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WITH APOLOGIES TO SCREWTAPE: A RESPONSE TO PROFESSOR ALEXANDER

MY DEAR SCREWTAPE:

I am in receipt of your essay on discharge and forgiveness. [1] I have discussed it with my nefarious colleague Slumtrimpet [2] and we are quite perplexed by the course of action you recommend. Assuming that you are not merely playing "Devil's Advocate" (as the saying goes), we have been unable to determine how your advice regarding bankruptcy reform will help to advance the cause of Our Father Below. In fact, in recent years many of our best pupils have found the American bankruptcy system to be an especially efficacious way of advancing our mission of fraud, selfishness, and opportunism. [3] As a result, we are unable to see how restraining this valuable opportunity advances our cause. Indeed, it appears to us at the College that bankruptcy reform will prove highly detrimental to our cause and will instead advance the cause of The Enemy. Perhaps I should elaborate on our disagreement with your recommendations.

Naturally, a part of the training here at the Tempsters' Training College is detailed "opposition research"—know thy enemy! With all due respect, our research has revealed that The Enemy is not as you portray him. The Enemy is not so unwitting as to believe that his foul cause will be advanced by a mere attachment to discharge and forgiveness. Rather, The Enemy believes that one is obliged to honor one's promises—including financial promises—as critically important to advancing his cause. "The wicked borrows ***614** and does not repay. [4] Furthermore, The Enemy has made it clear that a failure to condemn those who break promises that they can fulfill spreads evil in the world and advances our cause. The Enemy has condemned bankruptcy as a sin absent overbearing financial necessity. [5] The Enemy believes that the a trust relationship exists between debtor and creditor and that the debtor has a moral obligation to keep his word and reciprocate the benefit provided by his creditor. Failure to keep one's contractual promise is a violation of this trust. Indeed, failure to keep one's promise when one has the ability to do so is a sinful act worthy of spiritual punishment. To the extent that debt forgiveness is justified by circumstances, the debtor must show substantial hardship and an inability to make voluntary repayment under any circumstances. The debtor is not entitled to such forgiveness; rather, he is expected to perform his promises unless he can prove the injustice or undue hardship that would result to his family from being forced to do so. Indeed, this attitude is not unique to The Enemy, as his allies throughout the world and throughout history have believed similarly. As one of The Enemy's scholars has observed, "The religious contours of Christianity, Islam, Judaism and Hinduism clearly foster in their believers a moral code that emphasizes the importance of debt-repayment, and hence, the avoidance of bankruptcy at all costs." [6]

Consider the Jewish "Jubilee" that you describe. [7] My research assistants here at the College have determined that the Jubilee did not stand for a blanket principle of forgiveness. [8] It only applied to the most needy debtors. [9] The Jubilee did not release obligations "in the nature of fines or penalties, loans not due until after the Seventh Year, claims already reduced to judgment but not collected before the Seventh Year, and any loan secured by a pledge." [10] Most critically for this discussion, excusing a needy debtor from the legal obligation to repay a debt did not eliminate the *moral* obligation to repay the ***615** debt if the debtor subsequently obtains the financial means. [11] It has been written, "In the event that an individual has become indebted to finance his consumption, there is a very strong moral obligation to repay that debt in full." [12]

Our research shows that the Christian religion holds a similarly suspicious view of bankruptcy, holding default on debt-repayment promises as morally wrong. [13] "[O]ne can ... readily find in the Bible ample authority for the proposition that failing to repay one's creditors is a sin." [14] Christians believe that "absent exceptional circumstances, debt-repayment should not be excused and must be honored regardless of how long it takes to completely pay it off." [15] Thus, financially-strapped debtors are encouraged to strongly consider alternatives to bankruptcy such as entering into a debt repayment ***616** workout agreement with their creditors and to treat efforts by financially troubled individuals to repay their debts as a "true Christian act." [16]

The Enemy believes that entering into a contract creates a moral obligation to perform that promise. Nor is he alone in this belief. Similar moral admonitions also prevail in non-western religions. For instance, in Islam, "the fulfillment of one's contractual obligation is viewed as one of the most important human achievements and divine virtues." [17] Secular contracts and promises are seen as "sacred," in that God is a witness to every contract and every contract among individuals is symbolic of the covenant between God and each individual. [18] Hinduism "commands those who undertake personal debts to repay them" [19] and "consider[s] the failure to repay one's debts to be a sin." [20] A Hindu debtor who repays his debts is promised he will go to heaven; one who does not is "cursed with an incurable disease, ending up with a horrible afterlife in hell." [21] Asian cultures such as Korea and Singapore adhere to similar norms of reciprocity that uphold obligations to pay debts and reciprocation of favors. Such notions of reciprocity are seen as an essential element of maintaining social harmony and the sense of a "right social order." [22]

In order to advance our cause we must defeat this idea that entering into a contractual creates a moral obligation to perform the promise and to reciprocate the benefit bestowed. It is doubtful that your advice to advocate bankruptcy reform will further this cause. In fact, it appears that those of strong religious belief in The Enemy's cause are less likely to file bankruptcy then those who lack such beliefs, indicating the moral roots of contractual promise-keeping. [23] The current American bankruptcy system has provided an tool for undermining this belief in the moral importance of keeping one's promises. Allowing rich and famous individuals to breach their promises with little consequence has done much to advance our cause. Even ***617** our cold hearts must be warmed at Toni Braxton's statement to a reporter upon filing bankruptcy, "I'm gonna go out and enjoy myself"? [24] And recall her delicious defense of her Gucci silverware purchase, "I only spent about $1,000 on it. If *that* made me broke, then I was truly in bad shape. It's Gucci—I love it. I'd buy it again. And now that I get a huge discount because I've given them so much pub, I can *really* shop." [25] Turning bankruptcy into a marketing ploy for Gucci silverware—what a devilishly ingenious scheme!

Even better for our cause, undermining the obligation to keep one's financial promises seems to have had the effect of undermining the moral obligation felt to live up to one's obligations in other spheres of life. [26] The reciprocity relationships embedded in financial promises are interwoven with an entire web of moral, social, economic, and legal relationships that underlie society generally. [27] Thus, undermining financial obligation has the unexpected benefit for us of simultaneously weakening this entire web of reciprocal relationships.

But you are mistaken at the degree to which bankruptcy reform would weaken the tradition of debt discharge in American bankruptcy law. The legislation does not deny anyone a discharge. All it requires is that as a *condition* for discharge that those with above-median incomes with the ability to repay a substantial portion of their debts without significant hardship would be required to do so through a chapter 13 plan rather than being allowed to elect chapter 7. [28] Thus, it preserves the discharge while reaffirming the flagging principle of fulfilling one's promises. The Bankruptcy Code contains ***618** many such conditions on a debtor's ability to receive a discharge. [29] Indeed, as you note, in 1984 a similar condition was added to the Bankruptcy Code, permitting the bankruptcy court to dismiss a debtor's petition if it would constitute a "substantial abuse" of the bankruptcy system. [30] It is evident, however, that Bankruptcy Judges and United States Trustees have failed to make serious attempts to carry-out Congress's instructions. [31] Because bankruptcy professionals have refused to effectuate this intent responsibly, Congress is now forced to impose means-testing by statute. [32] As one advocate of reform has observed, "Since 1984, the provision in the Code, § 707(b), which has allowed judges to control this problem, has not been used. It is entirely

discretionary. If the judges had been trying hard to make that provision work, if the U.S. Trustee's Office had been pushing for enforcement, we would not be here today [advocating reform]." [33]

Some courts have concluded that ability to pay standing alone can establish substantial abuse. [34] Even those who do not accept ability to pay as dispositive generally agree that it should be the primary factor to consider in determining whether "substantial abuse" exists in a given case. [35] Factors other than one's income and ability to repay remain relevant under statutory means-testing, but are focused in a more orderly and predictable manner than under the current common law means-testing regime. [36] Means-testing *already* exists today, just in a confused and non-systematic way. For ***619** instance, one court denied a substantial abuse motion against a debtor with substantial repayment capacity because the debtor appeared to be "a decent person." [37] The primary effect of means-testing legislation is merely to bring uniformity and predictability to this regime.

From The Enemy's perspective, statutory means-testing is a substantial improvement over the current common law system. Current law requires fact-intensive, case-by-case scrutiny in every single case to determine whether substantial abuse exists even when the filer earns hundreds of thousands of dollars per year. Rather than encouraging uniformity and equality, the eligibility of an individual for bankruptcy turns on the happenstance of the judge and United States Trustee that a debtor happens to draw. [38] The current system creates wasteful and time-consuming litigation. Its arbitrariness mocks the rule of law. And it has done little to actually eliminate abuse; "many, including many in Congress, [perceive § 707(b)] as being a dismal failure[.]" [39] Given the dramatic increase in the number of filings in the past two decades it is probably not even plausible to believe that a system as cumbersome and expensive as the current system could even work. Annual personal bankruptcy filings have quadrupled in volume since the enactment of section § 707(b). Given the need to process some 1.3 million personal bankruptcy filings per year, even the most vigilant courts and trustees would be overwhelmed by the difficulties inherent in investigating and litigating § 707(b) challenges. When these logistical problems are combined with inconsistent vigilance levels throughout the country there is little wonder that § 707(b) has proven itself ineffective in preventing abuse.

By channeling the inquiry more precisely and by substituting a bright-line rule for the current unworkable standard, means-testing promises to bring predictability and fairness to a system riddled with real and perceived unfairness. ***620** [40] Few seriously believe that the current regime prevents more than a small fraction of the fraud and abuse in the bankruptcy system. [41] The failure to make even a rudimentary attempt to police fraud and abuse undermines public confidence in the bankruptcy system generally. Thus, by failing to prevent abuse by the opportunistic, the long-run consequence is to undermine support for legitimate bankruptcy filers.

It is inconceivable that means-testing program could be more complicated or administratively expensive than the current approach to policing abuse. [42] And even if there were a slight increase in the expenses in any given case ***621** (which is doubtful), this factor would have to be weighed against the reduction in the number of filings by high-income debtors and the increased financial recoveries by creditors. Although only about 7%-10% of debtors would actually be affected by means-testing, targeting high-income debtors with substantial repayment capacity would result in substantial recoveries of debts that would otherwise be discharged. Given the generosity of most exemption regimes and the availability of pre-bankruptcy planning and legal advice, few chapter 7 cases (even those involving high-income debtors) have any non-exempt assets to distribute to unsecured creditors. [43] The combination of undetected fraud and legal use of exemptions means that high-income debtors routinely walk away from debts that they could repay. Chapter 13, by contrast, is used not to maximize repayment to creditors but rather for more strategic purposes. [44] Means-testing would focus on those debtors for whom chapter 13 was intended—healthy, high-income debtors with regular employment and earnings who have substantial repayment capacity and substantial ability to successfully complete their plan. [45] Given that the typical payout in a chapter 7 case today is zero, increased use of chapter 13 by high-income debtors will undoubtedly increase creditors' recoveries over the current regime. Although reported cases almost certainly fail to provide a fully accurate picture of the current system, a short description of some cases will illustrate the boldness encouraged by the current system.

Doctor Robert Kornfield was a successful gastroenterologist in Rochester, New York. It appears that he earned $472,445 in 1994 and $404,593 in 1995, but his income "plunged" to $318,000 a year, although the repeated errors and modifications to his

schedules make it difficult to figure out his income, ***622** debts, and assets exactly.[46] (This sort of difficulty in figuring out a debtor's income, assets, and debts is quite common under American bankruptcy law.) Dr. Kornfield's newfound poverty made it difficult for him to make the payments on his "extravagant ... multi-million dollar home" that he was building.[47] Despite this income reduction, the Kornfields were "unwilling to make any effort to reduce their ... voluntary and excessive living expenses to enable them to pay something to their creditors."[48] Dr. Kornfield drove a Land Rover Range Rover and was spending $53,000 per year to send his children to private schools. He had exempt pension and profit-sharing accounts worth $390,216 and was paying $3,000 per month in rent and claimed to spend $1,200 per month on food. Given the erratic application of the anti-abuse provisions of current law, it is likely that Dr. Kornfield expected that his case might not be noticed, much less challenged by the United States Trustee.[49] By creating a presumption of abuse in cases such as Dr. Kornfield's, means-testing should persuade those in Dr. Kornfield's position that a more realistic lifestyle or a voluntary repayment plan is preferable to bankruptcy in dealing with his financial situation. If not, means-testing will put those like Dr. Kornfield on notice that if they want to keep their Range Rover they will have to repay some of their debts.[50]

Arguably more impressive in his commitment to our cause is Robert Kestell.[51] Mr. Kestell earned $193,000 per year and filed bankruptcy only 13 days after the entry of a divorce judgment entered for desertion. He did not schedule all of his assets and planned to reaffirm almost all of his debts except the dischargeable portion of a marital obligation. In a comment sure to warm your devilish heart, Kestell stated at his meeting of creditors, "I don't want [my ex-wife] to have anything."[52] A true ally in our battle against The Enemy.

***623** You also refer to the efforts to regulate credit terms through usury regulations and judicial decision-making.[53] But oddly you fail to observe the splendid effect that such regulations have had in hurting the most downtrodden and weakest members of society. Just recall the gains of our side during the era of usury limitations on credit card lending![54] It was absolutely marvelous! Our dear, dear pawnbroker friends have rarely seen such a splendid time as when usury limitations made it impossible for low-income borrowers to obtain competitive unsecured credit, driving them into pawn shops.[55] What a glorious time for our friends in the retail-credit business as well, as they were able to simply bury hidden increases in the price of the goods they sold so as to evade the restrictions.[56] And who cannot forget the wonderful decision in *Williams v. Walker-Thomas Furniture Company*,[57] for without its ruling making it so difficult to sell furniture and appliances to low-income borrowers we might have never seen the creation and great blossoming of the rent-to-own industry, now one of the most despised of all consumer credit industries.[58] Of course, we must remember that the result of usury limitations was not a complete victory for our side. While it did impose hardships ***624** on lower-income borrowers, it had the unintended consequence of transferring wealth from them to middle-income borrowers.[59] But we can't hope for all of our schemes to be an unmitigated success.

We also have great doubts about your plan to enlist members of the consumer credit industry as allies for our cause. You believe "that the industry has thrown a lot of money at the United States Congress as part of a vigorous and effective public relations campaign to make it more difficult for people to discharge their debts in bankruptcy."[60] I can understand why opponents of reform would seek to distract attention from the substance of the legislation and instead attack the motives of those who support it. After all, the legislation is very popular but the consumer credit industry is not. As you have so often instructed, this type of rhetoric is much more effective than reasoned argument in advancing our cause.[61] Of course, even if your belief in the influence of the consumer credit industry were correct, that fact by itself would say nothing at all about whether the legislation was substantively good or bad.[62] But attacking the messenger does have the salutary effect of raising suspicions about the substance of the legislation, thereby confusing public understanding of the issue.[63] As you remind us so often, our goal is to "fuddle" and confuse, not to teach![64]

But this belief seems to be unsubstantiated. You are correct that the banking industry has been financially active on Capitol Hill. But most of their contributions have gone—unsurprisingly—to members of the House and Senate *Banking* committees, not the *Judiciary* committees. This should be ***625** not be a surprise, as most of the rules and regulations that affect this industry are written by the Banking committees of course. In fact, the past year has been unusually active on matters of banking legislation, including major legislative initiatives repealing the Glass-Steagall Act and debates over the Community Reinvestment Act. In

contrast to these issues, bankruptcy reform (which falls under the jurisdiction of the Judiciary committee in both houses) is of almost trivial importance.

For instance, the American Bankruptcy Institute has observed that of the top 10 House recipients of consumer creditor PAC contributions, only one (Rep. Bill McCollum, R-FL) even serves on the House Judiciary Committee. But he also serves on the House Banking Committee, as do almost all of the others on the top 10 list. Even if contributions were offered to influence votes on bankruptcy reform, it does not appear to have succeeded. Five of the top 10 recipients in the House were Democrats. Of the Democrats, Rep. John LaFalce (D-NY) was the largest recipient, in the amount of $94,522. Representative LaFalce is the ranking Democrat on the Banking Committee. He also voted against H.R. 833 and has been an outspoken opponent of the bill.

Contributions to Senators shows a similar pattern. Of the top 10 recipients most are members of the Senate Banking Committee. Only 13 Senators voted against the bill in the Senate; ironically three of them are on the top 10 list. Only three of the 10 even serve on the Judiciary Committee. One of those is Senator Spencer Abraham (R-MI). Abraham is fourth on the top 10 list but he is responsible for the so-called “anti-cramdown” provision of the legislation, which is one of the provisions in the bill that is most harmful to the consumer credit industry.

In addition to the anti-cramdown provision, the legislation also includes many protections for divorced women and children that strengthen their power relative to unsecured creditors. Moreover, contrary to the interests of unsecured creditors, the legislation places only modest limitations on homestead and other exemptions. In short, it is hard to see how the legislation taken as a whole reflects the overriding influence of the consumer credit industry relative to other interested parties. It is illogical to conclude that there is a cause-and-effect relationship between financial contributions to Congress and political support for the bankruptcy reform bill. Because most of the financial support from the industry went to members of the respective Banking committees, not Judiciary committees, there is only a loose correlation between contributions and voting patterns on the bill. This suggests that your belief in the influence of the consumer credit industry over bankruptcy legislation is somewhat mistaken.

Your belief that this legislation is merely the creature of moneyed special-interests is also belied by the widespread popular and bipartisan political ***626** support for the legislation. Massive, bipartisan supermajorities have voted for the legislation in both houses of Congress, thus there are few politicians to whom we can turn for aid. These supporting votes include numerous legislators who are rarely thought of as pawns of the consumer credit industry, such as members of the Congressional Black Caucus. Public opinion polls show 70% approval for bankruptcy reform.[65] The entire credit industry appears to be in favor of it, from small creditors such as credit unions, to larger unsecured creditors, to even secured creditors. In addition, the legislation contains a number of new protections for divorced women seeking alimony and child support.[66] Although this does not prove whether the legislation is good or bad on its merits,[67] it does undermine the conclusion that it is merely the creature of rich and powerful special interests. Or are we to believe that so many politicians have been bought by the consumer credit industry, even members of the Congressional Black Caucus?

Our cause would be better served by making common cause with bankruptcy and trial lawyers.[68] It is to be expected that bankruptcy lawyers would ***627** oppose reforms, such as means-testing, that will reduce the number of bankruptcies that are filed by high-income debtors thereby indirectly reducing their income.[69] Lawyers are also upset about provisions of the reform legislation that will directly impact their wallets, such as the provision to elevate payment of child support and alimony expenses from seventh priority to first priority, dropping the payment of attorneys' fees from first priority to second. But you must be impressed by their cleverness. At the same time that they oppose this provision they also argue that the reforms will be detrimental to divorced women and children! If only it were so. But unfortunately these claims have been too vague and unsubstantiated to override the numerous substantive protections that the legislation actually includes. Thus, these attempts ***628** to spread confusion appear to have been unsuccessful, as the legislation continues to move forward with strong support.

Moreover, the bankruptcy bar is used to getting their way on such matters, as they were the primary architects of the 1978 Code.[70] By contrast, many of those affected by the 1978 Code were uninvolved in the drafting and have attempted to rein in its excesses ever since.[71] But these efforts traditionally have been undermined by their own internal conflicts, such as between secured and unsecured creditors.[72] Alas, it now appears that a much more active role is being taken by those actually affected

by the bankruptcy system and they are attempting to bring the bankruptcy system back into balance. Needless to say, bankruptcy lawyers have not approved of these interlopers into their traditional jurisdiction. [73] In fact, because bankruptcy law traditionally has originated in the Judiciary Committee rather than some other committee (such as Commerce), bankruptcy professionals have been able to exert disproportionate influence over the twentieth-century evolution of bankruptcy law. [74]

With all due respect, therefore, we have concluded that our interests and ***629** the interests of Our Father Below would be best advanced by *opposing* rather than supporting the bankruptcy reform legislation that you discuss. The current system undermines the moral sanctity of promises and personal responsibility by making bankruptcy freely accessible to opportunistic and dishonest individuals. What the World Above needs is fewer people like Harry Truman and more like Toni Braxton! [75] In turn, this spreads distrust and undermines the duties of reciprocity that support a free society and democratic government. [76] Perhaps more directly, the arbitrariness and unfairness of the current regime spawn generalized suspicion that the current bankruptcy system is rife with fraud and abuse. Absent reform, the ability of opportunistic individuals to prey on the generosity for those truly in need will help us to undermine the commitment to the bankruptcy discharge in general. Thus, if we frustrate reform today we can hope for far more severe attacks on the bankruptcy system in the future! As more and more unworthy individuals hide behind the bankruptcy system, this will further erode the social stigma and personal shame traditionally associated with bankruptcy, promising ever-more bankruptcies. [77] In turn, this will spawn ever-more furious calls for drastic reform. It is better for us to oppose balanced reforms today in hopes of more drastic reforms later.

It is better to simply sweep under the rug the need for bankruptcy reform and continue our rhetorical attacks on the consumer credit industry. [78] By all means we should avoid discussing the actual merits of the legislation and continue to distort its terms. Despite the fact that 1.3 million families will file bankruptcy this year in an era of unparalleled prosperity, dismiss this as ***630** a phantom crisis. Wait until we are in a recession to act. Only by acting to stop balanced bankruptcy reform today can we hope for more severe bankruptcy reforms later.

Your Evil Colleague,

DR. SLUBGOB

Footnotes

a1 Associate Professor of Law, George Mason University School of Law. I would like to thank the Law and Economics Center at George Mason University for financial support. I also apologize to C.S. Lewis.

1 Peter C. Alexander, *With Apologies to C.S. Lewis: An Essay on Discharge and Forgiveness*, 9 J. BANKR. L. & PRACTICE 601 (2000).

2 In *The Screwtape Letters*, Slumtrimpet was the Devil in charge of the girlfriend of the main “patient.”

3 *See infra* notes 42-52 and accompanying text.

4 Psalms 37:21; *see also* Proverbs 3:27-28 (“Do not withhold goods from those who deserve it, when it is in your power to act. Do not say to your neighbor, ‘Come back later, I'll give it tomorrow,’ when you have it with you.”); Romans 13:8 (“Let no debt remain outstanding, except the continuing debt to love one another, for he who loves his fellowman has fulfilled the law.”).

5 *See* Rafael Efrat, *The Moral Appeal of Personal Bankruptcy*, 20 WHITTIER L. REV. 141, 162-67 (1998).

6 *Id.* at 167.

7 Alexander, *supra* note 1, at 603.

8 The following discussion draws on Todd J. Zywicki, "The Reciprocity Instinct: An Evolutionary Analysis of Norms, Promise-Keeping, and Bankruptcy" (Working Paper, George Mason University School of Law, November 1999).

9 *See* Efrat, *Moral Appeal, supra* note 5, at 164 (citing GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW 495 (1953)).

10 HOROWITZ, *supra* note 9, at 495.

11 *See* Efrat, *Moral Appeal, supra* note 5, at 164.

12 Rafael Efrat, *The Evolution of the Fresh-Start Policy in Israeli Bankruptcy Law*, 32 VAND. J. TRANSNATIONAL L. 49 (1999); *see also* MEIR TAMARI, THE CHALLENGE OF WEALTH: A JEWISH PERSPECTIVE ON EARNING AND SPENDING MONEY 206 (1995) ("[T]here is a distinct moral demand that the debtor repay his debts out of his private assets in order to be 'clean before God and men [].'"); *id.* at 209 ("[T]he debtor does not possess any moral right that would absolve him from repayment of his debts. ... Halakhah defines as a form of robbery, the arrangements for part payment in settlement of debt. This is an additional expression of the moral obligation of people to meet their responsibilities in the marketplace.").

13 *See* Efrat, *Moral Appeal, supra* note 5, at 165; John R. Sutherland, *The Ethics of Bankruptcy: A Biblical Perspective*, 7 J. BUS. ETHICS 917, 921 (1988).

14 Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. ILL. L. REV. 1041, 1054;*see also* RON BLUE, MASTER YOUR MONEY 62 (1991) ("The principle that comes from [Psalms 37:21] is that not repaying debt is never an option for the Christian."); LARRY BURKETT, USING YOUR MONEY WISELY: BIBLICAL PRINCIPLES UNDER SCRUTINY 107 (1990) ("If we don't want to be counted among the wicked, we must repay any debt we owe. Knowing that should cause any Christian to avoid unnecessary borrowing for any reason. It really doesn't matter if the 'circumstances' are beyond our control. If we make a debt, we're stuck with it."); DANIEL D. BUSBY ET AL., THE CHRISTIAN'S GUIDE TO WORRY-FREE MONEY MANAGEMENT 87 (1994) ("How does the Bible address bankruptcy? The Scripture is clear in how we should handle our debts so that bankruptcy is not even an issue: 'When you make a vow to God, do not delay in fulfilling it. He has no pleasure in fools; fulfill your vow. It is better not to vow than to make a vow and not fulfill it.'" (citing Ecclesiastes 5:4-5)); JAMES L. PARIS, LIVING FINANCIALLY FREE 10 (1995) ("we should repay our debts as they come due").

15 Efrat, *Moral Appeal, supra* note 5, at 165; *see also* ALBERT J. JOHNSON, A CHRISTIAN'S GUIDE TO FAMILY FINANCES 82, 85 (1983) (noting the Bible's admonition that "the wicked borrow and do not repay"); Sutherland, *supra* note, at 917 ("Now isn't that amazing to you, that somebody would actually default on a debt that they created legally, morally, ethically, and then default on it? See, it ought to never happen with Christianity, or it ought to happen so rarely that we would take that person, and we would admonish them according to Matthew 18, and bring them before the church to restore them back into the faith.").

16 Efrat, *Moral Appeal, supra* note 5, at 166.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*, at 166; *see also* HERAMBA CHATTERJEE, THE LAW OF DEBT IN ANCIENT INDIA 83 (1970) ("[N]on-payment of debt is treated as a sin ...."); *id.* at 85 ("[N]on-payment of debt has been declared as a religious [offense] of a serious nature.").

21 Efrat, *Moral Appeal, supra* note 5, at 166-67. According to Efrat this means that in the afterlife a defaulting debtor is expected to become a slave of the creditor is expected to inflict constant trouble on the debtor. *Id.* at 167 n.115.

22 JAMES Q. WILSON, THE MORAL SENSE 72 (1993).

23 F.H. Buckley and Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 200 (1998) (observing that self-identified Catholics file bankruptcy less than the population as a whole).

24 *See* Joshua Wolf Shenk, *Bankrupt Policy*, NEW REPUBLIC, May 18, 1998, at 16. At the time she filed bankruptcy, Braxton's two albums had earned $170 million in sales and she owned "a baby grand piano, a Porshe, and a Lexus." *Id.* Other celebrity filers include Kim Basinger, Burt Reynolds, and M.C. Hammer. *Id.*

25 *Toni Tells Her Troubles: Braxton's Back from Bankruptcy—and More*, NEWSWEEK (May 1, 2000).

26 *See* Buckley and Brinig, *supra* note 23, at 200-06 (noting correlation between bankruptcy and divorce and explaining both as resulting from a reduced commitment to performing one's promises).

27 *See* Todd J. Zywicki, "The Ubiquity of Reciprocity" (Working Paper, George Mason University School of Law, March 2000); FRANS DE WAAL, GOOD NATURE: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 153-54 (1996) ("One a quid pro quo mindset has taken hold, the 'currency' of exchange becomes secondary. Reciprocity begins to permeate all aspects of social life."); MATT RIDLEY, THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION 251 (1997); ROBERT PUTNAM, MAKING DEMOCRACY WORK: CIVIL TRADITIONS IN MODERN ITALY (1995); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995).

28 According to the United States Bureau of Census, in 1997 the national median income for a family of four was $53,165. *See* United States Bureau of the Census, Table H-11, "Size of Household by Median and Mean Income: 1967 to 1997," <http://www.census.gov/income/h11.txt>.

29 *See*11 U.S.C. § 707(b).

30 *See* Alexander, *supra* note 1, at 610 (citing 11 U.S.C. § 707(b)).

31 *See* Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 128 (1998) ("Congress does not trust bankruptcy judges to implement the intent of Congress regarding debtor abuse." (citation omitted)).

32 *See* Williams, *supra* note 31, at 128 ("Congress is moving to enact heightened means-testing because of the perception that bankruptcy judges are not doing their job. As a body of decision-makers, they are asleep at the wheel. Advocates of H.R. 3150 and other rule-like models of reform are convinced that bankruptcy judges have become too timid in applying section 707(b)." (citations omitted)).

33 *Picking Up the Pieces on Bankruptcy Reform*, AM. BANKR. INST. J., Dec.-Jan. 1999, at 1, 48 (quoting George Wallace).

34 *See*In re Walton, 866 F.2d 981, 18 Bankr. Ct. Dec. (CRR) 1407, 20 Collier Bankr. Cas. 2d (MB) 533, Bankr. L. Rep. (CCH) ¶ 72605 (8th Cir. 1989); In re Kelly, 841 F.2d 908, 17 Bankr. Ct. Dec. (CRR) 611, 18 Collier Bankr. Cas. 2d (MB) 560, Bankr. L. Rep. (CCH) ¶ 72218 (9th Cir. 1988).

35 *See*In re Lamanna, 153 F.3d 1, 4, 33 Bankr. Ct. Dec. (CRR) 176, 40 Collier Bankr. Cas. 2d (MB) 937, Bankr. L. Rep. (CCH) ¶ 77791 (1st Cir. 1998) (debtor's ability to repay his debts out of future disposable income is strong evidence of substantial abuse); In re Koch, 109 F.3d 1285, 1288, 37 Collier Bankr. Cas. 2d (MB) 1320, Bankr. L. Rep. (CCH) ¶ 77318 (8th Cir. 1997) (noting that "the substantial abuse inquiry focuses primarily on Debtors' ability to pay").

36 *See, e.g.*, In re Cohen, 246 B.R. 658, 35 Bankr. Ct. Dec. (CRR) 243 (Bankr. D. Colo. 2000) (applying 15-factor test); *see also* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 2.14, at p.122 (1997) (noting that multifactor tests for determining existence of substantial abuse require courts to make speculative and subjective value judgments); *Resolved: The Time has Come for Means-Testing Consumer Bankruptcy*, AM. BANKR. INST. J., Apr. 1998, at 6, 45 (statement of George Wallace) ("Judges' values, which become important in determining how much expenses are appropriate for a debtor, vary widely across the spectrum of judges.").

37 Williams, *supra* note 31, at 113 (citing Matter of Butts, 148 B.R. 878, 880 (Bankr. N.D. Ind. 1992)). The court in *Butts* stated that the resolution of a § 707(b) motion "turns upon the extent to which the court is able to find within itself the compassion needed to allow the debtor to proceed." *Butts*, 148 B.R. at 880.

38 *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993); *see also Resolved, supra* note 36, at 45 (statement of George Wallace) ("There are over 300 bankruptcy judges out there, and, in most of their courts, section 707(b) is simply a dead letter."); Williams, *supra* note 31, at 111 ("Case law under section 707(b) may support Wallace's argument.").

39 Williams, *supra* note 31, at 110.

40 *See* Williams, *supra* note 31, at 126 ("Rules promote uniformity. Rules limit variation in local legal cultures." (citations omitted)); *Picking Up the Pieces, supra* note 33, at 48 (quoting George Wallace) ("But too much judicial discretion gives non-uniform results, and that's not fair either.").

41 The indifference of Bankruptcy Judges and United States Trustees toward § 707(b) is matched by similar apathy by panel trustees. Panel trustees have been no more interested in investigating and challenging substantial abuse cases because

it is not cost-effective. *See* Williams, *supra* note, at 113. It is common knowledge that debtors' schedules are beset with error and fraud. *See* Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 AM. BANKR. L.J. 653 (1999). It is common for debtors to file misleading schedules of income and expenses and then to correct them only *after* a substantial abuse challenge. *See, e.g.*, In re Cohen, 246 B.R. 658, 35 Bankr. Ct. Dec. (CRR) 243 (Bankr. D. Colo. 2000); In re Faulhaber, 243 B.R. 281 (Bankr. E.D. Tex. 1999); In re Wisher, 222 B.R. 634, 638 (Bankr. D. Colo. 1998) ("Mr. Wisher has made at least for representations as to his income and expenses, none of which are consistent. ... The most charitable interpretation of such inconsistent financial information is that Mr. Wisher does not know and has not disclosed his financial circumstances as required. A less favorable view is that Mr. Wisher has engaged in situational disclosure, adjusting his income and expenses to suit his purposes at a given point in time."); In re Watkins, 216 B.R. 394, 39 Collier Bankr. Cas. 2d (MB) 344 (Bankr. W.D. Tex. 1997) (court noted that it was "[n]ot surpris[ed]" that debtors (who had a combined gross annual income of $119,267.40) responded to United States Trustee's § 707(b) motion by increasing estimated expenses so as to reduce disposable income).

42 The number of published opinions reviewing cases for substantial abuse is staggering. A glance at a recent case indicates some 200 or more opinions on point revealing little consistency in the interpretation of § 707(b). *See*In re Attanasio, 218 B.R. 180 (Bankr. N.D. Ala. 1998). One commentator concluded that judicial interpretation of the substantial abuse provision is marked with "uncertainty and inconsistency." *See* Michael D. Bruckman, Note, *The Thickening Fog of "Substantial Abuse": Can 707(a) Help Clear the Air*?, 2 AM. BANKR. INST. L. REV. 193, 205 (1994). A simple computer program has already been written that can quickly test whether a debtor is affected by means-testing. *See* Edith H. Jones and Todd J. Zywicki, *It's Time for Means Testing*, 1999 B.Y.U. L. REV. 177, 201 (describing computer program designed by Carl Felsenfeld and William J. Perlstein). Moreover, roughly 75% of bankruptcy filers do not even meet the minimum income threshold for means-testing to apply, thus means-testing would be wholly irrelevant for those individuals. *See* Marianne B. Culhane and Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 37 (1999). Using regional rather than national standards would shrink this pool even further. *Id.* Other filers will clearly exceed the income and repayment portions of the threshold, thereby eliminating cases that would have to be litigated under current law. *See id.* at 56 (noting that the median gross income of those affected by means-testing substantially exceeded the national median income for such families, suggesting a large number of clear cases). Line-drawing problems will remain, of course, but there are likely to be far fewer such cases than under current law and all cases will be resolved more quickly and less controversially as a result of the clear rules established by systematic means-testing.

43 *See* Jones and Zywicki, *supra* note 42, at 186-92 (summarizing empirical studies). *See also*In re Carlton, 211 B.R. 468, 475 (Bankr. W.D.N.Y. 1997); *affirmed*, Kornfield v. Schwartz, 214 B.R. 705 (W.D.N.Y. 1997); *affirmed*, In re Kornfield, 164 F.3d 778, 33 Bankr. Ct. Dec. (CRR) 1023, 41 Collier Bankr. Cas. 2d (MB) 739, Bankr. L. Rep. (CCH) ¶ 77871 (2d Cir. 1999) (noting that although a growing number of cases involve debtors who have "substantial unsecured consumer debt" but "few seem to own (or report) any significant non-exempt tangible personal property, but many report substantial exempt retirement funds (IRA, 401-K or Keough accounts)"). Many of these debtors have the ability to repay as much as 100% of their prepetition debts under a chapter 13 plan.

44 *Carlton*, 211 B.R. at 475 ("fewer and fewer Chapter 13 debtors appear to have filed to pay back their creditors as much as possible, and more and more appear to have filed because it is the only way that they can pay the arrearages on their home mortgages, cram down personal property liens, such as on their vehicles, stretch out student loan repayments, or obtain a superdischarge").

45 Because Chapter 13 is primarily used for strategic purposes today, the overall "failure" rate of chapter 13 plans dramatically overstates the likely failure rate for the high-income debtors with regular income who would be affected by means-testing. *See* Jones & Zywicki, *supra* note 42, at 206-07.

46 In re Carlton, 211 B.R. 468 (Bankr. W.D.N.Y. 1997); *affirmed*, Kornfield v. Schwartz, 214 B.R. 705 (W.D.N.Y. 1997); *affirmed*, In re Kornfield, 164 F.3d 778, 33 Bankr. Ct. Dec. (CRR) 1023, 41 Collier Bankr. Cas. 2d (MB) 739, Bankr. L. Rep. (CCH) ¶ 77871 (2d Cir. 1999).

47 *Carlton*, 211 B.R. at 482, 483.

48 *Carlton*, 211 B.R. at 482.

49 Doctor Kornfield eventually appealed his case all the way to the United States Court of Appeals for the Second Circuit.

50 *See also*In re Smith, 229 B.R. 895, 898 (Bankr. S.D. Ga. 1997) (debtor entered into lease for Lexus with monthly lease payment of $571 immediately before filing bankruptcy); In re Watkins, 216 B.R. 394, 395, 39 Collier Bankr. Cas. 2d (MB) 344 (Bankr. W.D. Tex. 1997) (debtors bought brand new $25,000 minivan 15 days before bankruptcy, apparently on the advice of counsel).

51 In re Kestell, 99 F.3d 146, 36 Collier Bankr. Cas. 2d (MB) 1713, Bankr. L. Rep. (CCH) ¶ 77159 (4th Cir. 1996).

52 *Id.*

53 *See* Alexander, *supra* note 1, at 603 (describing the "usurious behavior of wonderfully greedy moneylenders").

54 *See* Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAPMAN L. REV. 79, 151-65 (2000).

55 *See* RICHARD PETERSON & GREGORY A. FALLS, IMPACT OF A TEN PERCENT USURY CEILING: EMPIRICAL EVIDENCE 15-20 (Credit Research Ctr. Working Paper No. 40, 1981).

56 *See* Zywicki, *Credit Cards, supra* note 54, at 151-59; Christopher C. DeMuth, *The Case Against Credit Card Interest Rate Regulation*, 3 YALE J. ON REG. 201, 238 (1986). *See also* SIDNEY HOMER & RICHARD SYLLA, A HISTORY OF INTEREST RATES 428 (3d ed. 1991) ("As in ancient Athens, and in all other periods of history, there has been no limit to the charges made by loan sharks. The better class of modern loan shark skirts the law by ... selling overpriced merchandise."). Similarly, pawn shops were able to reprice their services so as to evade usury restrictions, such as by discounting the value of the goods being pawned or by charging a flat-rate "hanging-up fee" for clothes. *See* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 49-50 (1999). Usury and other consumer lending regulations will be effective only if *every* possible term of the credit relationship is regulated, including the prices of any ancillary goods and services associated with the issuance of credit. A daunting task, to say the least.

57 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 2 U.C.C. Rep. Serv. 955, 18 A.L.R.3d 1297 (D.C. Cir. 1965).

58 *See* Alexander, *supra* note 1, at 603 n.12. Rent-to-own appears to be the true "lending" of last resort today, as the idea was originally introduced by a retail appliance store owner for those customers who were denied credit for appliance purchases. *See* Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates v. The Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385 (1997). This is still the case today, as rent-to-own arrangements continue to be used primarily by low-income consumers, who are unable to get other forms of credit at comparably better terms (if at all). *See* James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J.

751, 752 (1991); Eligio Pimentel, *Renting-To-Own: Exploitation or Market Efficiency*?, 13 LAW AND INEQ. J. 369, 394 (1995) ("Consumers who enter in [rent-to-own] transactions have usually been denied credit by other businesses. They typically resort to the [rent-to-own] arrangement in a final effort to obtain the merchandise they desire.").

59 *See* William J. Boyes, *In Defense of the Downtrodden: Usury Laws*?, 39 PUBLIC CHOICE 269, 272 (1982). Boyes concludes that usury limitations injure poor people but reduce interest rates for higher-income households. Middle-class and higher-income households, of course, tend to be more politically active and influential than lower-income households, perhaps explaining the political support for such regulations despite their counterproductive results. It is notable in this context that most lawyers, law professors, and bankruptcy judges are middle or upper-middle class.

60 Alexander, *supra* note 1, at 602-03.

61 C.S. LEWIS, THE SCREWTAPE LETTERS, Letter 1, page 21 (1976) ("Jargon, not argument, is your best ally in keeping him from the Church."); *id.* at Letter 9, page 55 ("But, as I said before, it is jargon, not reason, you must rely on.").

62 *Cf. id.* at Letter 9, page 55 ("Of course there is no conceivable way of getting by reason from the proposition 'I am losing interest in this' to the proposition 'This is false.'").

63 *See id.* at Letter 1, page 22 ("By the very act of arguing, you awake the patient's reason; and once it is awake, who can foresee the result? Even if a particular train of thought can be twisted so as to end in our favour, you will find that you have been strengthening in your patient the fatal habit of attending to universal issues and withdrawing his attention from the stream of immediate sense experiences.").

64 *See id.* at Letter 1, page 23.

65 *Cf.* TERESA A. SULLIVAN, ELIZABETH WARREN, AND JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 199 (1989) ("The generous willingness of Americans to help those in trouble is balanced by a demand that only the truly needy be helped.").

66 A summary of these provisions is provided in Todd J. Zywicki, Book Review: BRUCE G. CARRUTHERS AND TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES, 16 BANKR. DEV. J. 361, 393 n.98 (2000).

67 *See supra* notes 60-64 and accompanying text (criticizing logical error of inferring merits of legislation from identity or quantity of its supporters).

68 Lawyers are the largest domestic financial supporters of President Clinton and the Democratic Party. During the 1996 Presidential election, "More than any other interest group or profession, lawyers and law firms dominate[d] the list of top contributors to Bill Clinton's campaign. Through mid- 1996, the Clinton reelection committee had drawn more then $3.8 million from lawyers ...." Center for Responsive Politics, *Clinton/Gore 1996 Campaign Contributor Profile*, <http://www.opensecrets.org/clinton/clinton96data.htm> (visited May 17, 2000). In the 1997-98 election cycle, lawyers and law firms contributed $18,118,077 directly to Democratic candidates for federal office and $10,441,615 in soft money contributions to the Democratic party, a total of $28,559,692 in total contributions. For the period January 1995 to December 1999, lawyers and lobbyists contributed $19,136,689 in soft money to the Democratic Party, roughly five times the amount contributed to the Republican Party. *See* <http://www.commoncause.org/laundromat/results.html> (visited May 17, 2000). Casual empiricism suggests some correlation between lawyers' largesse and politicians' positions

on bankruptcy reform legislation. For instance, one of the leading reform opponents in the House is Rep. Jerrold Nadler (D-NY), the Ranking Minority member on the House Subcommittee with jurisdiction over the bankruptcy legislation. According to the Center for Responsive Politics, for both the 1997-98 and 1999-2000 election cycles lawyers and law firms have comprised the largest industry in terms of interest-group support for Congressman Nadler, raising $77,750 for 1999-2000, *see* <http:// www.opensecrets.org/politicians/indus/N00000939.htm> (visited May 17, 2000), and $80,850 for 1997-98, *see* <http:// www.opensecrets.org/1998***o***s/indus/N00000939.htm> (visited May 17, 2000). In both races this is more than twice the amount contributed by any other industry. In the Senate, Paul Wellstone (D-MN) has been perhaps the biggest opponent of bankruptcy reform. He too has garnered much support from lawyers. In the 1996 election cycle (his most recent), Senator Wellstone collected $210,977 from lawyers and law firms, gaining significantly greater financial support from lawyers and law firms than from any other single industry. *See* <http:// www.opensecrets.org/1996os/indus/S0MN00013.htm>. Given this, it is not surprising that President Clinton and the Democratic Party would pay special notice to the concerns of bankruptcy and trial lawyers. For instance, the White House has expressed a preference for the Senate version of bankruptcy reform, rather than the House. *See* Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 351 (1999) (noting that White House and First Lady Hillary Clinton support Senate version of reform bill and threatening to veto House version of bankruptcy reform legislation). A major difference between the House and Senate versions of the bill is that the House version would limit the ability to bring class-action lawsuits for illegal reaffirmations. Following the large plaintiffs recoveries and attorneys' fees paid out in the Sears case, class-action lawyers have now recognized the potential gains to be earned from bankruptcy class actions. The House bill would substitute increased public investigation and prosecution instead, including allocating a defined member of the Federal Bureau of Investigation and United States Attorney's Office in each judicial district to investigate illegal behavior. The Senate bill contains no such limitations on class actions. As a result, lawyers and the White House would be expected to favor the Senate bill rather than the House bill. Like the consumer credit industry, lawyers are active in lobbying on a number of different legislative initiatives that affect them directly, thus it would be untenable to draw a direct causal link between lawyers' general largesse and political opposition to the bankruptcy bill, just as it is untenable to draw a link between the consumer credit industry and political support for reform. Nonetheless, the correlation between lawyers' largesse and opposition to reform seems at least as strong as the purported correlation between giving by the consumer credit industry and support for reform. It is also interesting to note in this context that at least lawyers are making contributions to members of the Judiciary committees in the House and Senate who have jurisdiction over the bankruptcy reform legislation, as well as the President. Moreover, because of their ongoing involvement with matters of court administration and legal reform, lawyers traditionally have had a comparative advantage over other interests in achieving their goals in the Judiciary committees. *See* David A. Skeel, Jr., *The Rise and Fall of the SEC in Bankruptcy* (University of Pennsylvania Law School Institute for Law and Economics, Nov. 1999) (visited May 9, 2000) <http:// papers.ssrn.com/paper.taf?absract_id=172030>.

69 *See* Zywicki, Book Review, *supra* note 66, at 384-97; David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 511 (1998) ("all bankruptcy lawyers have an interest in increasing the use of bankruptcy").

70 *See* BRUCE G. CARRUTHERS AND TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES (1998). At the time, Congressman Father Drinan characterized the Bankruptcy Code as a "'full employment bill' for lawyers." *Id.* at 302 (quoting Father Drinan).

71 CARRUTHERS AND HALLIDAY, *supra* note 70, at 74 n.13 ("By 1978 there was comparatively little economic pressure or political controversy and, under these conditions, professionals thrived. They got rather less a free hand when economic changes stimulated pressure groups to take a much closer interest in the legislation of the 1980s and early 1990s.").

72 Zywicki, Book Review, *supra* note 66, at 382-84 (noting that bankruptcy is a rent-seeking process).

73 *See* Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 348-50 (criticizing Congress for perceived decision to listen to "special interests" in consumer credit industry rather than recommendations of bankruptcy professionals); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 488 (1997) (describing the lobbying efforts for the National Bankruptcy Review Commission, "The interests of the lobbyists and their collateral acquaintances came as a surprise, but it should not have. Long past were the days when Frank Kennedy could meet with Larry King, Joe Lee, Conrad Cyr, Vern Countryman, Gerry Smith and a handful of other people to work out the basic structure of the 1973 Commission recommendations on consumer bankruptcy."); *What Will Happen to the Commission's Report*? 31 BANKR. CT. DEC. (CRR), Issue 13 (Nov. 11, 1997) (quoting Gerald Smith's criticism that "special interest groups" were attempting to influence the National Bankruptcy Review Commission).

74 *See* Skeel, *Rise and Fall of the SEC, supra* note. In addition, the technical and non-ideological nature of bankruptcy law has made it possible for bankruptcy professionals to dominate the evolution of bankruptcy law to the exclusion of other interests. *See* CARRUTHERS & HALLIDAY, *supra* note, at 74. It has been observed that one of the purposes of creating this "mantle of technical complexity" has been to make it difficult for many affected parties to recognize what was happening. *Id.* at 148-49.

75 Truman's Kansas City haberdashery failed during the 1921 recession that rocked the agricultural Midwest. Nonetheless he vowed to repay his debts, even though his partner filed bankruptcy. It took Truman fifteen years to do so and as a result he was strapped for money for twenty years. *See* DAVID MCCULLOUGH, TRUMAN 151 (1992). Braxton's bankruptcy is discussed in more detail at *supra* notes 24-25 and accompanying text.

76 As Allan Bloom observed:

> There is a perennial and unobtrusive view that morality consists in such things as telling the truth, paying one's debts, respecting one's parents and doing no voluntary harm to anyone. Those are all things easy to say and hard to do; they do not attract much attention, and win little honor in the world. ... [It] is a humble notion, accessible to every child, but its fulfillment is the activity of a lifetime of performing the simple duties prescribed by it. This morality always requires sacrifice.
>
> ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 325 (1987)

77 *See* Jones & Zywicki, *supra* note 42, at 220; *see also* David B. Gross & Nicholas S. Souleles, "Explaining the Increase in Bankruptcy and Delinquency: Stigma versus Risk-Composition," at 16 (Aug. 21, 1998) (unpublished manuscript on file with author) ("Given the large number of people who could potentially benefit from filing for bankruptcy, even relatively small drops in stigma can generate ... large effects on default."); Scott Fay et al., "The Bankruptcy Decision: Does Stigma Matter?" at 27 (Jan. 1998) (unpublished manuscript on file with author) (noting that social stigma increases in importance at the margin in deterring bankruptcy filing rises as the marginal financial benefit from filing rises).

78 LEWIS, *supra* note 61, at Letter 4, page 34 ("It is funny how mortals always picture us as putting things into their minds: in reality our best wok is done by keeping things out.").

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