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September 11, 2009

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: "National Accuracy Study: Paperwork Comment (FTC file no. P044804)"

Dear Mr. Vander Nat,

Thank you for soliciting comments on the Agency's upcoming National Accuracy Study. I submit comments on questions 1 and 3 from the solicitation.

(1) whether the proposed collections of information are necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility;

The proposed collections of information are essential for the proper performance of the functions of the FTC, and the information sought will have practical utility. Current reports on the accuracy of the credit reporting system suffer significant limitations: they have not been performed by neutral entities, and thus may promote bias in favor of varying political agendas; they have suffered from small sample sizes, and thus have limited potential to be generalized to the entire population; and tied to the sample size problem, they tend to probe homogenous populations.

The FTC's goals of acquiring, "1,000 participants who as a group display a diversity on credit scores and on major demographic characteristics in line with national norms" are essential to addressing the significant limitations described above.

(3) ways to enhance the quality, utility, and clarity of the information to be collected;

The FTC should choose a neutral entity, with a strong reputation for excellence and integrity, to conduct the survey, such as Princeton Survey Research Associates, or the University of California's Survey Research Office. In light of Professor Elizabeth Warren's excellent article on the importance of good

social science research in public policy, I will leave the arguments in favor of neutral administrator of the survey to her.[1]

The entity that conducts the actual study could be different than the entities that supply data for the study. The nascent market of identity monitoring companies may be an excellent source for credit report data. These companies acquire consumer reports and other data on their clients, carefully monitoring them for variances. Upon enrollment, some of them carefully review the consumer report with the consumer on the phone or over the internet to find errors. This process may provide much of the data needed to conduct an accuracy study, while also assisting the consumer in correcting errors.

Identity monitoring companies represent a wide cross-section of consumers, including those who have been enrolled as part of an employment benefits package to those who enrolled themselves as a result of an identity theft incident. Recruitment into the study could be enhanced by offering reduced or free subscriptions to such services.

Respectfully submitted,

/s

Chris Jay Hoofnagle
Director, Information Privacy Programs[2]
Berkeley Center for Law & Technology

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[1] Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WISCONSIN LAW REV. 1 (2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=332162.
[2] Institution provided for identification purposes only.

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THE MARKET FOR DATA: THE CHANGING ROLE OF SOCIAL SCIENCES IN SHAPING THE LAW

ELIZABETH WARREN

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ADDRESS

THE MARKET FOR DATA: THE CHANGING ROLE OF SOCIAL SCIENCES IN SHAPING THE LAW

ELIZABETH WARREN*

The Thirteenth Thomas E. Fairchild Lecture
University of Wisconsin Law School
November 2, 2001

I am deeply honored to be invited to deliver this year's Fairchild Lecture. Judge Fairchild holds a very special place in the hearts of those in the legal profession and those in the legal academy. It is a singular pleasure to be given the opportunity to honor the judge and for just one moment to speak for all those who would express their appreciation and admiration for his years of service to the causes of justice. Thank you for having me here.

I am particularly pleased to be at the University of Wisconsin. The last time I spoke here was many years ago. I did not get the job, but I am resilient. Notwithstanding rejection, I have long regarded the University of Wisconsin as a kind of philosophical home. This is the place—the very special place—where empirical questions are framed, where "law-and-" is honored, and where creative, iconoclastic ideas are born. Stuart Macaulay, Bill Whitford, Marc Galanter, Lawrence Friedman, John Kidwell, and David Trubek have been teachers and tormentors throughout my career.

To come to the University of Wisconsin to talk about the role of social sciences in shaping the law is worse than carrying coals to Newcastle (or cheese to Wisconsin). Wisconsin is, after all, the place that pioneered the integration of the social sciences and law. Nonetheless, with all the good sense I showed the last time I spoke here, I plunge ahead.

My field is bankruptcy and commercial law, and I have been a principal

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* Leo Gottlieb Professor of Law, Harvard Law School. I want to thank the Fellowship Program at the Radcliffe Institute for Advanced Study for generous support during the time I wrote this lecture.

As I write this piece, I am acutely aware of my indebtedness to Professor Jay Westbrook and Dr. Teresa Sullivan, who have spent nearly twenty years as my co-conspirators in empirical research. Dr. Sullivan has been a patient teacher, educating me in the ways of data. Professor Westbrook has been a source of perpetual stimulation, on this topic and so many others. I am also indebted to Brady Williamson, who has taught me more about the practical realities of bankruptcy policy-making than I ever wanted to know. I am grateful to all three for their comments on this draft, and to Professor Robert Lawless, a fellow empiricist, who read the manuscript with care and engagement, as well as John King, whose pithy remarks were a treasure.

investigator on five major data collection projects. My current research is a kind of hub-and-spokes work with a core of data about real families in financial trouble. My co-investigators and I are trying to integrate these bankruptcy data into public policy debates in a variety of areas, including debates about government policies that purport to support home ownership, about the fallout of our health care finance system on middle class families, about disincentives to small business and entrepreneurial initiatives, and about the increased economic vulnerability of women heads of households. If we succeed, all sorts of people who have never thought much about bankruptcy or 11 U.S.C. § 1329(b)(2)(B)(ii) will become more familiar with how middle class families are trying—and all too often failing—to cope with a changing economic and social landscape.

With that background, I suspect I know where you expect me to go. I should begin with a citation to Peter Schuck lamenting the lack of social science research in the legal academy[1]—noting Wisconsin, of course, as the glorious exception. I should cite the many academic papers that call for more empirical research. I should note that even the high theorists in the law-and-economics movement call for more data—presumably to be done by one of the worker bees and not themselves.

After that introduction, you might then expect me to beat the drum for the importance of empirical research, to lament the lack of financial support for such work, to complain about how hard empirical work is, and to congratulate myself (with appropriate subtlety) for being one of those poor, unappreciated Stakhanovites. Then we could break for cocktails.

I hate to disappoint, but I'm not here to sing that song—although I love every verse. Instead, I'm here to sing a much edgier song. Peter Schuck's plea for law professors to do more empirical research has been echoed by more than two dozen scholars in the past decade.[2] The dearth of data,

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1. Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 323 (1989).

2. *See, e.g.*, Jake Barnes, *An Economic and Empirical Analysis of Certain Linguistic Practices Concerning Admission of Evidence*, 91 NW. U. L. REV. 646, 648 (1997); Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741, 743, 765 (1998); Peter David Blanck et al., *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 IOWA L. REV. 653, 678 (1990); Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 UCLA L. REV. 1117, 1121, 1125, 1262-63 (1996); Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 CLINICAL L. REV. 299, 301 (1997); Patrick T. Clendenen, *Volume VII*, 10 J. CONTEMP. HEALTH L. & POL'Y 297, 304-05 (1994); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 326 (1997); Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law*, 8 S. CAL. INTERDISC. L.J. 1, 3 (1998); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 834 (1999); James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1570-71 (1991); Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a*

lamented in each article, implies a sort of vacuum of information—a world without prior research. The authors seem to suggest a world that, if not breathlessly awaiting a data pronouncement from the academy, is at least willing to be happily surprised by hard information that will enlighten and transform.

The problem in empirical research, at least in the field I know best, is not that no one is producing data for a yearning public. To the contrary, a vigorous market for data exists. Journalists are hungry for "facts" to pepper their reports, lobbyists are eager to promote helpful "facts" and discredit unhelpful "facts," and some in Congress are assembling "facts" to support foregone conclusions. Ironically, the power of this market threatens to crush serious, policy-directed, empirical work in the legal academy. Indeed, the market is creating an anti-market in which one study seems to contradict another, leaving policymakers free to ignore all data and making such scholarship not only difficult, but useless. In this market, the empiricist faces a new—and very dangerous—world.

I confess at the outset to substantial bait and switch in this paper. The title is social sciences, but I'll talk almost exclusively about empirical research, principally quantitative work. The title is also "law," but I'll speak from the small part of the world I know—bankruptcy and commercial law. My excuse? I have none, except that I had to write the title before I wrote

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Federal Courts Seminar at Georgetown University Law Center, 83 GEO. L.J. 461, 469-70 (1994); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928, 932 (1990); Felice J. Levine, *"His" and "Her" Story: The Life and Future of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 69, 85 (1990); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1463, 1470 (1995); Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 370-72 (1998); Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 871-72, 887-88 (1996); Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 349-50 (1995); Joyce Palomar, *The War Between Attorneys and Lay Conveyancer—Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 478, 483 (1999); Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 824, 827-28 (1991); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1288-89 (1992); Michael E. Solimine, *Social Science Perspectives on Teaching Conflict of Laws*, 27 U. TOL. L. REV. 619, 619 (1996); Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 733-34 (1996); James J. White, *Phoebe's Lament*, 98 MICH. L. REV. 2773, 2773-74 (2000); Zipporah Batshaw Wiseman, *Women in Bankruptcy and Beyond*, 65 IND. L.J. 107, 107 (1989-90); Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 659, 679 (1998); Stephen Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511, 1538 (1995) (book review); Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 468 (2001) (book review); Stephanie M. Wildman, *Enlightened Social Insurance in a World Made Safer*, 44 U. MIAMI L. REV. 877, 879-80 (1990) (reviewing STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989)).

the paper, and I suffer from a severe optimism bias in my predictions of what I can accomplish. Of course, it is that same optimism bias that explains why I do empirical work.

I. THE LAW TO BE SHAPED

Legislatures frame much of today's law. Bankruptcy law is based entirely on a federal statute, which in turn rests on an obscure clause in the Constitution.[3] The law of secured financing and other forms of payment has been reified in the Uniform Commercial Code. Even general commercial law, with its roots in common law contracts, has become statutory. The extraordinary quantity of statutory law has made this subject the province of Congress and the fifty state legislatures. Of course, courts make the individual decisions applying these laws to specific disputes, and courts can still chart new courses that will influence the direction of law. Courts also retain the power to tell legislatures when they have stepped beyond constitutionally-permissible boundaries. Even so, a legislature can wipe out a policy direction, reverse a body of case law, or create entirely new rights with a fifteen-second voice vote.

The wide sweep of statutory law offers an important crucible for academics and law. In the area of transnational bankruptcy, for example, Professor Jay Westbrook of the University of Texas has pushed, pulled, nudged, and prodded more than two dozen countries toward an international accord to deal with the insolvencies of multinational corporations.[4] Professor Bruce Markell of the University of Nevada, working with the Judicial Conference of the United States Courts, hammered out the actual rules of implementation for proposed changes in small business bankruptcies.[5] Professors Karen Gross of New York Law School and Susan Block-Lieb of Fordham Law School have developed a pilot program to serve as the basis for statutorily-mandated educational programs for families that file for bankruptcy.[6] In each case, the academics have become deeply acquainted with the practical realities of these areas, informing their work by collaboration with judges, lawyers, business people, families, and legislators. They bring to the debates both the independent perspective of someone who has no paying client nor any short-term interest in a particular outcome, and, in each of these three cases, they offer real leadership that would otherwise be absent.

In other areas, however, legislatures are less inclined to collaborate in policymaking or policy implementation with specialists, whether they are inside the academy or out. Bankruptcy law was once heavily influenced by

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3. U.S. CONST. art. I, § 8, cl. 4.
4. *See, e.g.*, *Legislative Update*, BCD NEWS & COMMENT, Mar. 9, 2000.
5. *Rules Committee Anticipates Reform Act*, BCD NEWS & COMMENT, June 1, 2001.
6. *See, e.g.*, *New York Law School Offers Free Consumer Debt Management Education*, PR NEWSWIRE, Jan. 10, 2002.

those who spent their professional lives in the field, advising Congress either through the National Bankruptcy Conference or later as part of the National Conference of Bankruptcy Judges.[7] Those days have passed. Now bankruptcy is much more the province of interest groups that have spent millions to hire lobbyists, to launch a public relations campaign, and to make strategic campaign contributions.[8] Why? Because legislation affects their profits. Change a few words in 11 U.S.C. § 524, for example, and the $140 million that retailer Sears was required to refund following a federal indictment for deliberate violation of the bankruptcy laws in trying to collect debts from its customers that were discharged is Sears's to keep—and to continue to collect on into the future.[9]

The debates over policy have spilled into the public arena. No longer is bankruptcy a subject of interest to only a handful of people who have an intimate understanding of the structure of the system. In the past four years, every major newspaper and news magazine in the United States has run stories about the bankruptcy legislation pending in Congress. More than twenty newspapers, including the *New York Times*, the *Washington Post*, the *Los Angeles Times*, the *Wisconsin State Journal*, and the *Capital Times*, have run editorials stating a view on the pending legislation.[10] The public nature of the discussion has wrought another change: Empirical data have played a surprisingly important role in the ongoing effort to rewrite American bankruptcy laws.

II. EVIDENCE

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[11] the United States Supreme Court confronted the problem of trying to draw permissible boundaries on the use of statistical evidence in the courtroom. The justices went on at length about the kind and quality of data that can be presented as evidence and how so-called "junk science" could be properly barred from the courtroom.[12] While that decision has sparked a thoughtful debate among academics and trial lawyers, it is something of a reminder of Stewart Macaulay's admonition that life in appellate courts is amazingly stylized—and far removed from life elsewhere. While courts lay down complex rules for what a jury may or may not hear or a judge may or may not consider in

7. *See* Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986*, 74 AM. BANKR. L.J. 35 (2000).

8. *See* discussion *infra* Part III.

9. *Sears Settles, But Other Retailers Might be Vulnerable*, CREDIT CARD NEWS, July 1, 1997.

10. *E.g.*, *An Unfair Bankruptcy Bill*, N.Y. TIMES, Dec. 13, 2000, at A34; *Loopholes for Millionaires*, WASH. POST, July 16, 2001, at A14; *Deeper Hole for Debtors*, L.A. TIMES, Mar. 2, 2001, at B8; *Bankruptcy Reform Bill is a Bust*, WIS. ST. J., Dec. 4, 2000, at A6; *Views of the Capital Times: Feingold vs. Crooks in Congress*, WIS. ST. J., Mar. 4, 2001, at B2.

11. 509 U.S. 579 (1993).

12. *Id.* at 594-95.

deciding a specific case, both the law and the acceptable evidence have moved in a far different direction outside the courtroom.

In the rough and tumble world of legislative policy-making and campaigns to shape public opinions, there is no *Daubert*, no concept of junk science, no datum too filthy or too bizarre to be barred from the decision-making process. Instead, when legislative decision-making is at stake, the free market of the economists' happiest dreams exists: an unrestricted and rough world of competing ideas, information, and misinformation that parties will evaluate based on quality signals—and their own idiosyncratic needs.

I will go no further in treading upon the domain of political scientists regarding legislative decision-making than to make a small observation for those trained in law: Lawyers and their distant kin, legal academics, make a fetish of the kinds and quality of data that go into jury and judge decision-making. An entire course in the law school is devoted to "Evidence"—meaning only the evidence formally presented in a courtroom. Countless other courses such as Civil Procedure, Criminal Procedure, and Federal Courts also deal at least indirectly with evidence, exploring the kind and quantum of evidence that must be offered to sustain certain legal conclusions. Both lawyers and academics understand the importance of high quality information and how competing information has a hierarchy of reliability and persuasiveness. But their attention is focused on the hothouse of the courtroom and the stylized forms of evidence that pass without objection in that domain. By contrast, most of the laws with which both the lawyers and academics will deal are now made by a process lumped roughly into the category of "legislation" (or its pejorative cousin, "politics") that is well beyond their comprehension or even their passing interest. The *evidence* that will be employed in making those decisions is given little thought, even though the impact of this evidence has the potential to affect millions more lives.

III. THE MARKET FOR DATA

Empirical data are valuable in shaping legislation. There is no better evidence of that than the growing number of corporations and lobbying groups paying to produce such data for use in lobbying legislatures and influencing public opinion. Those who want to achieve victory in the legislative arena have decided that a spoonful of data helps the lobbying go down.

In 1978, the bankruptcy laws were modernized so that families in financial trouble would have two options—Chapter 7 liquidation and Chapter 13 payouts over time—to deal with overwhelming consumer debt and to protect themselves from the most aggressive credit collection

practices.[13] The consumer credit industry was able to shape some important provisions in the 1978 U.S. Code, but it saw the new bankruptcy law as insufficiently attentive to its concerns that the law maximize collection of outstanding debts. Overall, the new law made bankruptcy relief more readily accessible to families in financial trouble. In the early 1980s, the industry regrouped to launch an assault on Congress to amend the 1978 Bankruptcy Code to be more pro-creditor. The industry used all the typical devices: campaign contributions, letter writing campaigns from banks and credit unions, press releases, lobbyist visits to Washington offices, and so on. They also made an important contribution to a research foundation located at Purdue University's Krannert School of Business—the Credit Research Center.[14] In return, the Credit Research Center (or "CRC") self-published a two-volume study of consumer bankruptcy based on its field interviews in 1981 of 1,199 debtors in bankruptcy.[15] The study concluded that about $1.1 billion in debt was discharged annually by families that filed for bankruptcy when they could have repaid their debts.[16]

The study was never published as a book or extended article. It was not available in the ordinary academic channels nor could most libraries find it,

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

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

Before the laws were changed in 1978, a creditor could continue to try to collect after a bankruptcy filing, but a debtor could defend himself or herself in a legal action by pleading a defense of discharge based on the bankruptcy filing. A debtor improvident enough to promise to repay after the bankruptcy would see the debt automatically revived. In 1978, greater restrictions on creditors' post-bankruptcy collection efforts were imposed, along with various provisions to make consumer bankruptcy operate more efficiently to discharge personal liability on most debt. For a more detailed overview of the bankruptcy system, see, for example, CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY (1997).

14. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1095 [hereinafter Sullivan, Warren & Westbrook, *Limiting Access*]; Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087, 1087-88 [hereinafter Sullivan, Warren & Westbrook, *Rejoinder*].

15. CREDIT RESEARCH CTR., KRANNERT SCH. OF MGMT., PURDUE UNIV., 1 CONSUMER BANKRUPTCY STUDY 84 (1982) [hereinafter 1982 CREDIT RESEARCH CTR. STUDY].

16. *Id.* at 90.

but every member of Congress received a personal copy, hand delivered as part of an information package prepared by the blue-chip advertising agency, Ogilvy & Mather.[17] The 1982 CRC study bore the imprint of Purdue University and its business school. In 1984, Congress gave the credit industry what it wanted: a series of amendments that somewhat eroded the protection granted to troubled families in the 1978 Bankruptcy Code.[18] Many factors were at work in that 1984 legislation, and I would never claim to prove causation. But I will use a market test: the credit industry spent a substantial sum of money to develop the 1982 CRC study and then more money to hire a public relations firm to circulate it to Congress. Industry strategists obviously believed that data were worth whatever price they paid.

The credit industry's appetite to change the bankruptcy laws was merely whetted by the 1984 changes. In the early 1990s, the industry went on the offensive again. Consumer credit was highly profitable, and banks were engaged in a marketing frenzy. But as debt levels rose, so rose the number of bankruptcies. The industry realized that it needed to curtail bankruptcy filings to maximize profits as it expanded consumer lending. A few key senators held off the industry push to reduce bankruptcy protection, offering instead another National Bankruptcy Review Commission[19] that would make expert recommendations to a future Congress.[20] That Commission was headed by a Madison lawyer who teaches here, Brady Williamson.[21] The Commission was subjected to intense lobbying by the industry.[22]

When it became clear that the Commission would not embrace the credit industry proposals as the industry had planned, industry lobbyists went back to their friends in Washington, prompting them to propose a new

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17. Sullivan, Warren & Westbrook, *Limiting Access*, *supra* note 14, at 1095 & n.20.

18. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

19. As the need for a revision of the bankruptcy laws became clearer in the 1970s, Congress established the first National Bankruptcy Review Commission. This commission delivered its report in 1973. COMM'N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137 (1973).

20. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4107, 4147 (1994).

21. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS (1997). Former Congressman Michael Synar initially was named to chair the Commission, but he died shortly after the Commission was formed. *Id.* at xiv.

22. Other groups tried to offer some alternative perspectives, such as the Consumer Federation of America and the United Auto Workers and Consumers Union, who sent representatives to a few of the meetings. None of these organizations, however, could match the credit industry in volume or energy. No meeting of the Commission was complete without rows of credit industry lobbyists sitting in attendance, visiting with the Commissioners, and, as often as not, with several spots on the witness list to testify about the need for the industry's suggested changes.

pro-creditor bill days before the Commission delivered its report.[23] The credit industry's lobbying soon outstripped the spending of every other special interest group asking Congress for favorable legislation. Financial services outspent the traditional big spenders—tobacco, oil, and pharmaceuticals.[24] In 2000, MBNA, the country's biggest credit card lender, through its executives and PACs and "soft money" pledges, was the single biggest contributor to George Bush's presidential campaign.[25] During 2000 alone, the credit industry collectively spread around $37.7 million in Congress to both Democrats and Republicans.[26] The credit lobby's bill passed both houses of Congress by huge margins, and President Bush reassured the industry of his unwavering support.[27]

Senator Russell Feingold has called the bankruptcy bill the poster child for campaign finance reform,[28] a telling assessment from a man who observes the abuses of money and influence in Washington on a daily basis.

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23. Rep. Bill McCollum (R.-Fla.) and Rep. Rick Boucher (D.-Va.) introduced the "Responsible Borrower Protection Bankruptcy Act" in September 1997, a few weeks before the Commission Report was due. H.R. 2500, 105th Cong. (1997). Credit industry lobbyists made it clear that the timing was no accident but was instead a deliberate attempt to circumvent the Commission's proposals which were deemed by the lobbyists as "dead on arrival." *Proposed Bankruptcy Bill Gets Overwhelming Support*, CREDIT RISK MGMT. REP., Dec. 1, 1997, 1997 WL 8980050.

24. In 2000, the financial services industry was the biggest contributor to both political parties. See data reported by the Center for Responsive Politics, http://www.opensecrets.org.

25. *See, e.g.*, Robert Zausner & Josh Goldstein, *Bush's Largest Funding Source: Employees of Credit-Card Firm*, PHILA. INQUIRER, July 28, 2000, at A1. "By orchestrating mass contributions from its employees, the Wilmington-based company has become Bush's single largest source of campaign money. MBNA employees and their families have given more than $250,000 to the Republican's presidential bid, an Inquirer analysis found." *Id.*; Christopher H. Schmitt, *Tougher Bankruptcy Laws—Compliments of MBNA?*, BUS. WK., Feb. 2001, at 43. Schmitt confirmed that MBNA was "the candidate's single biggest source of cash" and added:

> [o]n the soft-money side, MBNA chipped in nearly $600,000). On top of that, MBNA Chairman and CEO Alfred Lerner and his wife, Norma, each kicked in $250,000 to the Republicans. Charles M. Cawley, CEO of MBNA's bank unit and a friend of Bush Sr., organized fund-raisers and gave $18,660 to Bush and the GOP.

Id.

26. Bruce Shapiro, *Let the Hogfest Begin*, SALON (Mar. 12, 2001), *at* http://www.salon.com/politics/feature/2001/03/12/bankruptcy/index.html (reporting on Federal Elections Commission figures analyzed by Public Campaign, the campaign-finance reform lobby). The group reports that this amount constitutes a 75% increase from 1998. *Id.* The split was 61% for Republicans and 39% for Democrats. *Id.*

27. House Bill 333 passed on Mar. 1, 2001, by a vote of 306-108 (roll no. 25). 147 CONG. REC. H600-H601 (daily ed. Mar. 1, 2001). Senate Bill 420 passed the Senate on March 15, 2001, by a vote of 83-15 (rollcall vote no. 36 Leg.). 147 CONG. REC. S2379 (daily ed. Mar. 15, 2001). President Bush's support for the bill was widely reported. *E.g.*, Jacob M. Schlesinger, *Bush to Support Bankruptcy Bill that Clinton Vetoed Last Year*, WALL ST. J., Feb. 2, 2001, at A4.

28. 147 CONG. REC. S2293 (daily ed. Mar. 14, 2001) (statement of Sen. Feingold).

His point is a good one: it is otherwise difficult to explain how a democratically elected legislature could favor a bill that would squeeze millions of working families in order to make a slight improvement in the bottom line of a small group of high-profit credit providers.

The tragic events of September 11 have at least temporarily dampened enthusiasm for a bill that would eliminate the last safety net for many families facing layoffs, and the gift of billions of dollars to the airline industry makes it particularly difficult right now for Congress to squeeze harder on middle class families and small businesses. What has been at work in the delay and the debate over bankruptcy legislation over the past five years, at least in part, has been a war over facts. A question—an empirical question—has slowed the process, changed some minds, raised some doubts, triggered some opposition, attracted a spotlight, and, perhaps most importantly, taken away cover for those who would be glad to do the industry's bidding.

The specific issue can be framed in a number of ways, but it centers on a central question of who uses the bankruptcy system and for what purpose. Do a bunch of slick operators who have found yet another way to take advantage of bill-paying citizens use bankruptcy to discharge debts they improvidently incurred and could actually repay? Or does the system function as a last safety net for tens of thousands of middle class families because of job losses, medical bills, and ex-husbands who won't pay?

Do politicians really care about the answer to this empirical question? For the cynics among us, it is easy to dismiss the role of data. In Washington, money talks—and only the credit industry is making campaign contributions. There are no debtor PACs or lobbyists. But even the most hardened politicians want a colorable argument to support their claims, especially if the media threaten to tell millions of readers or listeners that the legislation is, once again, a reward for big contributors and hurts middle class families. This means that a well-orchestrated effort for major legislative change is now accompanied by a public relations campaign. The industry does not need to shape public opinion to encourage legislators to support legislation; money can largely accomplish that. But it needs to shape public opinion to neutralize any public opposition that would make it too difficult (or too embarrassing) for law makers to support such legislation. Here is where the real market for data has emerged.

IV. DEMAND PRODUCES A PRODUCT

The Credit Research Center Study of 1982 concluded that the credit industry lost $1.1 billion in bankruptcy filings by debtors who could have repaid those debts.[29] The study heaped assumption on top of assumption, with every tilt in favor of the credit industry position. My long-time co-

29. 1982 CREDIT RESEARCH CTR. STUDY, *supra* note 15, at 88-91.

authors, sociologist Teresa Sullivan and law professor Jay Westbrook, and I wrote our first article together dissecting the 1982 study.[30] For me, the exercise was a private tutorial by a first rate demographer cataloguing the things that a researcher could do in the design, implementation, and data analysis in a study to distort the outcome of the research. Our critique was published by the *Wisconsin Law Review*, yet another reason that I regard this place with special affection. Among our many, many criticisms of the study, I'll mention just one: for 1,040 of the 1,199 respondents, the researchers did not use the debtor's report of current income to calculate the debtor's ability to repay.[31] Instead, the researchers based their calculation of $1.1 billion that the debtors could have repaid on an "deemed income," which they presumed the debtors would earn for the next five years without interruption, despite the fact that the debtors were not earning that income at the time of the filing—nor did they have any assurance that they would continue to earn it.[32]

When the 1982 Credit Research Center Study was produced, it was made available almost exclusively to legislators.[33] The target was Congress. The message was that bankruptcy reform was necessary because the current bankruptcy laws were subject to substantial abuse that were costing the banking industry money. The 1982 Credit Research Center Study may have been effective in its limited distribution to Congress, but by the mid-1990s the industry needed a message that would play better in the press. Selling the idea that the banks were losing money from bankruptcy would provoke a lot of skepticism, particularly because it was undeniable that credit card lending throughout the 1980s and 1990s was twice as profitable for banks—net of all expenses including bankruptcy—than any other type of lending.[34]

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30. Sullivan, Warren & Westbrook, *Limiting Access*, *supra* note 14, at 1103.

31. *Id.* at 1118.

32. *Id.* at 1118-22.

33. *Id.* at 1095 & n.20. Roy Mersky, William Stamps Farish Professor of Law and Elton M. Hyder, Jr. & Martha Rowan Hyder Centennial Faculty Fellow, Librarian and Director of Research, and Director of the Tarlton Law Library of the University of Texas, and surely one of the most well-connected law librarians in the country, spent weeks trying to secure a copy of the report both from the Krannert School of Business and from other libraries around the country. Ultimately his staff located a copy in San Antonio, which the Tarlton Library was able to borrow and photocopy. We three remain grateful to Professor Mersky for his efforts—and stunned by how hard it was to get a copy of this report. By contrast, as we were reviewing the work, we learned from the advertising agency that had been hired to distribute it, that every Senator and Representative had received a personal copy. *Id.*

34. Even as consumer bankruptcies have climbed, credit card lending has remained about twice as profitable as other forms of lending. The Federal Reserve Board documented the high profitability of credit card lending, noting, for example, that in 1996, credit card banks showed a 2.4% return on assets, compared to a 1.86% return on assets reported by all commercial banks. FED. RESERVE BD., THE PROFITABILITY OF CREDIT CARD OPERATIONS OF

For several years, the banks were losing money on their business loans and foreign loans, while their consumer loan portfolio was a reliable source of extraordinary profit. The effect of consumer bankruptcy on the banks' bottom line was negligible at best.

By the mid-1990s when the credit industry realized that the Bankruptcy Commission would not offer a blue-ribbon report endorsing its position, the industry already had a phalanx of lobbyists and a cohort of supportive senators and representatives. What the industry undertook this time was a public relations campaign designed to show the media—and hence the public—that bankruptcy legislation was not special interest legislation designed to increase profits for powerful creditors, but was instead a good measure for middle class families. The heart of this campaign was allegedly-neutral empirical research.

In short order, the credit industry commissioned studies from Ernst & Young,[35] WEFA,[36] and their old friend, the Credit Research Center.[37] Suddenly, three statistical studies bearing different logos explained in turn the desperate need for legislation. The information on how much the credit industry spent for these studies is proprietary, as is the information on the amount they spent on a public relations campaign to distribute their findings. One can gauge the magnitude of the effort by the remarks of reporters that for years press packages touting the industry point of view arrived weekly and that press releases came through the newsroom almost daily.

V. JUST THE FACTS—BANKRUPTCY COSTS EVERY AMERICAN FAMILY $400

The message always returned to a central research claim—proof positive that the system was broken and was hurting average citizens. The data proved it. The credit industry launched its public relations campaign to amend the bankruptcy laws with a blizzard of press releases and advertisements that purported to show that bankruptcy costs every American

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DEPOSITORY INSTITUTIONS (Aug. 1997), http://www.federalreserve.gov/boarddocs/RptCongress/creditcard/1997. The longer term trends for greater profitability for credit card issuers were identified in Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 259 (1997).

35. TOM NEUBIG ET AL., ERNST & YOUNG, LLP, CHAPTER 7 BANKRUPTCY PETITIONERS' ABILITY TO REPAY: ADDITIONAL EVIDENCE FROM BANKRUPTCY PETITION FILES (Feb. 1998), http://www.ey.com/global/vault.nsf/US/Chapter_7_Bankruptcy_Petitioners_Ability_to_Repay:_Additional_Evidence_from_Bankruptcy_Petition_Files/$File/feb98_report.PDF [hereinafter ERNST & YOUNG].

36. WEFA GROUP PLANNING SERVS., THE FINANCIAL COSTS OF PERSONAL BANKRUPTCY (Feb. 1998), http://www.house.gov/judiciary/5179.htm.

37. JOHN M. BARRON & MICHAEL E. STATEN, CREDIT RESEARCH CTR., GEORGETOWN SCH. OF BUS., PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY-TO-PAY 1 (1997).

family $400 each year.[38] A typical full page advertisement in the *Washington Post* carried the headline: "What Do Bankruptcies Cost American Families? A month's worth of groceries" above a picture of a family with a full grocery cart. The text followed: "Today's record number of personal bankruptcies costs every American family $400 a year," then exhorted people to endorse the pending bankruptcy legislation.[39] In effect, implied the ads and press releases, change the bankruptcy laws and every American family will be $400 richer. The "fact" was widely repeated.[40]

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38. For example, a full page ad in the March 30, 1998 issue of *Roll Call*, a newspaper widely circulated on Capitol Hill, cited the $400 fact. ROLL CALL, Mar. 30, 1998, at 38-39; *see also* ROLL CALL, Apr. 2, 1998, at 16-17.

39. WASH. POST, June 4, 1998.

40. *E.g.*, Bernard Dagenais, *Bankruptcy: Not Quite a Free Ride*, WASH. TIMES, May 10, 1999, at D3 (citing Former Secretary of the Treasury Lloyd Bentsen as making a "conservative estimate[]" of $408 as the cost of bankruptcy per household); Robert K. Heady, *Credit-Card Firms Would Be Winners in Reform*, SUN-SENTINAL (Fort Lauderdale), Mar. 8, 1999, at 22, Your Business (citing credit industry that bankruptcy "costs the average American Family $550 a year"); Richard Jones, *We All End Up Paying for Unfair Bankruptcy Laws*, WASH. TIMES, Oct. 6, 1997, at A16 (letter to the editor) (Mr. Jones is identified as the Vice President of MasterCard International); *see also* Aaron Zitner, *Battle Brews Over Laws on Bankruptcy*, BOSTON GLOBE, Oct. 17, 1997, at A1 (citing business groups as saying creditors will be left with $40 billion in unpaid bills in 1997).

The 1997 CRC report had never actually used the $400 figure, nor had any of the other industry studies.[41] Instead, years later a lobbyist took credit for the invention in a trade industry magazine interview.[42] But the $400 "fact" was cited and the 1997 CRC research was often cited as the source of the "fact." The CRC researchers never once distanced themselves from the numbers, so that the documentation of the cost imposed by bankruptcy was variously credited to "experts,"[43] "Purdue University researchers,"[44] "Georgetown researchers,"[45] a "study,"[46] "studies,"[47] a Congressman,[48] "court records,"[49] or no one at all—just an evidently well-known fact.[50]

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41. *See supra* notes 36-38.

42. *Top Creditor Lobbyist Tassey Goes for Broke*, AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588.

43. *Last Resort Is Coming First; Something's Wrong: In These Good Times, Bankruptcy is Booming*, L.A. TIMES, July 28, 1997, at B4 ("Much of that debt relief is simply unwarranted. Experts say that about 45% of Americans who seek complete debt relief from their debts through Chapter 7 personal bankruptcy filings could afford to pay off an average of one-third of their debts within three years.").

44. *Lax Bankruptcy Laws Make Everyone Pay*, USA TODAY, June 12, 1997, at 14A [hereinafter *Lax Bankruptcy Laws*] ("Purdue University researchers found a third of debtors could pay some of their bills, but don't."); Lloyd Bentsen, *Get Tough on Bankruptcy Laws*, WASH. TIMES, Sept. 19, 1997, at A19.

> According to a Purdue University study, nearly half of the people who file for bankruptcy could repay a significant amount of their outstanding obligations, but instead choose to renege. Bankruptcies of convenience now constitute a significant and rising percentage of personal bankruptcy filings, and the cost to consumers from this trend is enormous.

Id.

45. *Bankruptcy's Turn*, CHI. SUN-TIMES, July 27, 1998, at 23 ("According to a recent study by Georgetown University, about 25 percent of people who filed for Chapter 7 bankruptcy, which erases all debt, could have repaid a portion of their obligations.").

46. Daniel McGinn, *Deadbeat Nation*, NEWSWEEK, Apr. 14, 1997, at 50 ("[O]ne study says 45 percent of bankruptcy filers could pay back much of their debt."). The observant reader will notice that the specific number of debtors who could repay shifted around. Evidently the press releases varied from time to time.

47. Leigh Jones, *Area Bankruptcy Filings Drop 8.1 Percent*, J. RECORD (Okl. City), Aug. 10, 1998 ("Visa cites studies indicating the economic impact to last year's bankruptcies equaled $44 billion, or $400 for every American family."), 1998 WL 11956043.

48. Mary Deibel, *Bankruptcy Bandwagon*, ROCKY MOUNTAIN NEWS, Nov. 9, 1997, at 1G. "The idea [of bankruptcy reform] is to encourage more people to repay their creditors when they file for bankruptcy rather than walk away from debt under a system that will cost the nation $40 billion this year alone." *Id.* The article goes on to quote Congressman Bill McCollum: "That $40 billion a year translates into over $400 per household in higher costs for goods, services and credit." *Id.*; *see also* Mary Francis, *Rise in Bankruptcies Has Congress Chasing Reform*, INDIANAPOLIS STAR, July 5, 1998, at E1 (citing Congressman Gekas's spokesman as saying personal bankruptcies cost the average American family $400 more per year in higher interest rates and prices).

49. Matthew S. Schwartz, *Bankruptcy Proposal Stalled*, DETROIT NEWS, June 25, 2000, at 1 ("[C]ourt records indicate that bankruptcies cost creditors $40 billion a year.").

50. Bentsen, *supra* note 44 ("It has been conservatively estimated that personal bankruptcies amount to a hidden tax of $408 per household annually, and it takes 15 responsible borrowers to cover the cost of one bankruptcy of convenience."). Mr. Bentsen, a

At the time the "fact" was released, there were about 101 million American families. To give each family $400, it would be necessary to raise about $40.4 billion.[51] About 1.3 million families filed for bankruptcy in 1997.[52] For 1.3 million families to repay enough to produce $40.4 billion, the families in bankruptcy would have to come up with about $31,000 apiece—plus transactions costs. On the bankrupt debtors' median pre-tax income of about $21,000, this would be somewhat problematic.[53] The CRC's own work identifies only 185,000 debtors who might be able to pay anything.[54] In order to raise the promised $40.4 billion, these 185,000 families would need to come up with about $218,000 a piece.[55] In short, the basic math is absurd.

The question of how each bill-paying American family would save $400 if the legislation were passed presents questions of simple math from the recipients' end as well. Home mortgages and car loans are backed up by

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former senator and former Secretary of the Treasury, failed to disclose that he was a paid lobbyist for the credit industry. Robert Cwiklik, *Ivory Tower Inc.: When Research and Lobbying Mesh*, WALL ST. J., June 9, 1998, at B1. Congressman Bill McCollum also explained the loss without further citation, although he cited to the Credit Research Center earlier in his article, so perhaps the citation to $400 here was intended to refer to the CRC report. Bill McCollum, *Bankruptcy Law—Reform or Leave Whole?*, WASH. TIMES, Jan. 4, 1998, at B3 ("Last year, bankruptcies cost consumers $40 billion, amounting to a hidden tax of more than $400 per household. That $400 could buy a family of four 20 tanks of unleaded gas or more than a year's worth of disposable diapers."). The "fact" was echoed by national papers, such as the *National Law Journal*. *Senate Overwhelmingly Passes Bankruptcy Law*, NAT'L L.J., Oct. 5, 1998, at A10 ("Unpaid credit card debt is estimated at $40 billion, and companies say they are being forced to charge higher interest rates that hurt consumers who handle credit responsibly.").

51. As some of the earlier quotes indicated, the $40 billion total and $400 per household were often cited interchangeably or together. *E.g.*, McCollum, *supra* note 50.

52. There were 1,350,118 non-business bankruptcy filings during 1997. Press Release, Administrative Office of the United States Courts, Increase in Bankruptcy Filings Slowed in Calendar Year 1998 (Mar. 1, 1998), http://www.uscourts.gov/PressRelease/cy98BK.pdf.

53. Ed Flynn & Gordon Bermant, *The Class of 2000*, AM. BANKR. INST. J., Oct. 2001, at 20. Flynn and Berman collected data only for the Chapter 7 no-asset filers, the group targeted by the proposed bankruptcy legislation. *Id.* Median net income for this group was $20,796 for 2000, while mean income, pulled up by a few higher income debtors, was $23,340. *Id.*

54. BARRON & STATEN, *supra* note 37, at 32.

55. Of course, the industry would probably be willing to offer financing, but at 18% the statistical assumptions get more bizarre. If the families identified as able to make *any* payments were hit with a bill for $218,000, the interest alone would be $39,240—slightly more than the median annual household income in the United States in the year of the study. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, at 466 tbl.736 (120th ed. 2000). Table 736, "Money Income of Households—Percent Distribution by Income Level, Race, and Hispanic Origin in Constant (1998) Dollars: 1970 to 1998" identifies 1997 median household income as $37,581. *Id.* In other words, if they tried to pay off enough debt to produce a savings of $400 for each American family, the interest payments alone would consume the entire annual income of a typical family before they repaid a single dollar of the outstanding debt—or used a single dollar for food or housing.

collateral, which means they are already largely being repaid either by the debtors or by the sale of the collateral. The target for savings is credit cards, an unsecured debt that can usually be discharged in bankruptcy. Of course, anyone who does not spend $400 in interest charges cannot save $400 in reduced costs. The Federal Reserve estimated that less than half the households in the United States—about 44%—carried an outstanding balance and therefore paid interest on credit card loans in 1998.[56] This means that the average savings of $400 per family should be distributed in larger chunks to a smaller portion of the population.

The industry, of course, never explicitly said that the $400 it planned to recover from the bankrupt families would be passed on to its customers. History suggests that it would not. An example illustrates: A credit card issuer's biggest expense is not bankruptcy; it is the cost of the funds it borrows, which it then lends to its customers as they pay their bills over time. Between 1980 and 1992, the rate at which banks borrow money fell from 13.4% to 3.5%.[57] What happened to the rates the companies charged? During that same period, the average credit card interest rate rose from 17.3% to 17.8%.[58] More recently, as interest rates have dropped again, even customers with variable rate cards have discovered "floors" on their interest rates.[59] It seems that the fine print in many credit card agreements calls for customers to pay more as interest rates climb, but not less when they fall. The last nine interest rate cuts by the Federal Reserve have not affected most fixed rate cards and have had only modest effects on variable rate cards. The total savings from the nine interest rate cuts has created a $10 billion windfall for credit card issuers whose cost of funds have declined sharply while the rates they charge their customers have remained surprisingly sticky.[60] These pricing techniques explain how it is that the credit card issuers have maintained above-market profits on their lending for two decades: they simply do not price at the margin for cost, and their extraordinary profits more than offset the "cost" of bankruptcy.[61] Competition in this industry is not based on credit price so much as on marketing strategies, brand loyalty, and other devices that permit card issuers to collect extraordinary profits.[62] Based on current evidence, if the industry

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56. *Id.* at 510 tbl.794.

57. JAMES MEDOFF & ANDREW HARLESS, THE INDEBTED SOCIETY: ANATOMY OF AN ONGOING DISASTER 12 (1996).

58. *Id.*

59. Cecily Fraser, *A $10 Billion Windfall: Credit Card Lenders Don't Pass on Full Interest-Rate Cuts*, CBS MARKETWATCH (Oct. 3, 2001) ("[A]bout 25 percent of cards offering variable interest rates have a minimum, or so-called floors, to ensure rates don't dip below a certain price."), *at* http://www.cbsmarketwatch.com/news.

60. *Id.*

61. This is the conclusion of economist Lawrence Ausubel, who argues that banks price at the margin for high-risk borrowers, not for all borrowers. *See* Ausubel, *supra* note 34, at 261.

62. *Id.* at 263-64; *see also* ROBERT D. MANNING, CREDIT CARD NATION 99-124

can squeeze more money out of the families who otherwise would file for bankruptcy, shareholders will benefit, but not customers.

There is another problem in the industry's $400 calculation: even if debts totaling $40.4 billion were discharged in bankruptcy each year, *bankruptcy* would not be the cause of the loss. More than half of all the credit card debt listed in bankruptcy has already been written off as uncollectible before the debtor files the bankruptcy petition,[63] and a large portion of the remainder would probably be written off because the debtors were in financial trouble and not paying—whether they declared bankruptcy or not. Moreover, the high rate of reaffirmations in which debtors promise to repay some debts, notwithstanding the fact that they are about to be discharged in bankruptcy, means that not all debt listed in bankruptcy is ultimately discharged in bankruptcy. About one in four of all debtors agree to pay some debt notwithstanding their bankruptcy filing[64]—and that promise has always been legally enforceable. Finally, more than half of the debt listed in bankruptcy is secured by an interest in property of some kind.[65] If the debtor fails to pay, the creditor can take the property and resell it to pay the debt—or the debtor can continue to make payments even after the bankruptcy—all of which reduces the total amount the creditor actually writes off in bankruptcy.[66]

(2000).

63. A survey produced by the American Bankers Association said between 55% and 65% of credit card loans were charged off for reasons other than bankruptcy (this calculation excludes all charge offs for fraud—these are just plain old bad debts). Amanda E. Dawsy & Lawrence M. Ausubel, Informal Bankruptcy 2 n.3 (Jan. 2001) (preliminary manuscript) (citing AM. BANKERS ASS'N, BANK CARD INDUSTRY SURVEY REPORT (1997)), http://www.bsos.umd.edu/econ/bankruptcy/informal-bankruptcy-jan01.pdf. In addition, the 1998 Credit Collections Survey conducted by the Consumer Banker's Association estimated that 60% of all credit card accounts that were charged off for tax purposes, and 70% of charge-offs on other consumer loans, were the result of long term delinquency rather than bankruptcy. *Id.* (citing *Survey Shows Impact of Bankruptcy on Credit Card Collections*, CONSUMER BANKR. NEWS, Feb. 12, 1998). According to the 1996 VISA Bankruptcy Survey, some 65.2% of credit card loans were charged off for reasons other than bankruptcy, and this percentage has been relatively constant in recent years. *Id.* at 2 & n.2. All calculations exclude losses for fraud, which generally match the total losses for bad debts. *Id.* at 2 & n.1.

64. Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 713 (1999). This number was calculated before the huge scandal concerning unfiled reaffirmations came to light. Sears and a number of other creditors admitted to obtaining reaffirmation agreements and collecting from their debtors, but deliberately violating the law by failing to file those agreements with the court. *Id.* at 717. It is impossible to tell how many illegal reaffirmations were also producing revenues for the creditors at the time these data were collected. *Id.* at 718.

65. For example, mean secured debt for consumer debtors in both Chapter 7 and Chapter 13 filing in 1991 was $29,879, while mean unsecured debt was $20,706. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121, 128 (1994).

66. The debtors also pay for the bankruptcy system. The courts and administrative system are supported by filing fees the debtors pay at the time they declare bankruptcy.

At the insistence of Brady Williamson, then-Chair of the National Bankruptcy Review Commission, the Congressional Budget Office ("CBO") reviewed the Credit Research Center study, along with the other industry work by WEFA and Ernst & Young. The CBO identified substantial methodological shortfalls in all of the work and cautioned in particular that the Credit Research Center study "give[s] a misleading indication of the amount of losses that creditors could hope to recover under" the proposed legislation.[67] Subsequent reviews by the Government Accounting Office ("GAO") reached similar conclusions about the creditor-sponsored data.[68]

The difficulties with the $400/$40 billion claim arise at so many levels that anyone with a critical eye and a rudimentary knowledge of basic statistics should have been deeply skeptical of the claim. For those who

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Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 364-65 (1993).

67. Kim J. Kowalewski, Cong. Budget Office, *Evaluations of Three Studies Submitted to the National Bankruptcy Review Commission*, *in* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 21 app. G-2.d, at 9, *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html. The CBO was equally harsh in its assessment of the VISA report, which it cites for its "unsound method" and its analytic approach that has been "roundly condemned." *Id.* at 1.

68. The GAO focused an entire report on the Credit Research Center study, concluding that "the methods used in the Center's analysis do not provide a sound basis for generalizing the Center report's findings to the annual 1996 filings in each of the 13 locations nor to the national population of personal bankruptcy filings." U.S. GEN. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER REPORT ON DEBTORS' ABILITY TO PAY, GAO/GGD-98-47, at 6 (Feb. 1998) [hereinafter GAO, PERSONAL BANKRUPTCY].

In a separate report, the GAO raised a number of methodological concerns about the Ernst & Young studies, particularly with regard to their unproven assumptions and understated debtors' expenses. U.S. GEN. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTORS' ABILITY TO PAY, GAO/GGD-99-103, at 1, 3, 30 (June 1999) [hereinafter GAO, FOUR REPORTS]. The GAO noted overall, however, that it was hampered in its analysis by the refusal of all of the study researchers and their industry sponsors to share their data, "citing VISA's proprietary interest in the data." *Id.* at 5. This was in stark comparison with academic researchers Marianne Culhane and Michaela White, authors of the Creighton/ABI report, who turned their data over to the GAO for full analysis. *Id.* The GAO also reviewed the WEFA study, concluding that substantial questions about the data left the GAO unable to "determine whether the report's conclusion is valid" and suggesting that the claims of the study "be interpreted with caution." Letter from Richard M. Stana, Associate Director, Administration of Justice Issues, General Accounting Office, to The Honorable Martin T. Meehan, House of Representatives 5 (Apr. 22, 1998), *available at* http://www.gao.gov. The GAO also noted that it could not obtain further information about the data from the authors of that industry report either. *Id.* at 1.

The CBO conducted another detailed review. CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW (Sept. 2000), *available at* ftp://ftp.cbo.gov/24xx/doc2421/bankruptcy.pdf [hereinafter CBO, LITERATURE REVIEW]. The report summarizes and synthesizes several studies. After a summary of the shortcomings in the WEFA study, for example, the CBO concludes: "As a result, judging the reliability of the estimate is quite difficult. WEFA's projected losses for the 1997-2000 period undoubtedly overstate actual losses." *Id.* at 37.

needed help, the CBO and GAO reports were a matter of public record. And yet not a single report of the $400 fact raised either question—whether a group of bankrupt debtors could pay back such fantastic sums, or whether the industry would share even part of their "savings" with their bill-paying customers. Instead, the "facts" were simply stated and restated, creating a seemingly irrefutable basis for bankruptcy reform. That, no doubt, was precisely the sponsors' intent.

Interestingly, as the CBO and GAO bore down, and as the industry studies were re-analyzed, the amount of money which the industry claimed that debtors might be able to repay shrank from $40 billion to an estimated $1-4 billion—which would work out to about $10-40 per American family—an estimate that the CBO continues to suggest overestimates the amount of debt that could be repaid.[69] Professor Markell called attention to this difference,[70] but the recalculation apparently never made it into a single published report of the studies, nor did the industry-sponsored specialists ever offer the more modest number to be cited in place of the $400 fact. Instead, the industry—and the press—continue to use the $400 figure.[71]

The market for data produced what it could easily digest: a short, clear, powerful statement of "fact" that bears on the policy decisions under consideration. Longer, more complex, more ambiguous information was unnecessary.

VI. UNIVERSITY IMPRIMATUR FOR SALE

The market for data, like any other market, uses signals to determine the quality of the product. One way to signal quality is by the prestige of the person or institution offering the data.

The credit industry hired three research centers to produce papers.[72] The first was the WEFA Group, a research-for-hire economic forecasting

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69. CBO, LITERATURE REVIEW, *supra* note 68, at 30.

70. Bruce A. Markell, *Sorting and Sifting Fact From Fiction: Empirical Research and the Face of Bankruptcy*, 75 AM. BANKR. L.J. 145, 153 (2001) (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000)) (citing GAO, FOUR REPORTS, *supra* note 68).

71. *See infra* note 127.

72. It is possible, of course, that they hired other researchers as well but failed to publish their findings because they did not support the industry's political positions. The three researchers that have been identified repeatedly have made clear that their work is proprietary and can be released only by permission of the creditor providers who paid for it. When the GAO analyzed the 1996 CRC data, it made the following observation: "The authors of the [Credit Research] Center report declined to provide us a copy of the automated database used for their analysis, citing their interest in maintaining its proprietary value." U.S. GEN. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER AND ERNST & YOUNG REPORTS ON DEBTORS' ABILITY TO PAY, GAO/T-GGD-98-79, at 5 (Mar. 12, 1998) [hereinafter GAO, REVIEW OF ABILITY TO PAY REPORTS].

group.[73] The second was the well-known accounting firm Ernst & Young, LLP.[74] The third was the Credit Research Center.[75] In the mid-1990s, the CRC relocated from Purdue University to Georgetown University. Instead of being in the Midwest churning out data far from its target audience, the Center could operate out of Georgetown University, close to those who could and would use these data in the public policy arena. The Director of the Center, Dr. Michael Staten, could make himself available on short notice to visit with staffers or testify before Congressional committees. The Center touts exactly these benefits on its web site: "Location in the nation's capital provides outstanding access to policymakers and researchers within the federal government as well as numerous think-tanks, associations, and universities in or near the greater Washington area."[76] By moving to Washington, the CRC could be more effective not at producing data, but at marketing those data.[77]

The three commissioned studies represent a powerful development in the landscape of empirical research. While WEFA and Ernst & Young undoubtedly carry some prestige, it is relatively easy to advise caution based on the obvious work-for-hire nature of their relationship with an industry or lobbying group that hires them. But the university imprimatur on the CRC work suggests a kind of independence not found in other research reports.

The 1997 CRC study of bankruptcy carries no disclaimer about the

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73. WEFA GROUP RES. PLANNING SERV., THE FINANCIAL COSTS OF PERSONAL BANKRUPTCY (Feb. 1998).

74. ERNST & YOUNG, *supra* note 35.

75. BARRON & STATEN, *supra* note 37, at 3. I have attempted to document every fact about the Credit Research Center and its relationship with Georgetown University that was available through public sources. I also wrote to Georgetown University's McDonough School of Business and to Dr. Michael Staten to ask questions and to check the information I compiled. I sent Dr. Staten a pre-publication draft of this paper. Dr. Staten responded, taking sharp exception to the inferences I drew from the facts listed here and making it clear that by publishing this paper that I "risk [my] own academic reputation by publishing an *ad hominem* attack in the guise of scholarship." He also attempted to persuade the *Wisconsin Law Review* to refuse to publish the paper. He did not, however, take issue with any of the facts represented here. E-mail from Elizabeth Warren to Dr. Michael Staten (Oct. 31, 2001, 20:46:14 ET) (on file with author); Letter from Michael Staten to Elizabeth Warren (Nov. 6, 2001) (on file with author); Letter from Elizabeth Warren to Dr. Michael Staten (Nov. 20, 2001) (on file with author); Letter from Michael Staten to Elizabeth Warren (Feb. 2, 2002); E-mail from Ann de Ville, Assistant to Elizabeth Warren, to Michael Staten (n.d.); E-mail from Michael Staten to Ann de Ville (Oct. 31, 2001, 10:14:02 ET).

76. Georgetown Univ., Credit Research Ctr., *History*, *at* http://www.msb.edu/prog/crc/history.html (last visited Jan. 28, 2002).

77. It is unclear whether the CRC moved or simply expanded. Notwithstanding the Georgetown web site's reference to the July 1997 "relocation," the Purdue web site as of September 2001 continued to carry a listing for the Credit Research Center and continued to list its director, Dr. Staten, under the heading of "Purdue Credit Experts" with an explanation of the topics he would be available to discuss. *See* http://news.uns.purdue.edu/UNS/html3month/Credit.experts.html (last visited Jan. 28, 2002).

source of its funding,[78] nor does the web site that weaves the CRC in with its other "academic programs" at Georgetown. Instead, the name of Georgetown University appears prominently at the beginning of the paper document and on every electronic page about the Center.[79] Indeed, the CRC attempts to wrap itself in academic robes: "The Center's academic affiliation and policy-orientation bring sophisticated research expertise to bear on important regulatory issues. By subjecting its methods and results to external academic review, the Center maintains its integrity and objectivity as an unbiased resource for policymakers."[80]

The Center's mission statement touts its independent review of its scholarship, but it makes no mention that the bankruptcy petition research, so generously funded by the credit industry, has been published only through credit industry press releases and self-published working papers. The promised "external academic review" is no where in evidence.[81] According

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78. The CRC report is a thirty-two page document of the study design, findings, and conclusions. BARRON & STATEN, *supra* note 37. The authors are identified by their academic affiliations, but the self-published report does not explain the source of the funding for the reported data, or that VISA and MasterCard claim a proprietary interest in these data. *Id.*

79. The report from the CRC was coauthored by Dr. Staten at Georgetown and Dr. Barron at Purdue University, so the main report carries identification of both universities. *Id.* In his presentation to the National Bankruptcy Review Commission, Dr. Staten identified his affiliation only with Purdue University. Michael Stanton, Repayment Capacity of Consumers in Bankruptcy, Testimony before the National Bankruptcy Review Commission (Jan. 23, 1997). In his February 1997 presentation to the Merchant's Research Council, Dr. Staten's work carried only the identification of Purdue University. Michael Staten, Do Consumers Take More Bankruptcy Relief Than They Need? (Feb. 1997). In his April 1997 testimony before the Judiciary Committee of the United States Senate, Dr. Staten identified Purdue University as his academic affiliation, and he noted that the CRC had "received a grant from VISA and MasterCard to conduct a study of consumer insolvency choices." *Repayment Capacity of Consumers Who Seek Bankruptcy Relief Before the Senate Judiciary Comm., Subcomm. on Admin. Oversight and the Courts*, 105th Cong. (Apr. 11, 1997) (statement of Michael Staten, Director, Credit Research Center, Krannert Graduate School of Management, Purdue University), 1997 WL 176667. He made the same academic affiliation and notation about funding in his December 17, 1996, testimony before the National Bankruptcy Review Commission. Michael Staten, A Profile of Debt, Income and Expenses of Consumers in Bankruptcy, Testimony before the National Bankruptcy Review Commission (Dec. 17, 1996). In none of the reports or testimony did he disclose, however, that VISA and MasterCard asserted a proprietary interest in the data he produced and apparently have reserved prior approval—or disapproval—of all releases of the data.

80. Georgetown Univ., *supra* note 76.

81. Dr. Staten explains:

> [A]ll articles and reports produced by CRC are reviewed prior to release by the CRC Advisory Council and Research Committee. On these committees sit a distinguished group of over a dozen academic researchers (volunteers, each of them), mostly from universities other than Georgetown. We have maintained this structure throughout our 27-year history because it subjects our research product to a higher standard. By agreeing to serve in an advisory capacity, the reputations of these individuals become intertwined, to some degree, with the Center's. Thus, they have an incentive to be sure that our methodology is scientifically sound and our conclusions are supported by the empirical evidence.

to Dr. Staten, other Center papers are published in academic journals, but the bankruptcy studies remain unpublished because "ability to pay" articles are "fairly uninteresting to economists, at least as a subject for journal articles."[82] Other researchers have not found economic journals so inhospitable.[83]

The mission statement also omits mention that the data reported in these

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Letter from Michael Staten to Elizabeth Warren (Nov. 6, 2001) (on file with author). Presumably this is the "external review" promised on the web site, although there is no further information about this review process or who conducts the review either on the web site or in the self-published bankruptcy papers.

82. *Id.*

83. Both empirical and theoretical articles about consumer bankruptcy have appeared in a number of economics journals. *See, e.g.*, Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50 (1991); William J. Boyes & Roger L. Faith, *Some Effects of the Bankruptcy Reform Act of 1978*, 29 J.L. & ECON. 139 (1986); Ian Domowitz & Robert L. Sartain, *Determinants of the Consumer Bankruptcy Decision*, 54 J. FIN. 403 (1999); Ian Domowitz & Thomas L. Eovaldi, *The Impact of the Bankruptcy Reform Act of 1978 on Consumer Bankruptcy*, 36 J.L. & ECON. 803 (1993); Charles Fishman, *Deconstructing the Debt-Head*, AM. DEMOGRAPHICS, Dec. 1998, at 60; Reint Gropp et al., *Personal Bankruptcy and Credit Supply and Demand*, 112 Q. J. ECON. 217 (1997); Jon P. Nelson, *Consumer Bankruptcy and Chapter Choice: State Panel Evidence*, 17 CONTEMP. ECON. POL'Y 552 (1999); Richard L. Peterson & Kiyomi Aoki, *Bankruptcy Filings Before and After Implementation of the Bankruptcy Reform Law*, 36 J. ECON. & BUS. 95 (1984); Samuel A. Rea, Jr., *Arm-Breaking, Consumer Credit and Personal Bankruptcy*, 22 ECON. INQUIRY 188 (1984); Lawrence Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419 (1984); Alden F. Shiers & Daniel P. Williamson, *Nonbusiness Bankruptcies and the Law: Some Empirical Results*, 21 J. CONSUMER AFF. 277 (1987); Michelle J. White, *Bankruptcy Costs and the New Bankruptcy Code*, 38 J. FIN. 477 (1983); Michelle J. White, *The Corporate Bankruptcy Decision*, 3 J. ECON. PERSP. 129 (1989); Michelle J. White, *Public Policy Toward Bankruptcy: Me-First and Other Priority Rules*, 11 BELL J. ECON. 550 (1980); Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205 (1998).

When he read a draft of this article, Dr. Staten complained that none of the articles listed above dealt precisely with the debtor's ability to repay, the issue he addressed in the self-published work. Letter from Michael Staten to Elizabeth Warren (Feb. 4, 2002) (on file with author). He is right that no economics journal has published precisely the data he presented. The quantitative data in the studies cited above cover a number of consumer bankruptcy topics, all loosely dealing with the overarching question of why people file for bankruptcy. Dr. Staten does not make clear why journal editors would be interested in all the related topics but remain uninterested in the central question that appears regularly in the national debates about bankruptcy: whether the debtors filing for bankruptcy could repay their debts. Nor is it clear why Dr. Staten's papers could not be published in law reviews. Marianne Culhane and Michaela White, for example, seem to have found a lively interest in their article about debtors' ability to repay. Marianne Culhane & Michaela White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means Testing Real Chapter 7 Debtors*, 7 ABI L. REV. 27, 50 (1999) (finding six debtors in a sample of 1,041 Chapter 7 cases who could repay their debt).

Dr. Staten also points out that three articles based upon CRC bankruptcy research have been published in economics journals: a forthcoming article on credit reporting, a 1999 article on the use of debit cards, and a 1995 article on credit life insurance. None of these articles seem to rely on any of the data in which MasterCard or VISA claim a proprietary interest.

studies are proprietary, belonging exclusively to the funders who evidently have a say in what data are published and what data remain secret.[84] Nor does the mission statement explain its funding. The *Wall Street Journal* summarized the source of the Center's operating budget: The Credit Research Center "is supported entirely by credit-card companies, banks, retailers and others in the credit industry. The [bankruptcy] study itself was produced with a $100,000 grant from Visa U.S.A. and MasterCard International Inc."[85] The Center receives a "mix of corporate and foundation grants" averaging $450,000 to $600,000 per year.[86] According to the *Wall Street Journal*, the corporate donations pay nearly all the expenses of the Center, including the salary of its director, Dr. Staten.[87] Dr. Staten explains that he "checked with the University's legal counsel" and that he, the Center, and Georgetown University were "under no legal obligation" to provide any additional information about the names of the corporations that funded the Center or the amounts of their contributions.[88]

Georgetown's relationship with the CRC is difficult to unravel. The CRC's director, Dr. Michael Staten, is identified as "Distinguished Professor, The McDonough School of Business, Georgetown University" in the *CRC Staff and Organizational Structure* page of Georgetown's web site. But the usual academic relationship bears a distinctive feature: The Georgetown web site explains that Dr. Staten "reports to a fourteen member governing board" of the CRC.[89] The fourteen member governing board is comprised of academics from five business schools and one economics department,[90] along with executives from Fleet Bank, MBNA (the country's largest credit card issuer), J.C. Penney Company, Citibank, the American Financial Services Association (the lobbying arm of the credit industry),[91]

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84. *See* GAO, REVIEW OF ABILITY TO PAY REPORTS, *supra* note 72, at 5. "The authors of the [Credit Research] Center report declined to provide us a copy of the automated database used for their analysis, citing their interest in maintaining its proprietary value." *Id.*

85. Cwiklik, *supra* note 50.

86. Letter from Michael Staten to Elizabeth Warren (Nov. 6, 2001) (on file with author).

87. Cwiklik, *supra* note 50.

88. Letter from Michael Staten to Elizabeth Warren (Nov. 6, 2001) (on file with author).

89. The Credit Research Center pages on the Georgetown University web site list the CRC Staff and Organizational Structure and name the CRC Governing Board. Georgetown Univ., Credit Research Center, *at* http://www.msb.georgetown.edu/prog/crc/ staff.html (last visited Feb. 3, 2002).

90. The affiliations of the academics are listed as Georgetown, Purdue, Auburn, Temple, Washington University, and the University of Michigan. *Id.*

91. The AFSA web site describes itself as the national trade association for providers of financial services to consumers and small businesses, most of whom make unsecured personal loans, automobile loans, and home equity loans and provide credit cards through specialized banks. Am. Fin. Servs. Ass'n, *Welcome*, *at* http://www. americanfinsvcs.com (last visited Feb. 4, 2002).

and Freddie Mac (the quasi-government home mortgage lending agency).[92] A representative from the Federal Reserve Bank of Chicago rounds out the list.[93] The Director of the Center has referred to his board as a "Who's Who of credit granters."[94]

I leave it to the reader to judge the effect, if any, of the donations the CRC received on the content of the research it produced. The CRC Director denies any bias in his work, noting that he can operate independently of those that pay for the studies.[95] The dean of the Georgetown business school is quoted as saying that it gives him "some comfort" that no single corporation funds the entire Center, but that its donations come instead from sixty or seventy different credit granters.[96] I make only a simple empirical observation: As far as I can tell, the Credit Research Center, funded by the credit industry, has never produced a single piece of work at odds with a credit industry position on any subject, while it has produced multiple papers that support the industry's call for more pro-creditor, anti-debtor legislation—always in the name of independent, academic research.[97]

The symbiotic relationship is mirrored in other academic institutions and other fields. For example, the University of Maine has a lobster institute funded by the seafood industry. It sponsors research showing that lobsters don't suffer when they are boiled.[98] A recent Carnegie Mellon University study funded by the National Science Foundation identified more than a thousand corporate-sponsored institutes in the science and technology area alone.[99]

Funding a center with annual donations and special contributions for specific research is very different from funding a center with an endowment that the university itself administers. While both may promote work in a certain field, it is the annual contribution that keeps researchers on a short leash. If work is produced that the funders find incompatible with their political and public relations goals, it is easy for the funders to withdraw any future support. This is a harsh reality of which any center or institute dependent on annual giving will be acutely aware.

My task here is not to engage in extensive investigative reporting about the relationship between industry-funded research centers and their

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92. Georgetown Univ., *supra* note 89.

93. *Id.*

94. Cwiklik, *supra* note 50.

95. *Id.*

96. *Id.*

97. As for the larger question of the effects of money on an academic institution, I recommend a short story. Julius Getman, *The Price of a Chair*, 46 J. LEGAL EDUC. 456 (1996). Getman traces the shift in attitudes on a faculty in a fictional southwestern university when it is confronted with a gift for a Benito Mussolini chair in historical studies. The path from outrage to acceptance to welcome is whimsical, but it is no less disturbing.

98. Cwiklik, *supra* note 50.

99. WESLEY COHEN ET AL., UNIVERSITY INDUSTRY RESEARCH CENTERS IN THE UNITED STATES (1994).

university hosts. Instead, the Credit Research Center serves as a case study, illustrating one aspect of how the market for data functions.

VII. MARKET PRESSURES ON INDEPENDENT RESEARCHERS

The market has certainly changed the availability of for-hire studies. It has the capacity to change independent work as well. Research that is undertaken, in part, to help inform public policy debates, is reshaped to compete with paid-for studies. I focus on four areas in which the presence of industry-sponsored data changes the nature of independent research, but I recognize that the list is not exhaustive. These areas—funding, the informal rules governing research methodology, the methods of dissemination of work, and the form of critique—are reshaping independent research work.

A. Changing Funding Expectations

Those who undertake research for a center funded by a single industry have both an assured source of money for their work and the time to concentrate on pure research. Their principal constraint, of course, explicit or implicit, is the connection between the results of their research and more funding in the future. By comparison, most academic empiricists are free to choose their own research topics and free to pursue that research wherever it may lead. Their constraints are time and money: time to do the research and money to pay for their data collection, research assistants, statistical analysis, and so on. With the advent of centers such as the Credit Research Center, the university logo now embraces both types of research approaches—and lends its imprimatur to both kinds of published works.

The market for data has made data production profitable—not only for Ernst & Young or independent research groups, but for universities as well. As universities get into the business of supplying data through research centers or other interest group-funded activities, the universities can have more programs, find employment for more graduate students, and see their names in the press in association with active, interesting, well-publicized research. The willingness of the industry to undertake sophisticated public relations campaigns to promote work affiliated with the university is an additional plus. It seems to be a no-lose proposition for the university. Such centers as the CRC are typically funded on so-called "soft money," so that if the market changes and the funding patrons lose interest, the university typically has not committed itself to permanent employment for the center's staff.[100] In short, the university can prosper so long as the field is attractive

100. *Id.* I wrote Dr. Staten twice to inquire whether the CRC was supported by soft-money contributions, and, more particularly, whether his salary or the salaries for his staff were dependent on soft-money contributions. E-mail from Elizabeth Warren to Dr. Michael Staten (Oct. 31, 2001, 20:46:14 EST) (on file with author); Letter from Elizabeth Warren to Dr. Michael Staten (Nov. 20, 2001) (on file with author). Although Dr. Staten explained the

to a special interest. If industry attention wanes, the center and its researchers can be cast off—unless, of course, they can find a different sponsor interested in research-for-hire.

The presence of such industry-funded research centers has two intertwined effects on institutions: it increases the expectations imposed on empirical researchers to find their own funding, and it reduces the commitment of the universities and government to fund independent research. The centers that flourish are those that are well-funded; schools terminate those programs that do not pay for themselves. The process of attracting and weeding out research institutes exerts pressure to re-frame the academic agenda. Instead of discussing how to fund the kind of research that needs to be done, and trying to determine what research that would be, some financially pressed institutions may phrase their research agendas more often in terms of "helping researchers find outside support for their work," "seed grants until other support can be found," "capitalizing on the public/private partnership," and, only as a last resort, "funding the research that cannot attract independent support." To work in an area where industry funding is available exacerbates the problem—why draw on the dwindling pool of general research dollars for such work when research dollars are available from the very industry to be studied?

The problem is further exacerbated by the federal government's cutback in research dollars for social science work. Unlike high theory, which can nearly always be done in an empty room, empirical work almost always involves out of pocket expenses. For empirical work that relies on generating original data, the expenses for such prosaic items as photocopying court records or distributing questionnaires can be substantial. Without money, it is not possible to undertake certain kinds of research. The pressure in the legal academy is all in one direction. As schools face tighter budgets and the government backs out of research support, an empiricist must become not only a hunter for data, but also a hunter for money. That leaves less time for the work itself, while also forcing the researcher to face the inevitable pressure on results. As various industries begin to realize the public relations value of helpful research results, they offer a ready but potentially dangerous solution.

One response to the credit industry-sponsored studies illustrates the problem. The Honorable Edith Jones of the Fifth Circuit Court of Appeals and a former Commissioner of the National Bankruptcy Review Commission joined with Todd Zywicki, a former Fifth Circuit law clerk and now a professor at George Mason University, to write a law review article

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Center's general funding levels, he answered no questions about soft money. *See* Letter from Michael Staten to Elizabeth Warren (Nov. 6, 2001) (on file with author); Letter from Michael Staten to Elizabeth Warren (Feb. 4, 2002) (on file with author). I remain unclear about the extent to which the CRC receives soft-money contributions and how many people at CRC would lose their jobs if the credit industry withdrew its support.

endorsing the proposed bankruptcy legislation.[101] They addressed criticism (my own and others') of the credit industry studies, adding their own special perspective:

> Beyond scoring rhetorical points, however, it is unclear what the purpose is of dwelling on the fact that these studies were funded by the credit card industry. Are the critics claiming that the data are fabricated or falsely reported? Or do they merely disagree with the conclusions drawn from the raw data? Assuming that the data are accurate, the conclusions are the result of simple, easily reproducible, calculations. If so, then the fact that the credit card industry funded the research is a *non sequitur*, repeatedly invoked only to obscure the actual results of the studies.[102]

Their point is factually correct: Anyone with enough money can replicate the credit industry studies to see if the researchers have fabricated the data or otherwise misbehaved. The trick, of course, is that no one else has the money or the full-time research staff to undertake this kind of checking. The fact that the original researchers will not make their data available drives the costs up further and makes it even more improbable that anyone will check the work, no matter how outrageous the claims might be.[103]

There are, of course, several important caveats to this analysis. Not every center is inherently bad, nor is every piece of empirical research done by an independent scholar inherently good. Generous donors have established centers in universities that help promote first-rate research and are beneficial both to the schools and to various research fields at large, and some centers have done an excellent job in educating the public about their work. Industry gifts that create endowments have produced first rate scholarship, usually where the gifts permit a university to administer a fund that is not dependent on future gifts that can be withheld if a donor is unhappy about the results. Moreover, supported research that passes peer-review and that makes the data available for re-analysis has contributed greatly to our understanding of a number of areas. I assume these statements need no support. Instead, I have focused on the part of the conversation that I think we sorely need to have—what happens to empirical research when there is an active market for data and universities accept annual support from an industry with a powerful stake in the outcome. Whether the problem is one of reality or perception, it remains a problem of integrity.

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101. Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 196.

102. *Id.*

103. See discussion about the refusal of the CRC to make its data available even to government researchers attempting to verify the accuracy of its claims *infra* note 84 and accompanying text.

B. Changing the Rules of Research

The rules of research are both formal and informal. Senator Richard Shelby introduced federal legislation that required that every piece of research supported by public funds be made publicly available.[104] The terms of our first National Science Foundation grant required that we release all our data. Even when it is not required by funding agencies, my coauthors and I make our data available, an offer that is consistent with standard academic practices.[105] Sharing data permits subsequent scholars to review our procedures and our decisions, to test the work for robustness, and to build on the work with subsequent research. It is, to be blunt, intellectually honest. Of course, it also takes time to put a data set in order for strangers to use and to answer questions and explain obscure references. It also opens a researcher to attack, justified or otherwise. By contrast, the Credit Research Center and Ernst & Young describe the data they produce as proprietary and belonging to VISA.[106] The data are therefore unavailable to anyone for any purpose, and a credit card company must approve all disclosures.

For Ernst & Young to describe their data as proprietary is a matter that

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104. *Before the Joint Hearing of the Rules Subcomm. on Tech. and the Gov't Reform Subcomm. on Energy Policy, Natural Res., and Regulatory Affairs*, 107th Cong. (May 24, 2001) (statement of Scott L. Holman, President and Chief Executive Officer, Bay Cast, Inc., on Behalf of the U.S. Chamber of Commerce), 2001 WL 577713.

> As part of the 1999 Omnibus Appropriations Act, new standards were imposed governing access to data generated by taxpayer-funded research on which regulations are based. Often referred to as the "Shelby amendment," the data access provision required federal regulatory agencies to provide public access to federally funded research data collected through grants and agreements with research universities, hospitals, and other non-profit organizations.

Id.

Whether the law was designed to assure access or to give large businesses another advantage in the data debates is a matter of some dispute. One commentator noted:

> Shelby's concern for privacy does not, it appears, apply to scientists. A few years ago he introduced a piece of legislation that would require all federally funded scientists to release their raw data to anyone who asked—if that data had been used to produce a scientific article or to develop a federal regulation. Oil, mining and waste management industries wanted access to data used for creating such things as clean air standards so their in-house scientists could re-evaluate—and presumably discredit—the regulations.
>
> Not surprisingly, scientists let out a collective howl. "Our data's ours," they said, or words to that effect. Supporters of the Shelby amendment countered that the data was gathered using public funds, so the public ought to have a right to look at it.

Andreas Frew, *Washington Diary*, NEW SCIENTIST, Mar. 31, 2001, at 51.

105. In accord with both our promises to our subjects and widely accepted research ethics, we do not make the names of the people we study available to outside researchers. Before making it available to anyone else, we blind the data so that names, social security numbers or other distinguishing features that would permit identification of an individual debtor have been removed. This practice is in keeping with protocols approved by our universities' policies on protection of human subjects.

106. GAO, FOUR REPORTS, *supra* note 68, at 5. The GAO noted that it was hampered in its analysis of the data reported by the credit industry because of industry analysts' consistent refusal to share their data, "citing VISA's proprietary interest in the data." *Id.*

should be highlighted whenever their data are used in public policy discussions. For the Credit Research Center to make such a claim for data that bear the name and imprimatur of a well-respected academic institution such as Georgetown changes the ground rules for everyone. If the Center, using its university affiliation, produces data literally owned by a credit card company, then the market signal that comes from university affiliation is rendered meaningless.

I draw an unhappy conclusion. Data, packaged and sold to a willing public under a university imprimatur, may or may not be reputable. For anyone who does independent academic research, who has little to trade in but her independence and reputation, the idea that the market for data has devalued the premier signal for independence and quality—university affiliation—is deeply discouraging.

C. Changing How Work Is Disseminated

For a study that has never been published in any academic journal or book, the conclusions of the Credit Research Center's study on bankruptcy have received staggering amounts of attention. References to the work have appeared in countless press releases and been made part of countless press packages; it has been discussed by a phalanx of lobbyists, public relations people, and, ultimately, senators and representatives.[107] Its principal author, Dr. Staten, has testified before Congress,[108] advised Congressional staffers, and spoken repeatedly to the media. The study's conclusions have appeared in the Congressional Record.[109] It is an expensive process to spread the word on research work, but an interested group has done just that with the CRC study.

A few years ago, a reporter called me for a comment on the bankruptcy bill. When I explained that I thought the bill was badly misdirected and cited empirical evidence about who used the bankruptcy system, the reporter became quite aggravated. Why, he demanded, had he not heard about this research? He had been working on this story for nearly a week, had interviewed more than a dozen people, and had read several papers and summaries. If I was right about the presence of other research, then why had he not uncovered it in his work? I was very tired when he called. It was already early evening, and I looked forward to two or three hours of preparation for the next morning's 8:30 a.m. class. I had already spent nearly half an hour trying to walk him through the statute, the proposed legislation, and the data when he exploded with this thinly veiled suggestion

107. *E.g.*, *supra* notes 41-50.

108. *E.g.*, *supra* note 79.

109. *E.g.*, 144 CONG. REC. E87 (daily ed. Feb. 4, 1998) (statement of Rep. Gekas) ("In 1997, Americans filed an all-time record of 1.33 million consumer bankruptcy petitions, which erased an estimated $40 billion in consumer debt. Those losses are passed on to all consumers, resulting in a hidden tax of $400 for every American household.").

that I was making all this up. With some heat, I asked him to think back on the people he had interviewed: Was it possible that every single person was paid $500 an hour just to talk with him? Was it possible that every piece of paper he held was produced by someone who was paid to produce it? Was it possible that a whole cadre of people held jobs to do nothing but make sure he got favorable research reports and to do nothing to help him find the wealth of data that would not support their sponsors' position? I took it as a modest victory that for several seconds he had nothing to say.

Not everyone who supported the bankruptcy bill was paid to talk to reporters. Nor is there reason to believe either that Dr. Staten or any academic was part of the multimillion dollar public relations campaign to support the bankruptcy bill. The point of this anecdote is that when there is a political debate, favorable data can be seized upon, repeated loudly and often, in a deliberate and concerted effort to drown out contradictory information. This makes both the academic research and the dissemination of such research far more difficult to accomplish. Many academic researchers are consumed by their labor-intensive research combined with the full-time duties of a teacher and institutional citizen; there is precious little time—and no resources—to spend beating the drum about what the data show and how they fit into the ongoing debates.

I am a person of no small enthusiasm for my work. Give me another hour in each day, and I'll probably spend eighty minutes working. Like most of you, I have more research ideas than I have time to execute them. But in the past four years, I probably have spent an average of about an hour a day, day in and day out, talking with reporters and government staffers. I have taken calls from reporters while I was on vacation in Alaska, while I was lying in bed with pneumonia, and while I was trying to bake a birthday cake. My dean would note that since my time with reporters takes place across week-ends, summers, and holidays, it adds up to considerably more minutes than I have spent in the classroom in that same time period.

I began this paper with the observation that those who care about influencing policy outcomes—rather than simply influencing other academics—should be attracted to empirical research. But the competition in an active market for research changes the influence such research can have. For research to make it into the mainstream of ideas it not only must be published; it now requires an advocate to promote it. I have never written a press release or sent my work unsolicited to reporters, but I recognize that it is becoming increasingly unlikely that academic studies that are not aggressively promoted will have much effect. The competition in the marketplace of ideas has created research by press release. A sophisticated marketer announces findings far and wide, and the press covers it, usually without looking at the original study.[110] For those without access or

110. Interestingly, the *New England Journal of Medicine* refuses to publish any research for which a press release has been issued prior to publication. This is one way in

inclination to such promotion, some work will not be heard.

This leaves a researcher in a spot. While we may snicker about some of our colleagues and their love for the limelight, self-promotion is, for many academics, not a congenial undertaking. At the same time, most academics do not want to sit in a cloister, comfortably astride good data, and not share it. The point is the same whether the work affects bankruptcy policy or anthrax vaccines. Researchers develop data because they want them to be useful, but to make them useful they must be heard. The market for data is changing the dissemination of scholarly information, exerting a strong push toward reporting by press release by threatening to cause any other data to be overlooked.

D. Changing the Form of Critique

In 1998, Congressman George Gekas issued a press release promoting his sponsorship of the pending bankruptcy bill and proclaiming its worth based on the fact that bankruptcy costs every American family $400.[111] Like a good citizen—and a serious researcher—I called his office to ask where this information had come from and to suggest that both the conclusion and the research on which it was based might not be entirely reliable. I even offered some additional data about the bankruptcy system and another way to approach the cost question. I spoke with the staffer in charge of bankruptcy issues, who promised to call me back with more information about the Congressman's source of information regarding the $400 fact. When a week passed with no call, I telephoned the Congressman's chief of staff. He also promised to check the facts and call back. I made follow up phone calls, but I am still waiting for someone to return my call. In the meantime, Congressman Gekas continues to cite the "fact" that bankruptcy costs every American family $400.[112] Remember the name and the story for

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which some discipline can be exerted over the reporting of research, and an academic gold standard—for example, publication in a prestigious peer-reviewed journal—can be maintained.

111. Press Release, Congressman George W. Gekas, Statement of Chairman George W. Gekas, Judiciary Subcommittee on Commercial and Administrative Law, Bankruptcy Reform Act of 1998 (Feb. 3, 1998) (on file with author).

> When irresponsible spenders who can afford to pay all or some of their debt declare bankruptcy, you and I get stuck with the bill. It's a $40 billion bill that we share this year, or $400 per household. I don't know about you but $400 is 5 weeks' worth of groceries or 20+ fill-ups at the gas pump to me. It has also been estimated that it takes 15 responsible borrowers to cover the cost of one bankruptcy of convenience.

Id.

112. In his April 23, 1998 press release, for example, Congressman Gekas warned that "[l]ast year, it was $40 billion that came out of our wallet" under the current bankruptcy laws. Press Release, Congressman George W. Gekas, Gekas: We Can Create the Fiscal Discipline That Will Ensure Our Families a Brighter Future (Apr. 23, 1998) (on file with author). In his letter to the editor to complain about a *Washington Post* editorial on bankruptcy,

just a minute.

Not everyone fell for the $400 fact. In the May 15, 2000, issue of *Time* magazine, Pulitzer-prize winning reporters Donald L. Barlett and James B. Steele published a twelve-page report about the pending bankruptcy legislation. Under the title, "Soaked by Congress," they focused on the powerful connection between campaign contributions from the consumer finance industry and Congressional support for the bankruptcy bill.[113] The piece cited a number of studies to "underscore why the notion that debtors in bankruptcy court are sitting on many billions of dollars that they could turn over to their creditors is a figment of the imagination of lenders and lawmakers."[114] The authors gave the credit industry and Congressional supporters their own say. Senator Robert Torricelli, a Senate co-sponsor, sang the industry's song: "I believe this is the equivalent of an invisible tax on the American family, estimated to cost each and every American family $400 a year."[115] Not to be outdone, Congressman Bill McCollum, another cosponsor, added "[b]ankruptcy will cost consumers more than $50 billion in 1998 alone. That translates into more than $550 per household in higher costs for goods, services and credit."[116] Barlett and Steele had their own take: "There is only one problem with all this rhetoric: it's not true."[117]

The $400 "fact" had never raised a flicker of a question in the mainstream media,[118] but when the Barlett and Steele piece appeared in *Time*, a firestorm of criticism erupted. Congressman Gekas was now shocked, *shocked* to discover *inaccuracies* in the bankruptcy debate. In a letter to *Time*, bill co-sponsors Congressman McCollum (quoted in the *Time* article as saying bankruptcy now cost every family $550) and Congressman Gekas charged that the article "contained severe misrepresentations."[119] Senators took to the floor of the Senate to denounce the article,[120] bringing others to their feet in support.[121] The American Bankruptcy Institute sponsored a spirited exchange about accuracy in the media—not over the "fact" that bankruptcy costs every American $400, but to provide a forum to critique the *Time* article.[122]

Congressman Gekas noted: "The estimated losses associated with bankruptcy filings cost the average American family more than $400 a year in higher costs, rates and fees." George Gekas, *Winners in Bankruptcy*, WASH. POST, Mar. 4, 2000, at A15.

113. Donald L. Barlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 64.

114. *Id.* at 70.

115. *Id.*

116. *Id.*

117. *Id.*

118. *E.g.*, *Lax Bankruptcy Laws*, *supra* note 44 ("Purdue University researchers found a third of debtors could pay some of their bills but don't."); Katharine Q. Seelye, *House To Vote Today on Legislation for Bankruptcy Overhaul*, N.Y. TIMES, June 10, 1998, at A18:

> The industry estimates that of the 1.37 million people who filed for bankruptcy last year, 15 percent to 25 percent had the means to pay their debts. It says that the debts of these dishonest people are passed on to consumers in the form of

Credit industry lobbyists put together a seven-page list of the "inaccuracies" in the Barlett and Steele report.[123] This would be noteworthy in itself, but it took on added importance when an excerpt of the lobbyists' list then appeared as the original work of Congressman Robert Menendez in a letter circulated on his official Congressional stationery to all members of the House and Senate.[124] Senators Charles Grassley and Joe Biden, cosponsors of the bill, also wrote a letter to all senators decrying the "bias and inaccuracies in the *Time Magazine* article" and reasserting that bankruptcy costs are passed on to others, although they forbore using a specific number.[125] Even the *National Review* got into the picture, with an

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> higher prices and higher interest rates that cost every American household about $400 a year.

Id.; Cwiklik, *supra* note 50.

119. George Gekas & Bill McCollum, *Changing Bankruptcy Laws*, TIME, June 12, 2000, at 10. The only letter *Time* published in support of that article was from an independent academic, Professor Robert Lawless. *Id.* at 12.

120. On the floor of the Senate, Senator Grassley denounced the *Time* article as "simply false." 146 CONG. REC. S5384 (daily ed. June 20, 2000) (statement of Sen. Grassley). He explains the article as the result of work by a "tiny handful of fringe radicals who oppose bankruptcy reform," and claims they "have waged a disinformation campaign worthy of a Soviet Commissar." *Id.* He was followed by Senator Biden, who explained that the article was "simply dead, flat, absolutely wrong." *Id.* at S5385. He continued his charge, "in virtually every significant claim and detail, the charges leveled against this reform legislation are not true. They are simply false; they are flat wrong; and they are easily and conclusively refuted by a quick look at the facts." *Id.*

121. Among those defending the *Time* article was Senator Kennedy ("The Time magazine article makes these points effectively by comparing the plight of two debtors . . . ."). 146 CONG. REC. S3966 (daily ed., May 16, 2000). Other supportive Senators were Senator Wellstone ("'Soaked by Congress' [does] an excellent job of getting the record straight."), *id.* at S3968; Senator Harkin ("When I read [the *Time* article], some memories started coming back to me of my days when I was a legal aid lawyer before coming to Congress."), *id.*; and Senator Feingold ("Barlett and Steele have done a masterful job . . . ."), *id.* at S3969.

122. The exchange on the American Bankruptcy Institute web site featured comments by Professor Todd Zywicki, followed by publication of several responses. Todd Zywicki, *The Problem with Using Bankruptcy as a Tool in the Campaign Finance Reform Crusade*, Cracking the Code (Am. Bankr. Inst.), May 22, 2000, *at* http://www.abiworld.org/newslet/00zywickitimecon.html. Diane Kerns, a Chapter 13 trustee, began her discussion, which follows Zywicki's comments, by noting the widespread acceptance of the $400 fact, but the accuracy—or duplicity—of the reported fact received no attention from the article's critic, Professor Zywicki, or most of the commentators. Dianne Kerns, *Its* [sic] *About Time: Campaign Finance Reform Provides a Stage for the Truth About Bankruptcy Reform*, Cracking the Code (Am. Bankr. Inst.), May 22, 2000, *at* http://www.abiworld.org/newslet/00kernstimepro.html.

123. The industry response circulated with no cover page, but it was passed on by House staffers as coming from the industry. Fax from David Lachmann, U.S. House of Representatives, Committee on the Judiciary, to Elizabeth Warren (June 16, 2000) (on file with author).

124. See Letter from Congressman Robert Menendez to "Dear Colleague" (May 24, 2000) (circulated to all members of the House of Representatives) (on file with author).

125. Letter from Senators Chuck Grassley and Joe Biden to "Dear Collegue" (July 12,

attack on Barlett and Steele citing the piece as "junk journalism."[126]

Did this mean that Congress and the media had suddenly found religion on the question of the accuracy of the data they used in public debates? Not quite. There was no discussion in any of the attacks on the *Time* story about the inaccuracy of the data used to support the bill. Senator Torricelli's claim of a $400 cost to all Americans and Congressman's McCollum's inflation of that "fact" to $550, both in the *Time* story, passed without comment. Long after the dust up over the article, some of the media and Congress continued to cite the "facts" about the cost of bankruptcy. As recently as January 2002, yet another news source carried a short piece on bankruptcy, including the "fact" that bankruptcy cost every American family $400.[127] In his push to get the pending bankruptcy legislation back on track in late February 2002, Wisconsin Congressman James Sensenbrenner cited a "1997 study" showing that losses attributable to bankruptcy filing "would exceed $44 billion" a year.[128]

All of this might be entertaining, or merely a cautionary tale for those who read the popular news, but an empirical researcher hears the tale with a different ear. There are two messages: data that have political support and a strong public relations campaign will be used over and over regardless of their accuracy, while data that do not support the prevailing view—good or bad—will be attacked.

2000).

126. Ramesh Ponnuru, Time*'s Terrible Two*, NAT'L REV., July 17, 2000, at 24 (citing Robert Samuelson).

127. Eric Gillin, *Events Conspire Against Bankruptcy Measure*, THESTREET.COM, Jan. 10, 2002, *at* 2002 WL 10629832; *see also* Carl Weiser, *Congress to Finalize Bankruptcy Reform*, GANNETT NEWS SERV., Sept. 5, 2001. At least the source of the "fact" is made clearer than in most earlier pieces:

> Every year, $44 billion in debts are wiped off the books, according to the Coalition for Responsible Bankruptcy Laws, which represents banks, credit card companies, retailers and other creditors. The average American household pays $400 each year in extra credit costs passed on to consumers, according to George Wallace, a lawyer who represents the coalition.

Id. A more critical quotation of the "fact" came from another article focusing on campaign contributions and lobbying. Bart Jansan, *MBNA Big Donor Behind Debtor Bill*, PORTLAND PRESS HERALD, July 22, 2001, at A1. "The banking industry estimates that, on average, families pay $400 to $550 a year in extra credit card interest and fees to offset losses that could be collected from consumers protected by bankruptcy. Consumer groups, however, contend that estimate is riddled with errors." *Id.*

Many papers now cite the source of the "fact" as within the industry, but without indicating that independent experts have shown that it is inaccurate. "Supporters of the legislation . . . . say bankruptcy abuse creates a hidden tax of about $400 a year on every American family through higher interest rates passed on by consumer credit businesses and other charges." Marcy Gordon, *House Passes Bankruptcy Bill*, ASSOCIATED PRESS, Mar. 2, 2001, 2001 WL 15176140.

128. F. James Sensenbrenner, Jr., Testimony before Credit Union National Association (Feb. 27, 2002), http://www.house.gov/judiciary/sensenbrenner022702.htm; *see also Sensenbrenner Tells Credit Union Group That Bankruptcy Reform is "Alive And Well"*, WHITE HOUSE BULL., Feb. 27, 2002.

The effects of such a market for data are not subtle. When we discuss various technical twists in our data, my coauthor, Dr. Sullivan, repeatedly demands that we turn square corners—spending far more time and far more of our limited resources to track down tiny anomalies or slight shifts in how we draw our sample or execute our data gathering. It is her stated goal to make our work absolutely unassailable, its statistical validity unquestioned: in short, that the data reflect fact, or as close to fact as fallible humans can make it. When I complain that no one else takes these tiny variations into account and that the statistical differences will be minuscule, Dr. Sullivan never relents. She reminds me that there are any number of people ready to pounce on every number we produce.

While I appreciate Dr. Sullivan's effort to keep our collective skirts clean (a metaphor that sweeps in Professor Westbrook as well), the reality is much less rational than she supposes. In their article supporting the credit industry proposals, Judge Jones and Professor Zywicki evidently felt that they could not make out their case for legislative change without dealing with the contradictory empirical data. Our data, carefully patrolled by Dr. Sullivan, and the data produced by other independent researchers were dismissed as "isolated anecdotes,"[129] "overwrought,"[130] "bizarre,"[131] "nonsense,"[132] "apocalyptic rhetoric,"[133] and "shallow empiricism."[134]

Judge Jones and Professor Zywicki use strong language to attack empirical work that does not support their conclusions. That may be within the fair range of academic dispute. But what is remarkable about their attack, however, is that they have not a single criticism of the research methods—not one quibble over how the studies were designed or how the samples were drawn or how the data were collected.[135] Nor is there a word of criticism about the analysis of the data. Instead, they attack the conclusions broadside, heaping invective on invective, expressing their strong disagreement with the outcome without engaging the data themselves. For example, they attack data that demonstrate a strong statistical association between medical problems and bankruptcy filings.[136] Instead of a specific methodological critique, however, they simply reject wholesale

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129. Jones & Zywicki, *supra* note 101, at 221.

130. *Id.* at 178.

131. *Id.* at 184.

132. *Id.* at 224.

133. *Id.* at 207.

134. *Id.* at 221.

135. Professor Margaret Howard, in her review of our book, *The Fragile Middle Class*, began her analysis of the ongoing bankruptcy debates with precisely this point: "What is striking [about the Jones and Zywicki article] is that *not one critical word* is said about the methodology or assumptions of the industry-funded studies." Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 444 (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE, *supra* note 70).

136. *See* Jones & Zywicki, *supra* note 101, at 242.

fourteen empirical studies of debtors over a thirty-three year period,[137] including a 1999 statistical analysis of 1,500 debtors showing that 45.6% of the families indicated they were filing bankruptcy in the aftermath of a serious medical problem.[138] Judge Jones and Professor Zywicki dismissed this work with a single line: "little more than hand waving and faculty lounge speculation, perhaps rooted in ideological biases but most definitely not in scientific evidence."[139] They concluded their attack with a pointed suggestion that future work "should proceed in an air of full honesty and not according to a highly-selective list of variables identified primarily on ideological or other nonscientific grounds."[140]

I've now been at the center of five major empirical projects. The description of a helicopter as 20,000 bolts flying in loose formation would aptly fit a major data gathering effort. There are hundreds of judgments, unexpected twists, and opportunities to make good faith errors. Every publication based on detailed quantitative data has that breathtaking moment when it is time to let go of the data and let the reports be published, set in stone and there to chastise the author forever if there are any errors. I understand that the search for perfection in data gathering is elusive.

I read empirical work with a deeply sympathetic eye, and I have been critical only when the errors are many and seem always to tilt in a single direction.[141] I also am willing to subject my own work to the critical eye of others. I am willing to question and—sometimes—to defend the hundreds of choices I have made. It is only through that process of analysis and re-analysis, critique and response that scholars refine their understanding of the subjects they study.

The line I am trying to draw is a fine one. The threat of criticism,

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137. The studies are summarized in Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates Over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 379 (2001). Jones and Zywicki fail to discuss, or even cite, any of the studies they so quickly dismiss.

138. *Id.* at 392.

139. Jones & Zywicki, *supra* note 101, at 248.

140. *Id.*

141. In the mid-1980s, my coauthors and I were very critical of the original Credit Research Center piece on bankruptcy precisely because it was, in our view, nothing more than advocacy disguised as neutral science.

> We are led to conclude that the Purdue Study is not a neutral study by an independent body that offers well reasoned assessments of the present debtor-creditor laws and speculations on the implications of change. The Purdue Study is an adversarial document. It argues a position, selectively mustering facts to support its conclusions and ignoring those that are unhelpful.

Sullivan, Warren & Westbrook, *Limiting Access*, *supra* note 14, at 1145.

We were sharp—perhaps harsh—in our criticism, but the reason was that the data were deeply flawed, not that the tone was partisan. The exchange continued, with a response from one of the CRC authors and a reply from us. A. Charlene Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1069; Sullivan, Warren & Westbrook, *Rejoinder*, *supra* note 14.

whether from academics or politicians, provides a healthy incentive to take extraordinary care with data. It should be embraced. Peer review is a somewhat porous process, and much silliness has been published even in peer-reviewed journals. Nonetheless such review remains indispensable in maintaining academic integrity. But dismissing years of careful work as merely "ideological" or perhaps even "dishonest," with no further analysis, is not about refining our understanding of the subjects we study. This kind of attack is political warfare in which data is merely one of many powerful weapons. Anyone deeply concerned about maintaining his or her reputation—or simply concerned about spending time on research rather than on self-defense—would be well advised to stay out of an area with such a well-developed market for data.[142]

VIII. FULL CIRCLE—THE DATA DON'T MATTER

A strong market for data produces industry-sponsored studies that create an anti-market that says all studies are useless. I return to Judge Jones and Professor Zywicki's law review article. As they endorsed the bankruptcy legislation, they grappled with conflicting empirical studies. Their criticism of the academic studies showed little restraint. By contrast, the credit industry studies, so roundly criticized by the CBO and GAO, come in for nary a word of criticism from the judge and the professor.[143]

Even so, Judge Jones and Professor Zywicki seem vaguely discomforted that they may not have made an entirely compelling case based on the data. To deal with this problem, they take another approach: "Whether the studies were done by creditor-funded academics and

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142. Examples abound, but I'll cite just one more: In 1999, when Dr. Sullivan and I documented a startling rise in the number of women filing for bankruptcy, Congressman Gekas sent an immediate demand for a copy of our raw data set. Notwithstanding the fact that we were both under other time deadlines, we took the time to assemble the data for him and shipped it to him, sending it within days of the request. We never heard from him again.

The request was not a terrible imposition, although it consumed some time and some money in a project that was unfunded, but it was the tone of the letter that made it a disconcerting way to share data. Congressman Gekas never used the data in any way—or even acknowledged its receipt—leaving me to wonder if the point of the inquiry was merely to harass rather than to continue a substantive inquiry about the families in bankruptcy.

143. They deflect the GAO study that discredits the industry reports and points out their substantial methodological flaws. Judge Jones and Professor Zywicki helpfully observe that when the GAO says the data cannot be taken as a reliable statement of the debtors' ability to repay, it might mean that the credit industry reports actually *understate* rather than *overstate* how much the debtors could pay. Jones & Zywicki, *supra* note 101, at 194. They dismiss the criticism of the Congressional Budget Office by claiming the work is that of the CBO researcher *personally*, not an official report of the CBO. *Id.* at 192. In the press to get the report to the National Bankruptcy Review Commission before the NBRC's October 1997, deadline, the CBO issued the report after an informal rather than a formal internal review process. *Id.* at 192-93. Evidently having scored that procedural blow, Judge Jones and Professor Zywicki saw no need to deal with the substantive concerns raised by any of the government reports or any of the academic criticisms of the study.

accounting firms or by ideologically motivated academics is ultimately irrelevant or mutually canceling."[144]

It seems that in the new marketplace for empirical data, independent academic work not only competes with industry-funded work, it also gets thrown out along with it when the two are in conflict. All data are created equal. Judge Jones and Professor Zywicki feel no responsibility to weigh the data or to examine the research methods, the study design, or the statistical reports. Instead, they conclude that conflicting studies are simply "mutually canceling." It seems that in an active market for data, all data are equally valuable/valueless and can be discarded.

The Jones-Zywicki view resonates through the academy as well. University of Chicago Professor Douglas Baird has argued that different theoretical frames of reference will never be resolved by empirical research because the adherents are simply asking different questions. Professor Baird explains:

> First-rate empirical work has, of course, been done. It has also changed the way some have thought about bankruptcy law. Nevertheless, it would be a mistake to think that empirical studies will do much to end the current debates . . . . The messy world of bankruptcy cannot yield empirical data powerful enough to change minds to the extent that they embrace a different set of axioms.[145]

Professor Baird makes a telling point about respected academics who, rather than being captured by an interest group, are captured by a paradigm. In discussing debates among bankruptcy scholars, he argues that empiricists are unlikely to produce evidence so compelling that people acting in good faith would learn enough to modify their theoretical positions. Baird relies on Bayesian decision-making theory to make the point that even those who do not close their eyes to data are unlikely to be persuaded by data that do not fit their initial paradigm. If he describes reality, then he describes a world in which academics are far more wedded to theory than to evidence—even if evidence were available. The origin of their prejudice may be benign, but the message is not unlike the one overtly adopted by Judge Jones and Professor Zywicki: don't bother me with facts.

The anti-data movement picks up more steam when critics point out the ambiguity that always lies within empirical data. A recent example cropped up in a commentary by two government researchers who work in the bankruptcy field.[146] Professor Robert Lawless had developed a macro-statistical paper showing the strong correlation between consumer debt and

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144. *Id.* at 196.

145. Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 573-74, 586 (1998) (footnotes omitted).

146. Gordon Bermant & Ed Flynn, *Explaining the (Complex) Causes of Consumer Bankruptcy*, 2001 AM. BANKR. L.J. 20.

bankruptcy, rebutting a paper purporting to show otherwise.[147] In the course of their commentary on his work, government researchers Ed Flynn and Gordon Bermant denigrated Professor Lawless's study by saying it does not prove everything about the reasons people file for bankruptcy. Instead, Flynn and Berman describe an "impenetrable network of interconnected factors that are plausible causes of (or reasons for) a consumer's decision to file."[148] Using the example of whether divorce causes bankruptcy, they argue that data "are always subject to a different interpretation that is not refutable by the numbers themselves."[149] That is surely an accurate statement. But they then jump from the fact of indeterminancy, to radical indeterminacy: "studies about the causes of bankruptcy provide ambiguous or insufficient guidance for answering bankruptcy policy questions."[150] Because we do not know everything, we know nothing. Data are meaningless; according to Flynn and Bermant they are not helpful even for "guidance" in answering policy questions. Flynn and Bermant also seem to suggest that good studies are as useless as bad ones, since they draw no distinction among them. If that is so, then we might add two more names to the no-data-needed column.

The danger that policy debates and the marketplace for ideas are being tainted by seemingly independent work that is in fact industry-sponsored advocacy is a growing concern. A new book by Sheldon Rampton and John Stauber, *Trust Us, We're Experts: How Industry Manipulates Science and Gambles with Your Future*, wrestles with various forms of suspect data, including a special mention of the Credit Research Center.[151] A second book published this year, *It Ain't Necessarily So: How Media Make and Unmake the Scientific Picture of Reality*,[152] focuses on data from the hard sciences, offering a sharp rebuke to the popular media for their inaccurate reporting.

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147. Robert M. Lawless, The Relationship Between Nonbusiness Bankruptcy Filings and Various Basic Measures of Consumer Debt (web-based paper), *at* http://www.law.missouri.edu/lawless/bus_bkr/filings.htm (last updated July 18, 2001). While the point that more debt is linked to more bankruptcy might seem obvious to someone not steeped in the bankruptcy debates, in fact Professor Lawless was writing in response to a posting on the American Bankruptcy Institute web site that seemed to deny such a connection. The political significance of the point, of course, is part of what continues to drive the debate. If expanded consumer lending is a principal cause for an increase in the number of bankruptcy filings, then it is more difficult to sustain the argument that bankruptcy filings are on the rise because consumers are exploiting loopholes in the bankruptcy laws—loopholes that need to be closed with new legislation.

148. Bermant & Flynn, *supra* note 145, at 21.

149. *Id.*

150. *Id.* I am grateful to Jay Westbrook for pointing out this article and making clear the implications of Bermant and Flynn's statements. I had circled the airport when I read their article, but Westbrook landed the plane.

151. SHELDON RAMPTON & JOHN STAUBER, TRUST US, WE'RE EXPERTS: HOW INDUSTRY MANIPULATES SCIENCE AND GAMBLES WITH YOUR FUTURE 14 (2001).

152. DAVID MURRAY ET AL., IT AIN'T NECESSARILY SO: HOW MEDIA MAKE AND UNMAKE THE SCIENTIFIC PICTURE OF REALITY (2001).

Both books sound a loud warning: In the world of so-called academic studies, Reader, beware! Perhaps these books will encourage a better-educated public to read and to listen with greater sophistication; perhaps the books will promote media reports that feature more clarity and less hype about empirical research. The authors are certainly right to point out industry efforts at manipulation through data. Nonetheless, I fear that such books help cultivate a public attitude that gives new respectability to the old canard about liars, damned liars, and statistics. If much of what passes for research is tainted, then ignore it all. Policymaking in its most desiccated form, devoid of hard information, is a safer alternative.

An active market for data has produced an ironic response: the framework for ignoring all data. From multiple perspectives—whether as a committed advocate, a scholar who prefers a different theoretical paradigm, a researcher who recognizes that data often retain a degree of ambiguity, or simply a once-too-trusting-public—all data can be dismissed with ease. The market creates an anti-market.

IX. CONCLUSION

The world is not as Peter Schuck described it in 1989. There exists an eager, even aggressive, audience for empirical research and an active market in such research. That market has altered the nature of the work. Data have become more political and therefore at once more in demand and less important. The data, in the words of Judge Jones and Professor Zywicki, are "mutually canceling."[153] I disagree. Good studies and bad studies are not "mutually canceling." Regardless of what some advocates may claim, there are some objective facts and, hence, some objective truths. Whether public policy reflects that reality is not a choice left to those in the academy, but producing and protecting the research itself is our choice and our moral obligation.

Despite all the reasons not to do empirical research, such research persists and—perhaps like tough weeds—seems to be multiplying. Also like weeds, these independent academic studies have been changed by the adverse conditions under which they must grow. In any case, there is evidence that academics will continue to supply at least some of the raw materials. But the gap between developing the studies and influencing public policy is wider than ever. Professor Schuck suggested the first step: empiricists need to produce data. But the second step—a sort of assumed "if we build it they will come"—becomes increasingly doubtful in a market dominated by industry interests.[154]

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153. Jones & Zywicki, *supra* note 101, at 196.

154. Professor James J. White, whom I admire greatly, has argued a half dozen reasons why empirical work is unlikely to influence legislatures. *See, e.g.*, White, *supra* note 2. Among the reasons is that even if one does a very careful empirical analysis, in a legislative dispute, a vivid anecdote can render the systematic empirical work useless. *Id.* at 2778. He

Everyone in this room should care about the developments I have described. Your Congress, your state legislature, your city council, your fellow citizens, and you will be affected by data and pseudo-data in all manner of public policy debates. When universities lend their names to the production of proprietary data owned by its industry sponsors, they sell not only their good names, but your good name as well. They cheapen what each of us, empiricist and non-empiricist alike, has to offer in any policy discussion.

When you fail to draw careful distinctions among data, when you glance casually, instead of carefully, at empirical work, when you fail to respond to pseudo-research, you further destroy the foundation of good social science. If bad studies and good studies pass with equal inattention within the academy, then Gresham's law will kick in and only industry-friendly data will survive. The people in this room are the vanguard in policing the market for data.

The market for data threatens the role that social science research can play in policymaking. When data become a commodity—purchased, packaged, and sold to a willing public under a university imprimatur by those who profit from its distribution—then empirical work becomes little more than cheap ad copy. When that happens, the value of every kind of research academics do declines sharply. Like it or not, our collective worth is on the line.

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also claims that skepticism and politics will always make an unwelcome home for empirical work. *Id.* at 2777. I am heartened to see his strongly stated concerns over the role empirical data are playing in policymaking.