IN THE REGULATION OF MANMADE CARCINOGENS, IF FEASIBILITY ANALYSIS IS THE ANSWER, WHAT IS THE QUESTION?

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I

For more than a generation, cancer has been America’s most feared disease. Cancer deaths are frequently long, debilitating, and inexcusable. In addition to its toll on its immediate victims, cancer brings extended grief and, all too frequently, financial disaster to the families of its victims. In the early part of this century, the disease was not so singled out for attention — tuberculosis, polio, bubonic plague, malaria, and measles all competed with cancer for attention as public health problems and for primacy in each citizen’s private economy of dread. Now, medical science has largely mastered treatments and preventions for these other diseases, leaving cancer with fewer competitors.1 Eliminating these rival sources of death has done more than simply leave cancer with fewer challengers; because people no longer die of these other afflictions, our life-spans have been increased sufficiently so that cancer, typically a disease of the middle-aged and elderly, has a much greater opportunity to claim its victims (pp. 17-18).

Americans are convinced that our advances in science play another major role in cancer causation, thereby contributing to its prominence as a public concern in yet another way. Numerous chemicals now used throughout the American economy have been linked to cancer, either through epidemiological studies of groups with an abnormally high incidence of cancer, especially workers in chemical and chemical-related industries, or through laboratory experiments on animals. Many of these chemicals, such as the synthetic hydrocarbons that form the basis of the plastics industry, were literally unknown to the planet before the Second World War. Others, like asbestos, were not a substantial problem until industrial uses dramatically expanded their

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1. Recently Alzheimer’s disease and, even more recently, AIDS have begun to rival cancer as sources of fear and unease among the general population.
dissemination. By virtue of scientific advance, we are guilty of fouling our own nest in an especially dreadful way. 

Given the vast positive contributions of postwar technology to our modern standard of living, such manmade sources of cancer might have emerged in our social and cultural constructions as the grim but inevitable product of a bargain struck so that we might reap the benefits of the Chemical Age. In fact, this is not at all how the problem of manmade carcinogens is perceived. Most Americans do not associate the responsibility for such sources with the “us” of the Pogo comic strip. Instead, they see villains and victims, those who have reaped the benefits and those upon whom cancer has been imposed. There are just enough stories around of companies suppressing evidence of cancer risks or acting in apparent disregard of substantial risks to fuel the perception of manmade chemicals as the victimization of the American populace.

Substantial fear of bodily harm, combined with a perception that some other persons are responsible, produces enormous pressure for governmental action and legal redress. While conventional tort litigation is an obvious starting place for such redress, cancer has proven highly resistant to the established doctrines of tort and nuisance. Even if common law tort actions had proven more adequate, political entrepreneurs would probably have packaged legislative proposals to address cancer fears. As it was, the overwhelming failure of tort to assuage Americans’ sense of indignation virtually ensured a large volume of legislation aimed at the cancer risk. In the past twenty-five years, Congress has written a vast array of legislation aimed at reducing exposures to manmade cancer agents.

Perhaps a vast disarray of legislation would be a more apt description. Throughout this past quarter century, politicians, industry, environmental organizations, and federal agencies have been struggling to define an appropriate policy toward manmade carcinogens. The result of all this “policymaking” has been a patchwork of some twenty or so separate statutes that exhibits few unifying principles. Its burdensome

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2. “We have met the enemy, and he is us.”

3. See, for example, the account of the asbestos industry’s apparent coverup of medical concerns about exposure to airborne asbestos in P. Brodeur, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985).

4. To date, the most intractable obstacle has been the requirement that a plaintiff be able to prove cause-in-fact by a preponderance of the evidence. Given our present inability to link cancer to specific causes, the typical cancer plaintiff will be unable to sustain that burden. The more we learn about cancer etiology, the more difficult it becomes to isolate single causes. See, e.g., pp. 3-16. Critiques of tort’s cause-in-fact requirement, proposals to reform that requirement, as well as analyses of other doctrinal obstacles facing the typical cancer plaintiff, are extensive. In addition to pp. 161-217, see, for example, Farber, TOXIC CAUSATION, 71 MINN. L. REV. 1219 (1987); Ginberg & Weiss, COMMON LAW LIABILITY FOR TOXIC TORTS: A PHANTOM REMEDY, 9 HOSTRA L. REV. 359 (1981); Rosenberg, THE CAUSAL CONNECTION IN MASS EXPOSURE CASES: A “PUBLIC LAW” VISION OF THE TORT SYSTEM, 97 HARV. L. REV. 849 (1984); Robinson, PROBABILISTIC CAUSATION AND COMPENSATION FOR TORTIOUS RISK, 14 J. LEGAL STUD. 779 (1985).
and sometimes conflicting mandates have created a Gordian knot that administering agencies have been largely unable to cut. Agencies have been slow to regulate any manmade chemicals at all; they have apparently ignored serious risks while acting against relatively trivial ones (p. 126), and the regulations they have produced bear no consistent relationship to one another or to any discernible principle of regulatory decisionmaking. Some fair portion of their energies are dissipated attempting to torture impossible statutory commands into some defensible course of action that comports with “administrative reality” (p. 129). In short, statutory implementation can best be characterized as one of “delay, ineffectiveness, and inconsistency” (p. 129).

Among the more puzzling attributes of this regulatory disarray, federal cancer laws employ several fundamentally different regulatory techniques. In *Environmentally Induced Cancer and the Law*, Frank Cross identifies four such techniques, or “paradigms” for cancer control — “zero risk,” “significant risk,” “cost-benefit analysis,” and “feasibility analysis” (p. 69). Some of the important differences between these techniques can be illuminated by treating them as instances of three more general categories. Thus, zero risk and significant risk are members of the broader category of health-based standards, cost-benefit is a special case of balancing standards, and feasibility analysis is a technology-based standard.

Health-based standards mandate that exposure levels be set to ensure against stipulated health risks or adverse environmental effects. The process of setting permissible levels under health-based standards theoretically ignores the costs of complying with them. Such stan-

5. See, for example, Cross’s description of divergences of approach and policy by the Consumer Product Safety Commission, the Environmental Protection Agency, and the Occupational Safety and Health Administration in deciding whether and how to regulate formaldehyde. P. 102, 122, 126.

6. Indeed, this is a puzzle that extends to pollution policy generally, not just to cancer policy. See, e.g., McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, LAW & CONTEMP. PROBS., Summer 1983, at 159.

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9. Nonhuman health, environmental, or public welfare effects are relevant to the standard-setting process under many of the statutes that regulate carcinogens, but the human health effects largely dominate the debate over appropriate levels of control, so we can designate these statutes as “health-based” without much loss of descriptive accuracy.

10. For instance, the Clean Air Act requires the EPA to set ambient air quality levels for the most widely prevalent air pollutants at a level requisite “to protect human health.” When Congress has clearly instructed the EPA to ignore costs, the courts have upheld the instruction. See, e.g., Lead Indus. Ass’n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980). See generally TVA v. Hill, 437 U.S. 153 (1978).
ards can be pegged to different levels of protection. Cross’ zero-risk paradigm seeks to eliminate the risks of all adverse health effects, while the significant risk approach reduces risk levels not to zero, but down below the level determined to be significant to society.

Sometimes statutes instruct the agency to balance the benefits of controls against the costs of installing such controls.\textsuperscript{11} None of the federal balancing statutes requires agencies to conduct a fully quantified cost-benefit analysis; instead, they leave to the agency’s discretion the politically sensitive task of specifying the details of how this “balance” is to be struck.\textsuperscript{12} Still, Cross’ paradigm of cost-benefit analysis is the specific balancing method that draws the most attention. Devotees often use it as the ideal toward which all our regulatory efforts should tend, while critics, especially environmentalists, treat it as their primary enemy.

Health-based standards peg regulation to desired health risk reduction while ignoring the costs of achieving those reductions; balancing standards compare those reductions with such costs. The third basic type of standard concentrates on costs and ignores health risk reductions. Such approaches can be labelled technology-based, because the level of pollution control depends on analyses of technology that might be employed to abate or control exposure. As with health-based standards, it is possible to calibrate technology-based standards to various levels of stringency, sometimes by specifying how much cost the industry is to bear, sometimes by limiting the sophistication of the technology upon which the standard will be based. Regulatory statutes that deal with toxic chemicals and carcinogens by employing a technology-based standard typically require allowable discharges to be set at the level achievable by employing the best available technology that the target industry can afford to install. Cross terms this approach “feasibility analysis.”\textsuperscript{13}

\textsuperscript{11} See, e.g., the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(bb) (1988) (requiring the EPA to ensure that approved pesticides not pose “unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [their] use”).

\textsuperscript{12} While the balancing statutes enacted by Congress do not mandate quantified cost-benefit analysis, Executive Order 12,291, signed by President Reagan in 1981, does mandate that major federal rules be preceded by a Regulatory Impact Analysis that identifies benefits and costs and that chooses the regulatory option that maximizes net benefits to society. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. § 601 app. at 473-76 (1988). Because maximizing net benefits seems to require as fully quantified a cost-benefit analysis as possible, E.O. 12,291 and its implementation by the Office of Management and Budget have been taken to establish a presumption in favor of quantification. See DeMuth & Ginsburg, White House Review of Agency Rulemaking, 59 Harv. L. Rev. 1075 (1986).

\textsuperscript{13} An example of a different technology-based standard is the “best practicable control technology currently available,” which water pollution dischargers were required to install by 1977. See 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(1)(A) (1988). This standard requires industries to employ existing pollution control technology to reduce water pollution discharges until the costs of removing additional increments become “wholly out of proportion” with the costs incurred to remove earlier increments. See Weyerhaeuser v. Costle, 590 F.2d 1011, 1045 n.52
When applied to any particular pollution problem, these three basic approaches lead to three different levels of pollution control, sometimes to three wildly divergent levels of control. Much of the sense of confusion attending federal regulation of carcinogens, and a great deal of the inconsistency in regulatory actions taken by federal agencies, can be attributed to the concurrent existence of these incongruent approaches, with no clearly articulated explanation for when each of them is most appropriate. Not only do they deprive our cancer prevention efforts of any coherent justification, the way some of them have been implemented by federal agencies has contributed to the delay and inactivity characterizing our regulatory efforts.14

II

Cross seeks to bring some order and common sense to this general picture by injecting an element of realism and pragmatism into it (p. xv). To begin, he depicts cancer policy as stalemated between two unrealistic extremes. On one side stands a cadre of “zealous environmentalists” who insist that the zero-risk strategy is the only one acceptable to deal with a cancer epidemic. Cross thinks this position is ultimately “ridiculous” because it fails to recognize that social needs other than cancer avoidance also make valid claims on scarce resources (pp. 69, 71). In Cross’ view, the ability of zero risk to gain any audience is attributable to its advocates’ misinforming the public about the magnitude of the cancer risk.

To set the record straight, he marshals evidence showing that America’s fear of the manmade sources of cancer “has been exaggerated considerably” (p. 17). Statistics show that death rates for most cancers in the United States have actually declined in this century, once the data have been adjusted to account for the aging of the population. The singular exception is lung cancer, the one cancer whose dominant cause is acknowledged to be a “life-style” choice — smoking — and not any industrial pollution or discharge (pp. 18-19). In fact, the widely publicized notion that ninety percent of cancers come from “environmental causes” trades on a misunderstanding of the original study that first drew this conclusion. That study employed the term “environmental” very broadly, to include such life-style factors as smoking and dietary practices in addition to manmade pollution (pp. 18-19). Cancers caused by the dissemination of manmade chemicals are actually a distinct minority of the cancers that occur in the United States today. The leading comprehensive study on the subject concludes that less than ten percent of current cancers are attributable to

14. See pp. 97-133 (discussing implementation efforts).
pollution, food additives, pesticides, and occupational exposures. In Cross's view, this "realistic" appreciation for the magnitude of the problem ought to modulate society's urge to remove all such risks from the environment, a position he regards as "too facile" and ultimately ineffective (pp. xiv-xv).

This does not mean, however, that there are no legitimate grounds for demanding that manmade causes be reduced from their current levels. Although the cancer situation is not as dire, in historical perspective, as commonly supposed, and although manmade sources are not the entire explanation of the danger that does exist, frequently cancers caused by manmade sources are preventable. So another "extreme" position rejected by Cross is the do-nothing position of "representatives of industry [who] seek[] to avoid all regulation" (p. 142). The ambition of federal policy, Cross concludes, ought to be to steer a moderate course between zealous environmentalists, who want all risk from manmade sources eliminated, and industry leaders, who want no regulation at all (pp. 142-47). "[S]ociety's optimal response to the problem lies between these two poles" (p. 15).

Having stripped away the extremes, Cross advances a number of "pragmatic" reform suggestions to move in a moderate direction and hence improve federal regulatory performance. He still has at his disposal three of his four initial regulatory paradigms, one from each of the more general categories referred to a moment ago: significant risk, cost-benefit analysis, and feasibility analysis. Any of these three paradigms might serve a policy of moderation, because all of them lie somewhere between the extremes of zero risk and no additional controls.

In perhaps the most interesting proposal of the book, Cross argues that federal regulatory policy should primarily rely upon feasibility analysis (p. 90). Regulation based on feasibility analysis, he says, is superior to the other two for an apparently simple reason: whenever federal agencies have utilized feasibility analysis to mandate the "use of available, effective technology to reduce exposure to carcinogens as far as reasonably possible," this approach to regulation has proven the "most effective" (pp. 90, 147).

In reaching that judgment, Cross relies heavily on our twenty-five-odd years of experience in trying to implement statutes that employ different versions of the three basic types of regulation. By attending to the lessons of history, he suggests, we can improve on our current regulatory patchwork, which has supplied us with real-world experience with each major type of regulation. That experience seems to

16. Pp. xiv-xv. The concluding portion of the book addresses tort reform. This review focuses on his critique of the federal regulatory system and his proposals for its reform.
reveal a pattern: when agencies operate under the mandate of technology-based controls, they are able to write a higher volume of regulations, have those regulations survive court challenges, and subsequently see them through to implementation by affected industries, as compared to insubstantial progress when they use either health-based or balancing approaches.\textsuperscript{17}

Learning from our regulatory experience is both possible and essential. By presenting a skillful summary of an extraordinarily complex past, Cross contributes importantly to that process. The book’s lessons from history do not, however, provide sufficient support for the choice of feasibility analysis, in part because such history lessons are inherently equivocal, a point to which I shall return in a moment.\textsuperscript{18} Even assuming that history speaks with one voice, what we hear from that voice will depend upon what we want it to say. When we mine history for its “lessons,” as we do when seeking guidance concerning contemporary public policy issues, we inevitably bring some vision of normative order or desirable practices to our reading. \textit{Environmentally Induced Cancer and the Law}, although an impressive book, ultimately does not succeed in presenting a compelling case for feasibility analysis because it fails sufficiently to articulate the desirable goals that environmental policy ought to serve. The following section amplifies on this point.

III

No regulatory technique is immune from criticism, as Cross clearly knows. The chapter in which he critiques each of his paradigms is the most thought-provoking of the book (pp. 69-95). That being the case, the choice of one over the others must depend upon which combination of advantages and disadvantages supplies the best mix. Policymakers in this field, in other words, must necessarily be “quasi-utopians,” interested not in “perfection but [in] tolerable imperfection, tolerable because it is better than anything else they consider attainable though not nearly as good as lots of alternatives that can be imagined.”\textsuperscript{19} This much is surely consistent with the book’s call for a pragmatic approach.

However, the book fails to confront an underlying difficulty. Ascertainment of which of several options is “better” demands some criterion

\textsuperscript{17} See pp. 97-134. Cross’ excellent summary of regulatory experience concentrates on carcinogens. Other scholars have examined federal pollution policy more broadly, including experience in regulating common air pollutants and toxic and conventional water pollutants. They have reached similar conclusions. See, e.g., Latin, \textit{Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine-Tuning” Regulatory Reforms}, 37 \textit{Stan. L. Rev.} 1267 (1985); McGarity, supra note 6.

\textsuperscript{18} See \textit{infra} text accompanying notes 36-38.

of betterness, some principle that might be used to determine which among the imperfect options is better. Consider some possibilities. We might select one legislative option over another for reasons of simplicity, because it can be more easily administered, because it has more favorable distributive consequences, because we find it most compatible with other national programs or objectives, or because we think that it best treats individuals as ends and not as means. 20 In other words, legitimate criteria for law are diverse. We might organize the sorts of disagreements people can have over law by organizing the sorts of reasons for valuing law into general categories. For instance, people support laws for consequentialist reasons, for their ability to produce good results. People also support laws for duty-based reasons, because they believe the laws discharge social obligations or enforce private ones, irrespective of whether the resulting external effects are judged good or bad. Laws can also be seen as expressing values, as signifying or embodying some quality or concern. Each of these criterial categories, the consequentialist, the duty-based, and the expressive, deals in contested concepts and values. The supporters and the opponents of federal legislation banning flag-burning, for example, disagree about what social message laws respecting the flag should express. The dispute over “reparations” as a basis for civil rights legislation is largely a dispute over what society’s obligations are. When experts on special education argue the desirability of “mainstreaming,” they are often debating whether the anticipated effects of a law mandating such mainstreaming are desirable or not.

One reason laws are disputed is that people have disagreements within each category, disagreeing about what consequences ought to be pursued, what duties discharged, or what values expressed. Normally, maybe always, the arguments advanced for and against laws will also span across the categories. Lawmaking involves what Thomas Nagel has termed the unity of action and the fragmentation of value, 21 because single acts of legislation raise a multiplicity of value concerns. Our modern society is closely identified with dissensus over values, which is why Nagel refers to the phenomenon as a fragmentation. When we turn to law, this phenomenon ensures an additional source of disagreement, for it is to be expected that even if we could agree on a menu of legitimate values, we lack consensus on how to reconcile conflicts among them. Many people agree, for instance, that the exclusionary rule vindicates a social ideal that police and courts treat suspects fairly; they also agree that the rule operates to insulate some guilty criminals from successful prosecution. One value cuts in favor of the rule, the other against. One reason the rule is controversial is that we agree neither on the magnitude of these countervailing

20. See generally McGarity, supra note 6, at 200-33.
phenomena nor on how to reconcile the clash so as to reach the proper judgment, all things considered.

Within contemporary society, it seems highly implausible that we might reach agreement in any area of significant social policy on legitimate ends or objectives and on how to resolve any conflicts among those ends or objectives. From our present perspective, the idea that ideological lions might lie down with ideological lambs would seem to qualify as one definition of utopia itself. Even if we achieved that much utopia, however, policymakers might still have to be quasi-utopian actors. We might still face a variety of possible means to accomplish stipulated ends and, hence, the need to make comparative judgments among them. Everyone may agree, for example, that directors of corporations should be prevented from making unduly profitable deals with their corporations because of their fiduciary obligations to shareholders, and yet some might urge that this norm be enforced by prophylactic prohibition of all such deals, while others might support case-by-case challenges to rescind deals thought to be unfavorable to the corporation. In any world in which implementation technologies are imperfect, we will still need some criteria for selecting among imperfect options.

None of this is startling; in fact, policymaking has probably always operated in a context where all this disputing — within the various categories of value, among conflicting values, and about how to put into effect a stipulated agenda or menu of ends — is assumed to exist. "Policymaking" has been defined as the "reconciliation and elaboration of lofty values into operational guidelines for the daily conduct of society's business,"22 a definition plainly broad enough to encompass all of this.

In the modern administrative state, however, we see a recurring effort to suppress some of these disputes. The crucial move here is to divide policymaking into two distinct parts, the value-laden and the value-free, and subsequently to treat the first as a "political" and the second as a "scientific" activity. As played out in the normal science of "policy analysis" or "public administration," this division of labor seeks to provide policy analysts with a secure professional niche. Theirs will be the task of studying implementation possibilities and problems, and of recommending successful strategies to the political officials who are charged with formulating the agenda of ends or objectives. The goal is to isolate the business of determining "operational guidelines" from that of "reconcil[ing] and elucidat[ing] . . . lofty values."23

This strategy proves to be incoherent. Any "science" brought to

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23. Id.
policy will come with its own normative baggage, its own set of ends and objectives, which may or may not be compatible with the social objectives determined by the political branch.\textsuperscript{24} Science frequently operates, for example, by virtue of simplifying and modeling complex phenomena. This results inevitably in foregrounding certain aspects of those complex phenomena, while backgrounding others. Especially common is the effect that quantification has of "dwarfing soft variables," meaning that certain values that are difficult to quantify, such as dignity values and expressive values, are overshadowed by the more readily quantifiable information, such as economic effects.\textsuperscript{25}

Just this line of argument has been vigorously advanced by some opponents of the cost-benefit paradigm, one of Cross' three candidates for implementing a moderate cancer policy.\textsuperscript{26} Cross might have used this critique in order to establish a point of superiority for feasibility analysis, but he does not. Doing so would require endorsing a normative order that gives significant weight to the soft variables dwarfed by the machinery of cost-benefit analysis. In resting the case for feasibility analysis so heavily on its effectiveness, but subsequently failing to articulate toward what end that paradigm is the most effective instrument, Cross seems to be trying to stay on the science side of the politics/science division as exclusively as possible, which means trying to discuss implementation issues without reference to the substantive ends, values, or objectives being implemented.\textsuperscript{27}

Now it is probably impossible to discuss implementation issues without at least mentioning ends, if only in passing. The book does contain a few such "mentions," but fleshing them out fails to strengthen the case for feasibility analysis. In the preface, for instance, we are told that "[g]overnment's first task is to prevent environmentally induced cancer, insofar as possible, through such regulatory organizations as the Environmental Protection Agency" (p. xiv). While

\textsuperscript{24} One of the early pieces, still among the best, developing this theme is Tribe, \textit{Policy Science: Analysis or Ideology?}, 2 PHIL. & PUB. AFF. 66 (1972).

\textsuperscript{25} A second objection to the politics/science dichotomy is that it ignores the degree to which scientists operating in policy-relevant fields must make assumptions or judgments not themselves supported by scientific consensus or experimentation. Critics of the division argue powerfully that these judgments should not be left on the science side of the divide, and that policy will be vulnerable to illegitimate manipulation if it fails to recognize this. See, e.g., Latin, \textit{Good Science, Bad Regulation, and Toxic Risk Assessment}, 5 YALE J. ON REG. 89 (1988).

\textsuperscript{26} E.g., Latin, supra note 17.

\textsuperscript{27} Should policy scientists find that choices among implementation devices raise further conflicts among ends or objectives, as they almost universally do, the analyst has an out. She can highlight the dispute, treat it as an unresolved issue, and refer the matter back to the political side of the divide for its resolution. In practice, policy analysts make \textit{sub rosa} value judgments at many different points in their analyses, which is one compelling reason not to permit the complete separation of political accountability from professional expertise. See, e.g., G. BENVENISTE, \textit{The Politics of Expertise} (2d ed. 1977). For an excellent analysis of the tendency for science and social values to become intertwined, even when the "hard" sciences are involved, see Latin, supra note 25.
this statement might be taken as expressing an end or goal for environmental policy, treating it that way raises more questions than the book answers. First, regulating "insofar as possible" is not defended in the book on anything other than instrumental grounds. Second, were regulation insofar as possible the proper end of policy, then feasibility analysis, which requires regulation to the limits of technological feasibility, would seem to be the most logical method to achieve that goal, whereas Cross clearly thinks such an approach is illogical, "perhaps the most illogical risk management approach."[28] "[C]omplete reliance on feasibility analysis," Cross says, "is logically unsound" (pp. 92-93).

Elsewhere, Cross writes that "[i]f government is to prevent cancer, it must know the causes of cancer" (p. 1), and that "[a]n understanding of the context of environmentally induced cancer will enable the law to better fulfill its preventive and compensatory role" (p. 2). Perhaps the prevention of "potentially preventable cancers" is the goal of policy (p. 2). If so, then the "most effective" regulatory instrument would be the one that prevented the highest number of cancers.

Cancer prevention is a wildly popular and clearly legitimate objective, but it cannot supply the critical purchase necessary to support the claimed superiority of feasibility analysis. If cancer prevention stood alone as our social objective, we could accomplish that most directly by simply shutting down the chemical industry immediately.

Indeed, if cancer prevention is the goal, then what of those "zealous environmentalists" who support the zero-risk paradigm, but whose arguments — while "rhetorically" powerful — ultimately "appear[,] somewhat ridiculous" (pp. 69, 70, 71), and whom Cross accuses of "incorrect, irresponsible and ultimately self-defeating" exaggerations of the magnitude of the manmade carcinogen problem (p. 36)? Their objective turns out to be the right one, after all. This is not at all what Cross advocates. The reason that it is even possible to reach such a conclusion stems from an ingredient missing from the book's argument. Any regulation short of the zero-risk paradigm depends upon there being some countervailing value, one that conflicts with pure cancer prevention, that merits a role in policy formation. Cross needs such a value to make his case against zero-risk, but the book fails to articulate one clearly. We are told we need moderation, but moderation describes a capacious territory, and any of the three regulatory paradigms can be designed to fit within it. In order to determine which does a better job, we need to know some goal a moderate policy should serve, and hence why moderation seems advisable.

In the most general of terms, we know, of course, that the competing value has something to do with the costs of obtaining cancer prevention. Unfortunately, that general thought starts us down the road

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28. P. 147. The reasons feasibility analysis is "illogical" are discussed later in this review. See infra Part IV.
to yet another conclusion that Cross doesn’t want us to draw, for it seems to suggest the use of a balancing approach of some sort — even cost-benefit analysis itself — as an appropriate basis for cancer policy.

Actually, selected passages in the book can make one think that Cross isn’t terribly hostile to that conclusion. Cost-benefit analysis has been frequently faulted for requiring data that is, practically speaking, often unavailable and that, when available at all, is subject to manipulation by industry interests. Yet Cross brushes such objections aside, quoting with approval Aaron Wildavsky’s aphorism, “better a flawed economics than a bogus politics.”29 Cross acknowledges other criticisms of cost-benefit analysis, such as the complaint that it has ethical shortcomings, especially in its willingness to put a price on human life, yet he concludes that “[c]ost/benefit analysis is neither inherently ethical nor inherently unethical” (p. 84). Rather, cost-benefit analysis is flexible enough to accommodate all sorts of moral and ethical values, should the analyst be instructed to incorporate them.30 After a review of all the standard objections that are raised against using cost-benefit analysis to decide matters of public health and safety, Cross still concludes that this paradigm is the only approach that “recognizes the full range of implications that may result from government control of carcinogens.”31

With this as the case “against” cost-benefit analysis, one wonders why it has been rejected. Its major shortcomings seem to be data availability and manipulability. Yet as Professors Ackerman and Stewart have suggested, the former can be addressed by adopting some simplifying assumptions and best guesses, pressing all the time for better information.32 As for the latter, it is not obvious that cost-benefit analysis suffers from this deficiency to any greater degree than the other paradigms.33

29. P. 85 (citing A. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICYMAKING 156 (1979)).

30. Cf. Leonard & Zeckhauser, Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy, in VALUES AT RISK 31, 42 (D. MacLean ed. 1986): “[N]ot every important social value can be represented effectively within the confines of cost-benefit analysis. Some social values will never fit in a cost-benefit framework and will have to be treated as ‘additional considerations’ in coming to a final decision. Some . . . may be binding constraints.”

31. P. 89. Elsewhere, Cross indicates that he finds the approach of welfare economics to environmental problems the most cogent in theory. Cross, Natural Resource Damage Valuation, 42 Vand. L. Rev. 269, 283-84 (1989).


33. Technology-based standards generally are highly dependent upon industry supplied information on technological capability, installation and operating costs. This provides industry ample opportunity to manipulate or obstruct. A study of EPA’s implementation of the technology-based effluent standards under the Clean Water Act concluded that “[i]ndustry was capable of manipulating the rulemaking process by withholding data on costly, but effective, abatement technologies and supplying excessive and confusing data.” W. MAGAT, A. KRUPNICK & W. HARRINGTON, RULES IN THE MAKING 36 (1986).
The problems in connecting the book's primary policy recommendation with a persuasive argument could be multiplied by reviewing the case against its other competitor, the significant risk paradigm, but I will leave that to the reader. Inconclusiveness is foreordained, I think, by virtue of the book's silence on the subject of policy ends or goals. In these circumstances, all that can eventually be said in support of feasibility analysis is that which Cross does say, articulately and well: feasibility analysis has worked, the other two have not. And, you might ask, why isn't that sufficiently persuasive? After all, many, many people have pointed out the shortcomings of various theoretical approaches to health and safety regulation, including feasibility analysis. At the end of the day, however, theory doesn't prevent cancers; effective regulation does.\(^{34}\)

The choice thus presented, then, is not among plausible, diverse, operational guidelines. It is between something and nothing. Here we have the bedrock explanation for Cross' apparent conviction that he can propose feasibility analysis without an elucidation of the full panoply of conflicting values that surround cancer policy. Whatever one's particular constellation of values, no one could object to trading in our current sluggish performance for more effective, moderate performance (except the extremists, and maybe only half of them).\(^{35}\)

Given the premises, this conclusion does indeed follow. Alas, the historical account upon which the premises rest can support more than one meaning. Even conceding that history demonstrates that feasibility analysis has worked, at the most it also demonstrates only that the others have worked less well so far, not that they cannot work. Indeed, supporters of either significant risk or cost-benefit analysis can legitimately draw some very different historical lessons from those emphasized by Cross.

Much of our current technology-based regulation was drafted before we had developed much sophistication in devising more economic-oriented strategies, so that the selection of these approaches instead of balancing ones, including those using cost-benefit analysis, occurred in a historical context that may have unduly discounted such strategies.\(^{36}\) Furthermore, both balancing statutes and significant-risk

\(^{34}\) Supplying just this kind of effectiveness defense of technology-based standards is the primary enterprise of Professor Latin's extensive study. Latin, supra note 17; see also McGarity, supra note 6.

\(^{35}\) I suppose even "zealous environmentalists" would endorse feasibility analysis if they truly thought the only other choice was doing nothing. That would leave the "industry representatives" standing alone.

statutes have been the victims of unrealistic demands for precision and
data quality, which have made them vulnerable both to public criti-
cism and judicial review. Cross realizes this point, yet fails to appreci-
ate that one way of addressing it would be to lower expectations of
rigor and precision, so that agencies might take effective action under
these paradigms.\textsuperscript{37} Finally, notwithstanding their slow start, balanc-
ing approaches especially are gaining an experience base indicating
that some of their claims of superiority over feasibility approaches are
justified. Both implemented approaches and studies of alternatives to
existing regulation suggest, for example, that economic approaches to
regulation are much more cost-effective than technology-based ap-
proaches that attain the same overall pollution reductions.\textsuperscript{38} So his-
tory is a treacherous ally of feasibility analysis. A plausible argument
can be made that, were society willing to accept approximations for
currently hard-to-quantify data, and were courts more willing to sus-
tain regulations based on fairly crude balancing formulas, a regulatory
regime built around the balancing paradigm would prove as workable
as a feasibility-based approach.

IV

Feasibility analysis cannot be shown to be superior to its competi-
tors on implementation grounds alone, because significant-risk and
cost-benefit analysis could both be made to work, in the loose sense
that each could be employed in a "moderate" program of risk reduc-
tion that would be "more effective" than our current system. On
Cross' account, this leaves the case for feasibility analysis radically di-
minished, for while each of its competitors has its own advantages,
independent of implementation concerns, the only advantage offered
for feasibility analysis is this one. Otherwise, Cross considers it logi-
cally unsound.\textsuperscript{39}

Giving up on feasibility analysis would nevertheless be decidedly
premature. After all, it does indeed seem to be gaining a working he-
geny in the world of practical administration. Several programs
that began operations under another paradigm have been or are being
shifted over to a feasibility approach, while those that started under
feasibility analysis have shown little tendency to migrate elsewhere.\textsuperscript{40}
On the other hand, whatever their intellectual advantages, signif-

\begin{itemize}
\item 37. Thus, Cross' proposal that the federal courts soften the intensity of their review of agency
action under cancer control statutes would seem likely to improve the effectiveness of all the
moderate paradigms, not just feasibility analysis. See pp. 152-55.

\item 38. Major studies are summarized in Ackerman & Stewart, supra note 32, at 1334-40.

\item 39. Pp. 92-93, 147. Cross argues that significant-risk is supported ethically on contractarian
grounds and that cost-benefit analysis is the only paradigm that permits consideration of all
relevant social concerns raised by cancer exposure. See pp. 75-76, 89.

\item 40. The two most prominent programs that have or are being shifted are the water toxics
program and the air toxics program.
\end{itemize}
risk and cost-benefit approaches still look hamstrung. Significant-risk analysis remains hobbled by the absence of a working consensus on what risks are significant, and the candid use of cost-benefit analyses founders on the question of placing monetary value on a human life. As Cross has well recounted, under currently prevailing conditions, feasibility analysis does seem to work, whereas significant-risk and cost-benefit analyses do not. Even if this evidence does not support claims of inherent implementation superiority, it does trace a tendency in regulatory development that itself needs some explaining.

We can make some headway toward such an explanation by reversing the relationship Cross sees between the implementation advantages of feasibility analysis and claims that it is superior. Instead of concluding that feasibility analysis is superior because it can be implemented more effectively than the other paradigms, we might conclude that feasibility analysis has been implemented more effectively because it is superior, not for technical, implementation reasons, but on normative grounds. It just might be that because feasibility analysis better expresses the underlying constellation of values people wish to vindicate in their environmental policy, implementation has met less resistance: we have been more willing to tolerate simplifying assumptions, and we are more united in the conviction that regulations based on this approach ought to be carried through. In contrast, because significant-risk and cost-benefit analyses express those underlying values less well, they are viewed suspiciously, there is more resistance to implementation, and there is less willingness to engage in the simplifying assumptions necessary to make any quasi-utopian regulatory approach work.41

This point can be made in terms of the "logic" of a regulatory paradigm. The logic of a set of operational guidelines, or a regulatory paradigm, turns on a comparison of its internal structure and order of relationships among decision criteria to the rationale or justification for creating those guidelines. If this internal structure mirrors or resembles the structure of the argument that justifies the guidelines, we can say that those guidelines exhibit a transparent logic, one that illuminates or reveals their justification. For instance, welfare economics justifies regulation by arguing that society should promote courses of action maximizing human preferences, as exhibited by the willingness to pay of individuals affected by the action. Cost-benefit analysis,

41. Occasionally, people attempt to study the motives of advocates for different positions in environmental disputes. Results seem to suggest that strident disagreement on so-called implementation issues frequently indicates that deeper, "philosophical" differences are providing much of the animus for the dispute. See, e.g., R. Liboff, REFORMING AIR POLLUTION REGULATION: THE TOIL AND TROUBLE OF EPA'S BUBBLE 9-10 (1986) (study of disagreements over the implementation of emissions trading policy "found that disagreements over political and philosophical concerns were more vigorous than those over implementation issues and that conflicts over implementation issues were most intense when they most reflected underlying philosophical concerns").
with its consideration of costs and benefits and its decision rule of selecting the course of action that maximizes the net of benefits over costs, tracks the structure of this normative justification. Thus, if one begins with a welfare economics justification for public policy, cost-benefit analysis is a "logical" regulatory structure to employ for its implementation.

Not all regulatory structures possess such a transparent logic. Consider, for example, the much-maligned Delaney clause for color additives, which requires the Food and Drug Administration to ban color additives for food if they have been shown to induce cancer in laboratory animals.42 Although the clause has been criticized as absolutist, thereby prohibiting the FDA from making cost-benefit comparisons in individual regulatory decisions, it just might have a cost-benefit justification. Suppose Congress determined that having the FDA perform individualized cost-benefit analyses for each color additive would not improve the quality of the program's decisionmaking sufficiently to offset the time and expense involved in doing so.43 Congress might then conclude that the cost-beneficial regulatory option was to create an operational guideline that did not permit the case-by-case weighing of costs and benefits. If this were in fact the justification for the Delaney clause, we would have to conclude that this regulatory program lacked a transparent logic. The internal structure of the regulatory program, those criteria and relationships relevant to reaching a regulatory decision, would not mirror the structure of this hypothetical welfare economics justification for the program.44

With this definition at hand, we can express a hypothesis about the superiority of feasibility analysis: contrary to Cross' view, feasibility analysis may be superior because it is more transparently logical than its competitors, not less, in that its internal structure more closely resembles the underlying values, and their relationships to one another, that make up one persuasive justification for environmental regulation. In the remainder of this Part, I shall explore this possibility, once again limited to a comparison of feasibility analysis with the single alternative of cost-benefit analysis.

43. Considerations that might support such a decision include (a) a belief that lack of data will make individualized cost-benefit analyses inaccurate; (b) a belief that most color additives, which serve cosmetic functions only, would fail a cost-benefit test; (c) a belief that the gains to be had from efforts to discriminate among different color additives through individualized cost-benefit inquiry would be outweighed by the costs of acquiring the necessary information to perform those studies, even if the information eventually gathered was reliable.
44. As a historical explanation of Congress' motivations, the account in the text is counterfactual. For a detailed exploration of Congress' probable motives in enacting the several Delaney clauses, see Merrill, FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?, 5 Yale J. on Reg. 1 (1988). However, an argument similar to that in the text has been advanced as a justification for the Delaney clause. Doniger, Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control, 7 Ecology L.Q. 497, 656-57 (1978).
A convenient way to begin exploring the logic of feasibility analysis is by reviewing what environmentalists find deficient in cost-benefit analysis, and in the normative justifications offered by welfare economics for it. Economic analysis approaches the value conflict that surrounds cancer regulatory policy as it approaches all such conflicts, by assimilating it to the general problem of allocating scarce resources. In principle, all such conflicts should be resolved by producing that mix of goods that maximizes the satisfaction of individual preferences for them, as measured by individual willingness to pay. As we have just seen, cost-benefit analysis is a logical regulatory paradigm for carrying out that task.

Thus, when Cross refers to feasibility analysis as illogical, he seems implicitly to be assuming that the underlying justificatory argument for regulation is that given by welfare economics. Unlike cost-benefit analysis, the structure of feasibility analysis provides no recognition of human health benefits, and hence has no way of conceiving of a function that smoothly "trades off" such benefits for costs. Because it is illogical in this way, feasibility analysis can produce perverse results when viewed from the economics perspective. It can reduce overall welfare both by overregulating (by imposing costly technologies on a facility that is located in a sparsely inhabited area and therefore is causing few harms) and by underregulating (by permitting the continued operation of a facility located in a very densely populated area, where cost-benefit analysis would recommend closing the facility entirely).

This much is well understood. Equally well understood is that many individuals (whether "zealous environmentalists" or not) who contemplate the issues raised by difficult environmental choices come to conclude that cost-benefit analysis seriously misrepresents the values at stake. To be sure, advocates of environmental protection disagree over the nature of what is being misrepresented. Mark Sagoff, for example, contends that environmental values reflect "principles," or components of reasoned ethical systems, as contrasted to consumer "preferences," and that it is the demand for judgment under a regime of reasons instead of according to a regime of willingness-to-pay that counsels rejecting cost-benefit analysis.45 Daniel Farber, on the other hand, while critical of Sagoff's sharp distinction between principle and preference, also argues against cost-benefit analysis. Environmental values have worth independent of their ability to advance human welfare, but advancing reasoned arguments is not a necessary prelude to valuing, he says, because "to value something is simply to care about

it." The reason most people value the environment is emotional, not because of some elaborate syllogism.

. . . The act of valuing something is somewhat like caring about a person, and demanding that a person justify his love for another seems decidedly strange. Values are simply not things that normally require rational justifications.

And so for environmental values.

While Sagoff and Farber disagree on a good deal, they share in common the claim that cost-benefit analysis should be viewed with suspicion because such analysis misrepresents the environmental values they want to protect. This view does not contest the instrumental adequacy of cost-benefit analysis to justify stringent regulation. Cost-benefit analysis has, in fact, been a friend of environmental objectives on many occasions, often enabling environmentalists to make a case for more stringent or protective measures. Nevertheless, and despite the fact that the cost-benefit paradigm is tremendously flexible, capable of reflecting whatever values individuals may happen to have, many environmentalists view cost-benefit analysis with suspicion because it performs this "reflecting" in a very specific way. Cost-benefit analysis is exclusively sensitive to the "commodity value" of the output of regulatory programs, and environmentalists believe this exclusivity results in a distorted reflection of many environmental values.

Commodification permits the representation of any value in terms of a single metric — consumer willingness to pay. This characteristic is extremely important in explaining cost-benefit's flexibility. It is, however, just the characteristic that environmentalists believe is deficient. Regardless of how their claim is described — whether as the claim that individuals (and, some insist, animals) possess inherent

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47. Id. at 345-47.
48. Carol Rose has also been critical of Sagoff's preferences/principles distinction, and she provides yet another characterization of the deficiencies of cost-benefit analysis. For her, the principal problem is that the economic approach may reinforce an impoverished rhetoric, one that condones selfish behavior and fosters the belief that values are private and not subject to discussion. This fights against the ambition of environmentally concerned citizens (1) to engage others in cooperative and to a certain extent altruistic behavior and (2) to bring value differences out into the public arena, where they can be discussed and debated. See Rose, supra note 45.
49. See Anderson, Values, Risks, and Market Norms, 17 PHIL. & PUB. AFF. 54, 56 (1988): "[A] commodity value [is] a good that is appropriately produced and distributed in accordance with . . . four norms." These norms describe and define market exchanges:

First, in determining the production and distribution of goods, the market does not recognize any distinction between wants and principles or needs. Second, the parties to a market exchange have no precontractual obligations to provide the goods being exchanged. Third, the power of an individual to promote her interests in the market is a function of her financial resources and relative competitive position. Finally, the market provides an avenue for the expression of discontent through exit, not voice.

Id. at 56.
value,\textsuperscript{50} or as the claim that the regime of reasons is normatively prior to valuing goods in the market, and hence can legitimately establish constraints on what can be traded there,\textsuperscript{51} or as the claim that individuals "simply care" about things in ways other than by placing a commodity value on them — environmentalists assert the policy relevance of other ways of valuing. Furthermore, and this is the key idea here, these other ways of valuing are incommensurable with, and hence not reducible to, commodity valuation.\textsuperscript{52} By virtue of its structural denial of any smooth comparability between costs and benefits, then, feasibility analysis resonates with an important feature of environmental thought in a way that cost-benefit analysis cannot.

To see a second important dimension to the topic of regulatory logic, we must supplement Cross' call to be realistic with yet another dose of realism, this time of the Legal Realist variety. The Realists' persistent attacks on formal structures in law and policy drove home the point that what one takes to be the "natural" or "normal" baseline, from which deviation requires justification, has a profound influence on the shape of positive law.\textsuperscript{53} In constitutional law, for example, Lochner-era jurisprudence is partially explained by the Supreme Court's adopting a "common law" baseline, in which human relations under the operations of common law doctrines of property, contract, and tort required no defense, but government intervention to alter such relations did. The post-Lochner era, in contrast, at least partially

\textsuperscript{50} E.g., T. Regan, The Case for Animal Rights 235 (1983).

\textsuperscript{51} Richard Andrews has described this approach to public policy as the "philosophy of normative constraints." He writes:

In this conceptual framework, government is not simply a corrective instrument at the margins of economic markets but [a] . . . central arena in which the members of society choose and legitimize . . . their collective values. The principal purposes of legislative action are to weigh and affirm social values and to define and enforce the rights and duties of members of the society, through representative democracy. The purpose of administrative action is to put into effect these affirmations by the legislature, not to rebalance them by the criteria of economic theory.


\textsuperscript{52} E.g., Lukes, Making Sense of Moral Conflict, in Liberalism and the Moral Life 127 (N. Rosenblum ed. 1989). Lukes writes:

[We would do well to] "suspend the monistic assumption underlying so much of moral theory" and "acknowledge that not everything is good or right to the extent that it is commensurable with respect to any single standard."

The key idea, then, is that there is no single currency or scale on which conflicting [incommensurable] values can be measured, and that where a conflict occurs no rationally compelling appeal can be made to some value that will resolve it.

\textsuperscript{53} See, e.g., Singer, Legal Realism Now, 76 CALIF. L. REV. 465 (1988); Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873 (1987). The more contentious lesson, of course, was that, although reasoning from baselines seems inescapable, there are no neutral or natural ones. See id. at 903-10.
repudiated that baseline, permitting much more government intervention into, for example, labor-management relations.54

Assumptions about baselines can often be determinative of government decisions, whatever regulatory paradigm, including cost-benefit, one chooses. Consider a choice between a stringent environmental measure and the status quo. If one starts with the baseline assumption that the victims of the action have a right to be free from harm or environmental degradation, as environmentalists typically do, stringent environmental protection will appear to be the “normal” situation, and inaction, preserving the status quo, will require justification. A cost-benefit analysis of the decision would value the “benefits” of a decision to pollute by the polluters’ willingness to pay to degrade the environment, and would value “costs” by the willingness of victims to accept payment to give up their baseline position. Using these guidelines, cost-benefit analysis may very well support the stringent environmental measure.55 On the other hand, if the baseline were switched, so that the status quo of costless pollution is taken as the baseline, then the victims of pollution will be viewed as the beneficiaries of stringent controls and the polluters as those who must bear the costs of giving up their baseline position. The value of benefits will now be calculated according to victims’ willingness to pay. If this is substantially less than their willingness to accept payment, cost-benefit analysis may now favor the status quo.56 In other words, cost-benefit analysis will end up favoring the persons whose interests received preference initially by virtue of the location of the baseline, so that where the analysis starts will determine where it ends.57

One of the principal objectives of the environmental movement has been to reconfigure the baseline in many matters of environmental policy and health and safety protection. Early on, environmentalists noted that common law rules are inherently biased in favor of despoil-

54. See Sunstein, supra note 53, at 903-10. The contrast between Lochner and post-Lochner jurisprudence is also one concerning the degree of justification the government must supply for its interventions.

55. See e.g., M. SAGOFF, supra note 45, at 74-88.

56. Imagine John Muir being asked how much he would accept as payment for converting Yosemite National Park into an amusement park. Now imagine how much he would be willing to pay to prevent that from occurring. While the latter amount would probably be substantial in Muir’s case, it would also quite likely be far less than the first sum — if he were willing to price the matter at all. Willingness to pay, after all, is always constrained by the size of one’s bank account while willingness to forgo payment is potentially limitless.

57. This point has often been expressed by noting that cost-benefit analysis is indeterminate, and that the results of the analysis often depend upon whether individual preferences are calculated by reference to their asking prices (willingness to accept payment) or their offering prices (willingness to pay) for the goods or services in question. See, e.g., Farber, Plastic Trees, supra note 46, at 352-54; Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. CAL. L. REV. 669, 678-95 (1979); Kennedy, Cost Benefit Analysis of Entitlement Problems: A Critique, 33 STAN. L. REV. 387, 401-07 (1981).
ers of the environment. Under common law norms, such individuals can generally act without court approval, whereas persons damaged or potentially damaged by their actions have the burden of initiating expensive legal action to stop them. Even worse, where legally sufficient proof is not readily available, these lawsuits will be unsuccessful. An important component of the environmental agenda of the 1960s and 1970s urged adoption of a new baseline, which Judge McGowan once summarized as follows: "Hitherto, the right of the polluter was pre-eminent, unless the damage caused by pollution could be proven. Henceforth, the right of the public to a clean environment would be pre-eminent, unless pollution treatment was impractical or unachievable."

The preceding suffices for a preliminary sketch of the logic of feasibility analysis as applied to the problem of manmade carcinogens. Many Americans believe that public policy should be predicated upon the "preeminence" of a deep-seated respect for human life, a respect that Cross notes plays a prominent role in debates about cancer risk. Giving preeminence to respect for life does not mean that protecting life is lexically prior to all other values — does not mean, in other words, that public policy must always be willing to spend additional resources to reduce risk, no matter what the other demands on resources may be. Precisely what it does mean would require much greater and detailed exploration of candidate value systems than we have so far conducted, but two characteristics of what most environmentalists take it to mean have already been suggested. First, protecting human life (and, more generally, the living environment) ought to play a more prominent role in establishing our social baseline, so that measures that deny complete protection are the measures that require explanation. Second, respect for human life is a value incommensurable with the commodity value of a life.

Adopting these two ideas has a profound effect on an assessment of the logic of regulatory paradigms. Typically, cost-benefit analysis employs commodity valuation exclusively, and operates under an implicit baseline of the status quo. As a consequence of this choice of the baseline, the question, "Why are you regulating this private activity at all?" appears to be the "natural" one to ask. Moves away from the

59. As was the case with efforts to address carcinogens through traditional common law actions. See supra sources cited in note 4.
61. See, e.g., p. 75.
62. Despite the inroads of environmentalism over the past 20 years, this baseline may well still be the dominant one in policy circles. An example of it at work can be found in the excellent study of air pollution regulation by Bruce Ackerman and William Hastie. They urged that Congress require the EPA to justify its regulations according to the environmental benefits that would be achieved by them. "At least," they argued, EPA would be "openly arguing about the
status quo baseline require justification. Commodity valuation then
necessitates that such justification come from a determination that a
regulation's costs are outweighed by the regulation's benefits, as cal-
culated under the assumption that victims will be hypothetically paying
polluters to abate.

All of this changes dramatically if the baseline and approach to
valuation change. If the baseline against which policies must be justi-
fied is taken to be freedom from the harm of pollution, then the salient
question changes from "Why are you regulating?" to "Why are you
allowing risky activity?" The effect of rejecting commodity valuation
as the exclusive instrument for responding to that question then pre-
ecludes a simple cost-benefit response. Feasibility analysis implicitly
suggests another answer: as a first approximation, we might allow
risky behavior when we are concerned that the effects of still tighter
controls would cause substantial social dislocation. That answer is by
no means free from controversy, but it is, I believe, an answer that
many would find at least initially worthy of consideration. Elsewhere
I have argued that respect for life must under some circumstances give
way to competing values, including the value we place on human be-
ings being accorded a meaningful opportunity to formulate and pursue
life plans.\textsuperscript{63} The value we place on human flourishing, as contrasted to
the value of human existence, strikes me as the proper place to begin
to flesh out a justification for less-than-absolute protection against risk.
Substantial social dislocation of the kind that would ensue if risk-crea-
tors are regulated beyond the point of technological and economic
feasibility can upset living patterns, shattering the hopes, ambitions, or
plans of affected individuals. Provided the residual risk that remains
after all feasible controls are in place is modest enough, an accommo-
dation to competing values at the point of feasibility may seem desir-
able. In fact, I take the growing deployment of feasibility analysis as
some evidence that this is so.

* * *

The foregoing suggests that regulatory paradigms compete with
one another at the normative as well as at the implementation levels.
The feasibility approach is not an illogical approach to regulation, for
it resonates with an underlying justificatory structure that treats
human life as a preeminent value and that further postulates that the
values implicated by many regulatory conflicts are incommensurable.
If, as I believe, a significant segment of the American population gen-

\textsuperscript{63} Schroeder, Rights Against Risks. 86 COLUM. L. REV. 495 (1986).
erally subscribes to such a justificatory structure, pointing out the logic of feasibility analysis helps explain its implementation successes.

An argument of this type does not, however, supply sufficient reasons to prefer feasibility analysis. On the one hand, such an argument has indicated differences between the logic of this approach and the logic underlying cost-benefit analysis, but it has not shown the superiority of the one over the other. Indeed, we ought to attribute some of the continuing confusion over which regulatory paradigm to employ to the unresolved contest among the quite different logics each presents for public consideration. On the other hand, selection of a ruling logic would still not render self-evident the selection of regulatory paradigms. Implementation considerations, including the considerations that receive careful attention in Professor Cross' book, will continue to influence the shape that operational guidelines take.

While an understanding of feasibility analysis' logic is therefore insufficient to end the struggle among competing paradigms, it remains a necessary prelude to any progress in this area. If feasibility analysis is going to be the answer, we ought to understand that the questions being answered include normative ones as well as technical ones.
RE-VISION OF THE BANKRUPTCY SYSTEM:
NEW IMAGES OF INDIVIDUAL DEBTORS†

Karen Gross*


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

† © 1990 by Karen Gross.

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

A. Thinking About Images

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

One cannot tell from the painting alone whether Martineau was depicting a real-life debtor family in the Victorian era or, assuming its historical accuracy, whether the picture is representative of Victorian debtor families generally. At a minimum, however, the painting reflects a symbolic reality for one individual, the artist, and it may represent broadly shared societal perceptions or even a quantifiable depiction of reality.
The risk of confusing perception with reality has been of particular interest to feminist scholars. Simone de Beauvoir suggests that the male's mythical perceptions of the ideal woman do not comport with real women. Although one might expect that men would change their idealizations to mirror reality, de Beauvoir's point, in the feminist context, is that the opposite occurs. She states: "If the definition provided for this concept is contradicted by the behavior of flesh-and-blood women, it is the latter who are wrong: we are not told that Femininity is a false entity, but that the women concerned are not feminine."

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

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

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


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


6. Id. at 237.
know who debtors really are. Determining preferences suggests that, at least in the first instance, we can distinguish between image and reality. It assumes that we have access to objective and perspectival data. Only then can there be a meaningful comparison.

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

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

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

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

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

10. The study actually looked at 1547 cases; the usable number of cases is 1529. Since more than half of the cases involved joint filings, the authors studied a total of 2409 individuals in bankruptcy. P. 17.
which the authors accomplish the two above described tasks and evaluates their success in doing so.

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

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

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

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11. Marsha Hanen expresses this point in her essay, Hanen, Feminism, Objectivity, and Legal Truth, in FEMINIST PERSPECTIVES, supra note 8, at 29. She states: "Merely to break down rigid and unproductive systems of classification will not, by itself, lead to the more humane and cooperative forms of knowledge, which is ultimately what we need, rather than just to new or altered frameworks. But the questioning of the categorizations, and the serious consideration (and even trying) of some alternatives, probably represents a necessary first step..." Id. at 44.

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

ences of women in the bankruptcy system\textsuperscript{14} as single and joint filers and as the nonfiling ex-wives, homesharers, and daughters of male debtors.\textsuperscript{15} I investigate the significance that gender\textsuperscript{16} has played in shaping the bankruptcy system. I believe, as more fully developed, that the bankruptcy system has been developed and applied based on a prototypical debtor who is male. If this prototype is proved inaccurate — by describing male debtors erroneously and failing to consider women debtors at all — then the system created around the prototype is unresponsive to real debtors. This then raises for me the larger issue of whether the povertization of debtors — women debtors in particular — mirrors the povertization of these individuals outside the bankruptcy system or whether, and by far more troubling to my mind, the bankruptcy system as developed, applied, or experienced actually contributes to that povertization.

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

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

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

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

\textsuperscript{16} I am using this term in the broadest sense, not solely in terms of issues of sameness and difference based on gender. I also propose to consider, within the rubric of “gender,” issues of socioeconomic class and ethnicity as well. \textit{See} Scales-Trent, \textit{Black Women and the Constitution: Finding Our Place, Asserting Our Rights}, 24 HARV. C.R.-C.L. L. REV. 9 (1989). I also recognize that not all feminists have a common view as to the meaning of gender and that many nonfeminists and some feminists equate the word “gender” with the word “sex.” \textit{See} D. RHODES, \textit{JUSTICE AND GENDER} 5 (1989); \textit{see also} Minow, \textit{supra} note 13; West, \textit{supra} note 13; Williams, \textit{supra} note 13.
individual debtors in general and women debtors in particular.\textsuperscript{17} Creating the opportunity to consider these issues, perhaps more than anything else, is the book's greatest strength.

\section*{PART ONE}

\textbf{A. The Modern Painting}

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

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Year & Total Filings \\
\hline
1984 & 344,275 \\
1985 & 364,536 \\
1986 & 477,856 \\
1987 & 561,278 \\
1988 & 594,567 \\
1989 & 642,993 \\
\hline
\end{tabular}
\caption{Bankruptcy Filings, 1984-1989}
\end{table}

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

Criticism of these statistics has been leveled at the Administrative Office of the United States Courts. For example, it has been suggested that the filing rates may be somewhat inflated due to the methodology employed by the Administrative Office. There also has been concern as to the criteria employed to define business and nonbusiness filings. See p. 13 n.2; see also Sullivan, Warren & Westbrook, \textit{The Use of Empirical Data In Formulating Bankruptcy Policy}, LAW & CONTEMP. PROBS., Spring 1987, at 193. However, the Administrative Office remains the only official source for filing data and hence its figures, even if troubling, provide us with a starting place.

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

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

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


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

\textsuperscript{21} See supra note 19 (discussing some of the prior empirical work). Sullivan, Warren, and Westbrook are understandably critical of much of the previous empirical work. Pp. 16-17; see also Sullivan, Warren, & Westbrook, supra note 19; Warren, supra note 19. Some of the work has sought purely economic explanations, an approach also critiqued by Sullivan, Warren, and
we have, then, is a legal system based upon an artist’s impressions (i.e., a painting) of the individual debtor rather than more accurate material. These artist’s impressions are important, however. They explain how we constructed the bankruptcy system we have; they give us a starting point. But what we need and do not have is a more accurate and representational portrait of individual debtors in contemporary America.

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

Some of the information culled by Sullivan, Warren, and Westbrook is new and dramatic, uncovering distortions in the bankruptcy system that require us to reevaluate some of our basic assumptions about how that system operates — both practically and theoretically. These data also serve to explain why some of the anticipated consequences of the Reform Act of 1978 were never realized. Other findings revealed in As We Forgive Our Debtors are not shocking; they comport with what many of us would have anticipated, indicating that, in some respects, our imagery is consistent with a quantitative version of reality. But the fact that these findings are not startling does not diminish their significance.

B. What the Data Reveal: Images of Individual Debtors

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

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

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

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

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

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

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

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

\textsuperscript{30} Pp. 89-91. This is an example of where the findings of Sullivan, Warren, and Westbrook in *As We Forgive Our Debtors* differ from earlier studies. See Herrmann, supra note 19, at 325.
nondebtors. Debtors may have owned homes, but they had higher mortgages than homeowners outside the bankruptcy system and less income with which to repay them. Almost one third of the debtors who had been permitted to incur a second mortgage had done so, compared to 9.8% of homeowners in the general population (p. 134). The debtors may have had credit made available to them like the rest of the population, but 13% of the debtors owed more than half a year's income on credit card debt and almost a third of the debtors owed at least three months' income on credit card debt (pp. 183-84).

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

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

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

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

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

33. P. 170. This is another finding noted by Professor Shuchman. See Shuchman, New Jersey Debtors, supra note 19, at 570-71.
Many debtors were self-employed and their financial failure could be correlated in major respects to their business failure, demonstrating a heretofore largely undocumented link between small business and personal failure. Most debtors were not capable of fully repaying their creditors in either liquidation or reorganization, a finding contrary to a major empirical work that previously provided much of the impetus for stricter creditor protections. At most, 9% of the debtors in Chapter 7 could pay their creditors in full over a three-year period and 16% of the Chapter 13 debtors could repay creditors in full in the same period (p. 214). Debtors did not enter into the bankruptcy system casually; their decisions were motivated by a host of factors (pp. 243-54). Few debtors appeared to be true abusers of the bankruptcy process (pp. 184-88). Many debtors were women (p. 149) and most of these women were poorer than their male counterparts.

C. The Consequences of Destroying Stereotypes

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

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


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

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

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

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

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

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

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

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for the schism in the bankruptcy laws between individual and business filings. Individual debtors are treated differently from corporate debtors, and individual debtors with consumer debts are treated differently from individuals with business debts. See Gross, The Debtor as Modern Day Poet: A Problem of Unconstitutional Conditions, 63 NOTRE DAME L. REV. 165 (1980). Second, our perceptions affect how the system has treated individual debtors themselves. They have shaped the choices available to individual debtors within the bankruptcy system.


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

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

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

44. Again, Professor Spelman makes this point with clarity and sensitivity in her book Inessential Woman, where she draws on the problems of Uncle Theo in Iris Murdoch's novel, The Nice and the Good. Uncle Theo is troubled by the multiplicity of the pebbles on the beach. He would rather reduce the plurality to one. See id. at 1-2. The absence of multiple images has also been a problem in feminist thought. As Spelman states, "[M]uch of dominant Western feminist thought has shared Uncle Theo's dismay and discomfort with manyness, [and] has been uneasy about the enormous variety of women and women's experiences." Id. at 16; see also Minow, Introduction: Finding Our Paradoxes, Affirming Our Beyond, 24 HARV. C.R.-C.L. L. REV. 1 (1989). Professor Minow notes that by avoiding focusing on differences among individuals and subgroups, feminists have become locked in a battle over gender differences. It is only if we focus on our multiplicity that we can begin to envision and achieve social change. Ruth Sidel suggests
tion impossible.\textsuperscript{45} It becomes harder to develop legislation that works.\textsuperscript{46} Homogeneity in the bankruptcy context also has helped us to escape a moral dilemma. It is easier for us to live with ourselves if we can blame some debtors (e.g., the scoundrels) for their own financial predicament while feeling sorry for others (i.e., the impoverished person) who got into their predicament through events they could not control. In both cases, it is a way of denying that we too might be debtors — that would be too frightening because it would suggest that bankruptcy could happen to any of us (p. 103). Confronting heterogeneity makes us confront ourselves.\textsuperscript{47}

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

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


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

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

\textsuperscript{49} This assumption is embodied in Chapter 7, the liquidation chapter of the Code. 11
There is a further assumption that this individual has only limited assets. Therefore, he is allowed to exempt his necessaries, although there is a sense that there will not be much to exempt in any event.\textsuperscript{50}

In contrast, the scoundrel should only be permitted to reorganize, as the liquidation option would provide too easy a way out of his obligations.\textsuperscript{51} It is assumed that the scoundrel, who is fortunate and dishonest, can and should repay his creditors (pp. 5-7). Indeed, the bankruptcy laws are designed to discourage the scoundrel from avoiding the preferred scenario, reorganization, by seeking to liquidate. This is accomplished by setting the level of exempt property so that the liquidating debtor must give up more of his assets\textsuperscript{52} and by making reorganization more attractive by expanding the scope of the reorganization discharge.\textsuperscript{53} By these means, the scoundrel, who would ostensibly have a greater amount of property that is nonexempt and a greater percentage of debt that is nondischargeable,\textsuperscript{54} is presumably discouraged from liquidating.

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


\textsuperscript{51} This is because a liquidation discharge would permit him to keep all of his future earnings. See 11 U.S.C. §§ 523, 541, 727 (1988). Moreover, the exemptions are, at least in some jurisdictions, quite generous so that the liquidating debtor is able to retain a large portion of his assets. See R. Ginsberg, supra note 40; J. Kosel, supra note 40; 7 Collier on Bankruptcy: Exemptions (15th ed. 1979 & Supp. 1989).

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

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

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

\textsuperscript{54} This assumption is based on the fact that in Chapter 7, debt incurred through false pretenses or in a fraudulent manner is nondischargeable. 11 U.S.C. § 523(a)(2), (4) (1988). A scoundrel, in all likelihood, would have incurred his obligations fraudulently and hence, would want a bankruptcy chapter that could relieve him of these obligations. Section 1328 accomplishes just that. See 11 U.S.C. § 1328 (1988).
liquidation option to the scoundrel debtor was made in 1984 through two distinct changes to the Bankruptcy Code. The first further limited exemptions on the theory that this would inhibit filing altogether and the second specifically empowered the court to dismiss the case of a debtor who substantially abuses the bankruptcy process, with abuse being judicially interpreted to include seeking to liquidate when one is capable of reorganizing.

Neither of the 1984 amendments discussed above could be directly studied by Sullivan, Warren, and Westbrook because the cases they evaluated were filed in 1981 and the amendments did not go into effect until three years later. Subsequent empirical data do demonstrate that at least the addition of section 707(b) appears not to have reduced the level of filings nor shifted debtor filings from Chapter 7 to Chapter 13. This result is not surprising, though, when it is recognized that the changes to the Bankruptcy Code were based on mistaken assumptions as to who our debtors are and how they behave. There are certainly debtors who are impoverished, and some who are scoundrels,

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

56. This is also reflected in the 1984 amendments by the expansion of § 707(b) and the addition of § 1325(b). 11 U.S.C. §§ 707(b), 1325(b) (1988); see Breitowitz, New Developments in Consumer Bankruptcy: Chapter 7 Dismissal on the Basis of "Substantial Abuse", 60 AM. BANKR. J. 33 (1986); Gross, supra note 37, at 85-140. Although the term "substantial abuse" has not been defined by the Code, courts have increasingly utilized the term to mean that debtors who could repay their creditors in a Chapter 13 filing but elect not to do so cannot be permitted to liquidate and obtain a discharge. For a compendium of cases, see Gross, supra note 37; Gross, supra note 40. Several recent cases have also taken this expansive view. See In re Krohn, 886 F.2d 123 (6th Cir. 1989); In re Kelly, 841 F.2d 908 (9th Cir. 1988); In re Walton, 866 F.2d 981 (8th Cir. 1989). But see In re Braley 103 Bankr. 738 (Bankr. E.D. Va. 1989); In re Wegner, 91 Bankr. 854 (Bankr. D. Minn. 1989); see also p. 221.


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

Another example is the assumption that the only debtors who will seek joint relief will be a husband and wife, thus accounting for the limiting language in 11 U.S.C. § 302 (1988) which permits joint petitions only among married couples. While various courts have overridden this explicit statutory provision under the guise of interpretation, other courts have felt constrained by its limitations. See In re Lam, 98 Bankr. 965 (Bankr. W.D. Mo. 1988); In re Pipes, 76 Bankr. 981 (Bankr. W.D. Mo. 1987); In re Malone, 50 Bankr. 2 (Bankr. E.D. Mich. 1985). Considering the changing nature of the family, it is time the Bankruptcy Code began to keep pace. See The Changing Role of the Family in the Law, 22 U.C. DAVIS L. REV. 689 (1989); see also Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (gay life partner of
but there are many who do not fall into either category.\textsuperscript{59}

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

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

Sullivan, Warren, and Westbrook also demonstrate that while it might appear that exemption levels would dictate debtor behavior (pp. 233-34, 240-42), debtor behavior cannot be explained simplistically
(pp. 254-55). Like the heterogeneity among debtors, there is a host of factors affecting debtor behavior — economic variables, social-demographic variables, and local legal cultures (pp. 242-52). We are confronted with complexity and a lack of easy answers.63

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

D. Completing the Picture: The Image of Creditors

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

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

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

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


65. Pp. 288-89. The entitlement of secured creditors in bankruptcy is ably explained in M. Bienenstock, supra note 64, at 159-236.
are willing to take added risk with entrepreneurial borrowers because, on balance, they derive more profit from these borrowers (p. 289).

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

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

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

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

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

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

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

E. Women Debtors — Breaking the Silence

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

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

In a recent symposium reviewing As We Forgive Our Debtors, Zipporah Batshaw Wiseman addresses the topic of women debtors in an article titled Women in Bankruptcy and Beyond. Wiseman, Women in Bankruptcy and Beyond, 65 IND. L.J. 107 (1989). The actual discussion of women debtors is brief — 10 pages. Professor Wiseman suggests that we still need to ask, “What
long disempowered women. 71

The data on women debtors are among the most dramatic of those presented in As We Forgive Our Debtors. Women debtors comprise a surprisingly high number of those who seek relief. Twenty-six percent of all filings studied were by single-filing men 72 and seventeen percent were by single-filing women (pp. 149-50). Fifty-seven percent of all filings were joint. 73 Stated differently, seventy-four percent of all cases involved a woman debtor, compared to eighty-three percent of the cases which involved a male debtor, and forty percent of debtors filing singly were women. Reflecting upon the Martineau painting for a moment, it is clear that in the United States today, the portrait could well be painted without a male debtor; indeed, a woman might be found standing in the place of the rogue-like son. 74

The single-filing women were predominantly unmarried (p. 150). Their financial position was, in a word, horrendous. Family income of households with a working male debtor averaged approximately $18,000. 75 Family income of households with a single-filing woman debtor averaged $10,600. 76 These data are consistent with studies

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

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

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

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

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

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

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

76. P. 152. Professor Shuchman also observed that women debtors earned less than their male counterparts. See Shuchman, New Jersey Debtors, supra note 19, at 550. His data show that male debtors earned an average of $14,725, compared to women debtors who earned on.
outside the bankruptcy field demonstrating that women earn less than men.\textsuperscript{77} If one omitted all income from other sources and considered only the income of the primary earner in a family, the gap between male and single-filing female debtors narrowed but remained large (p. 152). Single-filing women debtors earned sixty-five cents for every dollar earned by male debtors (p. 152), remaining close to the 1981 federal poverty line of $9300 (p. 65).

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

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

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


\textsuperscript{78} P. 153; see supra note 77 and accompanying text. Professor Rhode devotes an entire chapter (titled \textit{Equality in Form and Equality in Fact: Women and Work}) in her book to these issues. See D. RHODE, supra note 16, at 161-210.
come may be the difference between seeking bankruptcy relief and staying outside the bankruptcy system (p. 156). And more women single filers than their male counterparts may be too poor to seek relief in the first instance — they may be unable to retain counsel and/or pay the requisite filing fee.79

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

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

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

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

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

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

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

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

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

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

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

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

\textsuperscript{84} \textit{See} Perception and Reality, \textit{supra} note 4.

\textsuperscript{85} Pp. 19-20. The conclusions of this study do indicate, as noted by Sullivan, Warren, and Westbrook, that the 1984 amendments did not change consumer bankruptcy practice in major ways. P. 19. However, that does not necessarily mean that debtors also remained unchanged. Debtors could have changed substantially and the bankruptcy system could have proceeded without taking these changes into account. Indeed, it seems more probable to me that the bankruptcy system proceeded without recognizing the changing character of debtors than that debtors remained the same over the years between 1981 and 1990.
ment of individual debtors. In addition, a broad range of other societal changes may have had an impact on the bankruptcy process. We must consider broad changes in the national economy (e.g., the shift from a manufacturing to a service economy with concomitant changes in the demand for manual versus white-collar labor), rates of interest on consumer debts, unemployment levels, increased access to and use of credit by women, altered family structure and work patterns, decreases in governmental spending on social welfare programs, nonindexing of minimum wage and social security payments, increasing drug abuse, no-fault divorce laws, changing views of the morality of bankruptcy relief (particularly in light of well-publicized corporate filings), and the quality and personal biases of the many new judges appointed to the bankruptcy bench, to name but a handful. Therefore, it seems not just possible but likely that individual debtors today are different from those of 1981. We cannot know for sure until 1990 data becomes available. Until then, we should be cautious about extensive reliance on 1981 data.

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


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

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

89. R. SIDELL, supra note 44, at xvi.
individuals (pp. 49-62). They recognize that numbers can obfuscate
the emotions of debtors and their creditors (p. 5). Numbers cannot
tell us everything; they cannot quantify the moral choices confronting
debtors or the pain of not being able to succeed (pp. 8-9). Therefore,
as the authors recognize, the portrait they paint is not complete.

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

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

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

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

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

93. See Siporin, supra note 19, at 55-60 Many wives reportedly turned against their hus-
bands, finding them inadequate. Id. at 59. Many family members expressed feelings of intense
rage, exhaustion, and defeat before filing. Id.
II. RE-VISION: BANKRUPTCY FROM A FEMINIST PERSPECTIVE

A. Thinking About Women Debtors

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

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

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

94. See Parnas & Cermak, Rethinking Child Support, 22 U.C. DAVIS L. REV. 759 (1989); Pearce, Welfare Is Not For Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty, 19 CLEARENCHOUSE REV. 412 (1985); Williams, supra note 13, at 799, 824-27. Ruth Sidell suggests that the phrase was first coined by Diana Pearce. R. SIDELL, supra note 44, at 15. In defining "feminization of poverty," Diana Pearce states: "Whether as widows, divorcees or unmarried mothers, women have always experienced more poverty than men. But in the last two decades, families maintained by women alone have increased from 36 percent to about 50 percent of all poor families. That is the feminization of poverty." Pearce, supra, at 412.

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

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

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

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

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

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

98. See supra note 26.

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

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

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

102. See E. Spelman, supra note 13.
volving women debtors. I suggest we think about women debtors at three stages — before, during, and after a bankruptcy filing. There is some overlap of issues in these three stages but they provide a way of addressing a broad range of concerns. The most manageable task is to look at what happens to women debtors during a bankruptcy case. In that context, we must look initially at how a facially gender-neutral statute, the Bankruptcy Code, is applied. For example, we must consider whether women debtors are treated in the same way as their male counterparts when a bankruptcy court determines legal issues. In addition, we must look at how the Code is interpreted, and consider whether the judicial definitions of statutorily undefined terms in some way affect women debtors adversely. Then, we must look beyond the law, as applied and interpreted, and examine how judges and the U.S. Trustees speak to and treat women debtors when they meet them in person. We must look at the words employed and the kind of narrative discourse followed in the judges' opinions. We must look at the stories told by the debtors themselves in the documents they have filed with the court. And, we must look at the stories those documents do not tell; we have to investigate the gaps in those docu-

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

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

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

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

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

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

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

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

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

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

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

112. The Code has several discharge provisions. See, e.g., 11 U.S.C. §§ 523, 727, 1141, 1328 (1988). The discharge in Chapter 7 is narrower than the Chapter 13 discharge. Although there has been a growing literature about the theoretical underpinnings of the fresh start policy in individual bankruptcy cases, the topic has not as yet, in my view, received sufficient analysis. As suggested here, we must begin by defining what kind of fresh start we are talking about. For current literature on the theoretical aspects of the fresh start policy, see T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986); Hallinan, The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and Interpretive Theory, 21 Rich. L. Rev. 49 (1966); Howard, A Theory of Discharge in Consumer Bankruptcy, 48 Ohio St. L.J. 1047 (1987); Jackson, The Fresh-Start Policy in Bankruptcy, 98 Harv. L. Rev. 1393 (1985). See also Wiseman, supra note 70, at 118-19. She states, "Even the best legal representation, free or at a low cost, for women in bankruptcy will not address the more fundamental issues of the economic straits of women's
This fresh start can be experienced at several levels. A debtor can be legally excused from existing financial commitments. But legal excuse does not mean the debtor is psychologically excused. To have a real fresh start, one needs to be relieved of one's sense of obligation to one's creditors. A fresh start also means (or at least should mean) that the debtor will have a new opportunity for self-realization. If bankruptcy does not provide that opportunity, then the fresh start obtained may be illusory.

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

B. Before the Filing

1. A Lack of Knowledge

The ability of women (and men) to use the bankruptcy system hinges, at least in part, on their awareness of the benefits the bankruptcy system can offer them. Although we do not have data on women's knowledge of bankruptcy in particular, there is considerable empirical work suggesting that women are generally less aware than men of the legal options available to them. There are also data indic...
cating that women are generally less knowledgeable about financial matters and less comfortable in dealing with such matters than their male counterparts. Indeed, data suggest that women handle money differently from men. There also is an acknowledged link between money and power. In contemporary American society, women have less power than men. Perhaps this means most women have less money than men. Or, perhaps it is the other way around. Because most women have less money than men, they also have less power.

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


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

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


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

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

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

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

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

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

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

126. A full discussion of the reasons for this position appears infra at notes 132-46 and accompanying text.
127. See infra text accompanying note 146.
128. See supra notes 20, 26-43, and accompanying text.
129. One way of seeing this is the inapplicability of 11 U.S.C. § 707(b) (1988) to this category of debtor.
130. For a discussion of this view, see West, supra note 13.
131. The characterization of the bankruptcy discharge in this manner is mine. However, the description is keyed to an appreciation of what happens to creditors in bankruptcy. What I am suggesting is the underlying but unarticulated essence of bankruptcy in its rawest form. The term "screw you" has sexual connotations, and they are intended. The power that men can exert over women in a relationship involving intercourse frequently places women in a subordinated position. Therefore, it is men who can screw women and men who can screw their creditors. Women, on the other hand, are generally perceived and referred to in the sexual context as those who get screwed. And, relative to men, they are screwed. For women to adopt the "screw you" approach inherent in pursuing a bankruptcy discharge requires their integration of an essentially male value system.
132. Indeed, what is and is not a rogue debtor is not altogether clear. Rogue could mean someone who partakes of the opportunities offered by the Code; it could also mean someone who has systematically defrauded creditors. The debtor who seeks discharge by liquidating rather
approach may not work because the underlying assumption is that either stereotypic category of debtor seeking discharge is comfortable saying "screw-you" to creditors. It is presumed that the debtor is willing to break from their creditors with a large measure of emotional and moral impunity. Or, perhaps the debtor must be willing to break with his or her creditors and withstand the sense of failure and self-worthlessness that may follow.

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

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

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

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

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

135. In a sense, bankruptcy involves notions of breach of contract, the morality of which has evoked a rich literature. See C. Fried, *Contract as Promise* (1981); Kronman, *Paternalism*
point are we willing to elevate the personal needs of debtors above the commercial needs and expectations of their creditors? Once we are within the realm of moral issues, we must address the possibility that women and men think about and handle moral dilemmas differently.\textsuperscript{136}

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

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

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\item \textsuperscript{136} At this juncture, I am suggesting that women may address moral issues differently from the way men do. I am not suggesting that women have, as yet, developed an entire moral philosophy distinct from existing moral philosophy. Such a theory may ultimately be developed but, at present, it appears to be only in the formative stages. \textit{See} Baler, \textit{What Do Women Want in a Moral Theory}, 19 Notes 53 (1985).
\item \textsuperscript{137} \textit{C. Gilligan, supra} note 71.
\item \textsuperscript{138} Gilligan's work is a response to the hierarchy of moral values established by Kohlberg. \textit{See} 1 L. Kohlberg, \textit{Essays on Moral Development: The Philosophy of Moral Development} (1981); Kohlberg, \textit{Moral Stages and Morality: The Cognitive-Developmental Approach}, in \textit{Moral Development and Behavior} (T. Lickona ed. 1976). Kohlberg's system of moral development generally placed girls lower on the scale than boys. This result was, according to Gilligan, based on Kohlberg's sense of what was the morally "right" way to analyze moral problems. \textit{C. Gilligan, supra} note 71, at 18-19. For a readable account of the differences between Gilligan and Kohlberg, see Blum, \textit{Gilligan and Kohlberg: Implications for Moral Theory}, 98 Ethics 472 (1988). A more recent attempt to address these issues appears in \textit{Mapping the Moral Domain} (C. Gilligan, J. Ward & J. Taylor eds. 1988).
\item \textsuperscript{139} Gilligan states: "Being dependent, then, no longer means being helpless, powerless, and without control; rather, it signifies a conviction that one is able to have an effect on others, as well as the recognition that interdependence of attachment empowers both the self and the other, not one person at another's expense." Gilligan, \textit{Remapping the Moral Domain: New Images of Self in Relationship}, in \textit{Mapping the Moral Domain} \textit{supra} note 138, at 3, 16.
\item \textsuperscript{140} Examples of this critical literature include E. Spelman, \textit{supra} note 13; \textit{A Conversation, supra} note 29; Greeng & Maccoby, \textit{How Different Is a Different Voice}, 11 Signs 310 (1986); Scales, \textit{supra} note 13; Sunstein, \textit{supra} note 13; Walker, \textit{In a Differnt Voice: Cryptoseparatist Analysis of Female Moral Development}, 50 Soc. Res. 665 (1983); Walker, \textit{Sex Differences in the Development of Moral Reasoning: A Critical Review}, 55 Child Dev. 677 (1984); West, \textit{supra} note 13; Williams, \textit{supra} note 13.
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deed, Gilligan appears to have clarified her position in recent years, suggesting that not all girls think one way and all boys another, and that there is no single "right" way to address moral problems. She has also taken the view that the ethic of caring does not necessarily damn women to a life of subordination. Whatever the criticism of Gilligan, I believe she has something significant to say. It is what makes at least some of us more sympathetic to the feelings of the wife than to those of the husband in the Martineau painting. Gilligan's work demonstrates first that there can indeed be a heterogeneity of views on issues of morality. Therefore, a legal (or indeed nonlegal) system that assumes that a single perspective is the only legitimate perspective is misguided. Second, Gilligan's work reveals that at least one part of that heterogeneity is comprised of the voices of women. The assumption that all women think as all men do is, as Gilligan observes, inaccurate. Not all men think alike, nor do all women.

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

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

141. See supra note 138.
143. E.g., an economic, political, or social system.
144. This seems to be what Martha Minow describes as stage-three feminist scholarship. See Minow, supra note 44, at 2-4.
145. The absence of a single image of debtors is established at supra notes 26-31 and accompanying text.
146. I think we also need to explore how, in a capitalistic and success-oriented society, men feel about their failures and whether the bankruptcy experience is for them a form of emasculation. Barbara Weiss observes that at least in the Victorian literature, some men turned the experience of failure into an opportunity for rebirth. See B. WEISS, supra note 1.
overhaul of the entire bankruptcy system? Am I suggesting that we need a separate bankruptcy system for women?

3. The Consequences of Difference

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

Another possibility is to limit the applicability of the fresh start, a controversial approach that is currently being pursued through implicit restrictions on access to Chapter 7\footnote{11 U.S.C. § 707(b) (1988).} and the encouragement of the use of Chapter 13.\footnote{See Gross, supra note 37; Gross, supra note 40.} Applying the current statutory and judicial approach to differing debtor perspectives, we are left to encourage those debtors who are uncomfortable with the Chapter 7 "screw you" mentality to proceed under Chapter 13 and repay their creditors over time. Indeed, we currently reward the antipathy toward the "screw you" mentality by expanding the scope of the discharge in Chapter 13, a consequence with a degree of irony given that those utilizing Chapter 13 may be uncomfortable with the idea of discharge in the first place.\footnote{Moreover, this incentive works only if the debtor has nondischargeable debts in a Chapter 7 proceeding that would be dischargeable in a Chapter 13 proceeding. Another possible and perhaps more likely scenario is that the debtor is not affected by the expanded discharge — at least not to a significant degree.} In sum, the reorganization as opposed to liquidation mode is more accommodating to those who want to continue their relationships with creditors.

This suggestion has some merit but there are several obstacles in the way of its success and several philosophical concerns about its application. Encouraging reorganization as opposed to liquidation assumes that reorganization cases generally succeed, a result that Sullivan, Warren, and Westbrook's research suggests is doubtful at best (pp. 214-17). It also assumes that those debtors desiring to use Chapter 13 will be eligible for its benefits. This also is problematic in that Chapter 13 is available to only those debtors with regular income.\footnote{11 U.S.C. § 109(e) (1988).} Regular income requires that a debtor's income be "sufficiently stable" to make plan repayments.\footnote{11 U.S.C. § 101(29) (1988).} Many debtors,
particularly single-filing women debtors, may not have stable income. They may not work regularly and their child support and alimony payments, while designed to be regular, are erratic. Although some courts have made an effort to construe this requirement broadly by, for example, indicating that Aid to Dependent Children payments constitute regular income,\textsuperscript{152} there may be many debtors who prefer to proceed in a reorganization mode but are ineligible to do so.\textsuperscript{153}

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

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

\textsuperscript{152} See \textit{In re Hammonds}, 729 F.2d 1391 (11th Cir. 1984).

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


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


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

\textsuperscript{158} See Gross, supra note 40.
women to remain economically deprived while their creditors benefit-
ted and male debtors began afresh. Adapting the system to give
greater weight to the ethos of caring and interrelationships would
mean that women might not gain from our having heard and heeded
their different voice; instead, they might be harmed.159

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

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

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

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

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

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

163. This would arguably promote increased compromise by removing bankruptcy from the
control of judges and permitting debtors to meet with their creditors face to face outside the
courthouse. It would diminish the patriarchal overtones of a system dependent on judges rather
than the parties themselves. This is not as dramatic a solution as some might suggest in that
bankruptcy already encourages compromise, at least in the corporate context. See Curtin, Gross
& Togut, Debtor-Out-Of-Control: A Look at Chapter 11's Check and Balance System, 1988
Ann. Surv. Bankr. L. 87. Counseling was also suggested by the Commission to study Bank-
ruptcy Reform in the late sixties and early seventies. See REPORT OF THE COMM. ON THE
Let me propose a shorter-term solution that can be stated very simply: we should attempt to humanize the bankruptcy process. The simplicity of this statement should not be taken to mean that the implementation of the solution is simple or, for that matter, that the proposal is simple-minded. Personal bankruptcy involves a broad range of human emotions. Owing money is, for many debtors, not just a matter of dollars and cents. Many debtors with financial problems are also experiencing very real personal problems — many, but not all, caused by their financial condition. These are problems that cannot be addressed in the bankruptcy system as presently configured.

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

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

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\(^{164}\) One possibility is to consider conditioning discharge on a debtor's utilization of counseling services.

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

\(^{166}\) If we think about possible funding sources, one immediately comes to mind. We could "tax" the consumer credit industry, which would have to contribute a certain dollar amount to a fund for the benefit of debtors every time a new credit card is issued. No doubt, this "tax" would be passed on to all credit card users through increased annual rates or interest charges. Then, we are balancing whether society is better served by these short-term cost outlays spread among the general population for the long-term goal of better utilization of credit (achieved through the counseling) or by letting debtors flounder in perpetuity, a cost also borne by society as a whole.
story — either in writing or orally — in their own voice.167 They may feel that the papers filed with the court do not adequately explain what has happened to them. Their story may just not fit within the little boxes on the official forms employed in bankruptcy cases. Moreover, in the one instance where debtors speak, namely the meeting of creditors,168 debtors are asked questions in the formal examination conducted under oath and recorded.169 This is hardly the time for a debtor to bare her soul. Indeed, with the streamlined procedure for handling individual cases, many debtors never personally appear in court or, if they do appear, their case is handled in a mass discharge proceeding where all debtors are treated alike.170

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

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

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

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

169. For a detailed description of the 341 meeting and its related procedures, see J. BERK & S. JENSEN-CONKLIN, supra note 4, at 56-57 & app. F.

170. Section 524(d) of the Code provides that the court “may hold a hearing . . . .” 11 U.S.C. § 524(d) (1988). Many courts have dispensed with the hearing altogether. See J. BERK & S. JENSEN-CONKLIN, supra note 4, at 144.

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

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

173. See Schafran, supra note 105, at 269-71.
filing rates. Indeed, the system is already stressed by the continual influx of new bankruptcy cases. However, increasing filing rates for women debtors is already a concern; it suggests an increasing inability of debtors generally to satisfy their creditors. Blaming increased filing rates on accessibility to bankruptcy relief seems to miss the point; we should focus on why people need such relief. For women, the answer appears, at least in part, in *As We Forgive Our Debtors*. Women debtors, more than their male counterparts, are living on the edge of poverty. The bankruptcy system, while not the initial cause of the situation, is certainly in a position to attempt to break the cycle of poverty.

C. During the Case

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

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

174. See supra note 18.
175. The government has projected 850,000 new filings by 1991, the vast majority of which will involve individual debtors. Szczepak, supra note 18.
176. It must be remembered that, at present, we know little about how many women as opposed to men actually file. See supra note 74.
177. See supra notes 75-78, 161-62 and accompanying text.
178. See supra notes 126-53 and accompanying text.
179. For an analysis of the social security system from a feminist perspective, see Becker, supra note 122.
180. There are several other examples that could have been used. First, § 522(a)(10)(D) permits a debtor to exempt alimony, but only to the extent reasonably necessary for support. 11 U.S.C. § 522(a)(10)(D) (1988). Since it is primarily women who receive alimony, this provision permits bankruptcy courts to revisit decisions reached by family law courts; and women may, then, be deprived of income they found hard to get from former spouses. Section 523(a)(5) can lead to similar consequences. This section prohibits a debtor (the male debtor will usually be the one seeking discharge) from discharging alimony and child support. 11 U.S.C. § 523(a)(5) (1988). However, like § 522(a)(10)(D), a court can reevaluate whether what the debtor is paying is properly characterized as alimony and child support. If recharacterized as a property settlement, the debtor's obligation is dischargeable, again creating a second bite at the apple — most frequently to the detriment of women debtors. (One can ask, though, whether the converse is true. Can a woman debtor object to a former spouse's discharge of a property settlement on the theory that it is really in the nature of alimony?) Another example of possible disparate impact involves § 522(f)(1) which permits a debtor to eliminate judicial liens that impair a debtor's exemption. 11 U.S.C. § 522(f)(1) (1988). In a divorce settlement, one spouse can obtain such a lien to preserve an interest in a homestead, to ensure that the other spouse does not sell the home free and clear. Since many debtors are male, the male debtor could use § 522(f)(1) to eliminate
are: (1) the application of section 1325(a)(3) in conjunction with section 1325(b);¹¹¹ (2) the questions asked in the Statement of Affairs required to be filed by the debtor under section 521(1); (3) the definition of "reasonable equivalent value" within section 548(a); and (4) the meaning of joint filings in section 302.

On its face, the Bankruptcy Code provides that a Chapter 13 plan can be confirmed if the requirements of sections 1325(a) and (b) are satisfied.¹¹² Section 1325(b), which was added in 1984 as part of the consumer credit amendments, requires that where a debtor's plan does not provide for paying creditors in full (and creditors object), the debtor must allocate all of his disposable income to plan payments.¹¹³ Section 1325(a)(3) provides that a plan must be proposed in good faith.¹¹⁴ Recent cases have debated whether the Code permits zero payment plans under which debtors with no disposable income give their creditors nothing but still get the expanded Chapter 13 discharge.¹¹⁵

Prior to 1984, these zero payment plans engendered considerable controversy,¹¹⁶ and although the 1984 amendments may have been intended to eliminate them, one can make a very good argument that they, in fact, validated them.¹¹⁷ The argument for eliminating these plans is that even if the debtor allocates all of his disposable income to plan payments, thereby satisfying section 1325(b), but has no disposable income, a zero payment plan does not constitute a plan proposed in good faith. Therefore, section 1325(a)(3) is not satisfied. Stated differently, the issue is whether, assuming section 1325(b) is satisfied, a plan that contemplates paying nothing to one's creditors is one of the factors to be considered in determining good faith or is per se bad faith.

If it is considered beneficial to expand the use of Chapter 13,¹¹⁸

¹¹¹ This topic was suggested by a student paper on zero repayment plans written by New York Law School student Raymond Selig. R. Selig, "Zero Plans": Still Alive and Well in Chapter 13 (1990) (unpublished manuscript on file with author).


¹¹⁵ See, e.g., Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987).


¹¹⁷ See 5 COLLIER ON BANKRUPTCY ch. 1325 (15th ed. 1988); Comment, Section 1325(b) and Zero Payment Plans in Chapter 13, 4 BANKR. DEV. J. 449 (1987).

¹¹⁸ See supra notes 147-59 and accompanying text.
then debtors who comport with section 1325(b) by allocating all
 disposable income to creditors — even if the amount is zero — should be
deemed to satisfy the section 1325(a) good faith standard. This as-
sumes, of course, that there are no other factors such as fraud, misrep-
resentation, or omission of financial data that would militate against
confirmation.189
Since many women debtors have little or no disposable income,190
the elimination of zero payment plans would have an adverse impact
on them. These women debtors, who might be more comfortable
within Chapter 13 and its more conciliatory approach (even where the
net result is the same for creditors), will find themselves unable to ob-
tain a Chapter 13 discharge. This scenario is an example of the conse-
quences that can ensue when a facially gender-neutral statute is inter-
preted in a manner that affects debtors of one gender more par-
icularly.

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

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

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

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189. There are factors other than the amount of repayment to creditors to be considered. See
In re Okoreeh-Baah, 836 F.2d 1030 (6th Cir. 1988); In re Chaffin, 816 F.2d 1070 (5th Cir. 1987);
(1983); Winters, Good Faith Under 1325(a)(3): Debtor's Choice or the Court's Dilemma?, 92
190. As indicated supra at notes 75-76 and accompanying text, women debtors typically
barely have enough to make ends meet.
filing of the original petition herein?" The debtor is asked to supply names, dates, and places. Suppose a debtor is a compulsive gambler. Suppose the debtor’s spouse (e.g., her husband with whom she is filing jointly) is a compulsive gambler. Is the debtor likely to admit either of these things? Indeed, being able to admit to compulsive gambling activity presupposes that one is on the road to recovery. It also presupposes that a debtor in a joint case has no fear in disclosing something of this nature about a spouse. Moreover, how many gamblers, whether frequent or occasional, can remember exactly when, where, and how much they gambled? Most gamblers would also be unwilling to disclose the identity of their bookmakers. Yet the sanctions for failure to comply with the request for information are severe. A debtor can be denied a discharge for failing to explain satisfactorily any loss of assets.

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

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

197. There is one further level of similarity. Rape victims are often accused of “causing” their own rape by dressing in a certain manner or acting toward a man in what is perceived as a provocative and inviting manner. Women debtors may be similarly accused in that they spent beyond their means, they accepted credit from creditors, they participated in their downfall.
chance to tell their story; they must have it written. The people doing that writing are, for the most part, their lawyers; and these lawyers are predominantly men.

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

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

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198. See supra notes 167-70 and accompanying text.
199. See supra note 167.
201. See R. Aaron, supra note 40, at § 10.07[1]; V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 135 n.4 (1974); see also Pedlar, When Transfers Between Husband and Wife Are Fraudulent, FAM. ADVOC., Winter 1983, at 32.
204. See In re Kaiser, 722 F.2d 1574 (2d Cir. 1983); United States v. West, 299 F. Supp. 661 (D. Del. 1969); Pedlar, supra note 203.
205. See P. Chesler & E. Goodman, supra note 119, at 207: “Women’s work is not valued. Our society honors what is paid for, which is not female labor.” See also A. Kessler-Harris, supra note 77; D. Rhode, supra note 16, at 30-31; WOMEN’S CONSCIOUSNESS: WOMEN’S CONSCIENCE (B. Anddolsen, C. Gudorf & M. Pellauer eds. 1985); see also Becker, supra note 122.
206. In 1972, Chase Bank computed the value of a wife’s work, considering all her tasks: nurse, cook, chauffeur, and the like. It came to $13,391.56 annually. However, the bank did not take into account other compensable activities of wives as teachers, secretaries, sexual and emotional companions, or therapists, which would have increased the figure substantially. P. Chesler & E. Goodman, supra note 119, at 98. Given inflation, other studies have placed the value of women’s work within the home considerably higher. Granat, Couples: The High Price of Acrimony, Wash. Post, Feb. 26, 1982, at D5, col. 1.
cades of marriage and the continuation of these services prospectively would seem to entitle a wife to an interest in her husband’s property (particularly property that is used in the family home or the home itself) if her household work is valued. The wife “paid” for these items, even though she never received a paycheck and title does not appear in her name. 207

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

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

207. Some state laws accomplish this result through community property laws or other laws entitling spouses to ownership interests in property acquired during the marriage. See W. McClanahan, Community Property Law in the United States (1982); Washington, Uniform Marital Property Act Symposium, 21 Hous. L. Rev. 595 (1984); see also J. Dukeminier & J. Krier, Property 351-58 (2d ed. 1988). However, community property notions are not the be-all, end-all for women debtors.


209. See supra note 58.

210. See supra note 58.


212. See supra note 73 and accompanying text.
D. After the Case

I have already suggested that a legal fresh start is not enough for debtors. A fresh start requires an emotional component as well as a real sense that there is some possibility of rebuilding. I suspect that many women debtors cannot get a fresh start at any of these three levels, although perhaps empirical data will prove me wrong. First, as already noted, many debtors do not list all their debts. Unlisted debts cannot be discharged. Moreover, many debtors reaffirm their debts (pp. 32, 319), even with the increased standards for reaffirmation added in 1984. Reaffirmation means that a debtor’s future is encumbered. One can only wonder how many debtors voluntarily agree to repay their creditors, particularly creditors with whom they have frequent contact and emotional ties. Certainly, empirical work looking at whether men and women debtors reaffirm (formally and informally) at the same rate would prove useful.

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

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

213. See supra text accompanying notes 114-15.
214. See supra note 68.
216. 11 U.S.C. § 524(c), (d) (1988); see also Boshkoff, supra note 114.
218. See supra notes 132-46 and accompanying text.
CONCLUSION

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

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

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

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

I want to start by stating that my painting is not complete. That is its first feature. It is incomplete because we still do not know a great deal about individual debtors. I am not sure a painting like this can
ever be finished. It also does not contain images of creditors, and they form an essential part of bankruptcy imagery. Further, my painting cannot be painted on a single panel because there is no one image of the debtor family. Any single image would leave out too much. So I am painting a triptych — a series of three panels that together comprise one painting.220 My painting style is realism but with overtones of surrealism; there is intensive attention to detail, to things and people.

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

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

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

220. It would have been possible, and fully consistent with this essay, to paint three different panels, depicting debtors before, during, and after the bankruptcy case. I have tried, however, to combine aspects of the “before, during, and after” approach within each of my panels.
problems. The late afternoon sunlight angles sharply through the window.

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

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

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

Alfred F. Conard*


For more than a century, personal injury tort law has been suffering amputations by workers' compensation and automobile no-fault regimes, eclipses by Social Security and employee benefits, and enchainment by limitations on the size of awards. Now Stephen Sugarman proposes to put the poor beast out of its misery, and to substitute a comprehensive system of compensation and deterrence that would operate largely without regard to fault and even without regard to the cause of need.1

It is a brave plan and a mature one. Sugarman leaves no stone unthrown against tort suits for personal injury and no victim forgotten in his scheme for compensation. He recognizes the unreadiness of public opinion for his final solution, and proposes a more plausible "first step" to move society gradually toward its ideal destination.

I. THE PATHOLOGY OF TORT SUITS

Viewing the tort system in terms of the merits that its defenders claim for it, Sugarman finds it sick. It provides no compensation at all for accident victims who cannot tie their injuries to a tortfeasor who is either financially responsible or adequately insured.2 When it does

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2. P. 37. Sugarman cites a British survey which found that only 12% of accident victims
compensate, it is likely to award huge amounts for pain and suffering\(^3\) which would be better spent on the basic needs of the uncompensated.

The tort system fails also, in Sugarman's eyes, to punish or deter injurers. Most tortfeasors are covered by liability insurance, so that they pay no more when they cause injuries than when they do not. The threat of increased premiums or of cancellation is remote.\(^4\)

In Sugarman's analysis, the tort system also incurs prohibitive costs. It consumes vast human work hours in the litigation and insurance industries, whose costs surpass the benefits delivered to injury victims.\(^5\) On occasion, it poisons the system of justice by providing rewards for fabricated or exaggerated claims.\(^6\)

Sugarman's dissatisfaction is not confined to the tort system's failure to achieve its avowed objectives. He is a professor not only of torts, but also of social and welfare legislation. From the welfare perspective, he is appalled by the lack of compensation for victims of accidents, diseases, and disabilities who cannot ascribe their misery to the fault of anyone else, but who are just as deserving as are the victims of reckless drivers (p. 37).

Sugarman is equally concerned with the plight of those who are in need because they are unemployed. His major premise is encapsulated in his broad assertion: "In general, all Americans should be ensured reasonable levels of income for periods of nonwork and should have generous protection against the risk they will incur medical and other expenses" (pp. 134-35).

Viewing fault as irrelevant to the appropriateness of compensation, Sugarman proposes that society should stop wasting its resources on proving its presence or absence as a condition of compensating need (pp. 127-29). He has examined carefully the numerous varieties of no-fault plans,\(^7\) and finds that they provide no relief for the victims of misfortune who cannot cite a "cause" of their need. Even the victims who can prove a cause undergo the delay and expense required to prove that a particular company or individual or product did the damage.

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4. Pp. 12-16. Sugarman makes these assertions without citing specific data. He recognizes that the assertions do not apply to large enterprises that self-insure, but he does not explain why tort law is ineffective in producing safety practices in these enterprises.

5. P. 40. Sugarman cites J. Kakalik & N. Pace, Costs and Compensation Paid in Tort Litigation (1986), and various commentators.


II. THE PRESCRIPTIONS

Sugarman prescribes two regimes of treatment for the sickness of personal injury tort law. One of them is his ultimate plan, which he calls a "Comprehensive Compensation Strategy" (pp. 127-65) and which I will abbreviate as "CCS." Recognizing that CCS is some decades ahead of public opinion, he proposes another package for immediate adoption, which he calls a "Substantial First Step" (pp. 167-200) and which I will call "SFS."

1. The Comprehensive Compensation Strategy (CCS)

CCS would "do away with personal injury law" by sweeping it into a pair of comprehensive systems that would consolidate a basket of other programs such as workers' compensation, unemployment compensation, and Old Age, Survivors' and Disability Insurance (OASDI, popularly known as "social security"). But it would be broader than all of them put together. Under CCS, people who would otherwise lack needed income or health care would receive it without regard to the cause of their need. Occasions for compensation would include not merely accidents, illnesses, and lay-offs, but any other cause of need, including youth, old age, or incompetence (pp. 134-43). In contrast to no-fault, it might be called "no-cause" insurance.

Compensation would be paid from two sources. Temporary needs of wage earners and their families would be paid by their employers. Long-term needs would be met by an expanded social security system (pp. 143-48), which I will call "XSSS" to distinguish it from existing programs like OASDI, Unemployment Insurance, and Aid to Families with Dependent Children (AFDC).

Although CCS would compensate need regardless of its cause, the levels of compensation would vary in relation to the levels of income that the victims had earned before their need arose. As under workers' compensation, wage substitution would be set at some proportion of the prior wage, with some sort of cap.\(^8\) This arrangement would lead to considerable variations in the level of support. Nonearners would be supported at a lower level, which would be uniform with a few exceptions.\(^9\)

For deterring risky activities, Sugarman would turn from tort law to governmental regulatory agencies like the Consumer Product Safety Commission, the Occupational Safety and Health Administration, the Environmental Protection Agency, and the National Highway Traffic

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9. A surprising possible exception would embrace victims of total disability who, at the onset of their disability, were students in higher education. Since their expectations of future income would be higher than the average, their disability benefits might be set above the minimum. P. 139.
Safety Administration, which would be given increased powers to investigate, regulate, and penalize violators (pp. 156-59). He suggests rather tentatively that tort suits for punitive damages on account of intentional wrongs might be preserved, although he places no reliance on them to promote safety practices (pp. 160-62).

Obviously, CCS goes far beyond any of the no-fault proposals that led the attack on tort law in the 1970s. It even goes beyond the New Zealand Compensation Act of 1972, 10 which eliminated tort suits for personal injury. The New Zealand law awarded compensation to employed persons and victims of automobile accidents, but gave no benefits to unemployed persons who were injured by means other than automobiles. Furthermore, its benefits were not mingled with those of the social security system; accident compensation and social security were separate systems. 11

The closest ancestor of CCS is probably a set of recommendations advanced in 1984 by a group of social scientists at Oxford University, who proposed a unified program of compensation for illness and injury. 12 But CCS is more comprehensive than the Oxford plan in that it would compensate unemployment from causes other than illness and injury, and includes provisions for injury prevention that are not mentioned in the Oxford group’s proposals.

2. The Substantial First Step (SFS)

Sugarman’s “Substantial First Step,” contains both take-aways and give-aways (pp. 167-200). The most substantial take-away would be the reversal of the traditional “collateral source rule,” which requires that damages be awarded without regard to most of the benefits that the injury victim may receive under workers’ compensation, sick leave, Social Security, or other sources. 13 Under SFS, most collateral source compensation would be deducted from damages recoverable in tort suits. 14


12. D. Harris, M. MacLean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield & Y. Brittan, Compensation and Support for Illness and Injury (1984). The work was sponsored by the Centre for Socio-Legal Studies, Wolfson College, Oxford University.


14. Pp. 174-76. Sugarman does not describe the procedures by which the collateral benefits would be deducted, but seems to assume that they would be estimated and deducted in the same way that losses are estimated and awarded. He says that “the torts process, whether in settle-
Take-aways under SFS would also include limits on awards for psychic loss and punitive damages. Nothing would be paid for the pain and suffering sustained during the first six months of a victim’s disability, and a monetary cap of $150,000 would be imposed on recoveries for long-term pain (pp. 176-80). Punitive damages would be awarded only by the judge, rather than by a jury (pp. 181-83).

A few crumbs of satisfaction would be offered to tort claimants and their lawyers. First, contributory negligence would no longer bar or diminish recovery (p. 186). Second, attorneys’ fees would be routinely awarded to successful claimants (pp. 183-86). These consolidations would apply only to the remnants of recoverable damage that would remain after deduction of collateral sources and curtailment of psychic and punitive awards.

The principal give-away that SFS would offer to injury victims is an expansion of the benefits that most employers already grant to employees and their families pursuant to law or contract (pp. 169-74). In cases of temporary disability, employees would be paid a fraction (typically two thirds) of their basic wage after a brief waiting period (typically one week). They would receive these benefits for disabilities of all kinds, including those having no relation to their jobs. Employers would also provide sick leave at full pay, without a waiting period, in some proportion to the number of days worked.

These provisions would be compulsory for all employers. Sugarman thinks they would add little to the costs of benefits now provided by major employers voluntarily or pursuant to state laws and union contracts (p. 189).

When the disability continues beyond a short term (typically six months), the employers’ payments would be replaced by payments under the existing system of Old Age, Survivors’ and Disability Insurance (p. 171).

Employers would also be encouraged, although not compelled, to provide health insurance to employees and their families. An incentive to provide these benefits, which are already widespread, would be supplied by relieving employers who provide them from medical benefit liabilities under workers’ compensation (p. 173).

III. A Historical Perspective

Sugarman’s proposals seem revolutionary when compared with existing tort law, but they are not so radical when viewed against legisla-
tion, scholarship, and reform proposals affecting personal injury law over the past century.

1. Work Injuries

One hundred years ago, a major preoccupation of tort lawyers comprised claims of injured workers against their employers.15 "Assumption of risk" and the "fellow-servant rule" were the bread and butter of defense advocates. These aspects of the common law of tort were gradually excised by employers' liability laws, which appeared as early as 185516 and reached the major industrial states by the first decade of the twentieth century.17

The employers' liability laws were only the precursors of deeper invasions. In most industries, tort actions by employees against employers were categorically displaced in the first quarter of the twentieth century by workers' compensation acts. These laws replaced the concept of fault with the concept of cause; employees were compensated for injuries caused by the employment regardless of fault. The principal elements of compensation were a prescribed fraction of the employee's prior wage, and virtually unlimited costs of medical treatment for covered injuries.18

The modified tort system that had survived for work injuries in the railroad industry19 was similarly studied by the Railroad Retirement Board in the 1930s and 1940s, and found inferior to a workers' compensation regime.20 Congress did not, however, act on this finding.

2. Automobile Injuries

By the late 1920s, automobile accidents had superseded work accidents as the flagship of tort law. Some thoughtful academics and jurists became concerned by the tort system's capricious under- and over-compensation of injuries. In 1932, a consortium of distinguished lawyers, judges, and professors produced a study of automobile accident compensation that concluded by proposing a system of compensation for automobile injuries modeled on workers' compensation.21 But no legislature adopted the committee's proposal.

15. In T. Shearman & A. Redfield, LAW OF NEGLIGENCE (4th ed. 1888), 115 of the 561 pages of text were devoted to "Liability of Masters to Servants." The introduction to the fifth edition in 1898 contained a spirited editorial denunciation of the fellow-servant rule. T. Shearman & A. Redfield, LAW OF NEGLIGENCE vi-vii (5th ed. 1898).
17. Id.
18. Id. at 27-52.
21. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCI-
In the 1950s and 1960s, a series of studies at Temple University, University of Pennsylvania, and the University of Michigan again highlighted defects of the fault-based tort regime in relation to automobile accidents. These studies were followed and confirmed by a nationwide study sponsored by the federal Department of Transportation. At the same time, scholars at Columbia University and the University of Chicago were studying sources of court congestion, to which accident suits were a major contributor.

Of the many reform proposals emanating from these studies, the most influential was the "Basic Protection" plan of Robert Keeton and Jeffrey O'Connell, which became the template for the conclusions of the Secretary of Transportation and for a flock of bills in state legislatures. It led to the adoption during the 1970s of "no-fault" automobile injury laws in sixteen states.

DETS (1932) [hereinafter ACCIDENT COMPENSATION REPORT]. The compensation plan appears at pages 211-16.

The study was authorized and the report issued by a committee "formed by voluntary association." Id. at 2. Its 14 members included academics (Charles E. Clark and Walter F. Dodd of Yale, J.P. Chamberlain of Columbia, and William Draper Lewis of Pennsylvania and the American Law Institute), public officials (Arthur A. Ballantine, Assistant Secretary of the U.S. Treasury, Ogden L. Mills, Undersecretary of the U.S. Treasury, and William A. Schnader, Attorney General of Pennsylvania), incumbent or former judges (Victor J. Dowling of the New York Appellate Division, Robert S. Marx of the Cincinnati Superior Court, Bernard L. Shlentag of the New York Supreme Court, and Horace Stern of the Philadelphia Common Pleas), and practicing lawyers (Miles F. Dawson and Henry W. Taft of New York, and Henry S. Drinker, Jr. of Philadelphia). See id. at 15 n. 2.

The study was conducted primarily in Philadelphia under the direction of a Philadelphia lawyer, Shippen Lewis, but under the sponsorship of the Columbia University Council for Research in the Social Sciences. See id. at 8-9.

22. Adams, A Survey of Economic-Financial Consequences of Personal Injuries Resulting From Automobile Accidents in the City of Philadelphia, 1953, 7-3 ECON. & BUS. BULL. 5 (Temple U., Mar. 1953); A Comparative Analysis of Costs of Insuring Against Losses Due to Automobile Accidents, 12-3 ECON. & BUS. BULL. 7 (Temple U., Mar. 1900), at 1.


25. J. VOLPE, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (1971). This was the summation of the Department of Transportation's "Automobile Insurance and Compensation Study," reported in a series of paperbound pamphlets.


27. R. KEETON & J. O'CONNELL, supra note 2.

28. For tabulations, see J. HAMMERT, R. HOUCHENS, S. POLIN & J. ROLPH, AUTOMOBILE ACCIDENT COMPENSATION: STATE RULES VIII, 13 (1985) [hereinafter J. HAMMERT]; 1 ALL-INDUSTRY RESEARCH ADVISORY COMMITTEE, AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES 78 (1979) [hereinafter ALL-INDUSTRY COMMITTEE STUDY]. The All-Industry Research Advisory Committee describes itself as "formed by the property-casualty industry." It lists three insurance company associations and three representatives of "independents" as its members. Id. at III.

In addition to the 16 states that the All-Industry Committee Study lists as "no-fault," it lists...
The no-fault automobile insurance laws had two basic elements. First, they required that every automobile insurance policy should compensate victims of accidents involving the insured automobile regardless of fault; this meant that injured drivers and passengers could recover compensation for their injuries from the insurer of the car in which they were riding. Second, these laws curtailed the right of victims to sue anyone else for causing their injuries.

For major injuries (variously defined), victims could sue tortfeasors essentially as under common law. The amount of payments under the surviving zone of tort law proved to exceed substantially the amount paid under no-fault. Even in Michigan, commonly called the “purest” of the no-fault states, compensation for automobile injuries under the tort system substantially exceeded compensation under no-fault law.29 The no-fault movement stalled in the 1980s, and there have been no further conversions.30

3. Social Welfare Programs

While personal injury tort law continued to nourish lawyers and underwriters and congest judicial dockets, more direct means of relieving the distress of needy individuals, including injury victims, grew up alongside it. The destitution of injury victims, which had been highlighted by the Columbia study of 1932,31 had been greatly alleviated by the creation and subsequent expansions of the Social Security system to provide compensation for disability and death, and by sick leave and health insurance supplied by employers voluntarily or under labor contracts. By 1984, compensation for automobile accident victims under tort law was less than ten percent of the compensation paid to the victims of loss under the panoply of social and private loss-shifting systems.32

29. Id. at 83 (reporting that in 1977 41.1% of total insurance payments were made under the no-fault regime and 53.4% under the tort regime).
31. Accident Compensation Report, supra note 21, at 65.

The authors make a point of the apparent increase of the tort proportion, but the significance of this aspect of the data is unclear. The measure of the “tort” sector used in these articles includes payments under no-fault plans, presumably to provide comparability with earlier years in which no-fault plans did not exist. If the no-fault payments were subtracted, however, and allowance were made for errors in the statistics, the apparent shift in proportions might be insignificant.
4. Curtailing Payouts

In the late 1970s and the 1980s, attacks on personal injury tort law took a new tack, inspired not by a concern for compensation, but by a concern with the spiraling costs of liability insurance. Every state adopted at least one statute limiting in some way awards of compensation for personal injuries. The movement led the American Bar Association in 1979 to appoint a Special Committee on the Tort Liability System, which reported, predictably, that no substantial changes were needed.

In 1986, U.S. Attorney General Edwin Meese appointed a group to study the "insurance crisis." The group found no structural fault in the tort system, but reported that the magnitude of awards had become unreasonable. Its principal recommendations were to eliminate joint-and-several liability, cap noneconomic damages at $100,000, turn large lump-sum damages into periodic payments, limit contingent fees, and stimulate alternative dispute resolution.

5. The Augury

These historical notes provoke both positive and negative reflections on Sugarman's proposals. On the supportive side, they remind us that tort law has been repeatedly charged with tragic deficiencies, and has been partially displaced by workers' compensation and no-fault regimes. More significantly, the primary role of relieving the distress of injury victims has been taken over by sick leave, Social Security, health insurance, and other programs that are unrelated to fault. If CCS were adopted, it would not deprive most injury victims of their meat and potatoes, but only of their fortune cookie.

On the negative side, history reminds us that personal injury tort

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33. See Olson, The Liability Revolution, in NEW DIRECTIONS IN LIABILITY LAW 1-3, 42-53 (W. Olson ed. 1988); Olson, Overdeterrence and the Problem of Comparative Risk, in id. at 42.
35. The Special Committee on the Tort Liability System, Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in AMERICAN TORT LAW (1984) (American Bar Assn. publication) [hereinafter ABA COMMITTEE]. The committee observed that, "[i]f there is a central complaint, it is that the tort liability system 'costs too much,'" and explained that "[w]e take note of this criticism because of the frequency of its repetition." Id. at 2-31 (citation omitted). The conclusions of the committee rejected virtually all suggested modifications of the system. Id. at 13-1 through 13-21.
36. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter WORKING GROUP REPORT]; TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987) [hereinafter WORKING GROUP UPDATE]. These are paperback, typewriter-offset publications issued by the Government Printing Office that are not identified as the output of any standing agency.
37. WORKING GROUP REPORT, supra note 36, at 64-75.
law is a dietary staple that has survived every prior attempt to reduce it. Although workers' compensation laws generally purport to suppress tort actions for worker injuries, claimants’ attorneys have found means of maintaining tort suits against the remote employers of the victims’ immediate employers and against the suppliers of equipment to employers. Reformers’ dreams of abolishing tort litigation seem about as likely to materialize as the abolition of armed conflict among nations.

IV. ARE SUGARMAN’S PROPOSALS A SOLUTION?

My reflections on Sugarman’s proposals fall into two categories. The first I will call “optimality”: If his proposals could be popularly accepted and legislatively adopted, would they advance human welfare? The second I will call “acceptability”: Could a majority of judges, lawyers, and jurors learn to view the system as beneficial and fair? I will apply these questions separately to the Comprehensive Compensation Strategy and to the Substantial First Step.

1. The Comprehensive Compensation Strategy (CCS)

a. Is it optimal? The central feature of CCS is its severance of the link between the source of compensation and the cause of the need being compensated. The fundamental question is whether this severance will help more than it will hurt the men, women, and children whom it will affect.

In the tort system, compensation for an injury comes from or through persons who are associated in some way with the cause of the injury. The link persists even in automobile no-fault systems, where compensation depends on proving that automobile operation was a cause of the injury, although the operation need not have been faulty.

The link between cause and compensation has potential values on both sides of the compensation process. On the victim’s side, it creates an incentive to identify the causes of injuries in order to obtain compensation. On the compensator’s side, it provides motives to avoid accidents. When accidents have happened, the link provides incentives to resist claims for compensation that are unjustified or exaggerated, although this benefit is partially, or perhaps wholly, offset by the incentive to resist meritorious claims, too.

The incentive for accident avoidance is admittedly weak, touching individual tortfeasors lightly because they are usually covered by insurance or immune to money judgments. But it does motivate insurance companies to raise premiums for accident-prone drivers, and leads employers to promote safety practices by their employees.

38. See O’Connell & Barker, supra note 32, at 928-29; O’Connell & Guilin, supra note 32.
Severing the link seems likely to have two kinds of costs, which may be massive, but which are hard to detect and control.

1. Loss of safety incentives. Uncoupling compensation for injury from causes of injury seems likely to diminish safety incentives for the potential perpetrators of injury, and perhaps even for the potential victims.40

On the perpetrators’ side, the fear of suffering a huge liability beyond the coverage of insurance would vanish. True, individual perpetrators could lose their licenses, or even their jobs, and employers could suffer from increased Social Security taxes, or perhaps fines of the type levied on negligent nuclear energy generating companies. But the chances of incurring these penalties would depend on the zeal of governmental agencies, which would probably lack the prosecutorial incentives of plaintiffs’ lawyers and which would be subject to community pressures to go easy on the providers of employment and tax dollars. The notorious failure of the U.S. Department of Energy to police nuclear pollution illustrates the danger of relying on government agencies to promote safety without the goad of private action.41

Under tort law, accident victims and their lawyers have a powerful incentive to put their fingers on perpetrators of injury because their compensation depends on identifying a culprit. When victims lose this incentive, safety-promoting agencies like the Occupational Safety and Health Administration and the National Highway Traffic Safety Administration may never find out whom to punish.

The possibility of a decline in reporting the causes of injury is suggested by this reviewer’s observations on property damage reporting under Michigan’s no-fault law. The no-fault law, as originally enacted, abolished liability for damage done by automobiles to other automobiles, on the theory that car owners could insure themselves against damages to their own cars more efficiently than they could insure themselves against causing damage to others.42 Under this regime, owners of damaged cars who formerly would have insisted on a


police report in order to sustain a claim against another driver stopped reporting fender benders to the police. Where there was no personal injury, the police, even when present, sometimes let the parties decide whether they wanted a report made.43

Uncoupling compensation from causation might also reduce the incentives for potential victims to avoid injury, or to minimize the consequences of injuries that occur. Although human nature provides universal incentives to shy away from evident danger, it does not prevent thousands of cyclists from riding without helmets, or millions of motorists from omitting to fasten their safety belts. A system that is explicitly indifferent to contributory fault might intensify the widespread indifference to protecting oneself from tragedy.

The persuasiveness of Sugarman’s proposal rests finally on the reader’s degree of confidence in the capacity of a government bureau to detect the causes of injuries and to assess penalties without the pressures supplied by private claimants. In order to embrace his plan, one must believe that the costs of governmental safety administration plus the costs of an increase in accidents through the loss of deterrence would not exceed the costs of the tort system.

ii. Risk of abuse. Although the title of Sugarman’s book signals only his proposal to excise tort law from personal injuries, his Comprehensive Compensation System involves an expansion of the Social Security system that is equally revolutionary. Under the existing system, beneficiaries have to show a need based on a specific cause, such as suffering a disabling injury, being laid off from work, or having dependent children that keep the claimant at home. Under CCS there would be subsistence support for anyone who is not working.

Sugarman probably assumes that there would be some means of determining that beneficiaries have a good reason, such as injury or lay-off, for not working, but he does not explain it. If there were no system, people could choose to live on the dole if they preferred not to work or preferred to work in the underground economy, where their incomes would not be visible to administrators of the system. The costs of supporting undeserving claimants would fall eventually on the general public through taxes.

How effective the civil servants of this expanded social welfare network would be in dealing with unjustified claims can only be guessed, subject to the biases of the guesser. Case workers in a welfare system seem likely to be more sensitive to demands of the needy claimants in their waiting rooms than to burdens imposed on distant taxpayers.

43. Under the law as it stood from 1972 to 1979, owners of damaged cars sometimes wanted a report charging the other car’s driver with a violation because their own collision policies compensated them more generously for accidents caused by the negligence of others than for unexplained accidents. Whether the 1979 amendment changed the attitudes of car owners or police to accident reports is unclear.
b. Can it win acceptance? In order to accomplish Sugarman’s aims, CCS must be perceived by a wide sector of public and professional opinion as fair and just. The proposals would have to be favorably perceived at the legislative stage in order to be adopted. They would need to enjoy enough acceptance after adoption to dissuade judges and jurors from evading or distorting their provisions or (in the case of judges) declaring them unconstitutional.44

i. The abandonment of tortfeasor liability. Few ideas are dearer to lawmen and laymen than that wrongdoers should be ordered to pay for the wrongs they commit. The fact that tort law does not actually make tortfeasors pay, but rather shifts the costs through insurance to innocent bystanders, seems to have no effect on public attachment to the tort charade. The pretense of penalizing tortfeasors is perpetuated even by sophisticated academics, who talk as though tort law made tortfeasors pay for injuries. A Yale law dean and a Yale economics professor recently offered “four tests for liability in torts,” all of which were phrased in terms of whether “the loss lies on the injured victim” or “the loss lies on the injurer.”45

Sugarman’s abolition of the charade of tortfeasor liability (or the palliation of the charade in his proposed Substantial First Step) will not be acceptable until lawyers and voters learn to think of tort law not as allocating losses between injureds and injurers, but as allocating loss between injureds and a broad population of innocent consumers and taxpayers.

ii. Indifference to the victims’s deserts. Sugarman’s proposals clash with intuitive justice also by excluding the contributory fault of victims from any effect on the benefits that they receive. Defenses based on contributory fault of the victim are to be completely abolished in SFS as well as in CCS. Nothing is said about victims’ aggravation of their injuries by neglect, which is presumably irrelevant, too.

The abolition of the contributory negligence defense is not surprising; it was banished long ago in workers’ compensation systems. But most of these systems recognize a defense of “self-inflicted injury,” and some recognize other fault-based defenses, such as “wilful misconduct.”46

It is easy to accept Sugarman’s view that some level of subsistence and medical care should be provided regardless of the victim’s own fault. To let the needy starve, even when they have precipitated their


46. See 1 A. Larson, supra note 39, at 6-1 through 6-67.
own needs, would be inhumane. It might also drive them into the underground economy, where they could live on crime.

But humanitarians who favor the compensation of even the negligent may still see some need for penalizing contributory fault. They may be reluctant to see claimants recovering compensation for pain and suffering (which would be allowed under SFS) to which claimants have contributed by their own fault, or to see faulty claimants collecting punitive damages (which Sugarman would allow even under CCS) from defendants who are no more faulty than themselves.

iii. The squeeze-out of private insurance. Sugarman's plan would have the effect of moving a good deal of benefit administration from the private insurance industry to an expanded public system of social welfare. This shift would be most marked in relation to work injuries, which are currently compensated by insurers for long periods of disability. In this respect, Sugarman's proposals differ from Keeton's and O'Connell's Basic Protection, under which insurance companies would simply shift their activities from paying on a fault basis to paying on a no-fault basis.

This shift of activity would antagonize not only the private insurance industry, but also a wider public who would see it as the nose of the socialist camel in the business tent. It might be opposed even by observers who are neutral between private and public enterprise, but who would think it wasteful to create new government facilities and staffs to perform functions that private insurance agencies are already performing.

The acceptability of Sugarman's proposals therefore depends on the swing of public favor between public or private administration of benefit programs.

iv. The squeeze on lawyers. The lawyers who would oppose CCS would include not only the specialists in personal injury law, but also most general practitioners, to whom the chance of sometime picking up a big personal injury case is their best hope for opulence. Although these lawyers lost a few battles over no-fault, they have subsequently organized and blocked any further expansion of that concept.

There are, to be sure, lawyers who would see advantages to society or to corporate clients in cutting out damage suits, at least if the plan were modified to preserve the business of insurance companies. But these lawyers are far outnumbered by the general practitioners and the tort specialists. The recent report of an American Bar Association committee, which supported the preservation of personal injury tort law without even the limits suggested by the Attorney General's

47. R. KEETON & J. O'CONNELL, supra note 2.

48. ABA COMMITTEE, supra note 35.
Working Group,⁴⁹ is a good indication of the position of the organized bar.

In the 1970s, no-fault advocates prevailed over the bar in some states by winning the support of a consumer movement that was more militant than it is today, of a sector of the insurance industry, and of both labor and management in the automobile industry. But the subsequent mobilization of the bar, which stalled no-fault in the 1980s, seems likely to block Sugarman’s proposals in the 1990s.

2. **The Substantial First Step (SFS)**

Since Sugarman’s Substantial First Step proposes a less complete revolution than his Comprehensive Compensation Strategy, it appears to have some advantage over CCS in acceptability.

Unlike CCS, SFS would preserve substantial private incentives for safety practices. The tort actions that survive would keep individuals and enterprises aware of the liability threat. These actions would also provide a demonstration of society’s condemnation of risk-enhancing behavior.

By preserving a role for insurance companies and lawyers, SFS would weaken the appeal of these groups to public opinion. Although voters are not prepared to dispense with attorneys and private underwriters, they are quite ready to believe that lawyers and insurance companies are getting “too much.” The authorization of attorneys’ fees would palliate the indignation of the organized bar and dull voters’ receptivity to lawyers’ complaints.

The “collateral sources” that would dispense a good deal of the compensation under SFS are less afflicted with structural weakness than Sugarman’s expanded social welfare system would be. The administrators of disability insurance, for example, have a professional interest in controlling the costs of their program which might not exist among administrators of a universal welfare system like the one Sugarman proposes.

There is a fair chance that SFS might overcome the inertia that stalled adoption of no-fault automobile proposals in the past decade by offering reductions in liability to a wider circle of defendants. These reductions might be partially offset by the proposed increases in health insurance, sick leave, and disability benefits, but the public (other than successful damage claimants) would probably gain because most of the collateral source compensation is already being paid. The savings would come from reducing duplication.

V. **How Do We Get There?**

If Sugarman’s plans could be made to work as designed, they

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would create a society that would not only be kinder and gentler to the unfortunate, but would also free the income of the fortunate from the drain of costly litigation. Although the attainability of these goals is problematic, they seem worth the risks of social experimentation.

Any such experimentation would, however, face formidable opposition. Sugarman does not tell us how this opposition is to be overcome. He tends none of the rousers like O'Connell's *Blame Game* and *Lawsuit Lottery* to inspire activists. He does not even present tables or charts to make his points more visual.

Readers who are intrigued by Sugarman's goals will probably be asking themselves how society could be moved closer to the end-zone. I offer here some of the thoughts that have crossed my mind as I pondered this problem.

1. *Denouncing Double-Dipping*

One of tort law's most vulnerable vices is the principle that is known to lawyers as the "collateral source rule," but is little known by any name to anyone else. It is the rule that lets injury victims collect damages for lost wages and medical expenses even when those expenses have already been compensated, or will be compensated, by other sources such as workers' compensation, group health insurance, and OASDI.

A powerful coalition could be organized to attack the rule. But first, the rule would have to be given a name more easily grasped by the public, like "double-dipping." Motorists, whose voting power was demonstrated in the recent California referendum on insurance premium reductions, could be promised a substantial reduction in premiums if damages were reduced by collateral sources. Merchants and manufacturers would gain by a lowering of judgments for product liability.

Defendants' gain would not be confined to the arithmetical advantage of subtracting collateral benefits from the jury's estimate of gross loss. In many cases, defendants would gain also by reducing the jury's estimate of gross loss, because jurors would no longer visualize injured claimants as destitute paupers; they would see them rather as suitors who are no worse off than the jurors themselves, but are grasping for an extra slice of the welfare pie.

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2. Revealing Who Pays and How Much

Trials, appeals, political debates, and even academic discussions of injury compensation are conducted in front of a looking glass that reflects only the needs of the claimant and conceals the people behind the mirror who will pay the bill. No evidence and no argument is admitted about whose pockets will be tapped for the millions of dollars that the jury may assess against the nominal defendant, nor about the disparity between what is paid by the contributors and what is received by beneficiaries.

In economic fact, most damage awards are shifted through various mechanisms, and eventually borne by the innocent public, much like taxes. Damages assessed against individual motorists are shifted via insurance to large classes of automobile owners, differentiated by factors such as their neighborhoods of residence and drivers' ages. Damages assessed against manufacturers and merchants are shifted to consumers via higher prices, or to the taxpayer public by way of deductions from the taxable incomes of manufacturers and merchants. Moreover, the amount that the public pays is approximately twice what the injury victims receive because of the costs of investigation, litigation, and insurance administration.

From a welfare perspective, the merits of paying a million dollars to an accident victim, whether viewed in terms of intuitive justice or economic optimality, depends on who ultimately pays, and how much. If juries are to make just decisions about shifting wealth, they

53. See, e.g., S. Shavell, supra note 41, at 1, 5; Calabresi & Klevorkin, supra note 45.
54. For the general rule on the inadmissibility of evidence of either defendants' or plaintiffs' insurance, see 2 J. Weinstein, WEINSTEIN'S EVIDENCE ¶ 411[01] (1989); cf. Arnold v. Eastern Airlines, 712 F.2d 899 (4th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (reversing a judgment because of counsel's oral argument on defendant corporation's wealth) (content of the argument described in Arnold v. Eastern Airlines, 681 F.2d 186, 196 (4th Cir. 1982)).
56. For a compilation and analysis of data from various surveys, see J. Kakalik & N. Pace, supra note 5, at x-xiv, 66-76.
57. On the intuitive level, there seems to be no welfare gain in requiring individuals with incomes of $20,000 to compensate losses suffered by individuals with incomes of $40,000, unless the losses of the latter reduce them to the level of the former. Even among individuals with equal incomes, there is no obvious gain in requiring the uninjured members to contribute a total of $2000 to compensate an injured member for a $1000 loss, which would enrich the injured member less than it would impoverish the contributors, in the aggregate.

On the plane of economic optimality, the case for compensation through a system that costs twice as much as it delivers is even more problematic. The total wealth of the injured and the injurers is reduced when the latter pay $2000 in order to give the former $1000. The system
should know from whom, as well as to whom, they are shifting it, and the approximate ratio of benefits to burdens.

A possible tactic for promoting recognition of who really pays for personal injury compensation would be to admit in injury trials evidence and argument about who ultimately pays the bill and about the ratio between costs and benefits. Although insurers have traditionally opposed disclosing the fact of a defendant’s insurance, they might find it advantageous if they could also disclose who pays in the end, and how much. Admitting this kind of evidence would prolong and complicate trials, but it is as relevant to a just solution as evidence on a claimant’s anatomy, physiology, and prospective future earnings.

A proposal to admit these considerations in lawsuits would require a long campaign of public education, but the campaign itself would serve to educate voters and jurors on the realities of who pays what for injury compensation.

3. **Punishing the Perpetrators**

If the charade of assessing big damage awards against tortfeasors is abolished by the adoption of Sugarman’s proposals, the importance of imposing real penalties for real fault should be intensified. Rather than putting a cap on punitive damages, as Sugarman proposes, punitive damages should be made truly punitive by assessing them against individuals, rather than corporations, and by forbidding anyone to insure or indemnify defendants against punitive liability. In order to restrain juries from assessing millions of dollars to express the depth of their indignation, they should be told that the damages are uninsurable and that defendants will have to pay punitive damages from their own pockets. This device would preserve the law’s function in condemning wrongdoing while reducing the temptation for jurors to play Robin Hood by awarding “punitive” damages that will not cost a penny to the individuals who erred.

Claimants who have contributed to their own misfortunes could also be penalized without impoverishing them by diminishing their claims for punitive damages or for compensation for pain and suffering. Preserving the role of contributory fault in awards of these kinds would honor the law’s functions of relating awards to deserts, and of demonstrating society’s disapproval of risky practices of victims as well as of tortfeasors.

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appears to be optimal only in cases where the loss of the injured, if uncompensated, will be multiplied by continued disability, unless one regards benefits to lawyers as a social objective.  

Cf. Priest, *Understanding the Liability Crisis*, in *NEW DIRECTIONS IN LIABILITY LAW* 196, 210-11 (W. Olson ed. 1988) (“In effect, the system forces those with low incomes to subsidize the insurance costs of those with high incomes.”). See also observations of S. Shavell, *supra* note 41, at 266, on “socially undesirable claims.”
4. Conserving the Services of the Insurance Industry

Sugarman’s plan could be modestly revised to keep insurance companies in the business of handling a volume of benefits similar to what they now handle under workers’ compensation and health insurance. The primary merit of this step is its economy. It would avoid the expense of creating a new pool of personnel, office buildings, and computers to replace an existing pool of people and facilities.

On the political level, this amendment would disarm the skeptics who doubt that governmental agencies can operate as efficiently as private ones, and might mollify the powerful insurance industry.

5. Promoting Class Suits for Safety

Although Sugarman’s plans are oriented toward welfare, they will fail to attract the support of safety advocates if they rely exclusively on the diligence of government bureaus to suppress dangerous activities. When individual claims have lost their sting, the law should authorize class suits for injunctive relief on behalf of potential injury victims, like miners, hospital patients, or automobile travelers (against trucks), in which attorneys’ fees’ would be assessed against enterprises that disregard safety measures.

This device would provide a second line of defense against risks that government officials may ignore, like the poisoning of the environment around military defense facilities.58

6. Justifying the Lawyer Squeeze-out

One of the toughest tasks in selling the Sugarman agenda will be persuading the public to dispense with the lawsuits that they have learned to regard as the prime instrument for compensating the innocent and punishing the guilty. The argument that lawsuits have a high expense ratio is unpersuasive to voters because they do not perceive that they are the ones who pay the bill.

In order to make an effective appeal for a compensation system that bypasses lawyers, voters would have to be persuaded that they would save a lot on liability insurance that would not be offset by additions to their social welfare taxes. They would need to be shown that a big share of compensation can be dispensed more quickly and more cheaply in no-fault systems than through tort law.

In order to make an effective appeal on the basis of cost reduction, a viable CCS should not expand the classes of social welfare beneficiaries very far beyond those that now qualify under the cause-con-
nected programs such as those for the aged, the disabled, the laid-off, and parents of dependent children. The humanitarian goal of helping the neglected needy will not win as many votes as savings on insurance premiums. The broadening of the social security net may be a desirable objective, but hitching it to the attack on tort law is likely to defeat both objectives.

CONCLUSION

During the 1990s, scholars and legislators will confront a passel of proposals to "reform" personal injury law. The flood of tort law modifications, which reached every state in the 1980s, gives proof of a tide of dissatisfaction that has not reached its apogee.

Most of the reform proposals will tinker with specific problems, like collateral sources in medical malpractice cases, or the magnitude of awards for pain and suffering, or the levels of insurance premiums. If adopted, these proposals will complicate the crazy-quilt of tort law without relieving the problems of delay, expense, undercompensation, and overcompensation.

In contrast with these patchwork repairs, Sugarman has offered a bold, well-articulated plan for extricating society by stages from the injustices and the waste of personal injury compensation under tort law. His work challenges scholars and legislators to replace atomistic revisions with a comprehensive and consistent plan for compensating needs of many kinds, while preserving incentives to avoid the creation of needs. Reformers and anti-reformers of the 1990s should be prepared to justify their projects as steps toward some goal as comprehensive and as fair as Sugarman's.

Judge Richard Neely's latest book provides a political blueprint for overhauling current product liability law. Like Neely's earlier works, this book is not directed at the legal community; rather, the author intends that the work furnish the business community with a new strategy to bring about product liability law reform. The substance of Neely's proposed reform is unoriginal: he suggests adopting a national law of product liability. It is his proposed means of implementing the change that is unique.

The author identifies a structural deficiency in the current product liability system as the primary justification for reform. Because of the

1. Other books by Judge Richard Neely include THE DIVORCE DECISION (1984), HOW COURTS Govern AMERICA (1981), WHY COURTS DonT WORK (1983), and JUDICIAL JEPDARDY (1986). Judge Richard Neely was elected to the West Virginia Supreme Court of Appeals in 1972 at the age of 31. He served as Chief Justice in 1980 and 1985. Between graduation from Yale Law School and his election to the West Virginia Supreme Court, Judge Neely served in the Army as an artillery captain, practiced law as a solo practitioner, and, in 1970, served one term in the West Virginia Legislature. Judge Neely is also a professor of economics at the University of Charleston.

2. Nor does Neely claim the book is a work of legal scholarship; indeed, he begins the book with the statement that "Larry Tribe and Richard Epstein, two leading constitutional theorists, can't write this book. . . . Too much brilliance, and too nice a regard for the intricacies of legal theories, can affect a person's appreciation of how to deliver a bold blow to the political jugular." P. 1. Epstein has commented on the area, however, in discussing the likelihood of the Supreme Court limiting the area of punitive damages. He thinks it unlikely that the Court will become involved: "To get involved is like hugging a tar baby . . . . Conservative justices will be reluctant to use constitutional law to intervene in an historically states' rights area, and liberals will be wary of interfering with justice." Olson, PUNITIVE DAMAGES: How Much Is Too Much?, BUS. WK., Mar. 27, 1989, at 54, 56 (quoting Epstein). The Supreme Court's recent refusal to apply the excessive fines clause of the eighth amendment to reduce an award of punitive damages supports Epstein's position. Browning-Ferris Indus. of Va., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2505, 2914 (1989).


4. P. 57. Neely does cite several other, less important factors that have increased the hazard to business from product liability claims. These include the increased capacity of the courts, and the proliferation of lawyers — in particular, the increase in the number of "dumb lawyers." Pp. 21-23. The latter factor is important to the product liability issue because a "bunch of dumb lawyers are more likely to be ambulance chasers than they are to crowd the more intellectually demanding fields of taxation, administrative law, or corporate takeovers." P. 23. Neely's argument that more "dumb lawyers" are entering the field appears to be based on incorrect or out-

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inherently parochial nature of state courts, exacerbated by the fact that many state judges are elected, Neely contends that state courts are locked into a “competitive race to the bottom.” Neely defines this “race” with a simple example. Allowing a paraplegic to collect a few hundred thousand dollars from the Michelin Tire Company, following a single-car crash of unexplained cause, permits Judge Neely a sound night of sleep. Michelin will likely survive, and if it doesn’t, only the French will care. More important, Judge Neely’s disabled constituent will have sufficient money to live out her life — and she, her family, and her friends will vote for Neely in future elections (pp. 1-4). In more general terms, Neely perceives state court judges as more than happy to redistribute out-of-state wealth to in-state constituents. And given a product liability system with standards “as fluid as Lake Michigan” (p. 20), courts have little trouble formulating decisions to further this objective.

Neely’s solution to this problem is neither surprising nor original. The author advocates replacing the current system of product liability law — in reality fifty-three separate systems of law — with a uniform, national common law of product liability. Federal courts would be given supervisory authority over the law, with state courts continuing to administer the law. Under such a system, federal courts, with their inherent national perspective, would be impervious to the pressures that lead to the “competitive race to the bottom.” Not only are federal courts national in scope, but federal judges are lifetime appointees, unlike the majority of state court judges. The idea of a national common law of product liability has been advocated by others, and it has

dated information. According to Neely, fewer brilliant people are applying to law school, which suggests that the schools are accepting lower caliber applicants. Just the contrary appears to be true: according to a recent report from the Law School Admission Services, the number of applications to accredited law schools is continuing a “record-breaking” string of increases that began three or four years ago. The number of applications has increased 44.6% since 1986. The More the Merrier, STUDENT LAW., Feb. 1990, at 5-6. The increased applications, unaccompanied by an increase in law school populations, would ordinarily portend increased competitiveness and selectivity in law school admissions. Neely fails to articulate why he feels the caliber of law students in general is declining, other than to relate the difficulties faced by his local law school in attracting qualified applicants. P. 23.

5. Recognition of this perceived bias is well-established:
However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen or between citizens of different states.


6. Neely, in his typically blunt style, later sets forth an even more aggressive agenda, stating that “[t]he best I can do, and I do it all the time, is make sure that my own state's residents get more money out of Michigan than Michigan residents get out of us.” Pp. 71-72.

been the subject of several unsuccessful bills in Congress.8

Neely diverges from the mainstream, however, in rejecting Congress as the appropriate forum in which to bring about this reform.9 In a chapter entitled “Kiss Congress Goodbye” (pp. 80-105), he explains why Congress is unable to act in this area. The structure of Congress itself, according to Neely, favors the status quo by erecting numerous barriers to the passage of any legislation.10 Rather than throw up his hands in despair, though, Neely advocates bypassing Congress, with the federal judiciary acting unilaterally to create a national product liability law. This strategy for bringing about change is Neely's most controversial suggestion. The legality of such a solution is doubtful. Neely himself seems to concede this point when he states that "I make no claim to having reconciled state sovereignty with a national law of product liability]" (p. 107). Nevertheless, he cites New York Times Co. v. Sullivan11 for the proposition that the Supreme Court has the power to rewrite state law when policy considerations mandate it (pp. 103-05). Yet, unlike libel law, product liability law does not implicate the first amendment or other overriding constitutional concerns.12

Neely replies to this objection with an analysis of federalism, dividing the doctrine into three distinct schools of thought: historical federalism, result-oriented federalism,13 and practical federalism (p. 118). The first two conceptions of federalism, Neely admits, do not support

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9. Later in the book, Neely also rejects any reform based on a coordinated effort by the states. P. 159 (discussing the failure of the Uniform Contribution Among Tortfeasors Act).

10. Support for this contention may be found in the public choice literature. See, e.g., W. Eskridge & F. Frickey, Legislation 368-77 (1985) (cyclical majorities, the gatekeeping power of committees, and strategic voting all work to obstruct implementing the will of the majority). Neely also identifies other impediments to legislative action, including the technical nature of the subject matter and the lobbying power of the American Trial Lawyers' Association. Pp. 80-81.


12. Two recent Supreme Court decisions emphasize this point. In Florida Star v. B.J.F., 109 S. Ct. 2603 (1989), the Court set aside an award of damages against a newspaper, even though the paper had published a rape victim's name in violation of a state statute. 109 S. Ct. at 2613. In upholding the right of the paper to publish such information, the Court found the first amendment concern overriding. Decided the same term, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2509 (1989), reaches a different result. Lacking the first amendment concern present in Florida Star, the Court refused to set aside or reduce a jury's determination of punitive damages in a private dispute. 109 S. Ct. at 2914.

13. Neely's historical federalism is based on traditional ideas of federalism, whereby the federal government is a government of delegated powers. The doctrine is derived from the intent of the framers, who did not set out to create a strong, centralized government. P. 108. Result-oriented federalism, on the other hand, is more fluid. Neely defines it as a convenient doctrine invoked by those opposing particular federal legislation. Under this concept of federalism, for example, those opposed to racial integration may raise federalism arguments if they believe more favorable treatment is available from the states. P. 111.
a court-enacted national common law of product liability. Yet practical federalism, which Neely defines as a doctrine chiefly directed at fostering competition among state governments (p. 112), lends support to Neely's proposal. In particular, one goal of practical federalism is preventing extortion of concessions by distributional coalitions (pp. 113-14). And Neely's plan, with product liability law administered at a national level, furthers this objective by reducing the externalities resulting from the competitive race to the bottom. 14

Neely, again acknowledging the weakness of his position, retreats in the final chapter of the book, suggesting that Congress enact an empowering statute (pp. 169-71). Similar to the Sherman Act, the statute would be worded in general terms, granting the federal judiciary the right to fashion a national common law of product liability. Neely's concession to constitutional concerns is, however, short-lived. At the end of the proposal he states that although such a bill would be marginally easier to pass than a more detailed statute, it still is unlikely to pass, and thus the solution ultimately must come from the federal judiciary (p. 173).

On a more general level, Neely's argument that a problem of sufficient magnitude exists to justify his reform is not wholly persuasive. The author begins with the presumption that a product liability crisis is inevitable, but fails to provide much evidence to support this proposition (p. 3). His argument appears to be based on his own proclivity for redistributing wealth to in-state plaintiffs, 15 generalized to encompass a significant number of state appellate judges (p. 4). Taken together with the data "all around us" that product liability law is a hazard to the economy (p. 3), this desire to redistribute wealth seems sufficient to convince Neely that a crisis is at hand. 16 Yet there is much evidence that contradicts such a conclusion.

Much of the analysis of the increase in product liability claims has

14. Earlier in the book, Neely acknowledges that federal courts may exhibit some bias as well. For example, federal judges are typically local appointees and thus may feel some sense of obligation, or perhaps kinship, to in-state litigants. Yet he argues that this bias is diluted at the appellate level. P. 40.

15. It is not entirely clear to what degree these factors play a role in Neely's decision making. A recent "clarification" in the ABA Journal suggests that Judge Neely may only be mimicking what he perceives to be an unspoken rationale other judges use. The Journal had quoted a passage from The Product Liability Mess in which Neely explained how redistributing out-of-state wealth to in-state plaintiffs helps Neely's chances for reelection. The following month the Journal made it clear that the quote did not reflect Neely's personal views. Quotes A.B.A. J., Jan. 1989, at 32.

16. One observer has noted that "the claim that the rise in liability insurance rates can be adequately explained by higher tort awards appears to be based largely on anecdotes and conjecture." Rabin, Some Reflections on the Process of Tort Reform, 25 SAN DIEGO L. REV. 15, 29 (1988). Thus, Neely appears to have joined a crowd by presuming, without a solid basis, that liability law had precipitated a crisis.
focused on cases brought in federal court. But a mere two percent of the cases filed in the United States are filed in federal court, and an increase in activity in federal courts does not necessarily imply that a similar increase in state courts has occurred. Admittedly, at first glance the data on federal filings is alarming. From 1974 to 1985, product liability claims in federal courts increased 758%. Removing asbestos claims from the total, however, leads to a much different result; over one quarter of all product liability claims during this period were asbestos claims. By 1986, asbestos claims accounted for 43% of federal product liability claims. And, from 1985 to 1987 nonasbestos product liability claims in federal courts decreased 27%. Neely himself supports litigants' pursuit of asbestos claims (p. 2). Finally, even if one still considers the data on federal claims alarming, evidence suggests that state courts have not suffered similar increases in claims. Tort claims as a whole in state courts increased nine percent from 1978 to 1984; over the same period the population increased eight percent.

At this point, one cannot help but question the value of the book: little evidence supports the notion that there is a product liability crisis, and even if a crisis is at hand, Neely's proposal for reform appears

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18. Id. at 415-16 (1988). Yet many are willing to make this leap of faith. For example, a recent government report states that “[t]he growth in the number of [federal] product liability suits has been astounding... There is no reason to believe that the state courts have not witnessed a similar dramatic increase in the number of product liability claims.” REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 45 (Feb. 1986). Empirical evidence suggests otherwise: as a whole, federal court litigation has been increasing at a pace about four times that of state courts. J. GUNTHER, THE JURY IN AMERICA 164 (1988).

19. Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3, 24 (1986). All other tort claims increased a relatively small 24% over the same period. Id.


22. Galanter, supra note 19, at 7. Unfortunately, the data available on state court claims does not separate product liability claims from all other tort claims. Nevertheless, the numbers suggest something other than a litigation crisis. Left unanswered, however, is the question of where the common perception of a product liability crisis originated. One possible explanation is the insurance industry itself. In 1986, the Insurance Information Institute spent $6.5 million dollars to promote the idea that a crisis was at hand. The Manufactured Crisis, 51 CONSUMER REP. 544, 545 (1986). And there is some speculation that some insurers even canceled policies on noneconomic grounds to strengthen the perception of a crisis. Abramowitz, W. Va. Sues 5 Big Medical Insurers, WASH. POST, Apr. 15, 1986, at D4, col. 1. Economic self-interest appears to have been the industry's primary motivation. Comment, supra note 17, at 408. The industry may profit from a public perception of crisis. For instance, following a Delaware Supreme Court decision that appeared to enlarge potential director and officer liability, insurance companies that underwrote such coverage were able to raise premiums far in excess of their increased exposure. Put another way, these firms earned abnormally high returns as a result of a perception of crisis. Bradley & Schipani, The Relevance of the Duty of Care Standard in Corporate Governance, 75 IOWA L. REV. 1, 55-56 (1989).

The author’s strategy for change reveals useful insights into the judicial process. Part of Neely’s strategy includes lobbying the judiciary. In Neely’s view, judges are merely politician and although the method of explaining proposals to the judiciary is different, bringing about change is nonetheless a lobbying exercise (pp. 149-50). According to the author, the “major difference between courts and other political institutions . . . is that it is not usually smart to try to bribe appointed judges” (p. 14). Neely’s lobbying plan includes what he terms a “propaganda function,” designed to inform the judiciary of the need for a national common law of product liability. Magazine articles, op-ed pieces, and *The Product Liability Mess* are all examples of this type of lobbying.  

The idea that the judiciary can and should be lobbied by business is sure to provoke discussion. Neely bemoans the inability of the judiciary to gather information—so-called “legislative facts” —so necessary to making intelligent decisions (pp. 139-41). In so doing, Neely reveals the importance of information about the world to his job as a decision maker; concomitantly, he reveals the frustration of the judiciary with its inability to gather such information.

Moreover, Neely’s candor throughout the book allows the reader an inside look at a modern legal realist at work. Neely provides the reader with an understanding of what is important to at least one sitting state appellate judge in making decisions. Neely’s work is unique if only for the fact that it comes from one who actively practices legal realism rather than from the “pointy-headed elite.” Certainly, Neely overstates his position at times for effect, but nevertheless the reader

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23. The following discussion is subject to one caveat: readers familiar with Neely’s recent work _Judicial Jeopardy_ will find that *The Product Liability Mess* offers little new material.

24. The second prong of Neely’s plan involves publication of academic articles in prominent law journals. Supporting this prong of the battle plan, Neely discusses a case he decided by adopting in its entirety a scheme described in a law review article. Actual implementation must then come about by bringing numerous test cases to court. P. 146.


26. Judge Neely uses this term to describe academic commentators, who, the author contends, propose solutions that are often worse than the problem. P. 4.

27. Neely seems to enjoy making bold statements: “One jerk-water Texas state trial court (with the obscene concurrence of a Texas court of appeals) has managed to screw up something bigger than many nation-states . . . .” P. 37 (discussing the *Pedzio v. Texas* litigation). Later he discusses business lawyers who later become judges, commenting that even when business lawyers become judges they “often devote the rest of their lives to doing penance for having been business whores when they were young.” P. 59. Neely is also not afraid to contradict himself; this last quote conflicts with an earlier statement, in which Neely asserts that once conservative or liberal judges are appointed, they “seldom change their spots.” P. 26.
is left with the sense that Neely provides an accurate picture of how he goes about his job.\footnote{28} The Product Liability Mess has one other redeeming aspect: despite its substantive flaws, the book is a pleasure to read. The work is direct, confrontational at times,\footnote{29} and almost devoid of footnotes. In one of the author’s earlier books he states that he “would prefer to be read rather than admired.”\footnote{30} Neely’s latest work appears destined to realize that objective.

— Matthew Harris

\footnote{28. Other appellate judges have also provided valuable insights into the judicial process. See, e.g., B. Cardozo, The Nature of the Judicial Process (1921); J. Frank, Courts on Trial (1949); R. Posner, Federal Courts (1985).}

\footnote{29. Perhaps Neely is continuing a family tradition in this aspect. Although he provides no details, he does note early in the book that his own grandfather (it is not clear if this is the same grandfather who was a U.S. Senator) was expelled from the West Virginia University College of Law for whistling “Dixie” on campus. P. 31. One might imagine Grandfather Neely’s rendition of “Dixie” was furnished for more than mere musical entertainment.}

\footnote{30. R. Neely, How Courts Govern America xii (1981).}