

“HERSTORY” REPEATS: THE BANKRUPTCY CODE HARMS WOMEN AND CHILDREN

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I. INTRODUCTION

For years, scholars have recognized that American bankruptcy laws have had a negative effect on women and children, especially the provisions dealing with the discharge of marital debts.¹ Even though the U.S. Bankruptcy Code² has been historically viewed as gender-neutral, several authors have demonstrated that dischargeability disputes between spouses often resulted in women being treated disparately.³ The language in 11 U.S.C. § 523(a)(5) excepted from discharge those

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"Herstory" is used in place of "history" intentionally. As author Major Mary E. Card has written, "[h]erstory" is intentionally used to replace the conventional use of the word history and to symbolize that most history is in fact the story of men's lives." Mary E. Card, *Founding Mothers: The Women Who Raised Our Nation*, 2005 ARMY LAW 99, 102 n.39 (2005) (book review). See also Francine Banner, *Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant*, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 603 (2000-2001) ("[F]eminist works provide a counter-narrative and alternative record of women's lives and histories—a 'herstory'—which challenges the reader to look beneath traditional societal expectations.").

¹ See, e.g., Peter C. Alexander, *Building "A Doll's House": A Feminist Analysis of Marital Debt Dischargeability in Bankruptcy*, 48 VILL. L. REV. 381 (2003) (examining Congressional and judicial failures to rectify problems for women regarding dischargeability of divorce obligations); Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351 (1994) (focusing on women who are adversely affected when their husbands discharge marital debts in bankruptcy as means of exposing gender-bias in marital debt discharge provision of Bankruptcy Code); Otilie Bello, *Bankruptcy and Divorce: The Courts Send a Message to Congress*, 13 PACE L. REV. 643 (1993) (discussing ways in which debtor in bankruptcy is able to retain or convey property awarded to ex-spouse); Karen Gross, *Taking Community Interests into Account, An Essay*, 72 WASH. U. L. Q. 1031 (1994) (criticizing failure of bankruptcy scholarly works to take into account community at large and analyzing community interest); Margaret Mahoney, *Debts, Divorce and Disarray in Bankruptcy*, 73 UMKC L. REV. 83 (2005) (explaining effects of bankruptcy on divorce).

² Pub. L. No. 95-598, Title I, § 101, 92 Stat. 2549 (1978) (codified primarily as title 11 United States Code), as amended. Throughout the text of this article, the U.S. Bankruptcy Code will be referred to as "the Code."

³ See, e.g., Alexander, *supra* note 1, at 363–66; A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B. U. L. REV. 961 (1998) (considering role of marital status in bankruptcy and arguing that law should generally deny bankruptcy benefits to married debtor whose spouse refuses to accept emotional and financial duty of marriage); Jeffrey Margolin, Note, *Taming the Pernicious Creature That is §523(a)(15) of the United States Bankruptcy Code*, 8 CARDOZO WOMEN'S L.J. 45 (2001) (noting varying interpretations of section 523(a) (15) and suggesting method prescribed by Seventh Circuit); Shayna M. Steinfeld & Bruce R. Steinfeld, *A Brief Overview of Bankruptcy and Alimony/Support Issues*, 38 FAM. L.Q. 127 (2004) (addressing bankruptcy basics and preplanning strategies); Sheryl Scheible Wolf, *Introduction to the Special Issue on Family Law and Bankruptcy*, 31 FAM.

debts that were in the nature of alimony, maintenance, or support while 11 U.S.C. § 523(a)(15) excepted from discharge the remaining types of marital debts in some cases. For years, bankruptcy scholars and others called upon Congress to reform the Bankruptcy Code to ensure that women and children were not victimized by gendered interpretations of the statute.

On October 17, 2005, a new bankruptcy law went into effect.⁴ While it does reform how marital debts will be treated in bankruptcy, it is controversial legislation. Ostensibly crafted to end bankruptcy abuse, the new statute completely transforms bankruptcy theory. Gone are the days when bankruptcy courts opened their doors to anyone with clean hands needing a fresh financial start. Gone, too, are the days when debtors and their attorneys selected the appropriate form of bankruptcy relief to be filed. Chapter 7 liquidation, chapter 13 consumer reorganization, and chapter 11 reorganizations were legitimate choices to be explored and debtors and their counsel knew that the choices they made were subject to scrutiny by the bankruptcy court and the Office of the United States Trustee. If it would be an abuse of the bankruptcy system for a debtor to liquidate her debts in a chapter 7, the debtor's bankruptcy could be dismissed.⁵ If a debtor lacked regular and steady income or had too much debt to file a chapter 13, the case could also be dismissed.⁶ If a debtor did not have the ability to file a plan under chapter 11, the same result could occur.⁷

Now that the "new Code" has gone into effect, debtors will no longer encounter the system of laws that provided them with relief from their debts if they were "honest, but unfortunate;" instead, they will face a radically new system. Debt forgiveness will be reserved for those fortunate members of society who will be able to afford expensive attorney fees and increased court fees or for those desperate members of society who will be forced into repayment plans that will stretch their abilities to live and provide for the basic needs of their families. The individuals who will be harmed most by the new laws are families, particularly families struggling to make ends meet because they do not have adequate health insurance and have insurmountable medical bills; families whose primary breadwinner has been downsized out of a job; and families that are torn apart by divorce.⁸

L.Q. 369 (1997) (introducing articles on most commonly encountered and controversial bankruptcy issues involving family law).

⁴ See generally Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, 119 Stat. 23 (2005).

⁵ See 11 U.S.C. § 707(b) (2000).

⁶ See *id.* § 109(e).

⁷ See *id.* § 1112.

⁸ According to authors Elizabeth Warren and Amelia Warren Tyagi, the top three reasons cited for a family's financial failure are job loss, medical problems, and divorce or separation. ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* 80-81 (2003); see also Bruce A. Markell, *Sorting and Sifting Fact From Fiction: Empirical Research and the Face of Bankruptcy*, 75 AM. BANKR. L.J. 145, 147 (2001) (book review) (reviewing and quoting TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS* (2000) to show that 67.5% of bankruptcy filings are related to

The American family has been victimized by a sophisticated bait & switch scheme. Congress and the President made it incredibly difficult for everyday people to file bankruptcy by filling the new law with little-known provisions making it unlikely that someone will be able to file bankruptcy. Then, they misled the American people by advertising only that the new bankruptcy laws were intended to keep people who could afford to pay their bills from walking away from their responsibility. The plan was brilliant. Who could argue that bankruptcy should be available for people with the ability to pay their debts? Of course, the devil is truly in the details but, when the dust settles, the result will be the same as it ever was. Likewise, the conversation about family law issues in bankruptcy will also be the same as it ever was. The Bankruptcy Code is particularly harmful to women and children.

II. ADVERTISED CHANGES

Under the old bankruptcy laws, the system presumed that debtors lacked the ability to pay their debts and permitted them to file a chapter 7 liquidating bankruptcy to seek relief from their creditors. However, under section 707(b), the court, on its own motion or at the motion of the United States Trustee, could dismiss a bankruptcy petition filed under chapter 7 if it would be an abuse of the bankruptcy system to give this debtor a discharge pursuant to chapter 7 of the Code.⁹ This provision was not a hollow threat; there are myriad examples of debtors whose cases were dismissed because they had the financial ability to make payments on their debts and chapter 13 consumer reorganizations would have been a more appropriate form of relief.¹⁰ More important, countless debtors converted

job change/loss, 19.3% are related to medical cause, and 22.1% are related to family changes, such as divorce); 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, 693 n.39 (1998) (noting job loss, serious illness, and divorce as major reasons for filing bankruptcy).

⁹ See 11 U.S.C. § 707(b) (2000).

¹⁰ See, e.g., *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 4-5 (1st Cir. 1998) (adopting totality of circumstances test and dismissing chapter 7 petition as substantive abuse); *Fonder v. United States*, 974 F.2d 996, 998-1000 (8th Cir. 1992) (agreeing with bankruptcy court that plaintiff could pay debt in chapter 13 and therefore dismissing chapter 7 petition); *In re Krohn*, 886 F.2d 123, 126-28 (6th Cir. 1989) (dismissing chapter 7 petition because of plaintiff's ability to pay debt); *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913-15 (9th Cir. 1988) (holding chapter 7 petition should be dismissed because plaintiffs were clearly able to pay debt); *Gomes v. United States Trustee (In re Gomes)*, 220 B.R. 84, 87-88 (B.A.P. 9th Cir. 1998) (finding that ability to pay debt is primary factor in finding substantial abuse and dismissing chapter 7 petition on that ground); *In re Fauntleroy*, 311 B.R. 730, 734-35 (Bankr. E.D. N.C. 2004) (evaluating factors established in *Green v. Staples (In re Green)*, 934 F.2d 568 (4th Cir. 1991) and finding substantial abuse); *United States Trustee v. Mottilla (In re Mottilla)*, 306 B.R. 782, 787-88, 793 (Bankr. M.D. Pa. 2004) (dismissing chapter 7 petition because totality of circumstances weighed against Debtor); *In re Ogle*, 296 B.R. 691, 694 (Bankr. E.D. Va. 2001) (finding substantial abuse without reaching issue of whether case was filed in good faith); *In re May*, 261 B.R. 770, 773 (Bankr. M.D. Fla. 2001) (considering totality of circumstances as well as ability to pay debt when dismissing chapter 7 claim); *In re Laman*, 221 B.R. 379, 382, 385-86 (Bankr. N.D. Tex. 1998) (instructing debtors to convert chapter 7 filing to chapter 13 or have claim dismissed); *In re Seager*, 211 B.R. 81, 83 (Bankr. M.D. Fla. 1997) (finding ability to repay sufficient to establish substantial abuse); *Heller*

their chapter 7 liquidations to chapter 13s in the face of 707(b) motions rather than allowing their cases to be dismissed, thereby conceding that they had financial means to pay all or a portion of the debts.

Under the new law, the system presumes that everyone has the ability to pay something back and no longer permits debtors to file chapter 7 as the default form of bankruptcy. From now on, the burden is on debtors to demonstrate that they should be given chapter 7 relief. The new law requires that debtors demonstrate in their initial filings that they qualify for chapter 7 relief. Debtors must complete schedules listing their monthly income and expenses, as they were required to do under the old law, but now they must also provide statements that show how monthly net income is calculated, copies of pay stubs and W-2s, and a statement of any anticipated changes in income or expenses over the twelve months post filing.¹¹ In addition, they must complete a "means test," designed to identify those debtors who have the ability to pay their debts.¹² The means test is complicated and it is part of the new emphasis in bankruptcy on preventing abuse of the system.

Under the "old" bankruptcy laws, a debtor who filed a chapter 7 liquidation could have his or her bankruptcy petition dismissed if granting a discharge would be a substantial abuse.¹³ The new bankruptcy law replaces "substantial abuse" with "abuse" and provides several ways to determine if a debtor's filing is abusive. "Abuse" is not defined in the Code, but the pages and pages of new text in section 707(b) provide steps to help a court determine whether a filing is an abuse.¹⁴ The means test is not the equivalent of abuse, but "failing" the means test creates a presumption of abuse.¹⁵ The abuse formula is complicated to understand. Abuse is

v. Foulston (*In re Heller*), 160 B.R. 655, 659–60, 669 (D. Kan. 1993) (finding that future ability to pay debt can constitute substantial abuse to warrant dismissal); *In re Helmick*, 117 B.R. 187, 189–91 (Bankr. W.D. Pa. 1990) (dismissing chapter 7 claim because it was filed in bad faith); *In re Herbst*, 95 B.R. 98, 100–01 (W.D. Wis. 1988) (finding that while ability to pay is primary factor, courts should consider other factors when finding substantial abuse); *see also* *Green v. Staples (In re Green)*, 934 F.2d 568, 572–73 (4th Cir. 1991) (remanding to bankruptcy court for reevaluation pursuant to enumerated factors for dismissal of chapter 7 filing for "substantial abuse"); *cf. In re O'Neill*, 301 B.R. 898, 901 (Bankr. D. N.M. 2003) (denying Trustee's motion for dismissal because analysis of factors does not reach level of substantial abuse).

¹¹ The new pre-petition information gathering is in addition to a new requirement that individual debtors must seek and, in most cases, receive counseling from "an approved credit counseling agency" on various alternative opportunities for debt relief as well as assistance in budget analysis prior to filing bankruptcy. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37–38 (2005) (to be codified at 11 U.S.C. § 109).

¹² *See id.* § 102 (to be codified at 11 U.S.C. § 707(b) (2)).

¹³ *See* 11 U.S.C. § 707(b) (2000).

¹⁴ The former version of 11 U.S.C. § 707 contained twenty lines worth of text; the new version has 255 lines. *Compare id.* at § 707 with Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)).

¹⁵ *See* Dorraine A. Larison & Richard J. Pearson, *Means Testing: Abuse Still Exists & Debtors Perspective*, Minnesota State Bar Association Continuing Legal Education program, "Bankruptcy Reform 2005," Sec. 3; *see also*, Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 523 (2005) (explaining amount of available income that triggers presumption of abuse); Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 231–32 (2005).

presumed if: (current monthly income x 12) - (expenses + averaged secured debt + averaged priority debt) x 60 = 25% of non-priority unsecured debt (at the least \$6,000) or \$10,000.¹⁶

Despite the ability of debtors to file bankruptcies *pro se*, the new provisions in the Code, especially the means test, will make it very unlikely that someone will be able to file bankruptcy without the assistance of counsel.

III. HIDDEN CHANGES

In addition to making it more difficult to discharge one's debts, the new bankruptcy laws substantially increase the procedural and technical requirements on an individual seeking to discharge his or her debts. Debtors will have to keep better financial records and will have to invest considerable time in their preparation to file bankruptcy. Debtors will also have to seek, and in most cases receive, credit counseling within one hundred eighty days (180) prior to filing bankruptcy.¹⁷ These services can only be provided by an "approved" credit counseling agency.¹⁸ However, the biggest surprises will likely be the cost to file bankruptcy¹⁹ and the very real possibility that few bankruptcy attorneys will be willing to take a bankruptcy case in the future because the new law places substantial new burdens

¹⁶ See Larison and Pearson, *supra* note 15, at Sec. 3. Bankruptcy attorneys Dorraine Larison and Richard Pearson have attempted to translate the formula into a more understandable form. They write:

Abuse is presumed if:

- (1) If the Debtor owes between \$24,000-\$40,000, and can pay at least 25% of the non-priority unsecured debt over a 60 months time period (\$100-\$167/month depending on debt amount), abuse is presumed.
- (2) If the Debtor owes under \$24,000, and can pay at least \$100/month abuse is presumed. No abuse is presumed even if the Debtor can pay more than 25% of their debt.
- (3) If the Debtor can pay at least \$10,000 over 60 months (\$167/month) abuse is presumed. The amount of debt owed and the percentage repaid doesn't matter.

Id.; see also Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27-29 (2005) (to be codified at 11 U.S.C. § 707(b) (2) (A)).

¹⁷ See *id.* § 106 (to be codified at 11 U.S.C. § 109 (h)).

¹⁸ See *id.* § 106(e) (to be codified at 11 U.S.C. § 111(e)).

¹⁹ In one national news story, Henry Sommer, President of the National Association of Consumer Bankruptcy Attorneys, stated that, "[n]ow, the costs of filing for chapter 7 bankruptcy range from \$500 to \$1,500. The new law requires more paperwork and filing, which will result in higher legal fees." Sandra Block, *Filing Chapter 7 Bankruptcy Will get Tougher Soon*, USA TODAY, Apr. 21, 2005, at 4B. American Bankruptcy Institute executive director, Sam Gerdano, stated in that same article that "Some studies have estimated that the [new] law will increase the cost of filing by up to 50%." *Id.* See also Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the 'Bankruptcy Abuse Prevention and Consumer Protection Act of 2005'*, 79 AM. BANKR. L.J. 191, 211 (2005) (discussing increased costs to consumers filing for bankruptcy under new legislation); accord Leslie E. Linfield, *Strange Bedfellows: Bankruptcy Reform and Mandatory Credit Counseling*, AM. BANKR. INST. J., May 2005, at 12 (highlighting extra costs associated with mandatory credit counseling under new legislation).

on bankruptcy practitioners.

First, the new law restricts advertising by bankruptcy lawyers. They may no longer advertise that they provide "bankruptcy services" in short, one- or two-line display ads. Instead, the new legislation requires them to advertise themselves as "debt relief agencies" and, as a consequence, all of their existing advertising must be replaced with new, mandated language.²⁰

Second, the new law contains provisions that require bankruptcy attorneys to certify the accuracy of their clients' bankruptcy schedules, or lists of assets, or face court sanctions.²¹ Moreover, bankruptcy attorneys must also certify their debtor clients' ability to make payments in a consumer reorganization case.²² Under the old law, bankruptcy debtors were expected to provide their attorneys with a good faith statement of their income, expenses, assets and liabilities.²³ Attorneys would typically counsel their clients that, if the bankruptcy court determined that the debtor was untruthful in his or her disclosures, the debtor could be denied a discharge and could be prosecuted by the U.S. Attorney. Under the new law, the lawyer must also make his or her own certification, which has led to speculation by some that they will have to visit their clients' homes with video cameras to protect

²⁰ New section 528 requires that debt relief agencies use the following statement in any advertisement of bankruptcy assistance or the benefits of bankruptcy directed to the general public, "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." Failure to comply with these provisions could subject an attorney to penalties under 11 U.S.C. § 526(c). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 227 (to be codified at 11 U.S.C. § 526). As one recent continuing legal education booklet explains:

The ramifications of these new sections regarding debt relief agencies and assisted persons could be damaging for both debtors' attorneys and the consumer debtors they represent. While these additions seem to be concerned with debtors' rights to be fully informed and receive proper assistance, the sections are problematic because they could inhibit attorneys from undertaking representation out of fear of the new penalties imposed by § 526(c).

William I. Kampf, Richard J. Pearson and Curtis K. Walker, *Professionalism in Consumer Bankruptcy Practice: Substance & Ethics*, Minnesota State Bar Association Continuing Legal Education program, "Bankruptcy Reform 2005," Sec. 2.

²¹ See FED. R. BANKR. P. 9011. See also Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b) (4) (C) and (D)), which provides that a lawyer who signs any petition or pleading certifies reasonable investigation of the facts and circumstances; a determination that information in the petition is well grounded in fact; the matter is warranted by existing law or there exists a good faith argument for change; the petition filing does not constitute an abuse under 11 U.S.C. § 707(b) as amended; and the attorney has no knowledge, after inquiry, that the information in the filed schedules is incorrect; accord Catherine E. Vance & Corrine Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 286 (2005) (explaining attorney sanctions under new legislation).

²² Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707 (b) (4) (C) and (D)).

²³ Indeed, debtors in bankruptcy are already required to sign two forms that acknowledge, under penalty of perjury, that the information contained in their bankruptcy filings is true and correct, to the best of their knowledge. See Official Bankruptcy Forms 1 and 6.

the attorney from claims that the debtor's inventory is not complete and that they will have to retain appraisers to help establish a more accurate valuation of a debtor's property. There is real fear amongst the members of the bankruptcy bar that these extraordinary measures will have to be implemented in order to limit a bankruptcy attorney's exposure to liability. Moreover, attorneys who provide *pro bono* representation may be discouraged from taking bankruptcy cases because of the potential increase in the costs of providing services and because of the increased exposure to liability.

Robert D. Evans, director of the American Bar Association, explained to the Senate Judiciary Committee in a February 8, 2005 letter that "requiring debtors' attorneys to certify the accuracy of their clients' bankruptcy schedules means the lawyers will have to hire auditors to verify clients' claims. That would increase the cost of filing for bankruptcy."²⁴ Robert Reis, president and chief operating officer of Alps, Inc., a Montana-based attorney malpractice insurance company, explained to news agency MSNBC that the attorney-focused provisions in the new bankruptcy law are likely to increase malpractice premiums "because they will be susceptible to more financial and legal liability."²⁵ He predicted an increase in premiums of "15 to 20 percent."²⁶

If bankruptcy attorneys find the provisions in the new bankruptcy law to be too burdensome, they will choose not to take bankruptcy cases. If they find bankruptcy practice under the new law not to be cost-effective, they will choose not to take bankruptcy cases. In either case, the current number of attorneys who hold themselves out as "bankruptcy lawyers" is likely to decline. If fewer attorneys are available to help clients file bankruptcy, especially at a time when the process of filing bankruptcy has become much more complex, more clients will be left on their own and many may simply choose not to file bankruptcy at all.

IV. THE EFFECT ON WOMEN AND CHILDREN

The upcoming radical change to our nation's bankruptcy laws, including the increased costs to those seeking bankruptcy protection and the possibility that fewer professionals will be available to assist financially-distressed individuals, will certainly cause turmoil for many individuals who need relief from their financial obligations. As bankruptcy professionals try to understand the new bankruptcy law

²⁴ Press Release, MSNBC.com, Bankruptcy lawyers snipe over reform law details (May 1, 2005) (on file with author).

²⁵ Press Release, MSNBC.com, *supra* note 24; see Terry Carter, *The Exodus Begins: Lawyers Wonder Whether Chapter 7 Will be a Viable Practice Area under New Law*, 91 A.B.A.J. 12, 13 (2005) (stating malpractice insurance premiums are likely to increase under new bankruptcy laws); Vance & Cooper, *supra* note 21, at 322 (commenting how attorneys are likely to forego assistance to debtors since they are likely to be instructed by their malpractice insurers that such area of practice is out of their scope of coverage).

²⁶ Press Release, MSNBC.com, *supra* note 24; see Carter, *supra* note 25; Vance & Cooper, *supra* note 21, at 322.

and its effect on debtors, creditors and society in general, the conversation about the intersection of bankruptcy and family law will, unfortunately focus once again on the harm it causes to women and children.

There will be applause, at first, because alimony, maintenance, support and property settlement debts have been given new status as "domestic support obligations;"²⁷ that these obligations will now receive first-priority for repayment among unsecured creditors;²⁸ and that the automatic stay has been modified to permit the continuation of many more domestic relations/domestic support actions.²⁹ Some of the concerns expressed by the bankruptcy community about the dischargeability of marital debts have been addressed in the new law. In addition, the rules relating to the discharge of alimony, maintenance, support and property settlement obligations have been streamlined.³⁰ However, in order to take advantage of the new "domestic support obligations" provisions of the Bankruptcy Code one must be able to file bankruptcy in the first place. Since October 17, 2005, it has become dramatically more difficult for individuals to discharge their debts in bankruptcy. The increased pre-bankruptcy burden on debtors, together with the very real likelihood of increased professional costs associated with filing bankruptcy, will likely leave many people without the traditional bankruptcy option. The changes in the law will also change the national conversation about the forgiveness of debt. But it will be an all too familiar conversation—that the Bankruptcy Code negatively impacts women and children.

The higher costs associated with filing bankruptcy, and the very real possibility that bankruptcy lawyers will become scarce, may cause individuals and families with mounting financial pressures to feel that they are without hope as they try and extricate themselves from their situations. When people feel that they have no options, they tend to act outwardly because all of the personal damage that could be done to them has, in their minds, already been done. One phenomenon that practitioners and scholars may be discussing in the next few years is the rise of violence, particularly domestic violence, as the most convenient way out for struggling family members.

There are many factors that are often cited as causes of domestic violence; however, families facing financial difficulty is a common one.³¹ "According to

²⁷ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 211 (to be codified at 11 U.S.C. § 101(14A)).

²⁸ See *id.* § 212 (to be codified at 11 U.S.C. § 507(a)(1)).

²⁹ See *id.* § 214 (to be codified at 11 U.S.C. § 362(b)).

³⁰ See *id.* § 215 (to be codified at 11 U.S.C. § 523(a)(5) and (15)).

³¹ See WARREN & TYAGI, *supra* note 8, at 12,

Perhaps it should come as no surprise to discover that financial problems and marital problems are statistically linked. Study after study shows that money is a source of contention in most marriages, but it is particularly problematic for couples that are financially unstable. For a family living on the edge, every purchase must be scrutinized, creating flash points for conflict in marriages that are already overly

several studies, there are higher rates of domestic violence by men with less education, higher unemployment, and lower incomes.³² Moreover, financial stress can produce negative consequences for caretakers' behavior.³³ Beyond financial

stressed.

Id. (citation omitted); see also Angela Browne, *Reshaping the Rhetoric: The Nexus of Violence, Poverty, and Minority Status in the Lives of Women and Children in the United States*, 3 GEO. J. ON FIGHTING POVERTY 19, 20 (1995) (citing Richard J. Gelles, *Poverty and Violence Toward Children*, 35 AM. BEHAVIORAL SCIENTIST 258, 271 (1992)),

Poverty has consistently been found to constitute a serious risk factor for child abuse and neglect, as well as for partner violence. Although it is distributed across all income categories, violence often occurs in the context of other debilitating factors, such as a lack of resources to meet basic family needs and the presence of other emotionally or physically abusive interactions within the community.

Id. But see Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1511–12 (1998) ("Some psychologists locate the causes of domestic violence in individual pathologies, rather than in larger social structures.")

Also, an article in the 1994 Criminal Law Forum discussed causes of domestic violence internationally. The author wrote:

While the causes of domestic violence cannot be identified with certainty, many theories explain it on the basis of social structure and the complex set of values, traditions, customs, habits, and beliefs related to gender inequality. In the past, if domestic violence was acknowledged at all, it was traditionally addressed as a family law issue that should not involve the criminal justice system. Many countries are beginning, however, to treat domestic violence as a crime. Applying the criminal law to incidents of domestic violence is intended to protect the victim, punish the offender, and deter him from using violence against his partner again. There are strong arguments for and against the criminalization of domestic violence, an issue complicated by the fact that this type of assault takes place between people who are emotionally and financially involved with one another.

Kathy Mack, *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 803, 812 (1994) (emphasis added); see also Anne M. Coughlin, *Excusing Women*, 82 CAL L. REV. 1, 52 (1994) (explaining monetary dependence as external factor in preventing woman from leaving abusive relationship); Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why it Happens and How to Recognize It*, 17 WTRFAM. ADVOC. 14–18 (1995), reprinted in DOMESTIC VIOLENCE LAW 70 (2001) (Nancy K. D. Lemon ed., 2001) (hereinafter "LEMON").

³² LEMON, *supra* note 31, at 70 (emphasis added) (also noting, however, that studies rely either on police records or self-identification by batterer and that socially and economically advantaged men are less likely to be identified); see also U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY, NCJ-154348 (August 1995) ("Women age 19 to 29 and women in families with incomes below \$10,000 were more likely than other women to be victims of violence by an intimate."). But see Hanna, *supra* note 31.

³³ See Jeremy Travis, *Families and Children*, FED. PROBATION, June 2005, at 34 ("financial stress can produce negative consequences for caretakers' behavior, including harsh and inconsistent parenting patterns, which, in turn, cause emotional and behavioral problems for the children"); see also Karen Syma Czapanskiy, *Welfare Reforms Ends in 2002: What's Ahead for Low Income and No-Income Families? Parents, Children, and Work-First Welfare Reform: Where is the C in TANF?*, 61 MD. L. REV. 308, 353 (2002) (pointing out that depression and anger over income can negatively impact parenting skills); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 798 (1999) (stating that parents who are stressed from economic pressures are "often less engaged with their

helplessness, domestic violence literature identifies many other important characteristics of a batterer. They often feel powerless, are insecure, lack relationship skills, and are unable to identify or express their feelings directly.³⁴

If feeling powerless and insecure is a common trait among batterers, financial distress without easy access to bankruptcy may be just the kind of triggering event that could give rise to domestic violence.

Abusive men have a deeply rooted fear that they are inadequate. They don't believe they have a lot to offer. Batterers are unhappy with who they are and see themselves as failing to live up to their image of manhood. . . . Their violence is controlling behavior designed to keep themselves from feeling inadequate and powerless.³⁵

Imagine the distress in not knowing if you have enough money to feed your children their next meal; hearing the constant ring of the telephone by creditors who are seeking payments; or experiencing the ever-present worry that the sheriff is about to knock on the door with another summons, eviction notice, or levy. The pressure that debtors feel is real and intense; otherwise, so many would not feel so relieved when a bankruptcy attorney tells them that their debts are dischargeable in bankruptcy.³⁶

If the bankruptcy 'safety net' is removed, or at the very least rendered more difficult to access, what will families do? Some may resort to self-help; others may

children and less likely to follow the sort of child-rearing practices associated with positive child development"). Additionally, women of color face increased risk of domestic violence and much of the increased risk is associated with poverty and isolation. See Linda Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1017-18 (1995) (discussing African American Women and domestic violence); Browne, *supra* note 31, at 19 (examining violence minority women and children face); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994) (analyzing domestic violence within Latino community).

³⁴ See Barbara Corry, *ABC'S of Men Who Batter*, in DOMESTIC VIOLENCE LAW, at 107-09 (describing characteristics of batterer); Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 66 FORDHAM L. REV. 141, 196-97 (1995) (discussing personality traits of men who batter); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 286-91 (1985) (stating characteristics of batterers).

³⁵ Corry, *supra* note 34, at 107; see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH L. REV. 1, 57-59 (1991) (focusing on batterer's need for control); Stephen B. Reed, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 342-43 (1991) (stating need for "overpowering control" is due to batterer's "low self esteem").

³⁶ See generally Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 3-4 (1998) (commenting that consumers filing bankruptcy are seeking bankruptcy to obtain relief from significant financial problems and few are attempting to abuse system); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 419 (1999) ("As to abuse of the system, the study finds that the vast majority of the debtors were swamped by debt and in desperate need of debt relief"); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 493 (1997) ("there are no data showing that the consumer bankruptcy system is shot through with abuse").

resort to violence within the home. According to domestic abuse education consultant, Barbara Corry, "a batterer knows he can easily vent his anger on his spouse in the privacy of his own home and that she probably won't tell anyone."³⁷ In fact, the frustration that families might feel because there will be so many hurdles to jump prior to filing bankruptcy and because it will be expensive to find a bankruptcy attorney to represent them—is exactly the type of emotion that leads to domestic violence. "Men who batter are unable to differentiate between their feelings and they do not have a vocabulary to express their emotions. All of a batterer's emotions are funnelled [sic.] through anger. In addition, batterers have learned to use violence—instead of words—to communicate their feelings."³⁸

The rush to keep perceived bankruptcy "abusers" out of court may be the very thing that empowers spousal abusers.

V. CONCLUSION

One might ask why Congress and the President would support legislation that so clearly harms women and children. Surely they are not against women and children being protected from abuse, physical or financial. The answer is probably that money from special interests bought and paid for the new bankruptcy legislation. Very few members of Congress voted against the new bill, Republican or Democrat, and the list of those who voted in favor closely resembles the list of Senators and members of the House of Representatives who received money from special interest groups who benefit greatly from the new legislation.³⁹ In fact,

³⁷ Corry, *supra* note 34, at 109; *see also* James T. R. Jones, *Battered Spouses' Damage Actions Against Non-Reporting Physicians*, 45 DEPAUL L. REV. 191, 194–95 (1996) (examining whether physicians should report domestic abuse since victims are "very reluctant" to go to police); Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 ALB. L. REV. 1171, 1172 (1995) (noting many domestic violence cases probably go unreported).

³⁸ Corry, *supra* note 34, at 109; *see also*, Pualani Enos, *Prosecuting Battered Mothers; State Laws' Failure To Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J., 229, 232–33 (1996) (discussing batterer's anger and how "spousal abuse is a conscious choice made by the batterer for a particular purpose"); Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Case Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 152–55 (1997) (describing different types of batterers).

³⁹ The Senate voted in favor of the bill by a vote of 74-25 and the House voted in favor of the bill by a vote of 302-126. *See* U.S. Senate Roll Call Vote, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00044 (2005) (listing names of Senators who voted for and against bill); Final Votes Results for Role Call 108, <http://clerk.house.gov/evs/2005/roll108.xml> (2005) (naming members of House who voted for and against bill). *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (discussing legislative history of bill).

The credit industry has contributed over \$40 million to federal candidates and political parties since 1989. The Center for Responsive Politics, 'Career Profiles' Show Lawmakers' 16-Year Fundraising Totals, <http://www.opensecrets.org/pressreleases/careerprof.asp> (last visited Aug. 7, 2005). The top recipients include Sen. Olympia Snowe, R-Maine (\$316,700), Sen. Richard Shelby, R-Alabama (\$302,800), Sen. Joseph Biden, D-Delaware (\$255,900), Sen. Charles Schumer, D-New York (\$253,700), and Sen. Arlen

Representative Jerrold Nadler, a member of Congress from New York, bravely chastised his colleagues for what financial experts and consumer advocates have called "a giveaway to big banks and credit card companies."⁴⁰ Congressman Nadler stated:

Mr. Speaker, this bill is the worst pay-off to special interests, the worst rip-off—of the middle class especially—that I have seen in my public life.

The people who understand how bankruptcy law functions in the real world: the scholars, judges, trustees, and lawyers—whether they represent debtors, creditors, businesses or individuals—have all told us that this bill won't work, that it will be costly, and it will produce unfair and irrational results. But we are ignoring them, trusting instead lobbyists, credit card companies, banks, and anyone else who wanted some special favor . . . Trust the banks. Trust the lobbyists. Don't trust the people who do these cases for a living. Don't trust the advocates for women and kids. Don't trust the civil rights community. Don't trust labor. Don't trust disabled veterans' and military family advocates. Don't trust crime victims'

Specter, R-Pennsylvania (\$231,800). *Id.* at 1. See also Jeff Kosseff, *Lobbying Propels Bankruptcy Reform*, THE OREGONIAN, March 20, 2005, at E01 (pointing out credit industry's campaign contributions); Terry M. Neal, *If You Ain't Broke, Congress Has Fixed It*, Washingtonpost.com, March 22, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A56143-2005Mar22.html> (noting campaign donations contributed by credit card industry). Credit card giant, MBNA, may have played the most significant role in providing campaign and other funds to politicians. According to the New York Times:

In his final weeks in office, President Bill Clinton vetoed an identical bill, describing it as too tough on debtors. But with the election of Mr. Bush and other candidates who received their financial support, the banks and credit card industries saw an opportunity to quickly resurrect the measure. . . . MBNA's employees and their families contributed about \$240,000 to Mr. Bush, and the chairman of the company's bank unit, Charles M. Cawley, was a significant fund-raiser for Mr. Bush and gave a \$1,000-a-plate dinner in his honor . . . After Mr. Bush's election, MBNA pledged \$100,000 to help pay for inaugural festivities.

Philip Shenon, *Hard Lobbying On Debtor Bill Pays Dividend*, N.Y. TIMES, March 13, 2001, at A1, A14; see also Lowell Bergman & Patrick McGeehan, *How a Credit King Was Cut Off: Co-Founder of MBNA Meets an Anxious Board, and Losses*, N.Y. TIMES, March 7, 2004, at 1 (stating MBNA contributed \$350,000 to President Bush's election campaign); Richard A. Oppel, Jr., *Campaign Documents Show Depth of Bush Fund-Raising*, N.Y. TIMES, May 5, 2003 (noting MBNA has raised \$365,156 for Bush's campaign).

⁴⁰Press Release from Congressman Jerrold Nadler, http://www.house.gov/apps/list/press/ny08_nadler/Bankruptcy041405.html (April 14, 2005) [hereinafter Press Release]; see also Kathleen Day, *Bankruptcy Bill Passes; Bush Expected to Sign; For Many, Erasing Debt Would Be Harder*, WASH. POST, April 15, 2005, E01 (noting arguments against bill). See generally Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1122–24 (2004) (stating views against bill).

organizations. Trust the banks. Trust Visa. Trust MasterCard.⁴¹

Rep. Nadler's accusation has been repeated by many from the bankruptcy community. The President and a majority in Congress, however, disagree. It is therefore unlikely that substantial revisions will be made to the new Bankruptcy Code in order to make bankruptcy a viable option once again for families in financial distress. The past is prologue and "herstory" has apparently not taught Congress and the White House very much. Women and children will find themselves in danger because the Bankruptcy Code will likely no longer be the safety net for the "honest, but unfortunate." Likewise, the bankruptcy community may begin to see domestic violence substitute for bankruptcy as the escape route from financial distress.

⁴¹ Press Release, *supra* note 40, at 2. See generally Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 222–23 (2004) ("These days, many members of Congress consider bankruptcy professional part of the problem, not the solution"); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 191–92 (2005) ("many of the consumer provisions of the 2005 legislation were largely drafted by lobbyists with limited knowledge of real-life consumer bankruptcy practice.").