THE NEW ECONOMICS OF THE AMERICAN FAMILY

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INTRODUCTION

In a single generation, a change has taken place at the heart of the American family. In an effort to make their families more financially secure in an ever more difficult economic environment, families have sent both mom and dad into the workforce, committing both incomes to basic expenses such as mortgages, car payments and health insurance. The intent and the effect are in opposite directions.

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[1] *See* Figure 7 *infra* p. 27 and accompanying discussion

Over the past generation, families have become more—not less—vulnerable to economic collapse, more likely to falter in the wake of a job loss, medical problems and family break ups. Families have fallen into a two-income trap, working harder than ever as more of them fail financially.

The trap has ensnared families with children. Today, a household with children is nearly three times more likely to file for bankruptcy than its childless counterparts—whether married or single.[2] This year alone, more children will survive their parents' bankruptcy than will survive their parents' divorce.[3] If current trends continue, by the end of the decade, one in every seven children in the United States would live in a household that has declared bankruptcy.[4]

The change in the economic structure of the family has occurred gradually, without banner headlines or a single cataclysmic event, and the effects on the bankruptcy system have escaped notice. Congress debates legislative change while carefully avoiding a hard look at the actual families who file. Credit industry lobbyists press for a hodgepodge of privileges for their clients without examining the interrelated effects of credit practices and financial collapse. Judges have their hands full with a caseload that has doubled in less than a decade, and trustees and practitioners are caught up trying to keep the day-to-day operations of the system functioning. Academic discourse is far too often about a forest with no trees, that is, a bankruptcy system in the abstract, unburdened by the details of real families in trouble. The consequence is a collective failure to appreciate some of the key effects of changes in the financial structure of the family and to think about what

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[2] *See* Figure 7 *infra* p. 27 and accompanying discussion.

[3] *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (Basic Books 2003).

[4] *Id*.

such changes mean for the bankruptcy system and the future of the American family.

The occasion of the Twenty-Fifth Anniversary of the American Bankruptcy Institute is a fitting time to reflect on these changes in the economic structure of the family. In a single generation, the American family has become a much riskier economic venture. As the economic structure of the family becomes riskier, more families will fail. As more families fail, pressure will increase for changes within the bankruptcy structure, as well as other parts of the legal system.

I. RESTRUCTURING THE ECONOMICS OF THE FAMILY

When trouble strikes—a job loss, a medical problem, a family break up—most families need a safety net. They consume extra resources—cash to replace a lost income, more medical care, someone to lend a hand—hoping they can regain their economic stability at some future time.

There is no doubt that America's safety net has frayed. Welfare has been slashed, many hospitals have eliminated free care to the poor, public housing has been shuttered, Medicaid funding has been cut, food stamp programs have been cut back, and so on throughout the pages of the daily newspaper.

There is something beyond the obvious hardship implied in this litany that is important to notice. The "safety net" provided by each of these programs serves only one segment of the population: the poor. Nearly all these programs involve a stringent means test, making them available only to those near or below the poverty line. They are designed to keep hunger, disease, and destitution at bay for the poorest members of society, at least for a while.

But what about the vast majority of Americans in the middle class? What is their safety net? Where do they turn in the case of a calamity? Unemployment insurance offers modest protection, and Social Security protects against penury in old age. But there is little more. For most families to qualify for any other form of government assistance, they would have to forgo everything that makes them middle-class—their homes, their jobs, their places in their communities.

There is little discussion about the safety net for middle-income families, no wise experts expounding about it on the Sunday talk shows, no long articles about it in magazines or newspapers. The reason may be that the middle-class safety net isn't built with taxpayers' dollars. If the middle class has a private safety net, it is built family-by-family, home-by-home, far from the spotlight of media attention. In times of trouble, the first lines of defense are insurance policies, offering at least some financial protection against accident, illness, and death. Next is savings in the bank that can be tapped when the family has sudden needs. But there has been another line of defense for families with children, another type of insurance that has been widely overlooked. For generations, the most important part of the middle class safety net has been the stay-at-home mother.

A. No Reserve Worker, No Reserve Care Giver

Today's wisdom holds that a couple that sends both spouses into the workforce is better off economically. They may be stressed, they may feel guilty about sending their kids to day care, and they may have too little time for each other, but the one piece of good news that the family can count on is that they are more financially secure. The view is familiar, repeated with comforting regularity. "Jason's company isn't doing well. But if something happens to his job, at least Melinda is working." Or "The new house will be a stretch, but at least there are two of us to manage it." In their recent book, *He Works, She Works: How Two-Income Families Are Happier, Healthier, and Better Off,* Rosalind Barnett and Caryl Rivers sum up this perspective:

> Because they have two full incomes that help buffer them against the terrible wrenches of a changing economy, they do not feel the gut-wrenching vulnerability of standing at the edge of a precipice, ready at any second to topple off the cliff if a company downsizes or relocates . . . . The dual earner family offers economic stability, protection against financial disaster.[5]

Stability and protection—delicious ideas for the modern family—and exactly what everyone knows a second income provides.

But what if it doesn't? What if the modern two-earner couple is actually *more vulnerable* than the traditional single-breadwinner family? What if economic conditions and risks have changed so much in the last generation that the secure two-income family is a myth?

A generation or so ago, the typical one-earner family usually described the father as responsible for the economic health of the family, with the mother assigned to roles such as homemaker or helpmate. To the extent that she had an economic role, it was seen as one of careful spending. It was her job to ensure that Dad's salary went as far as possible; she mended torn shirts, packed bag lunches, and counted the family's pennies. Her *economic* contribution, in effect, was that of careful manager of what her husband brought home.

But this traditional view was always far too narrow. It conjures up an image of the stay-at-home mother forever confined to the home, unable or unwilling to make a financial contribution even when her family faced disaster. If her husband lost his job, the mythological mother could do little more than stand by helplessly and wring her hands. In reality, the stay-at-home mother was never such a cartoon figure. She has always worn many hats, changing roles as circumstances demanded. When her husband was working steadily, she would forgo a paycheck to spend her days at home taking care of the children and keeping house, but if

[5] ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER OFF 2, 5 (Harper San Francisco 1996).

circumstances changed, so did she. If her husband was laid off, fired, or otherwise left without a paycheck, the stay-at-home mother didn't simply stand helplessly on the sidelines as her family toppled off an economic cliff; she looked for a job to make up some of that lost income. Similarly, if her husband had a heart attack or an accident and needed to stay home to recuperate, she could find work and add a new income source to help the family stay afloat financially. A stay-at-home mother served as the family's ultimate insurance against unemployment or disability—insurance that added economic stability to the family, insurance that had a very real economic value even when it wasn't drawn on.

Consider a typical one-earner family from the 1970s. If a father who earned $38,700, the median income for full-time employed males (inflation-adjusted to $2,000),[6] was laid off from his job, he could dip into the public safety net and draw unemployment. But his unemployment check would cover only about half of his previous salary, leaving a huge shortfall for basic expenses. Without half of his income, the family might face imminent disaster. But if the previously unemployed mother entered the workforce to help her family through this rough patch, she could bring in much-needed income at just the right time. She wouldn't earn nearly as much as her husband, but on average she would bring in nearly $22,000 a year.[7] Assuming it took her a couple of months to find work, the family would just about break even. If the husband could find another job within six months (the limit imposed by most states on how long someone can collect unemployment benefits),[8] the family should be able to weather the storm without serious injury to their financial health.

What if dad never made it back to his original income? Mom's new paycheck could still make the difference between their long-term survival and collapse. If he were able to return to work at a lower-paying job, or if he could find only a part-time job, even with his income cut in half, the now-two-earner family might approximate its earlier lifestyle—and its long-term economic prospects. Mom might need to remain in the workforce permanently, and the family would have no reserves to meet any future setbacks, but they could weather one hard economic

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[6] U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES-PEOPLE, TABLE P-36, FULL-TIME, YEAR ROUND WORKERS (ALL RACES) BY MEDIAN INCOME AND SEX, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://www.census.gov/hhes/income/histinc/p36.html (last revised Sept. 30, 2002).

[7] In 1973, the median income for a woman who worked full-time, year-round was $6,488, or $21,913 adjusted for inflation to 2000 dollars. *See* source cited *supra* note 5. A longtime stay-at-home wife with fewer skills might have earned somewhat less than the median income on entering the workforce. Such differences, however, should be relatively modest. In the late 1970s, for example, women in their early twenties (who were presumably less experienced than average) earned only 12 percent less than the median income for all working women. In addition, middle-class women generally had higher levels of education than many lower-income working mothers. U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., HIGHLIGHTS OF WOMEN'S EARNINGS IN 2000, TABLE 13, MEDIAN USUAL WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS IN CONSTANT (2000) DOLLARS BY SEX AND AGE, 1979-2000 ANNUAL AVERAGES, REPORT 952 at 24, *available at* http://www.bls.gov/cps/cpswom2000.pdf (last visited Feb. 17, 2004).

[8] U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE FACT SHEET, *at* http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp (last visited Feb. 11, 2004).

blow—the permanent reduction of the primary breadwinner's income—intact.

Of course, the realities of a father's losing his job are far more varied and complex.[9] Researchers have found, for example, that a woman whose husband loses his job is more likely to enter the workforce if her children are older, perhaps because the higher cost of day care for small children can make a young mother's return to work too costly.[10] Some longtime stay-at-home mothers may find that they lack marketable skills; others may be frustrated that only low-wage jobs are available to them. In addition, a stay-at-home mother may have difficulty finding work when layoffs, such as the one that caught her husband, are making jobs scarce in their locale.[11]

Notwithstanding these difficulties, there is considerable evidence that as a family's economic position deteriorates, stay-at-home wives do exactly what one might predict: They look for a job. Sociologists have found that a woman is far more likely to enter the workforce if her husband takes a permanent wage reduction, if he faces an extended period of unemployment, or if he receives little or no unemployment compensation.[12] This squares with common sense: If a father found a well-paying job just a few weeks after being laid off, there would be little need for the mother to begin a job search. If, on the other hand, he could not find a job, or if the only jobs he could find paid considerably less than his previous position, then there would be far more pressure on her to find a way to bring home some

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[9] There have been conflicting studies of what sociologists call "the added worker effect," that is, the magnitude and direction of changes in workforce participation of wives of unemployed men. For example, some researchers have examined whether a wife's labor force participation increases in the same year of or in the year immediately following the husband's unemployment, and found no significant impact. *See* Tim Maloney, *Unobserved Variables and the Elusive Added Worker Effect*, 58 ECONOMICA 173, 183 (1991); W. Jean Yeung & Sandra L. Hofferth, *Family Adaptations to Income and Job Loss in the U.S.*, 19 J. FAM. & ECON. ISSUES 255, 255–83 (1998). More recent research, however, has shown that wives' entrance into the workforce is gradual, beginning one or more years before a husband's job loss and continuing for multiple years after the job loss. When this is taken into account, a significant "added worker effect" has been documented. *See* MELVIN STEPHENS JR., WORKER DISPLACEMENT AND THE ADDED WORKER EFFECT (Nat'l Bureau of Econ. Research, Working Paper No. 8260, 2001).

[10] *See* STEPHENS, *supra* note 8, at 17. Stephens found that the greater the number of children under age six, the less likely the wife was to increase her participation in the workforce. *See generally* JONATHAN GRUBER & JULIE BERRY CULLEN, SPOUSAL LABOR SUPPLY AS INSURANCE: DOES UNEMPLOYMENT INSURANCE CROWD OUT THE ADDED WORKER EFFECT? (Nat'l Bureau of Econ. Research, Working Paper No. 5608, 1996).

[11] Black women living in areas of high unemployment are less likely to increase their participation in the workforce, presumably because of the difficulty in finding a job. *See* Yeung & Hofferth, *supra* note 8, at 278.

[12] A wife is significantly more likely to increase her hours in the workforce if her husband suffers a large wage loss than if he finds a new job with similar or higher wages. *See* STEPHENS, *supra* note 8, at 22. As the duration of a husband's unemployment increased, the probability that his wife would enter the workforce nearly doubled. *See* Craig B. Little, *Technical-Professional Unemployment: Middle-Class Adaptability to Personal Crisis*, 17 SOC. Q. 262, 269–70 (1976) (interviews conducted with 100 unemployed male technical-professional workers during aerospace-defense-electronics recession of early 1972); s*ee also* GRUBER & CULLEN, *supra* note 9, at 3 in which the authors argue that unemployment insurance tends to crowd out spousal labor supply, stating "[o]ur estimates imply that in the absence of [unemployment insurance], wives' total hours of work would rise by 30% during their husbands' spells of unemployment." *Id.*

additional money. Researchers have found that the effect of wives' added income is not trivial; for the average married man who loses his job, his wife's new income offsets more than 25 percent of his lost wages.[13] That all-purpose insurance policy provided by the stay-at-home mother has paid off for millions of families.

Not only did stay-at-home mothers function as backup workers, insuring against loss of their husband's income, they were also available when the family had unexpected expenses. If there was an illness in the family, a stay-at-home mother could go to work to cover the deductibles, copayments, and other medical expenses not covered by insurance. If the family was uninsured, a stay-at-home mother could join the estimated four to five million women who now stay in full-time jobs just so that they can pay medical bills or provide health insurance for their families.[14]

A stay-at-home mother also provided a form of divorce-insurance. Divorce is the single most common trigger for stay-at-home mothers to enter the workforce. During the 1970s, when fewer than half of all married women were in the labor force, 83 percent of divorced women were working within two years of separation from their husbands.[15] In the 1970s, when a family broke apart, they encountered new expenses, such as a second place to live, a second car, a second set of utility payments. But they also had a source for new income—a mother who had not been working could join the workforce.

A sudden need for cash can arise from all sorts of causes, encompassing both good news ("Cynthia got into Yale") and bad news ("Termites have eaten away the foundation of your house"). Either way, the key point remains the same: Families with a stay-at-home mother have a backup earner, someone who can add supplemental income to the household—a jolt that can make the difference between covering the kids' tuition and keeping up with the doctors' bills rather than giving up health insurance or losing the house.

In addition to playing the role of backup earner, the stay-at-home mother plays another critical *economic* role: backup caregiver. The full-time homemaker does more than change diapers and check homework; she is available to provide extra care for *anyone*—child or adult—who needs it. She is on hand to care for an elderly relative who can no longer take care of himself. Three out of four caregivers to the disabled elderly (excluding husbands and wives) are daughters, daughters-in-law, or other female relatives and friends (such as nieces or granddaughters). A generation ago the majority of these women did not work outside the home.[16] If granddad has become too frail to manage on his own, the

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[13] *See* STEPHENS, *supra* note 8, at 26.

[14] *See* Shannon Brownlee & Matthew Miller, *Lies Parents Tell Themselves About Why They Work*, U.S. NEWS & WORLD REP., May 12, 1997, at 59.

[15] *See* William R. Johnson & Jonathan Skinner, *Accounting for Changes in the Labor Supply of Recently Divorced Women*, 23 J. HUMAN RESOURCES 417, 424 (1988); U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES-FAMILIES, TABLE F-7, TYPE OF FAMILY (ALL RACES) BY MEDIAN AND MEAN INCOME: 1947 TO 2001, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://landview.census.gov/hhes/income/histinc/f07.html (last revised Sept. 30, 2002).

[16] *See* Robyn Stone et al., *Caregivers of the Frail Elderly: A National Profile*, 27 GERONTOLOGIST 616, 616–26 (1987).

stay-at-home mother is available for the myriad tasks not covered by Medicare. She can help him dress every morning, drive him to the doctor's office, balance his checkbook, or just keep him company. And because she is at home full-time, she can perform these tasks without taking time from her own job and forcing her family to live without a paycheck they had been counting on. The same is true when a child faces a serious, prolonged illness—a stay-at-home mother can perform important functions without seriously affecting the family's takehome pay.

A mother who has gone into the workplace brings home a paycheck that is quickly absorbed into the family's budget, but she necessarily forfeits the real economic value of her backup role. So long as nothing goes wrong, the tradeoff is a simple choice between two viable alternatives. Some families prefer to have Mom at home and are willing to live with less money; others accommodate a working mother and enjoy a higher richer lifestyle. When trouble strikes, however, the family learns that the two choices may not have been as equivalent as they had seemed. Only one choice leaves the family with a safety net.

The number of families that have lost the stay-at-home mother safety net to the two-income trap can be measured in the millions. The transformation happened gradually, as hundreds of thousands of mothers marched into the workforce year after year. But over the course of a few decades, the change has been nothing short of revolutionary. As recently as 1976 a married mother was more than twice as likely to stay home with her children as to work full-time. By 2000, those figures had almost reversed: The modern married mother is now nearly twice as likely to have a full-time job as to stay home. Similarly, a modern mother with a three-month-old infant is more likely to be working outside the home than was a 1960s woman with a five-year-old child.[17] The transformation can be felt in other ways. In 1965 only 21 percent of women who worked when they were pregnant were back at their jobs within six months of giving birth to their first child. Twenty years later, that figure was higher than 70 percent.[18] As a claims adjuster with two children interviewed for the 2001 Consumer Bankruptcy Project explained, "It never even occurred to me not to work, even after Zachary was born. All the women I know have a job."[19]

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[17] *See* U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES-FAMILIES, TABLE F-14, WORK EXPERIENCE OF HUSBAND AND WIFE-ALL MARRIED-COUPLE FAMILIES, BY PRESENCE OF CHILDREN UNDER 18 YEARS OLD AND MEDIAN AND MEAN INCOME: 1976 TO 2001, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://www.census.gov/hhes.income/histinc/f14.html (last revised Sept. 30, 2002) (providing data used to calculate statistics in text).

[18] KRISTIN SMITH ET AL., U.S. CENSUS BUREAU, MATERNITY LEAVE AND PATTERNS: 1961–1995, HOUSEHOLD ECONOMIC STUDIES, TABLE I, WOMEN WORKING AT A JOB, BY MONTHLY INTERVAL AFTER FIRST BIRTH, 1961–65 TO 1991–94, CURRENT POPULATION REPORTS 15, *available at* http://www.census.gov/prod/2001pubs/p70-79.pdf.

[19] 2001 Consumer Bankruptcy Project; *see* WARREN & TYAGI, *supra* note 2, app. at 181–88.

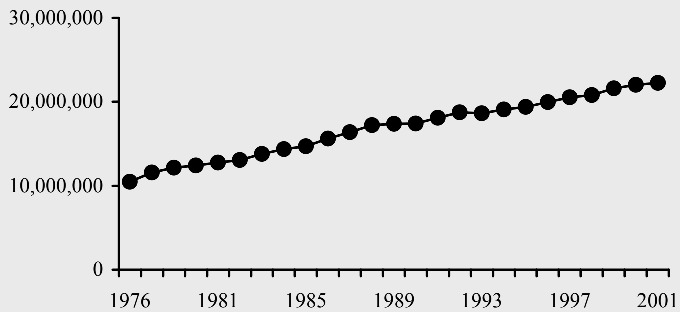

FIGURE 1: MOTHERS IN THE WORKFORCE FULL TIME
Source: U.S. Census Bureau

Even these statistics understate the magnitude of change among middle-class mothers. Before the 1970s, large numbers of older women, lower-income women, and childless women were in the workforce.[20] But middle-class mothers were far more likely to stay behind, holding on to the more traditional role of full-time homemaker long after many of their sisters had given it up. Over the past generation, middle-class mothers flooded into offices, shops, and factories, undergoing a greater increase in workforce participation than either their poor or their well-to-do sisters.[21] Attitudes changed as well. In 1970, when the women's movement was well under way, 78 percent of younger married women thought that it was "better for wives to be homemakers and husbands to do the breadwinning."[22] Today, only 38 percent of women believe that it is "ideal" for one parent to be home full-time, and nearly 70 percent of Americans believe it doesn't matter whether it is the husband or the wife who stays home with the children.[23]

It is the middle-class family whose finances have been most profoundly affected by women's entry into the workforce. Poorer, less educated women have seen small gains in real wages over the past generation. High-income women have enjoyed considerable increases, but those gains were complemented by similar

[20] STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP, 162 (Basic Books 1992).

[21] Between 1979 and 2000, married mothers at all income levels increased their hours in the workforce. Women whose husbands were in the bottom quintile, however, added 334 hours per year, and those in the top quintile added just 315 hours per year, compared with an average increase of 428 hours per year for women in the middle three quintiles. LAWRENCE R. MISHEL, THE STATE OF WORKING AMERICA 2002–2003, TABLE 1.32, ANNUAL HOURS, WIVES IN PRIME-AGE, MARRIED-COUPLE FAMILIES WITH CHILDREN, AND CONTRIBUTIONS TO CHANGE, 1979–2000, SORTED BY HUSBAND'S INCOME (providing data used to calculate above hours).

[22] COONTZ, *supra* note 19, at 168.

[23] Chris McComb, *Few Say It's Ideal for Both Parents to Work Full Time Outside of Home*, GALLUP NEWS SERVICE, Apr. 20–22, 2001.

increases in their husbands' rapidly rising incomes.[24] For the middle class, however, women's growing paychecks have made all the difference, compensating for the painful fact that their husbands' earnings have stagnated over the past generation.[25]

The changing economic dynamics of the two-parent family have echoed through the one-parent family as well. A one-parent family has no back up earner, no private safety net for times of trouble. The non-custodial parent pays a fixed sum, and while it is theoretically possible to change that amount when the custodial parent is in greater financial need, the harsh reality is that non-custodial parents are unlikely to contibute substantially more. These one-parent families live their lives on the edge of financial collapse, with no one to add an extra income in time of layoffs, illness or accidents.

The combination of divorce and births to never-married mothers has increased the ranks of children living with just one parent. The total number of two-parent households has remained essentially the same from 1970 to the present. By contrast, the number of one-parent households has more than tripled in the same time period. The result is statistically ordained: Today, nearly a third of all children are living in one-parent households.

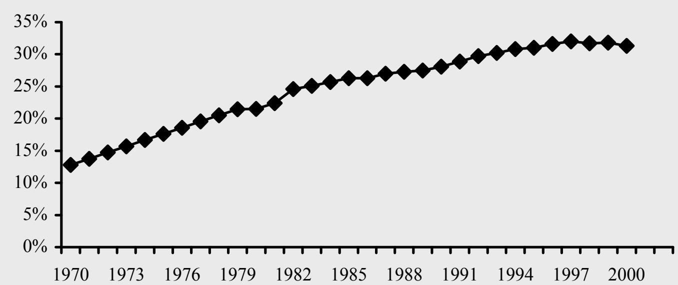

FIGURE 2: ONE PARENT FAMILIES AS A PROPORTION OF ALL FAMILIES WITH CHILDREN, 1970 – 2000
Source: U.S. Census Bureau

[24] Both women and men who did not finish high school saw declines in real wages over the past twenty years. By contrast, among college graduates, women's earnings have increased 30 percent since 1979, while men's earnings have increased by 17 percent. U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., HIGHLIGHTS OF WOMEN'S EARNINGS IN 2000, TABLE 15, MEDIAN USUAL WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS 25 AND OVER IN CONSTANT (2000) DOLLARS, BY SEX AND EDUCATIONAL ATTAINMENT, 1979–2000 ANNUAL AVERAGES, REPORT 952 at 28–29, *available at* http://www.bls.gov/cps/cpswom2000.pdf (last visited Feb. 17, 2004).

[25] Median earnings, which are the best measure of middle-class wages, have risen less than 1 percent for men since the early 1970s, while women's earnings have increased by more than one-third. U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES-PEOPLE, TABLE P-36, FULL-TIME, YEAR-ROUND WORKERS (ALL RACES) BY MEDIAN INCOME AND SEX, 1955 TO 2001, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://www.census.gov/hhes/income/histinc/p36.html (last revised Sept. 30, 2002).

This shift in family dynamics echoes the problem of the two-income trap. A rising proportion of households have no second adult at home. Both mom and dad are at work, whether they live together or live apart. The result is the same: no safety net.

It would be possible to write a book (or several books) about why so many mothers have entered the workforce. The women's movement contributed to this trend, opening up new employment possibilities and encouraging mothers to reconsider their lifetime goals. For some women, the decision to head into the workplace meant personal fulfillment and expanded opportunities to engage in interesting, challenging occupations. For many more, the sense of independence that accompanied a job and a paycheck provided a powerful incentive. But for most middle-class women, the decision to get up early, drop the children off at day care, and head to the office or factory has been driven, at least in part, by more prosaic reasons. Millions of women went to work in a calculated attempt to give their families an economic edge, with nearly 80 percent of working mothers explaining that they do it to support their families.[26] But even as they boosted current income, they forfeited some of their families' long-term economic security—not deliberately, to be sure, but inexorably nonetheless.

B. No Savings, No Insurance

A stay-at-home mother is not, of course, the only form of economic protection for a middle class family. To guard against risk, families have long purchased two forms of insurance—they have put away money for a rainy day and they have purchased insurance against calamities. Those twin aspects of protection—savings and insurance—have also come unraveled for middle class families. The data are familiar to many economists, sociologists and bankruptcy specialists, so a brief review of the highlights should make the point.

America's personal savings rate has plummeted in the past thirty years. Thirty years ago, families saved about 11 percent of their take home pay; today some economists claim that average savings is now a negative one percent.[27] The Bureau of National Affairs makes somewhat differen calculations, but it shows the same trend; national savings as a percent of personal disposable income has been dropping for nearly twenty years.[28]

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[26] In a survey of 1,000 working mothers, 80 percent reported that their main reason for working was to support their families. Carin Rubenstein, *The Confident Generation: Working Moms Have a Brand New Attitude*, WORKING MOTHER, May 1994, at 42.

[27] *See, e.g.*, SMR RESEARCH CORP., THE NEW BANKRUPTCY EPIDEMIC: FORECASTS, CAUSES, AND RISK CONTROL 94 (Hackettstown, NJ, 2001).

[28] BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, NATIONAL INCOME AND PRODUCTS ACCOUNTS TABLE, TABLE 2.1, PERSONAL INCOME AND ITS DISPOSITION, *available at* http://www.bea.doc.gov/bea/dn/nipaweb/TableView.asp?SelectedTable=58&FirstYear=2001&LastYear=2003&Freq=Qtr (last revised Jan. 30, 2004).

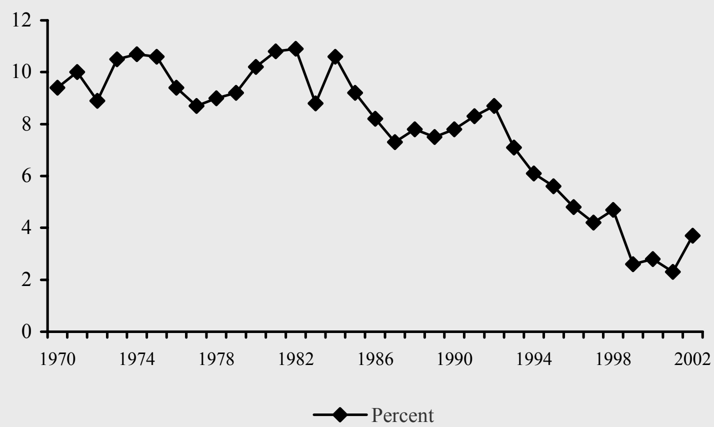

FIGURE 3: SAVINGS PROPORTION OF PERSONAL DISPOSABLE INCOME, 1970-2000
Source: Bureau of Economic Analysis

The health insurance safety net is also fraying. In the last thirty years, America's annual expenditures on medical care increased *four-fold* after adjusting for inflation.[29] Costs are on the rise for nearly every type of medical service: Americans are spending more than twice as much as they did twenty years ago on doctor's visits, hospital services, and home health visits.[30]

As the cost of medical care has risen, so, too, has the price of health insurance. Between 1980 and 2000, per capita healthcare expenditures by private insurance more than doubled.[31] Family contributions have risen as well: According to a survey by the Kaiser Family Foundation, the average amount an employed worker must contribute to the cost of a family insurance policy increased from $52 monthly in 1988 (inflation adjusted) to $174 in 2002.[32] Providing health insurance for a family now costs well over $7,000 a year.[33]

The result of rising costs is unsurprising: The ranks of the uninsured are swelling. Forty-five percent of small employers now offer no health insurance, up

[29] *See* U.S. DEP'T OF HEALTH & HUMAN SERV., CENTERS FOR MEDICARE & MEDICAID SERV., NATIONAL HEALTH STAT.GROUP, TABLE 4: PERSONAL HEALTH CARE EXPENDITURES AGGREGATE AND PER CAPITA AMOUNTS AND PERCENT DISTRIBUTION, BY SOURCE OF FUNDS: SELECTED CALENDAR YEARS 1980-2002, *available at* http://www.cms.hhs.gov/statistics/nhe/historical/tables.pdf (last modified Jan. 8, 2004).

[30] *See id*.

[31] *See id*.

[32] THE KAISER FAMILY FOUNDATION AND HEALTH RESEARCH EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS, EXHIBIT 3, AVERAGE MONTHLY WORKER CONTRIBUTION FOR SINGLE AND FAMILY COVERAGE 1988-2002, 2002 ANNUAL SURVEY 3, *available at* http://www.kff.org/insurance/3251.pdf.

[33] THE KAISER FAMILY FOUNDATION AND HEALTH RESEARCH EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS, EXHIBIT 1, AVERAGE ANNUAL PREMIUM COSTS FOR COVERED WORKERS, SINGLE AND FAMILY COVERAGE 2002, 2002 ANNUAL SURVEY 1, *available at* http://www.kff.org/insurance/3251.pdf.

three percentage points from 2001. The number of families without insurance is on the rise, growing from eighteen million in the late 1970s to more than forty-three million today.[34] In 2000, twelve percent of children—8.5 million—lacked health insurance.[35] Experts calculate that an individual is now 49 percent more likely to be without health insurance than a generation ago.[36]

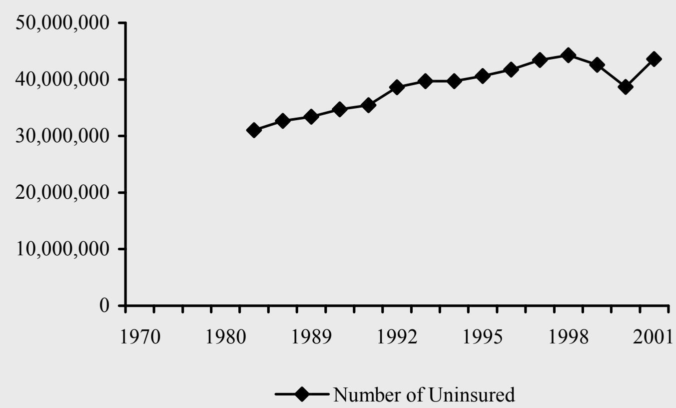

FIGURE 4: PEOPLE WITHOUT HEALTH INSURANCE, 1987-2001
Source: U.S. Census Bureau

A generation ago, the profile of the typical person without health insurance was an unemployed man in his twenties who lived at or near the poverty level.[37] Today, men fitting this profile are still likely to be uninsured, but there is a new group added to their numbers: A growing proportion of the uninsured are working, middle-income families. Two out of three families without health insurance have

[34] A. TAYLOR & J. BANTHIN, AGENCY FOR HEALTH CARE POLICY AND RESEARCH, CHANGES IN OUT-OF-POCKET EXPENDITURES FOR PERSONAL HEALTH SERVICES: 1977 AND 1987, NATIONAL MEDICAL EXPENDITURE SURVEY RESEARCH FINDINGS 21 (July, 1994); U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE 2000, TABLE A., PEOPLE WITHOUT HEALTH INSURANCE FOR THE ENTIRE YEAR BY SELECTED CHARACTERISTICS: 1999 AND 2000, CURRENT POPULATION SURVEY 3, *available at* http://www.census.gov/prod/2001pubs/p60-215.pdf (last visited Feb. 17, 2004). Over 43 million Americans lacked health insurance in 2002 (compared with 31 million in 1987). U.S. CENSUS BUREAU, HEALTH INSURANCE HISTORICAL TABLE HI-2: HEALTH INSURANCE COVERAGE STATUS AND TYPE OF COVERAGE ALL PEOPLE BY AGE AND SEX: 1987 TO 2002, *available at* http://www.census.gov/hhes/hlthins/ historic/hihistt2.html (last visited Apr. 22, 2004).

[35] U.S. CENSUS BUREAU, HEALTH INSURANCE HISTORICAL TABLE HI-2: HEALTH INSURANCE COVERAGE STATUS AND TYPE OF COVERAGE-ALL PEOPLE BY AGE AND SEX: 1987 TO 2002, *available at* http://www.census.gov/hhes/hlthins/historic/hihistt2.html (last revised Sept. 30, 2003).

[36] D. U. Himmelstein et al., *Analysis of Data from the Current Population Survey and the National Health Interview Survey* (unpublished analysis, on file with author).

[37] *See, e.g.*, Amy K. Taylor et al., *Being Uninsured in 1996 Compared to 1987: How Has the Experience of the Uninsured Changed Over Time?*, HEALTH SERV. RESEARCH 36:6 Part II (Dec. 2001).

annual incomes that would place them in the middle or upper classes.[38] Half of all adults without insurance are 35 or older, and three out of four hold full-time or part-time jobs.[39]

In 2001 alone, 1.4 million Americans lost their health insurance. Of the newly uninsured, 800,000 earned more than $75,000.[40] Today, sixty percent of children without health insurance live in households earning $25,000 a year or more, and 87 percent of their parents were employed.[41]

Many of those without health insurance try to avoid medical bills by staying away from doctors and hospitals. They simply avoid seeking medical treatment whenever possible. People without health insurance are less likely to seek ambulatory care, take prescriptions, or go to the hospital than their insured counterparts.[42] People with no health insurance are also far less likely than those who are insured to receive routine care such as annual blood pressure checks or pap smears.[43] Uninsured women with breast cancer have a 30 percent to 50 percent higher risk of dying than insured women.[44]

In a single year, 4 percent of those without health insurance spend more than 20 percent of their *entire* annual income on medical care, compared with just 1 percent of insured families.[45]

This data shows that families face economic set backs with far more limited resources than a generation ago. They have no back up earner and no back up caregiver. Most have no savings, and more than twice as many have no health insurance. In short, in a single generation, families have lost a significant portion of their private safety net.

The middle class family of a generation was far better prepared to weather an economic blow. With a stay-at-home mother, the family had reserves—extra earning capacity or someone to care for family members in need. The family was more likely to have financial protection as well in the form of savings and health insurance. Today's family, by contrast, is living more dangerously, with all adults

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[38] 64.1% of those without health insurance have an annual household income of $25,000 or more. U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE 2000, TABLE A: PEOPLE WITHOUT HEALTH INSURANCE FOR THE ENTIRE YEAR BY SELECTED CHARACTERISTICS: 1999 AND 2000, CURRENT POPULATION SURVEY 3 (Sept. 2001), *available at* http://www.census.gov/prod/2001pubs/p60-215.pdf.

[39] *Id*.

[40] John M. Broder, *Problem of Lost Health Benefits Is Reaching into the Middle Class*, N.Y. TIMES, Nov. 25, 2002, at A1.

[41] U.S. CENSUS BUREAU & BUREAU OF LABOR STATISTICS, TABLE H108, HEALTH INSURANCE COVERAGE STATUS AND TYPE OF COVERAGE BY SELECTED CHARACTERISTICS FOR CHILDREN UNDER 18, 2002, CURRENT POPULATION SURVEY, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SURVEY, MARCH SUPPLEMENT, *available at* http://ferret.bls.census.gov/macro/032003/health/h08_000.htm (last revised Sept. 11, 2003).

[42] AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, HIGHLIGHTS # 9: HEALTH CARE USE IN AMERICA, 1996, ESTIMATES FOR THE U.S. CIVILIAN NONINSTITUIONALIZED POPULATION, 1996 MEDICAL EXPENDITURE PANEL SURVEY HOUSEHOLD COMPONENT, ROUND 1, *available at* http://www.meps.ahrq.gov/papers/hl9_99-0029/hl9.htm (last visited Feb. 15, 2004).

[43] Taylor et al., *supra* note 36, at 25–26.

[44] Susan Brink, *Living on the Edge*, U.S. NEWS & WORLD REP., Oct. 14, 2002, at 58.

[45] Taylor et al., *supra* note 36, at 27–28.

at work and fewer resources to call on if something goes wrong.

If everything else in their families had remained exactly the same, the number in financial failure would be expected to rise simply because these families are less able to cope with job loss, illness and family break ups. But everything else did not remain the same.

II. MULTIPLYING THE RISKS FAMLIES FACE

There's nothing new or exotic about the problems faced by American families today. Jobs have come and gone, couples have broken up, and illnesses and injuries have been facts of life since the first caveman kissed the first cavewoman good-bye and headed off to the hunt. But having both parents in the workforce has actually compounded the ordinary risks of daily life.

With mom at work and the family's safety net far less secure, a short-term job loss or a medium-sized illness now poses a far greater menace to a family that has no reserves. It takes less to sink these families; as a result, more of them go under. That fact alone could account for a rise in bankruptcy filings, but the risk side of the equation has changed as well. Today, family balance sheets have shifted to a higher proportion of fixed expenses, two workers have doubled the likelihood that a family will encounter certain economic setbacks, and the overall risk of job loss and divorce increased.

A. More Income Committed to Fixed Expenses

Any businessperson will explain that risk increases whenever a greater fraction of income is committed to fixed expenses. If any problem arises subsequently, the business with the least flexibility is the one most likely to fail. The same is true for families. Absolute numbers matter less than relative numbers, so that the larger share of income committed to fixed expenses, all else being equal, the greater the number of failures when the family encounters some other economic blow.

The balance sheet for a family of four has undergone a profound transformation in just one generation. In 1973, a typical two-parent, two-child family would have had an annual income of $38,700—median wages for a fully employed male.[46] (To make the comparisons easy, all figures are adjusted for inflation, reported in $2,000 throughout this discussion.) If they had been able to buy health insurance through the father's job, they would have paid $1,030 a year—the average amount spent by an insured family that made at least some contribution to the cost of a private

[46] U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES-PEOPLE, TABLE P-36, FULL-TIME, YEAR ROUND WORKERS (ALL RACES) BY MEDIAN INCOME AND SEX, 1995 TO 2000, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENT, *available at* http://www.census.gov/hhes/income/histinc/p36.html (last revised Sept. 30, 2002).

insurance policy.[47] If they owned an average home in an average family neighborhood, they would have spent $5,310 a year in mortgage payments.[48] As a typical family of the time, they would own just one car, on which they spent $5,140 a year for car payments, insurance, maintenance, gas, and repairs.[49] And, like all good citizens, they pay their taxes, which claimed about 24 percent of their income.[50] Once all the taxes, mortgage payments, and other fixed expenses are paid, the typical one-earner family would be left with $17,834 in discretionary income (inflation adjusted), or about 46 percent of their pretax paycheck. They were not

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[47] U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURE SURVEY: INTERVIEW SURVEY, 1972–1973, TABLE 5. In 1972/73, the average family of four spent $160 (inflation adjusted to $640) on private health insurance (not including expenditures on Medicare). However, 38 percent of these families spent nothing whatsoever on health insurance, typically because they were uninsured, although in some cases because they were covered by a government program such as Medicaid or because they had a particularly generous employer who paid the entire bill. To develop a more accurate picture of the average health insurance burden on a middle-income, insured family (who would not typically qualify for Medicaid), we have included in our calculation only those families who spent at least $1 on health insurance. For our estimate for a middle-class family's typical expenditures on health insurance, the calculation is as follows: $640 (average expenditures on health insurance) divided by 62 percent (the portion of families who reported expenditures on private health insurance) = $1,027.

[48] *Id*. (providing data on Average Mortgage Principal and Interest Paid by a Home-Owning, Four-Person Family). For an explanation of the methodology, see *supra* note 46.

[49] *Id*. As we noted earlier, the average family of four actually owned 1.7 vehicles in 1972/73 and 2.5 vehicles in 2000. We also noted, however, that the average family of four has 2.5 adults. A family with more than two adults is presumably more likely to have more vehicles, while a family with two or fewer adults would have fewer vehicles. Since our focus here is on the nuclear family with two adults and two young children, we assume, for simplicity's sake, that the family owns just one car in 1972/73 and just two cars in 2000.

[50] Claire M. Hintz, *The Tax Burden of the Median American Family, Table 1*, *Taxes and the Median One-Income American Family*, 96 TAX FOUNDATION SPECIAL REPORT 6 (Mar. 2000). For our 1973 calculation, we apply the Tax Foundation's estimate of the tax rate for a single-income family in 1975. This report has the only data we can locate that attempts to estimate the entire state, local, and federal tax burden on middle-income families, using a consistent methodology over the past forty years. Most other estimates only account for federal income taxes, which underrepresents the true tax burden on families, and most offer only current estimates, without historical context. In addition, this report differentiates between the tax burdens on two-income and one-income families, which is critical for this analysis. We have made a few minor adjustments to the Tax Foundation's basic methodology. First, we have omitted employer-paid payroll taxes from both the income and the tax burden calculations. This does not change the comparison between 1973 and 2000 in any substantial way, but it prevents us from the need to gross up income by including the employer's contribution to payroll taxes, only to have that income deducted on the tax side. Second, we use median wages for a fully employed male, rather than median income for a single-income family, as the basis for applying the taxes, in order to be consistent with our model—a married couple in which the male was employed. The results should be quite similar either way: In 1975, the Tax Foundation reported that the median income for a single-income family was $12,560; according to the U.S. Census Bureau, median earnings for full-time, year-round male workers was $12,934 that year—a difference of less than 3 percent—which would indicate that a family living on median earnings for a fully employed male would be in roughly the same tax bracket as the family living on the median income for all one-income families. Third, we have adjusted the Tax Foundation calculations by omitting imputed corporate taxes, again avoiding the problem of overstating income by including an imputed distribution from corporate profits only to have that amount then deducted in taxes. Imputed corporate income taxes are from Ed Harris, et al., EFFECTIVE FEDERAL TAX RATES, 1979–1997 (Congressional Budget Office, Oct. 2001), *available at* http://www.cbo.gov/showdoc.cfm?index=3089&sequence=0. We have not included any itemized deductions, since average tax burdens already account for average deduction levels, and there would be a considerable risk of double-counting a family's deductions.

rich, but they had nearly $1,500 a month to cover food, clothing, utilities, and anything else they might need.

Compare those numbers with the typical family of 2000. The husband's wages are $39,000 in 2000—not even 1 percent more than his counterpart of a generation ago. But there is one big difference: Thanks to the wife's full-time salary, the family's combined income is $67,800—a whopping 75 percent higher than the household income for the one-income family of 1973.[51] A quick look at their income statement shows how the modern dual-income couple has sailed past their single-income counterpart of a generation ago.

Where did all that money go? Like their 1973 counterparts, the two-income family bought an average home, but today that three-bedroom-two-bath ranch costs a lot more. Even with lower interest rates and frenetic refinancing, their annual mortgage payments are nearly $9,000.[52] The older child still goes to the public elementary school, but after school and during summer vacations he goes to day care, at an average yearly cost of $4,350. The younger child attends a full-time preschool/day care program, which costs the family $5,320 a year.[53] With both parents at work, a second car is essential, so the family spends more than $8,000 a year on its two vehicles. Health insurance is another essential, and even for a family lucky enough to have an employer pick up a big share of the cost, insurance now takes $1,650 from the couple's paychecks.[54] Taxes also take their toll. Thanks in part to their higher income, the modern family has been bumped into a higher bracket, and the government takes 33 percent of the family's money.[55] So where does that leave the family of 2000 after these basic expenses are deducted? With $17,045—about $800 *less* than the one-income family of a generation ago.

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[51] U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES-PEOPLE, TABLE P-36, FULL-TIME, YEAR ROUND WORKERS (ALL RACES) BY MEDIAN INCOME AND SEX, 1955 TO 2000, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://www.census.gov/hhes/income/histinc/p36.html (last revised Sept. 30, 2002).

[52] U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURE SURVEY, 2000, TABLE 1400, SIZE OF CONSUMER UNIT: ANNUAL MEANS, STANDARD ERRORS AND COEFFICIENT OF VARIATION, *available at* http://stats.bls.gov/cex/2002/stnderror/cusize.pdf. For methodology, see *supra* notes 46–49.

[53] KRISTIN SMITH, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 1997, TABLE 7, CHILD CARE EXPENDITURES FOR CHILDREN LIVING WITH THEIR MOTHER AND IN A REGULAR CHILD CARE ARRANGEMENT: SPRING 1997, CURRENT POPULATION REPORT, JULY 2002, at 15, *available at* http://www.census.gov/prod/2002pubs/p70-86.pdf. Day care costs are calculated from average child care costs for mothers employed full-time with a child aged five to fourteen, and preschool costs are calculated from average child care costs for mothers employed full-time with a child under five.

[54] *See* TABLE 1400, *supra* note 51. The calculation of health insurance costs was made in the same manner as the calculation for 1972/73. For an explanation of the methodology, see *supra* notes 46–49.

[55] Hintz, *supra* note 49, at 7 tbl.2. For our 2000 calculation, we apply the Tax Foundation's estimate of the tax rate for a two-income family in 1998, the most recent year for which this calculation was available. Because they own a more expensive home than their one-income counterparts in the early 1970s, the two-income family also pays more property taxes in 2000, in addition to higher income taxes. For an explanation of the methodology, see *supra* notes 46–49.

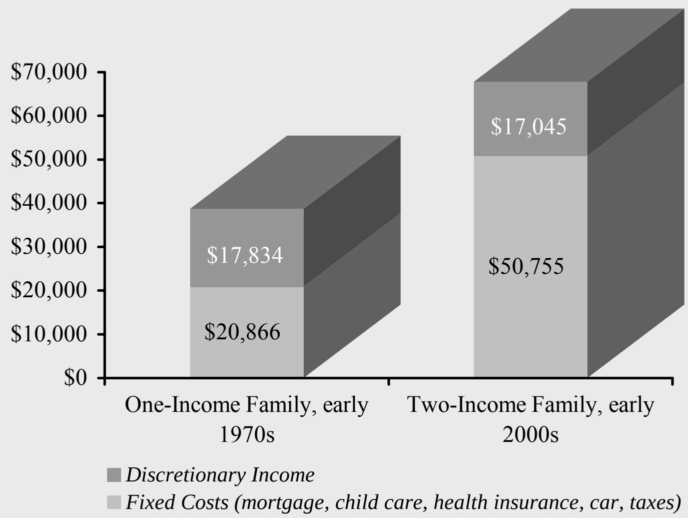

FIGURE 5: ONE INCOME/TWO INCOME HOUSEHOLDS MEDIAN FAMILY BUDGETS, 1970S – 2000S

Source: Census Bureau, BLS Consumer Expenditure Survey, Tax Foundation of America

This bears repeating. Today, after an average two-income family makes its house payments, car payments, insurance, child care payments and pays its taxes, they have *less* money left over than their one-income counterpart of a generation earlier, *even though they have a second, full-time earner in the workplace*.[56]

Critics would be quick to point out that today's two-income family does not actually *need* $67,800 a year that they pull in from two earners and that their family

[56] 2001 Consumer Bankruptcy Project; *see* WARREN & TYAGI, *supra* note 2, app. at 181–88.

Typical Budget, Four-Person Family	**One-income family, early-1970s**	**Two-income family, early 2000s**	**% change**
	Inflation adjusted	*Current dollars*	
Husband's Income	$38,700	$39,000	1%
Wife's Income	0	$28,800	∞
Total Family Income	$38,700	$67,800	75%
Tax Rate (% of income: Local, state, & federal)	24%	33%	29%
Taxes	$9,386	$22,256	137%
After-tax Income	**$29,314**	**$45,544**	**55%**
Home mortgage	$5,309	$8,978	69%
Day care (7-year-old)	$0	$4,354	∞
Pre-school (3-year-old)	$0	$5,321	∞
Health insurance	$1,027	$1,653	61%
Automobile: Car # 1 (Purchase, upkeep, insurance)	$5,144	$4,097	-20.4%
Automobile: Car # 2	$0	$4,097	∞
Total fixed expenses	**$11,480**	**$28,499**	**148%**
Discretionary income (food, clothes, extras, etc.)	**$17,834**	**$17,045**	**-4%**

should be able to get by on $48,000 a year. After all, the one-income family of a generation ago seemed to be getting along just fine—and holding on to their spot in the middle class—on $38,700 a generation ago. Be that as it may, the two-income family has signed binding contracts and long-term mortgages, made commitments and promises that depended on all $68,000 of income. If one of them were laid off, they could (and in all likelihood would) cut back around the edges. They might cancel cable or eliminate take-out dinners; they could postpone replacing the stained carpet and cross beer and soda off the shopping list.[57] But the effect of such belt-tightening would be modest at best. They cannot make up for the almost $20,000 hole in the family's budget when dad is out of work for six months by eating less or forgoing a new pair of sneakers. In order to pull back to a $48,000 budget, the two-income family would need to sell their home, trade in their car, pull their younger child out of preschool and enroll their older son in a lower-cost after-school day care center—a process that would take months to accomplish. Moreover, they would be unlikely to take such draconian measures until they were already deep in financial trouble and forced to admit that the lives they once lived were gone forever.

The expenditures of two-income families turn the standard financial analysis on its head in another way: They are vulnerable precisely because they did *not* over-consume on trinkets. They are vulnerable because they made long-term commitments to what most would consider sensible family purchases: housing, education, health insurance. They probably don't want to hear it right now, but the two-income family would be more secure financially if they had blown their second income on big-screen TVs and trips to the Bahamas, because those purchases do not require an ongoing financial commitment.

Should the two-income family have saved one income, locking it in the bank for a rainy day? Maybe, but even here the picture must be etched in shades of gray, rather than black and white. Money in the bank is great, but so are good nursery schools, college degrees, decent medical care, and homes in good school districts. Indeed, these parents might ask their critics what would be the point of mother's working if she couldn't spend the money to buy better lives for her children? Working mothers are not sending their kids to day care every day just so they can go on vacation or plan some glorious retirement. Cash savings, money for retirement, treats, and vacations can come later. Most two-earner families have decided that their children needed a good home *now,* good day care *now,* and good health insurance *now*. Many parents—and even a fair number of financial analysts—would agree with them.

It is important to note that this shift in the family balance sheet cannot be corrected by the decision of one parent to stay home. Larger economic forces have

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[57] Sociologists have documented immediate adjustments families make during a period of unemployment, noting that families often reduce their food expenses sharply or postpone major household purchases. *See* RAND D. CONGER & GLEN H. ELDER, JR., FAMILIES IN TROUBLED TIMES: ADAPTING TO CHANGES IN RURAL AMERICA (Aldine de Gruyter ed., 1994); *see also* Yeung & Hofferth, *supra* note 8, at 269–76.

overtaken these families. If the two-income family of 2000 tried to get by on a single income in today's economy they would be in even worse shape. Their expenses would be a little lower than a two-income family. They could save on after-school care for the older child, their taxes would be lower, and, if they are lucky enough to live close to shopping and other services, they might be able to get by without a second car. But if they tried to live a normal, middle-class life in other ways—buy an average home, send their younger child to preschool, purchase health insurance, and so forth—they would be left with only $6,720 a year to cover all their other expenses.[58] They would have to find a way to buy food, clothing, utilities, life insurance, furniture, appliances, and so on with less than $600 a month. The modern single-earner family that tries to keep up an average lifestyle faces a *60 percent* drop in discretionary income compared with its one-income counterpart of a generation ago. The increase in basic, fixed expenses leaves the family trying to get by on one median income with little chance to remain in the middle class.

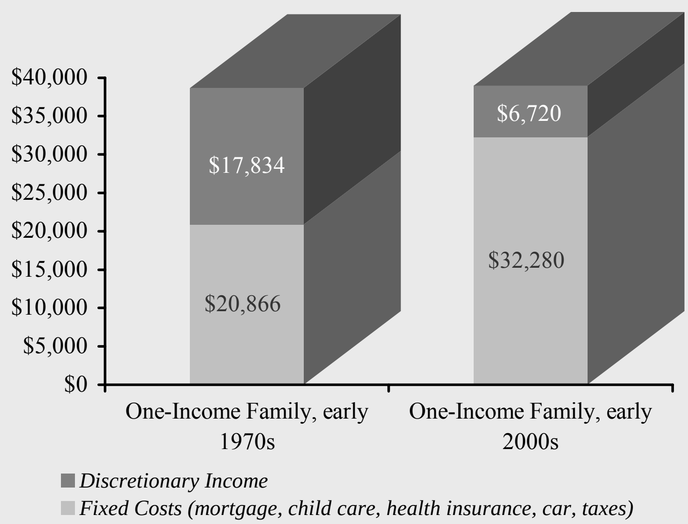

FIGURE 6: ONE INCOME HOUSEHOLDS MEDIAN FAMILY BUDGETS, 1970 – 2000
Source: U.S. Census Bureau, BLS Consumer Expenditure Survey, Tax Foundation of America

The expenses cited here are averages, and plenty of families manage to pay less (or more). But the alternatives families have pursued in an effort to make ends meet

[58] "Single-income family" assumes a median-earning, fully employed male, who earns $39,000 per year. If they buy an average home for a family of four, send the younger child to preschool (but not full-time day care), keep the older child at home after school with mom, have only one car, have an average health insurance policy, and pay average taxes for a one-income family, their annual fixed costs (including taxes) would be $32,280, or 83% of pre-tax income, and their annual discretionary income would be $6,720, or 17% of pre-tax income. 2001 Consumer Bankruptcy Project; *see* WARREN & TYAGI, *supra* note 2, app. at 181–88.

bear some scrutiny. Consider child care. Government statistics show that the average amount a family of four spends on after-school care is lower than the $4,350 cited above. The number cited here is from data on families who pay for child care, but the government "average" includes children who have a grandmother or an older sibling who watches them for free. That is a great way for those lucky families to save some money, but it doesn't do a bit of good for the typical family that has to rely on paid child care. For them, paying less money means getting less quality, such as an unlicensed neighbor who parks several children in front of a television set or an overcrowded center with barely passable facilities.

There are other ways families could save money. Families could also cut their health insurance expenses. They could drop those costs to zero by following the model of millions of other middle-class families who simply live without health insurance and pray for the best. Or they could give up the house and move into an apartment in a marginal neighborhood. There are always options, but for families with children, these options signal that their middle-class lives are slipping away.

Today's two-income family is a riskier economic unit than the one-income family of a generation ago. In the early 1970s, families committed just over half (53.9%) of their annual income to fixed expenses; today a two-income family commits about three-quarters (74.9%) of its income to fixed expenses. Today's one-income family is in even worse shape, required to commit 83 percent of its annual income to these irresolute fixed expenses just to keep a toe-hold in the middle class.

The margin for error has been slashed. Today's family has no leeway to cut back if one earner's hours are cut or if one of them gets laid off. There is no room in the budget if someone needs to take a few months off work to care for Grandma or if a child becomes seriously ill. The modern American family is walking on a high wire without a net; parents pray there won't be any wind. If all goes well, they will make it across safely, their children will grow up and finish college, their own elderly parents will need no care, and they will move on to their own retirements.[59] But if anything—anything at all—goes wrong, then today's two-income family is in big trouble.

B. More Internal Risk

The two-income family didn't just lose its safety net. By sending both adults into the labor force, these families actually *increased* the chances that they would need that safety net. In fact, they doubled the risk. With two adults in the workforce, the dual-income family has *double* the odds that someone could get laid off, downsized, or otherwise left without a paycheck. Mom *or* Dad could suddenly

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[59] Only 52 percent of all families have a retirement account. Ana M. Aizcorbe et al., *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances*, 89 FED. RES. BULL. 1, 13 (2003) (displaying results of 2001 Survey of Consumer Finances in Table 5B "Family Holdings of Financial Assets, by Selected Characteristics of Families and Type of Assets").

lose a job.

The basic math may seem obvious, but the consequences are surprising. The typical family of a generation ago, with a working father and stay-at-home mother, in any given year faced a 2.5 percent chance that dad would lose his job.[60] Back then, a two-earner couple[61] would have had a 4.9 percent chance of a major drop in income—almost double the chances of a single income family.[62] The odds aren't doubled to exactly 5.0 (2.5 + 2.5) because in some of the families both the husband *and* the wife will be laid off, so the total number of families who experience a layoff is slightly less than 5.0 percent. (Of course, that also means some families get hit with two layoffs, a double catastrophe.) No matter how the odds are calculated, the principle is straightforward: two workers, two chances to lose a job.

This situation would be tough enough for the two-income family if the working world had stayed the same over the past generation. But, as anyone who watches the nightly news or reads the newspapers knows, the world did not stay the same. In the past twenty-five years, the chances that a worker will be laid off, downsized, or restructured out of a paycheck have increased substantially. One team of researchers calculated that the odds that a worker would suffer an involuntary job loss have increased by 28 percent since the 1970s.[63]

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[60] Johanne Boisjoly et al., *The Shifting Incidence of Involuntary Job Losses from 1968 to* 1999, 37 INDUS. REL. 207, 218 (1998). From 1968 to 1979, the average annual rate of job loss because of layoffs or company closing among men aged twenty-five to twenty-nine was 2.5 percent. ***Id.***

[61] This calculation assumes that husbands and wives face roughly the same risk of getting laid off in a single year. ***See, e.g.***, PETER GOTTSCHALK & ROBERT MOFFITT, JOB INSTABILITY AND INSECURITY FOR MALES AND FEMALES IN THE 1980'S AND 1990'S 8–9 (Boston C. Dep't of Econ., Working Paper No. 408, 1999), ***available at*** http://fmwww.bc.edu/ec-p/wp401-425.php. The authors found that men and women had similar rates of job exits during the period 1981–1991. ***Id.***

[62] For simplicity's sake, this calculation assumes no correlation in the risk of job loss between husbands and wives. In fact, there is some evidence that the likelihood that a husband and a wife will both lose their jobs is weakly correlated. Husbands and wives tend to work in the same geographical area, for example, so both may face increased chances of layoff at the same time; also, they sometimes work for the same employer, who may cut back many jobs at once. As a result, the estimate in the text may slightly overstate the portion of couples in which one spouse loses a job. At the same time, however, it necessarily underestimates the proportion of couples experiencing a job loss for both spouses in a single year.

[63] *See* Boisjoly et al., *supra* note 59, at 218. The authors found a 28 percent increase in the incidence of involuntary job loss between the 1968–1979 period and the 1980–1992 period. *Id*.*; see also* Daniel Polsky, *Changing Consequences of Job Separation in the United States*, 52 INDUS. & LAB. REL. REV. 565, 576 (1999). Both studies found evidence that workers were more likely to lose their jobs in the 1980s and 1990s than they were in the 1970s. There is some evidence that the job loss rate improved during the expansion of the late 1990s. *See* HENRY S. FARBER, JOB LOSS IN THE UNITED STATES, 1981–1999 32 (Indus. Relations Section, Princeton Univ., Working Paper No. 453, 2001). That trend, however, may have reversed during the 2001–2002 recession, when mass layoffs were 40–50 percent higher than in the 1996–1999 period. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ARCHIVED NEWS RELEASES FOR EXTENDED MASS LAYOFFS, *available at* http://www.bls.gov/schedule/archives/mslo_nr.htm (last modified Dec. 1, 2003). There are no published studies that compare involuntary terminations during the 1970s with the early 2000s, so we have chosen, for simplicity's sake, to document the increase between the 1970s and the early 1990s, and then to assume that the 2000s rate is comparable to that of the 1980s and early 1990s. We note, however, that sociologists and labor economists have not come to a consensus about the incidence of job loss over the past generation. Their empirical findings differ, depending on the data sets they use, the specific variables on which they focus, and the populations they examine. Several studies using the Panel Study of Income Dynamics (PSID) data detected a rise in involuntary job losses in the 1980s and 1990s compared with the

Growing job insecurity has been hard on single-income families, who now face a 28 percent higher chance that the breadwinner will lose his job. But for today's dual-income family, the numbers are doubly grim, as each spouse faces a higher likelihood of a job layoff. This means that in a single year, roughly 6.3 percent of dual-income families—one out of every sixteen—will receive a pink slip.[64] A family today with both husband and wife in the workforce is approximately *two and a half times* more likely to face a job loss than a single-income family of a generation ago.

Layoffs aren't the only way a family can lose a paycheck. Illness, accident, or disability can have the same effect. Once again, the dual-income family has doubled its risks. Two workers, two chances for a heart attack, a bad fall, or any other medical calamity that can leave a family without an income on which it has come to depend.

This statistical analysis runs contrary to most families' assessment of the risks they face. With two incomes, most parents believe that they have built in some self-insurance against layoffs or medical problems. But they would be wrong. With two workers, the odds that they will lose *all* their income is lower, but those odds were also lower in one-income families that had a back-up earner. Once both incomes are committed to the family's economic survival, then two-income families face nearly double the risk that their family will be hit by a sharp reduction in income. No matter how an economist wants to slice up the risks, the reality is that any family that must have two paychecks 52 weeks out of the year to make the mortgage payments and put food on the table is a family that is running a double risk of economic collapse.

There is a painful irony to this. The family that sends both workers into the workforce in order to, as other researchers have claimed, "buffer them[selves] against the terrible wrenches of a changing economy"[65] have just made themselves *more* vulnerable to those very wrenches. Twice as likely, as a matter of fact.

1970s. Researchers relying on Current Population Survey (CPS) data have had found little increase in job instability overall, although they have noted a rising instability for certain subgroups. For a review of the literature, see, for example, JOHN M. FITZGERALD, JOB INSTABILITY AND EARNINGS AND INCOME CONSEQUENCES: EVIDENCE FROM SIPP 1983–1995 (Northwestern Univ./Univ. of Chicago Joint Ctr. for Poverty Research, Working Paper No. 99, 1999). We also note that we have not accounted for differences in age or skill among workers. Younger parents may actually be more likely to suffer a job loss, because of a relative lack of work experience. *See* Boisjoly et al., *supra* note 59, at 218, 220.

[64] Although most studies focus exclusively on men, we assume that husbands and wives, both working full-time, face an equal chance of job loss. This places the odds that one spouse would lose a job at 3.2 percent from 1980 to 1992. *See generally* Boisjoly et al., *supra* note 59. We assume once again that there is no correlation between the chances of job loss between husbands and wives. We have not accounted for possible changes in the odds of job loss after 1992. S*ee id*.

[65] BARNETT & RIVERS, *supra* note 4, at 2.

C. More External Risk

With a higher proportion of their income committed to fixed expenses and a greater risk of losing at least one of those incomes, families are in greater peril even if all other risks had remained the same. But all other risks did not remain the same. In fact, a number of risks have increased over the past generation, which has proved to be very bad timing for the middle-class family that had lost its safety net.

The increased chances of losing a job have already been noted, but the family faces other risks as well. Demographics pinched the family, as the number of Americans aged 85 and older (those most likely to need daily assistance) grew at a rate more than *six times* faster than that of the under-65 population.[66] Today's elderly have fewer children to share the burden, and more are alone after a divorce. As a result, families with minor children are now almost twice as likely to be providing assistance to elderly parents than receiving it.[67] The squeeze on the family is tough: They are far more likely than their parents to be called on to help their elderly family members.

At the same time, hospitals and insurance companies conspired to cut costs by dismissing patients "quicker and sicker." Today, one in three individuals require at-home care after being discharged from the hospital. That means that roughly 12 million families must find a way to take care of a sick relative every year.[68] If all the adults in the family are already committed to the workplace, well, that's just too bad. Once again, the bankruptcy statistics confirm the story: Dual-earner couples are nearly twice as likely as single-breadwinner families to file for bankruptcy because of work lost as a result of an illness in the family.[69]

Divorce is another calamity that hits today's two-income families with greater frequency. Pretty much everyone knows that newlyweds now face a high chance of splitting up (although the risk is slightly less than the 50/50 number that circulates as conventional wisdom).[70] But there is a wrinkle to the statistics that hasn't made

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[66] *See* FRANK B. HOBBS & BONNIE L. DAMON, U.S CENSUS BUREAU, 65+ IN THE UNITED STATES, CURRENT POPULATION REPORTS, TABLE 2-1 (Apr.1996), *available at* http://www.census.gov/prod/1/pop/p23-190/p23-190.html.

[67] Twenty-two percent of working parents report receiving at least one hour of unpaid assistance from their own parents each month, compared with 38 percent of working parents who report providing at least one hour of unpaid assistance to their own parents each month. JODY HEYMANN, THE WIDENING GAP: WHY AMERICAN'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 103–104 (2000).

[68] In 2000, there were 36 million hospital discharges in the United States. U.S. DEP'T OF HEALTH & HUMAN SERV., CENTERS FOR MEDICARE & MEDICAID SERV., HEALTH CARE INDICATORS, TABLE 1, SELECTED COMMUNITY HOSPITAL STATISTICS, 1999–2003, *available at* http://www.cms.hhs.gov/statistics/health-indicators/t1.asp (last visited May 1, 2004).

[69] In 2001, approximately 27,500 single-income couples, or 0.13 percent of all single-income couples in the United States, filed for bankruptcy after missing two or more weeks of work without pay because of the illness of one of the couple or of another family member. By comparison, 82,800 two-income couples, or 0.25 percent of the total, filed for bankruptcy after missing work because of illness. 2001 Consumer Bankruptcy Project; *see* WARREN & TYAGI, *supra* note 2, at 218 n. 47.

[70] Approximately 43 percent of marriages end in divorce. Press Release, Center for Disease Control, National Center for Health Statistics, Forty-three Percent of First Marriages Break-up Within 15 Years (May 24, 2001), *available at* http://www.cdc.gov/od/oc/media/pressrel/r010524.htm.

the news reports: The two-income trap has worked its way into the sanctity of marriage.

Many commentators have held out the hope that the divorce explosion will prove temporary and that marriages may actually become more stable as the sexes stride toward equality. *He Works/She Works* offers this bit of optimism:

> The era of the two-earner couple may in fact create more closeness in families, not less . . . . Divorces may decline as marriages become once again economic partnerships more like the ones they were before the industrial revolution . . . . fewer people will be able to waltz easily out of marriage, as they might have in the days when a thriving economy made good jobs easy to come by.[71]

This theory *sounds* good, but the hopeful message is once again undercut by hard data.

During the 1970s, a single-earner couple had about the same chances of splitting up as a dual-income couple. By the 1990s, however, a working wife was 40 percent more likely to divorce than her stay-at-home counterpart.[72] No one really knows why the difference has emerged, although sociologists have offered a number of competing theories. Some argue that the combination of working and bringing up the kids makes for a more stressful home life and leaves the two-earner couple with less time for each other. Others speculate that today's stay-at-home wives embrace more traditional gender roles, which can make for a smoother relationship. Feminist scholars offer their own explanation, arguing that working wives see themselves as less dependent on their husbands for financial support and are therefore freer to leave a bad relationship.[73] Whatever the reason, the grim fact remains: The modern two-income family faces a greater likelihood of divorce than the one-income family from a generation ago.

Yet another wrinkle to the family-breakup statistics often escapes attention: the couples who never marry. A quick glance at the census figures tells the story. Over the past 25 years the number of children whose mothers have never married increased more than fivefold.[74] Many of these women are not really single, as the "never married" box on the census form might imply. Instead, they live for many years with a male partner. Since the 1970s the number of unmarried couples

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[71] BARNETT & RIVERS, *supra* note 4, at 22.

[72] *See* Scott J. South, *Time-Dependent Effects of Wives' Employment on Marital Dissolution*, 66 AM. SOC. REV. 226, 226–45 (2001); *see also* Steven L. Nock, *When Married Spouses Are Equal*, 9 VA. J. SOC. POL'Y & L. 48, 56–62 (2001). Nock found that marriages between equally dependent spouses (defined as marriages in which each spouse earns at least 40 percent of the total family income) are 57 percent more likely than other marriages to end in divorce. *Id*. at 59.

[73] For a discussion of contributors to changing divorce rates among working and nonworking women, see South, *supra* note 71, at 226–45.

[74] U.S. CENSUS BUREAU, TABLE CH-5, CHILDREN UNDER 18 YEARS LIVING WITH MOTHER ONLY, BY MARITAL STATUS OF MOTHER: 1960 TO PRESENT, CURRENT POPULATION REPORTS (Mar. 2002); *available at* http://www.census.gov/population/socdemo/hh-fam/tabCH-5.pdf.

rearing children has increased *eightfold*. Today, cohabiting men and women represent more than 6 percent of all couples raising children, compared with less than 1 percent a generation ago.[75] Although six percent may sound like a modest proportion, the odds that a child will live with a cohabiting parent add up over time. According to one estimate, approximately four in ten children will spend some time in a cohabiting family before they turn sixteen.[76]

What does this have to do with the rising divorce rate? Cohabiting relationships share many of the financial characteristics of marriage. There are two adults to share the expenses and responsibilities of running a single household. When the cohabiting couple breaks up, the consequences are much like those when a married couple divorces. Someone has to find separate housing, and any joint obligations, such as a lease or a mortgage they both signed, must be resolved. If both partners are the children's biological parents, custody decisions must be settled, and arrangements for visitation and child support must be worked out. But here's the twist: The logistical consequences of splitting up may be the same, but the odds of breaking up are not. Cohabiting couples with children are more than twice as likely to split up as their married counterparts.[77] Once again, the frailty of families with children comes to the fore. As these unmarried parents go their separate ways, the number of families left without a second adult to share the burden continues to multiply.

D. Conclusion: More Risk

The risks facing the modern two-income family are layered one on another. The two-income family is a more deeply leveraged economic unit, with more of its income committed to a relentless demand to meet fixed expenses, leaving them with less flexibility in times of trouble. At the same time, two workers double the odds that at least one of them will face a period of joblessness. Finally, exogenous risk

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[75] The number of unmarried, opposite-sex-couple households with children under age fifteen increased from 204,000 in 1977 to 1.7 million in 2000. U.S. CENSUS BUREAU, TABLE UC-1, UNMARRIED-COUPLE HOUSEHOLDS, BY PRESENCE OF CHILDREN: 1960 TO PRESENT, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://www.census.gov/population/socdemo/hh-fam/tabUC-1.pdf (last revised Sept. 30, 2002). In 2000 there were 27.1 million married couples with children under eighteen. U.S. CENSUS BUREAU, TABLE F-10, PRESENCE OF CHILDREN UNDER 18 YEARS OLD BY TYPE OF FAMILY AND MEDIAN AND MEAN INCOME: 1974–2001, CURRENT POPULATION REPORTS, ANNUAL DEMOGRAPHIC SUPPLEMENT (Mar. 2002), *available at* http://www.census.gov/hhes/income/histinc/f10.html.

[76] Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 29–41 (2000).

[77] Wendy D. Manning & Pamela J. Smock, *The Relative Stability of Cohabiting and Marital Unions for Children*, (Bowling Green State University, Working Paper Series 02-18, 2002); *see also* Renata Forste, *Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.*, *Symposium on the ALI's Family Dissolution Principles: Blueprint to Strengthen or to Deconstruct Families? Brigham Young University*, Feb. 3, 2001 *available at* http://www.law2.byu.edu/alisymp/Papers/Forste0314.htm (citing Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, DEMOGRAPHY 26, 615–25 (1989)). The authors found that 29 percent of cohabiting unions end within the first two years, compared with only 9 percent of marriages. *Id.*

has multiplied, so that more families are struggling to deal with elderly parents, with sick family members, and with family break ups. The middle class family faces a wave of financial events that have turned against them—rising fixed costs, increasing risks from reliance on two paychecks, and multipling threats of job loss, medical problems and family breakups. Any one of these changes would spell bad news for the middle class family, but the combination has destroyed the economic stability of millions.

The need for an effective way for families in financial distress to right themselves has never been greater. Bankruptcy is moving into a more pivotal role in the economic survival of the middle class.

III. THE CHANGING ROLE OF BANKRUPTCY

The modern family has been hit with a hard one-two punch. In an effort to make their families more secure, both parents have committed to full-time jobs. They have increased their household income with no increase in their disposable income—and at the cost of increasing their risk profile as well. Families might have weathered this shift, but the economic calamities coming their way actually multiplied. The result is grimly predictable: more families are in financial trouble.

A. More Bankruptcy

The bankruptcy data reveal the increasing distress of families. The overall rise in bankruptcy filings has become familiar news, as quarterly reports from the Administrative Office of the United States Courts are reported by the media. Below the surface of these aggregated numbers, however, lurks an even more alarming picture. This data shows that the families in the worst financial trouble are not the usual suspects. They are not the very young, tempted by the freedom of their first credit cards. Nor are they a random assortment of Americans who lack the self-control to keep their spending in check. Rather, the people who consistently rank in the worst financial trouble are united by one surprising characteristic. They are parents with children at home.

The 2001 Consumer Bankruptcy Project[78] shows that married couples with children are more than twice as likely to file for bankruptcy as their childless counterparts. A divorced woman raising a youngster is nearly three times more likely to file for bankruptcy than her single friend who never had children.[79]

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[78] The 2001 Consumer Bankruptcy Project is a study of 1,250 families that filed for bankruptcy in five judicial districts in 2001. The data consist of questionnaires collected at 341 meetings, court records, and follow up telephone interviews. For a more detailed explanation of the study, see WARREN & TYAGI, *supra* note 2, at app. 181–88.

[79] In 2001, the filing rate for couples with children was 14.7 per 1,000, compared with 7.3 for couples without children. For unmarried women with children, the filing rate was 21.3 per 1,000, compared with 7.2 for childless women and 6.1 for childless men. *Id.*

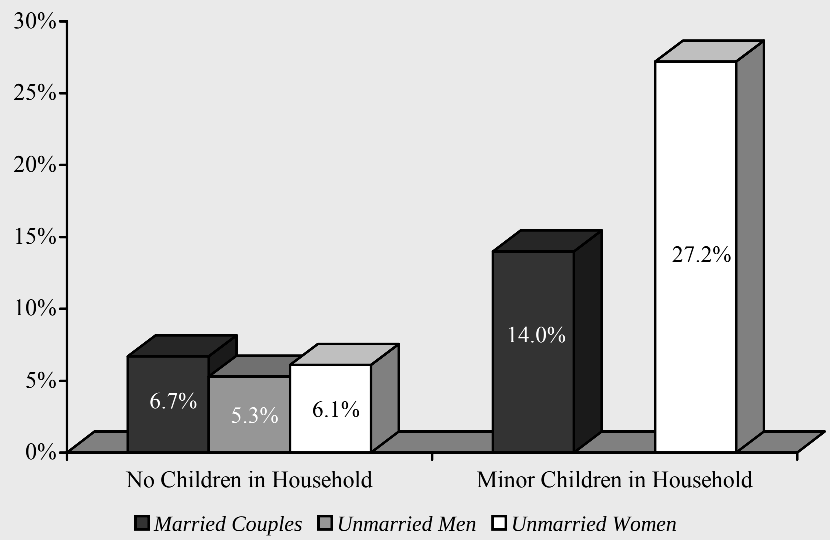

FIGURE 7: BANKRUPTCY FILING RATES, FAMILIES WITH OR WITHOUT CHILDREN, 2001
Source: 2001 Consumer Bankruptcy Project, Administrative Office of the United States, U.S. Census Bureau

Over the past generation, the signs of middle-class distress have continued to grow, in good times and in bad, in recession and in boom.[80] If those trends persist, more than five million families with children will file for bankruptcy from 2003 to the end of this decade. That would mean that, across the country, nearly *one of every seven families with children* would have declared itself flat broke, losers in the great American economic game.[81]

Bankruptcy has become deeply entrenched in American life. This year, more people will end up bankrupt than will suffer a heart attack. More adults will file for bankruptcy than will be diagnosed with cancer. More people will file for bankruptcy than will graduate from college. And, in an era when traditionalists decry the demise of the institution of marriage, Americans will file more petitions for bankruptcy than for divorce.[82] Heart attacks. Cancer. College graduations.

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[80] The bankruptcy rolls increased rapidly during the late 1980s and again in the late 1990s, both of which were expansionary periods. *See Bankruptcy Filings Continue Climb in Fiscal Year 2003*, 35 THE THIRD BRANCH 12 (Administrative Office of the United States Courts, Washington, DC), December 2003, *available at* http://www.uscourts.gov/ttb/dec03ttb/bankruptcy/index.html.

[81] This projection is based on a linear regression of personal bankruptcies in the United States between 1980 and 2002. The R-squared value was 0.937. This calculation assumes that the proportion of bankrupt families with children remained constant throughout this period. Based on these assumptions, 5.1 million families with children, or 13.5 percent of all households with children, would file for bankruptcy between 2003 and 2010 (results on file with author).

[82] In 2002, two million people filed for bankruptcy (including both husbands and wives who filed jointly). By comparison, 1.1 million Americans had a first or a recurrent coronary attack. AM. HEART ASS'N,

Divorce. These are markers in the lives of nearly every American family. And yet, we will soon have more friends and coworkers who have gone through bankruptcy than any one of these other life events.

The lines at the bankruptcy courts are not the only signs of financial distress. A family with children is now 75 percent more likely to be late on credit card payments than a family with no children.[83] The number of car repossessions has doubled in just five years.[84] Home foreclosures have more than tripled in less than 25 years, and families with children are now more likely than anyone else to lose the roof over their heads.[85] Economists estimate that for every family that officially declares bankruptcy, there are seven more whose debt loads suggest that they *should* file for bankruptcy—if only they were more sophisticated about financial matters.[86]

Who are the families in so much trouble? Most are ordinary, middle-class people united by their determination to provide a decent life for their children. Many had been felled by a layoff or a business failure; someone who glanced at this year's tax return might label them as poor. But very few were chronically poor. For most, poverty was only temporary, a setback in an otherwise solidly middle-class life. When membership in the middle class is defined by enduring criteria that don't disappear when a pink slip arrives—criteria such as going to college, owning a home, or having held a good job—more than 90 percent of those in bankruptcy

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TARGETING THE FACTS: OUR QUICK GUIDE TO HEART DISEASE, STROKE AND RISKS 1 (2002), *available at* http://www.americanheart.org/downloadable/heart/1014993119046targetfact.pdf (last visited Feb. 10, 2004). Approximately 1,284,900 new cancer cases were diagnosed. AM. CANCER SOC'Y, CANCER FACTS AND FIGURES 1 (2002), *available at* http://www.cancer.org/downloads/STT/CancerFacts&Figures2002TM.pdf (last visited Feb. 10, 2004). In 2001, American universities and colleges awarded 1.2 million bachelor's degrees. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., TABLE 247, EARNED DEGREES CONFERRED BY DEGREE-GRANTING INSTITUTIONS, BY LEVEL OF DEGREE AND SEX OF STUDENT: 1869-70 TO 2010-11 (Aug. 2001), *available at* http://nces.ed.gov/programs/digest/d01/tables/PDF/table247.pdf (last visited Feb. 10, 2004). In 2000, there were 1.1 million divorces in the United States, compared with 1.5 million bankruptcy filings. Calculated from CTR. FOR DISEASE CONTROL AND PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2001, 50 NAT'L VITAL STAT REP. NO. 14 (Sept. 11, 2002), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_14.pdf (last visited Feb. 10, 2004); *see also Bankruptcy Filings Continue Climb in Fiscal Year 2003, supra* note 79.

[83] *Late Payers* (Oct. 22, 2002), *at* http://www.cardweb.com/cardtrak/news/2002/october/22a.html.

[84] Harvey Altes, the CEO of Time Finance Adjusters Inc., a trade association of accredited repossessors, "estimated that between 1998 and 2002 the number of cars repossessed nationally doubled from 1.2 million to around 2.5 million." Adam Fifield, *For the Repo Man, These Are Good Times: The Sluggish Economy Makes for Busy Nights in a Ticklish Job*, PHILA. INQUIRER, Dec. 29, 2002, *available at* http://www.philly.com/mld.inquirer/4829870.htm.

[85] The proportion of mortgages in foreclosure proceedings at the end of the quarter increased from 0.31 percent in 1979 to 1.1 percent in 2002, an increase of 255 percent. *U.S. Mortgage Bankers of America, Foreclosure at End of Quarter* (2002) (unpublished data, on file with author). For homeowners who were initially backed by FHA single-family mortgage insurance between 1982 and 2000, married couples with children were, on average, 39 percent more likely to undergo foreclosure by 2002 than married couples without children. Single parents were 28 percent more likely than single individuals without children. U.S. DEP'T OF HOUSING AND URBAN DEV., FHA SINGLE-FAMILY MORTGAGE INSURANCE CUMULATIVE NUMBER AND PERCENT OF FORECLOSURES (1982–2002) (unpublished data, on file with author).

[86] *See* Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 707–09 (1998).

would qualify as middle-class.[87] By every measure except their balance sheets, the families in our study are as solidly middle-class as any in the country.

These families are united by another common thread: Most of these families sent two parents into the workforce. Two-income families are *more* likely to file for bankruptcy than their one-income counterparts.[88] Moreover, dual-income couples that have filed for bankruptcy are also *more* likely to cite job loss or injury as the reason for their financial collapse than their single-income counterparts.[89]

B. A Changed Bankruptcy System

It is one thing to identify change; it is quite another to predict the effects change will have on a complex legal and economic system. An increasing number of middle class families with children will strain the bankruptcy system in new ways, and talking about those strains in advance may encourage some creative approaches to meet the challenges in a planned, effective way. The suggestions below are designed to open a conversation about how the changing economics of the family may be matched by an improved bankruptcy system.

C. An Evolving Political Landscape

The credit industry has been trying to shift the balance in the bankruptcy laws ever since the ink dried on the 1978 Bankruptcy Code. The 1984 amendments were a triumph for the industry, followed by another round of industry-supported changes in 1994. More changes might have been in the works in 1994, except that consumer advocates in Congress put the industry off with the promise of a Congressional Commission to review (and presumably endorse) the industry's longer wish-list.[90] The 1997 Report of the National Bankruptcy Review Commission reaffirmed the need for balance in the bankruptcy system.[91] It called for some reforms to trim consumer abuses but recommended even greater reforms to rein in creditor abuses,

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[87] Among families in bankruptcy, 92 percent include a filer who completed at least some college (57 percent), held a job in the upper 80 percentile of occupational prestige (70 percent), and/or owned a home (58 percent). Two-thirds of filers met two or more criteria, and 27 percent met all three. Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 116 n.1 (2003).

[88] Fully 79 percent of married women who file for bankruptcy are in the labor force, compared with 62 percent of married women in the general population. U.S. BUREAU OF THE CENSUS, TABLE F-7, TYPE OF FAMILY (ALL RACES) BY MEDIAN AND MEAN INCOME, 1947 TO 2000, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENTS, *available at* http://www.census.gov/hhes/income/histinc/f07.html (last revised Sept. 30 2002).

[89] Among two-income families filing for bankruptcy, about 83.3 percent identified a job problem as leading to their bankruptcy. Among married couples with only one income, the percentage identifying a job problem was 74.6 percent. Among single filers, that is, men and women who filed for bankruptcy without a spouse, the proportion identifying a job problem is even lower: 63.6 percent. 2001 Consumer Bankruptcy Project; *see* WARREN & TYAGI, *supra* note 2, app. at 181–88.

[90] NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REP. (1997), *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html.

[91] *Id*.

a substantial setback to the credit industry lobbyists who had counted on a blue-ribbon commission to ratify its agenda.[92] The industry roared back, declaring the Commission Report "dead on arrival" and persuading a friendly Congressman to introduce an industry-sponsored bill just days before the Commission Report was made public.[93] With 147 co-sponsors on their bill and no organized, funded opposition, industry lobbyists were optimistic.[94] But their optimism was misplaced. Six years later, the latest version of that same bill is pending in Congress.

Throughout the past twenty-five years of Congressional consideration and reconsideration of consumer bankruptcy legislation, bankruptcy filings have continued to rise. Each quarter, the Administrative Office issues new filing data, often laced with phrases such as "record-breaking," and "all-time high."[95] In one sense, it is fair to predict that not much will change. The legal system has held in rough equilibrium even as filings have risen sharply and the economy has shifted from boomtime to bust. Past experience provides evidence that it will continue to do the same, at least for a time.

But change may come from other directions. The forces documented in this paper may cause the credit industry to sharpen its attack on the bankruptcy system. As mainstream creditors with heavy political clout market even more debt to even more families, and as more of those families seek protection from the bankruptcy system, the value of a legislative change that reduces bankruptcy protection increases. Creditors doing a simple cost-benefit analysis could be expected to re-double their contributions to friendly politicians and to the so-called "coalition" that has hired armies of lobbyists and public relations firms to support bankruptcy change.[96]

But the effects of increased credit industry efforts could be more than offset by growing public support for a balanced bankruptcy system. Already, creditor efforts to paint bankrupt debtors as deadbeats have fallen far short of the mark. The data never supported the myth of the proflicate debtor. Now the news media have written reams of articles to puncture the image as well. In discussions of the pending bankruptcy legislation, the media often framed the legislation as a credit

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[92] For example, the Commission Report called for limitations on repeat filings by chapter 13 debtors who were seeking protection from the automatic stay but dismissing their cases without attempting any repayment, a change that likely would have affected a very modest number of debtors. The Report also called for a ban on all reaffirmation of unsecured debt, a change that would have reined in credit card lenders that engaged in questionable or even unlawful practices to secure post-bankruptcy repayment promises. *Id*.

[93] *Bankruptcy Efforts 'Worsen' Chargeoffs*, 12 CARD NEWS 1 (Oct. 27, 1997).

[94] *Proposed Bankruptcy Bill Gets Overwhelming Support: 147 Legislators Sign On While Opponents Gear Up For Fight*, 7 CREDIT RISK MGMT REP. 1 (December 1, 1997).

[95] *See, e.g.*, News Release, Administrative Office of the U.S. Courts, Bankruptcy Cases Continue to Break Federal Court Caseload Records – Total Bankruptcy Filings and Non-Business Filings Hit Highs 1 (Aug. 18, 2003), *available at* http://www.uscourts.gov/Press_Releases/603b.pdf.

[96] In a careful study of campaign contributions and voting, political scientists have documented the extraordinary influence of money on votes on the bankruptcy bill. Stephen Nunez & Howard Rosenthal, Bankruptcy 'Reform' in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process 3 (Nov. 14, 2002) (unpublished manuscript, on file with author) ("The pattern of voting is consistent with the vote-buying model proposed by Groseclose and Snyder.").

industry wish list and a sign of industry power and influence rather than as a much-needed tool to fight debtor abuse.[97] As more families have personal experience with bankruptcy, the number of people who will passively buy the industry view of debtor misbehavior declines. More importantly, as families come to know more people—friends, family members, neighbors, co-workers—who file for bankruptcy, the assumption that bankruptcy happens to some distrant group of miscreants necessarily declines. Over time, bankruptcy may be a risk not just for "them," but also for "us," a change that can influence the climate for considering any change in legislation.

With a rising number of middle class families in financial trouble—whether they declare bankruptcy or not—politicians are beginning to see a new constituency for a kitchen table economic issue. Bill Clinton focused his 1992 campaign for president around the need for domestic economic change with the brutal reminder, "It's the economy, stupid." Already the 2004 presidential campaign has included specific references to families in bankruptcy. Howard Dean's op-ed in the Wall Street Journal picked up personal bankruptcy as a signal of middle-class economic distress.[98] Richard Gephardt made a stump speech on a similar theme.[99] John Edwards has made it a recurrent theme of his campaign, a key part of his stump speech.[100] If presidential candidates believe they can gain political traction by talking about bankruptcy issues, then the political currency of bankruptcy shifts radically. Many in Congress have long believed that bankruptcy was a "free" vote, a chance to vote for banking interests while attracting no negative attention from their consumer base at home. But if bankruptcy becomes a part of the political dialogue about middle class families in trouble, then politicians are forced to re-think their position. Will a vote in favor of credit card companies that squeezes tens of thousands of families at home get picked up in the next campaign for re-election? Is there any risk that some mother will stand up at a meeting at a meet-the-candidates night and ask why the incumbent supported such anti-family legislation? Will groups such as the Leadership Conference on Civil Rights or the Family Research Council begin "scoring" bankruptcy votes, as they now score votes on daycare initiatives and public school funding? Will someone repeat the experience of George Gekas, standard bearer for the bankruptcy bill, who found himself in a tight re-election campaign and suddenly the subject of newspaper articles that noted his opposition to amendments to the bill that would have curbed the unlimited homestead exemptions in Texas and Flordia.[101] Congressman Gekas lost. Such

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[97] Melissa Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 40 HOUS. L. REV. (forthcoming 2004).

[98] Howard Dean, Commentary, *We Can Do Better*, WALL ST. J., Aug. 21, 2003, at A8.

[99] *See* Rep. Richard A. Gephardt, Remarks at the Meeting of the Greenwich Village-Chelsea Chamber of Commerce in New York, New York (Aug. 4, 2003) (transcript available at http://www.bankofknowledge.net/2004/archives/000221.html#more).

[100] *See* John Edwards for President Website, *at* http://johnedwardsforpresident.com (last visited Feb. 13, 2004).

[101] *Bankruptcy Bill Runs Into Major Problem*, CARDLINE, Apr. 13, 2001, at 1 (discussing homestead exemption issue and quoting representative of George Gekas).

concern will not affect every politician; it may not affect many. But as the question gains purchase, the environment for changing the bankruptcy laws begins to shift, making a credit industry sponsored bill more difficult to enact.

The data highlighted here may ultimately have yet another impact on the likelihood of passing a bankruptcy bill designed to squeeze even harder on working families. These data suggest that the credit industry may be nearing the point at which it threatens to kill the goose that has laid twenty-five years' worth of golden eggs. Household debt cannot grow faster than household income forever. And an economy running on consumer spending cannot survive if millions of families are caught in a debt trap—committed to payments on so much past debt that nothing is left for new spending.

Eventually, the rehabilitative aspects of consumer bankruptcy may be as important to the survival of the consumer credit industry as it is to individual American families. Each debtor represents a future promise to pay back debt to a group of identified creditors. More stringent bankruptcy laws might squeeze something more out of these families on past debt, but it does so at the cost of future debt. A self-interested credit industry (and their friends in manufacuring and retailing of consumer products) might want to think twice before concluding that it makes sense to build a permanent pool of sub-prime borrowers, people who pay high interest on past debts but who have little prospects of re-entering the credit market for future purchases. The industry may cling to troubled consumers today at the cost of giving up on a more robust market of families to purchase tomorrow's services. Without bankruptcy to give families a reason to keep earning, without bankruptcy to give families the chance to keep spending, and without bankruptcy to give families in trouble some hope that tomorrow will be better, the credit industry could find itself in trouble. Some creditors may lose their taste for substantial changes in the bankruptcy laws.

D. *Is Housing Still Special?*

Mortgage lenders have always separated themselves from other consumer lenders. They get the best possible deal in bankruptcy and the least interruption to their pre-bankruptcy contracts.[102] No other creditor on the business or consumer side receives such extraordinary treatment.

At the time the 1978 Code was adopted, such deference may have been entirely appropriate. After all, mortgage lending was stable, long-term lending, with interest rates pegged only modestly above anticipated inflation. To require that these long-term lenders subject themselves to the vagaries of contract-rewriting that is the norm for bankruptcy risked de-stabilizing an entire industry. The fact that the industry threatened that it would stop making mortgages or raise mortgage rates made the case even more persuasive.

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[102] *See, e.g.*, 11 U.S.C. § 1322(b)(2) (2002) (chapter 13 plans may not impair rights of home mortgage lenders); 11 U.S.C. § 722 (redemption limited to personal property, not real estate).

As a policy matter, treating mortgages differently from other debt at a time when mortgage rates were deeply regulated, when first-time home buyers put down an average of 18 percent of the purchase price,[103] and when lenders carefully scrutinized their borrowers, made some sense. It could plausibly be argued that whatever reasons families got themselves into financial trouble had little to do with the mortgage industry, and those lenders should have, in effect, a near-exemption from the pains of bankruptcy.

The data presented here show how the world has changed. Mortgage lending has become a significant part of the middle class family's financial woes. Inflation-adjusted spending on mortgages has risen 70 times faster than men's wages, going up while inflation-adjusted spending on food, clothing, and many other consumer goods declined. Mortgage debt is now at the center of a family's financial life.

Objectively viewed, mortgages are increasingly beyond the reach of the families who try to pay them. The best evidence comes from the mortgage industry itself. Fannie Mae, the quasi-governmental agency that underwrites a huge fraction of home mortgage lending in the United States, advises families that monthly housing expenses should not represent more than 25 to 28 percent of gross monthly income.[104] The agency concludes that anyone whose housing costs exceed 40 percent of their earnings should be considered "house poor," spending so much on housing that they jeopardize their overall financial security.[105] But the label is misleading. Many of the "house poor" are not poor at all. They are middle-class families that overextended themselves in a desperate effort to find a home in a safe neighborhood with decent schools. Over the past generation, at the same time that interest rates dropped and millions of households sent a second earner into the workforce and drove up total family income, the proportion of *middle-class families* that would be classified as house-poor or near-poor has quadrupled.[106]

The strain on homeowners is reflected in the bankruptcy data. This year, approximately 850,000 homeowners will file for bankruptcy.[107] About 185,000 will

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[103] *See* GLENN W. KING, U.S. CENSUS BUREAU, GENERAL CHARACTERISTICS OF RECENT HOME BUYERS 1976 TO 1992, TABLE 1247 (1993) (on file with author).

[104] Fannie Mae, *Becoming A Homeowner: How Much House Can You Afford?*, *at* http://www.fanniemae.com/homebuyers/findamortgage/becoming/started/houseafford.jhtml?p=Find+a+Mortgage&s=Becoming+a+Homeowner&t=Getting+Started&q=How+Much+House+Can+You+Afford? (last visited Feb. 13, 2004).

[105] U.S. CENSUS BUREAU, HOUSE-POOR/HOUSE-RICH, STATISTICAL BRIEF (Aug. 1991) (on file with author).

[106] U.S. CENSUS BUREAU, ANNUAL HOUSING SURVEY FOR THE UNITED STATES AND REGIONS: 1975, TABLE A-1, INCOME OF FAMILIES AND PRIMARY INDIVIDUALS IN OWNER AND RENTER OCCUPIED HOUSING UNITS, 1975, *at* http://www.census.gov/prod/www/abs/h150.html (last modified Jul. 31, 2003); U.S. BUREAU OF THE CENSUS, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2001, TABLE 2-20, INCOME OF FAMILIES AND PRIMARY INDIVIDUALS BY SELECTED CHARACTERISTICS-OCCUPIED UNITS, *at* http://www.census.gov/prod/2002pubs/h150-01.pdf (last visited Feb. 13, 2004). The number of homeowners spending more than 35 percent of their income on housing has more than quadrupled, from less than 3 million in 1975 to nearly 13 million in 2001. *Id*.

[107] Raisa Bahchieva et al., *Homeownership and Financial Distress: The Interplay of Tax, Real Estate and Bankruptcy Laws*, A Report to the Ford Foundation (Aug. 13, 2002) (on file with author); *see also* Warren,

file after having lost a home for financial reasons before they filed.[108] For about 350,000 of those families, the explicit reason for filing will be to try to save their homes.[109] The remainder of the homeowners in bankruptcy fall at the two ends of the spectrum, either current on their home mortgages or already given their homes up. Home mortgage foreclosures among all families—in and out of bankruptcy—have tripled in less than 25 years.[110] The data are unmistakeable: commitment to a huge mortgage is threatening the economic survival of millions of families. So long as the mortgage obligation remains essentially outside the purview of bankruptcy policy, relief for troubled families will be modest at best.

There is a second reason to reconsider the special bankruptcy exemption for home mortgages. Since the last major reform of consumer bankruptcy, new terms have appeared in the lexicon of home mortgage lending: sub-prime, predatory lending, loan-to-own, 125 percent LTVs, zero-down, re-fi, flipping. As the new vocabulary suggests, home mortgages are no longer marketed as they once were. Lenders actively seek out homeowners to offer them cash if they will refinance. Companies specialize in so-called debt consolidation loans that load on more mortgage debt. Families in financial trouble are inundated with offers to refinance their homes and increase their principal debt. New mortgages are appearing with zero-amortization—a customer can pay on a mortgage for ten years or more, and still owe the same amount.

To give a sense of just how expensive subprime mortgages are, consider an example from a well-known lender. In 2001, when standard mortgage loans were in the 6.5 percent range, Citibank's *average* mortgage rate (which included both subprime and traditional mortgages) was 15.6 percent.[111] To put that in perspective,

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supra, note 86. If this proportion held steady for the FY 2003, the 1,613,097 non-business cases would have included about 52.5 percent homeowners, or about 846,900 families.

[108] 2001 Consumer Bankruptcy Project (11.4% of filers said they had lost a home for financial reasons within the five years preceding their bankruptcy filings); *see* WARREN & TYAGI, *supra* note 2, app. at 181–88.

[109] 2001 Consumer Bankruptcy Project (41.2% of homeowners responding said they were filing specifically to try to save their homes); *see* WARREN & TYAGI, *supra* note 2, app. at 181–88. If the proportions were the same in FY 2003, that would mean about 348,900 families were in bankruptcy court to try save their homes.

[110] The proportion of mortgages in foreclosure proceedings at the end of the quarter increased from 0.31 percent in 1979 to 1.1 percent in 2002, an increase of 255 percent. *U.S. Mortgage Bankers of America, Foreclosure at End of Quarter* (2002) (unpublished data, on file with author). For homeowners who were initially backed by FHA single-family mortgage insurance between 1982 and 2000, married couples with children were, on average, 39 percent more likely to undergo foreclosure by 2002 than married couples without children. Single parents were 28 percent more likely than single individuals without children. U.S. DEP'T OF HOUSING AND URBAN DEV., FHA SINGLE-FAMILY MORTGAGE INSURANCE CUMULATIVE NUMBER AND PERCENT OF FORECLOSURES (1982–2002) (unpublished data, on file with author).

[111] Lew Sichelman, *Community Group Claims CitiFinancial Still Predatory*, ORIGINATION NEWS, Jan. 2002, at 25 (reporting on new claims of CitiFinancial's predatory practices after settlements with state and federal regulators). There are several companies affiliated under the "Citigroup" logo. For ease of identification I refer to all of these companies under this organization's best-known moniker—Citibank. For a list of the largest subprime lenders active in the United States, see U.S. DEP'T OF HOUSING AND URBAN DEV., HUD SUBPRIME AND MANUFACTURED HOME LENDER LIST, DATA SET (2001), *available at* http://www.huduser.org/datasets/manu.html (last visited Feb. 15, 2004).

a family buying a $175,000 home with a subprime loan at 15.6 percent would pay *an extra $420,000* during the 30-year life of the mortgage—that is, over and above the payments due on a prime mortgage. Had the family gotten a traditional mortgage instead, they would have been able to put two children through college, purchase half a dozen new cars, *and* put enough money aside toward a comfortable retirement.

Citibank and other subprime lenders typically defend their business practices by arguing that they are helping more families own their own homes.[112] This defense is little more than public relations puffery. In the overwhelming majority of cases, subprime lenders prey on families that *already* own their own homes, rather than expanding access to new homeowners. Fully 80 percent of subprime mortgages involve refinancing loans for families that already own their homes.[113] For these families, subprime lending does nothing more than increase the family's housing costs, taking resources away from other investments, converting unsecured debt into secured debt, and increasing the chances that the family will lose its home if anything goes wrong.

Subprime lending has an even more pernicious effect. It ensnares people who, in a regulated market, would have had access to lower-cost mortgages. Lenders' own data show that many of the families that end up in the subprime market are middle-class families that would typically qualify for a traditional mortgage. At Citibank, for example, researchers have concluded that at least 40 percent of those who were sold ruinous subprime mortgages would have qualified for prime-rate loans.[114] Nor is Citibank an isolated case: A study by the Department of Housing and Urban Development revealed that *one in nine* middle-income families (and one in fourteen upper-income families) who refinanced a home mortgage ended up with a high-fee, high-interest subprime mortgage.[115] For many of these families there is no trade-off between access to credit and the cost of credit. They simply paid more for their mortgages.

Why would middle-class families take on high-interest mortgages if they could qualify for better deals? The answer is straightforward: they didn't know they could do any better. Many unsuspecting families are steered to an overpriced mortgage by a broker or some other middleman who represents himself as acting in the

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[112] *Predatory Mortgage Lending: The Problem, Impact, and Responses: Hearing Before the Comm. on Banking, Housing, and Urban Affairs,* 107th Cong. 232 (2001) (statement of Jeffrey Zeltzer on behalf of the National Home Equity Mortgage Association (NHEMA)); *see also* National Home Equity Mortgage Association, *Join NHEMA*, *at* http://www.nhema.org/join.asp?bid=363 (last visited Apr. 11, 2004).

[113] U.S. DEP'T OF HOUSING AND URBAN DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA, *available at* http://www.hud.gov/library/bookshelf18/pressrel/subprime.html (last visited Feb. 12, 2004).

[114] *See* Sichelman, *supra* note 110, at 25.

[115] DEP'T OF HOUSING AND URBAN DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA, *available at* http://www.hud.gov/library/bookshelf18/pressrel/subprime.html (last visited Feb. 12, 2004). To be sure, subprime lenders have focused more of their efforts among poorer homeowners; 26 percent of low-income homeowners end up with predatory refinancing, more than twice the rate of moderate-income families. *Id*.

borrower's best interests, but who is actually taking big fees and commissions from subprime lenders.[116] In some neighborhoods these brokers go door-to-door, acting as "bird dogs" for lenders, looking for unsuspecting homeowners who might be tempted by the promise of extra cash. Other families get broadsided by extra fees and hidden costs that don't show up until it is too late to go to another lender. One industry expert describes the phenomenon: "Mrs. Jones negotiates an 8 percent loan and the paperwork comes in at 10 percent. And the loan officer or the broker says, 'Don't worry, I'll take care of that, just sign here.'"[117]

Every now and then a case comes to the forefront that is particularly egregious. Citibank was recently caught in one of those cases. In 2002, Citibank's subprime lending subsidiary was prosecuted for deceptive marketing practices, and the company paid $240 million to settle the case (at the time, the largest settlement of its kind).[118] A former loan officer testified about how she marketed the mortgages: "If someone appeared uneducated, inarticulate, was a minority, or was particularly old or young, I would try to include all the [additional costs] CitiFinancial offered."[119] In other words, lending agents routinely steered families to higher-cost loans whenever they thought there was a chance they could get away with it.

For many families, a substantial portion of mortgage debt has become a substitution of one form of debt for another. No one would suspect it from looking at the ads, but for every family taking out a second mortgage to pay for a vacation, there are sixty-one more families taking on a second mortgage so they can pay down their credit card bills and medical debts.[120] The bankruptcy data mirror much of what is happening generally with mortgage lending. A third of homeowners in bankruptcy were carrying second or even third mortgages or had refinanced their mortgages to get some cash.[121]

All other secured creditors are subject to the bifurcation of an allowed secured claim into its component secured and unsecured portions, redemption of only the secured portion in chapter 7, and strip down of the amount to be repaid in chapter 13.[122] Home mortgage lenders could be subjected to the same rules, so that debtors

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[116] *See, e.g.*, Howell E. Jackson & Jeremy Berry, *Kickback or Compensation: The Case of Yield Spread Premiums* (Jan. 8, 2002), *available at* http://www.law.harvard.edu/faculty/hjackson/pdfs/january_draft.pdf.

[117] Dennis Hevesi, *A Wider Loan Pool Draws More Sharks*, N.Y. TIMES, Mar. 24, 2002, § 11, at 1.

[118] The charges alleged that Citibank's consumer finance unit employed deceptive practices to sell home loan insurance. To settle the case, Citibank agreed to pay $240 million, the largest settlement to date of a Federal Trade Commission consumer protection case. *Citigroup $240 Mln Lending Charges Settlement Approved By Judge*, BLOOMBERG NEWS, Nov. 15, 2002.

[119] Paul Beckett, *Citigroup's 'Subprime' Reforms Questioned*, WALL ST. J., July 18, 2002, at C14.

[120] In 1997, 61 percent of homeowners who had taken a traditional home equity loan reported that they took the loan to repay other debts, compared with just 1 percent who took the loan to pay for a vacation. Among homeowners with a line of credit (a somewhat more affluent group than those with traditional home equity loans), 49 percent took a loan to repay debts, and 13 percent did so to take a vacation. Glenn B. Canner et al., *Recent Developments in Home Equity Lending*, 84 FED. RES. BULL. 241, 248 (1998).

[121] Among all homeowners in bankruptcy, 34 percent had either taken out a second or third mortgage or refinanced to obtain cash. Among homeowners with minor children, the figure is essentially the same, 32.4 percent. 2001 Consumer Bankruptcy Project, *see* WARREN & TYAGI, *supra* note 2, app. at 181–88.

[122] *See* 11 U.S.C. §§ 506, 722, 1322(b)(2), 1325(a)(5) (2002).

could strip down a 125 percent loan-to-value ratio mortgage or a barely secured second mortgage to its secured value, permitting discharge of the remaining unsecured debt.

The once-clear line between mortgage debt and all other debt has begun to blur. More than any other segment in the consumer lending industry, home mortgage lenders have claimed that any efforts to restrict their collection rights will result in harm to the consumer, resulting in fewer loans and lower homeownership rates. That claim may have made sense in a different marketing era when each new borrower was carefully screened and mortgage lenders insisted on substantial down payments. But today's sub-prime mortgage market calls into question the entire structure of mortgage lending. As an aggressive new segment of the consumer lending market has emerged, a market that turns on high risks and high profits, it becomes increasingly difficult to explain why mortgage loans should be treated any differently in bankruptcy from car loans or credit card debts.

E. Reform Outside the Bankruptcy System

The stress on American families will change the demand for relief in areas far afield from bankruptcy. In one sense, bankruptcy is like a thermometer, recording the economic temperature of American families. In the same way the the problems facing families do not originate with bankruptcy, solutions that involve systemic change will also begin elsewhere.

Medical costs are escalating, and a growing number of families are filing for bankruptcy in the wake of a catastrophic medical bill. Over the past twenty years, the number of families declaring bankruptcy in the wake of a serious illness has multiplied more than twentyfold, or *2,000 percent*.[123] With nearly three-quarters of

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[123] Comparisons between bankruptcy filers in the early 1980s and today are difficult, because no one collected precisely the same data then as now. The best comparative estimate can be made from a 1981 survey that the San Antonio courts required of all families who filed for bankruptcy, which shows that about 8 percent of the filers cited a medical reason for filing. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 175, n. 1 (Oxford Univ. Press 1989). Extrapolating that sample to all filers in 1980 would suggest that about 23,000 families filed for bankruptcy in the wake of a medical problem. Other reports from about the same time estimate a lower number of medical-related bankruptcies, but they rely exclusively on court records to identify medical debt still outstanding at the time of filing and do not ask the debtors directly what had happened. For example, a 1978 study in Albany, New York, found that medical bills constituted less than 2 percent of scheduled debts, but the study was based entirely on identifying medical bills in court records. Barry A. Gold & Elizabeth A. Donahue, *Health Care and Personal Bankruptcy*, 7 J. HEALTH POL. POL'Y & L. 734–39 (1982). For comparability to the 1981 data, the 2001 calculation includes only families who specifically identified a medical reason, thus excluding those who identified lost time at work because of medical problems. That subset would suggest that about 424,500 families in 2002 filed because of an identified medical reason—more than a twentyfold increase. For more information on current filings for medical reasons, see DAVID HIMMELSTEIN, DEBORAH THORNE, ELIZABETH WARREN & STEFFIE WOOLHANDLER, ILLNESS AND INJURY AS A CAUSE OF BANKRUPTCY IN THE UNITED STATES (forthcoming 2004).

a million families filing for bankruptcy in the aftermath of a serious health problem, the need for an alternative health care financing system is made even clearer. Bankruptcy has become the insurer of last resort.

The bankruptcy data expose the depth of families' extraordinary financial fall after a serious health problem, but these data also reveal unexpected layers of family risk. Among the families filing for bankruptcy in the aftermath of a serious medical problem, income loss was as serious as high medical bills. The two-income trap is particularly viscious here: With both parents at work, families double the risk that a wage earner will be too sick or injured to work. If they need two workers to make the mortgage payment and put groceries on the table, they now face twice as much risk that a serious illness or accident will disrupt the family's financial picture. Each year, as many as *300,000 families* are driven into bankruptcy when they lose time from work because of a medical problem.

In addition to disability insurance for a fallen worker, the reduced ability to care for family members is a growing problem as well. For any family with all the adults at work—one-parent or two-parent households—a child's illness or an infirm parent can create a financial nightmare.

The bankruptcy data highlight the need to expand our national conversation about the financial impact of health care. Our federal disability system is geared toward those who will be out of work for a year or more. Families facing cancer, heart disease, diabetes, and many other diseases that may leave them with periods of debilitation but who may recover are left out of the system entirely. Whether change is to be accomplished by public or private means, the expansion of disability insurance to aid all workers who are struck with a serious disease should be on national agenda.

A third area ripe for re-consideration is credit regulation. As more middle class families see themselves in precarious financial shape, the pressure will grow to beat back the consumer-credit monster. Re-regulation of interest rates would accomplish that goal. Federal law could be amended to close the loopholes that let one state override the lending rules of another.[124] Alternatively, Congress could impose a uniform rate to apply across the country. Such a provision would enable the states or the federal government to reimpose meaningful limits on interest rates.

Consumer lenders may balk at the notion of re-regulation, claiming that tighter limits on interest rates would put America at risk for another banking disaster like the Savings and Loan (S&L) crisis of the late 1970s. Hemmed in by high inflation rates and low limits on interest rates, the Savings and Loans (which issued most home mortgages) found themselves hemorrhaging money.[125] But the real problem

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[124] Today many states have technical usury laws on the books, but in many cases the caps are so high that they provide little protection. Because out-of-state lenders can evade those laws, local lenders have pressed state legislatures to raise usury caps so that they are not put at a competitive disadvantage. Moreover, even if a state keeps its rates low, that provides little protection for its residents, since out-of-state lenders simply override local laws by incorporating in other states and marketing higher rate loans across state borders.

[125] Jerry W. Markham, *A Financial History of the United States*, 3 FROM THE AGE OF DERIVATIVES INTO THE NEW MILLENNIUM (1970–2001) 73–74 (M. E. Sharpe 2002).

was inflation, not usury laws per se, which had worked reasonably well for centuries. At the time, usury caps in most states were fixed by statute at a specific number, and they hadn't been written with double-digit inflation in mind. But that would be an easy problem to solve. Tying the limit on interest rates to the inflation rate or the treasury bill rate (which changes with anticipated inflation) so that the two never get too far out of sync. Lenders would always be able to lend profitably, *and* consumers would always be protected from unreasonable rates, regardless of the rate of inflation.

By harnessing the energy of the marketplace, lenders themselves would transform mortgage and credit card practices just by acting in their own best interest. Since they would no longer be allowed to charge exorbitant interest rates to families with marginal credit records, it would become unprofitable for lenders to pursue families in financial trouble. Instead, banks would once again have a reason to screen potential borrowers carefully, screening borrowers for credit worthiness and not making loans to those who have little chance of repaying.

The anti-regulation camp is undoubtedly ready to explain why regulating the credit industry (or any other industry, for that matter) is a bad idea. On the surface, their logic sounds convincing. A deregulated market reduces costs and provides more choices for home buyers and credit card holders, so consumers should win out—eventually. Besides, as federal judge Edith Jones wrote, "Nobody is holding a gun to consumers' heads and forcing them to send in credit card applications."[126] People always have the option of walking away from an overpriced mortgage offer or an outrageous credit card offer.

But this argument rests on one very important supposition—a well-functioning market for credit. Any honest economist will explain that markets work efficiently only when there is a level playing field, when consumers have full information about the costs and risks associated with whatever they are purchasing. The evidence is strong that the lending playing field is anything but level. After all, if the market were working properly, how could Citibank sell 40 percent of its high-priced subprime mortgages to families with good credit who would have qualified for low-cost mortgages? How could the company's loan officers get away with charging extra fees to anyone who "appeared uneducated?" And why would low-income whites get better terms on their mortgages than high-income African Americans?[127] A perfect market free to operate without government interference

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[126] *See* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. Rev. 177, 233 (1999).

[127] According to one study, African-American borrowers are *450 percent* more likely than whites to end up with a subprime than a prime mortgage. Association of Community Organizations for Reform Now, *Separate and Unequal: Predatory Lending in America* (Nov. 2002), *available at* http://www.acorn.org/acorn10/predatorylending/plreports/SU2002/index.php; *see also* U.S. DEP'T OF HOUSING AND URBAN DEV., OFFICE OF POL'Y DEV. AND RESEARCH, RANDALL M. SCHEESSELE, 1998 HMDA HIGHLIGHTS (Office of Pol'y Dev. and Reseach, Working Paper HF-009, HUD, 1999), *available at* http://www.huduser.org/publications/hsgfin/workpapr9.html.

certainly sounds good, but it is little more than a fantasy held up to distract policymakers while lenders rake in profits from those who never quite figure out the terms in fine print.

CONCLUSION

The data developed here highlight a structural change in the economics of the family. Today's families are increasingly likely to send all available adults into the workplace, committing a growing fraction of their combined income to long-term, fixed expenses. The result is a more highly-leveraged economic unit, one that has become more susceptible to any economic disruption. At the same time that families became more vulnerable, the risk of losing a job, coping with a medical problem or dealing with a family break up has increased. The result is disturbingly predictable: more families are turning to the bankruptcy system for help.

The strategy of middle class families to build their own safety nets is failing. It is no longer possible for both mom and dad to work, to buy a home in a decent neighborhood, to commit to health insurance and car payments, and to survive if something goes wrong. These parents are struggling, but they are not broken. They are hard workers, but the rules they played by are no longer the rules that govern financial success for the middle class. In a single generation, the world has changed, and these families are struggling to adapt. They committed themselves to thrift and hard work in exchange for a promise of economic security and a better future for their children. That promise has disappeared. There was a time when families sent mothers into the workplace only in times of distress. Today, women go to work every day just to maintain a tenuous grasp on a middle-class life. Plenty of families make it, but a growing number of those who worked just as hard and followed the rules just as carefully find themselves in a financial nightmare.

Liberal or conservative, faith-based or secular, any group that sees its mission as *families* should have interest rate regulation and bankruptcy protection at the very top of its agenda. Predatory lending is a family issue. Usury is a family issue. Bankruptcy is a family issue. These laws affect families—people with children—more than anyone else. There is likely no other issue—divorce, welfare reform, child custody—that will directly touch more middle-class families than the mortgage and credit card interest rates that drain away their economic viability and sap the intimacy and joy from family life.

The collective pressures on the family—the rising costs of educating their children, the growing insurance payments and medical bills, the rising risks of layoffs and plant closures, and the unscrupulous tactics of an unrestrained credit industry—are pushing families to the breaking point. But America's middle class will fight back. Their willingness to send 20 million mothers into the workplace had unintended fallout, but it was rooted in a powerful desire to create a better future for their children. Their failure to demand accountability from their politicians and the organizations that purport to speak for them has left them weakened. But the middle class was forged by families who knew hardship and conflict and who dreamed of giving their children something better. Collectively they have survived wars, scandal, epidemics, a Great Depression, and massive transformations in the U.S. economy. They are under assault, but the families that make up the great middle are not quitters. They are ferocious fighters, for themselves and for their children. Bankruptcy laws are becoming part of that fight.