five years of encouraging debates on women's issues, expanding the range of subjects discussed and acting as a catalyst for change. It is appropriate to celebrate what the editors and authors have accomplished, but it is no less important to identify the work that remains to be done—and to set about doing it.