

# The Façade of Gender Neutrality: Why Feminists Should be Talking About Bankruptcy

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Women's issues are most often associated with advocacy for women's autonomy. It was not until the late nineteenth century that coverture was abolished in this country and women were free to enter contracts without their husbands. In the early twentieth century, suffragettes fought for the women's right to vote and second wave feminists in the 1960s rallied around the Equal Rights Amendment. Today, women's rights activism is commonly associated with issues such as reproductive freedom, equal pay, and domestic violence. In 2001, then-professor Elizabeth Warren made the argument that Bankruptcy is an equally important issue for feminists in the United States.

## I. What makes bankruptcy a women's issue anyways?

Since at least the 1980s, single women filers have grossly outnumbered male filers.<sup>1</sup> In recent years, the gender gap has been closing<sup>2</sup> but that does not erase the millions of women filers who are living with the effects of past bankruptcies. This means that women in the United States are historically more likely than men to live with unmanageable debt, hire an attorney (usually for thousands of dollars), and live in bankruptcy for up to five years. These national trends are reflected in the clientele represented pro bono by the Massachusetts Debt Relief Foundation. Clients eligible for representation by MDRF are Massachusetts residents who do not own real property, have low asset values and live within 150% of the poverty line. Out of 346 Massachusetts residents represented by MDRF from 2011-2020, 71% were women and 29% were men. Of the 245 women represented, 95% were single filers and of the 101 men represented, 86% were single filers.

Women are disproportionately affected by debt for a variety of reasons. Patriarchy, embedded in our society, subordinates women on all fronts including financial wellbeing. On average, women make lower wages than men, are more often single heads of households, bear more child and healthcare burdens and are considered a greater risk to lenders.<sup>3</sup> Further, women were disproportionately targeted for subprime mortgages in 2008, thus as a sex, lost the most total wealth during the Great Recession.<sup>4</sup> Beyond the financial dimensions of debt and

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<sup>1</sup> Warren, Elizabeth. "What Is A Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics." SSRN Electronic Journal 25 (2002) at 29. Citing the Consumer Bankruptcy Project I; III, 1981; 2001.

<sup>2</sup> Linfield, Leslie E. "2010 Annual Consumer Bankruptcy Demographics Report." Institute for Financial Literacy, 2011, 8. <https://ssrn.com/abstract=1925006>.

<sup>3</sup>Coco, Linda. "Visible Women: Locating Women in Financial Failure, Bankruptcy Law, and Bankruptcy Reform." Charleston Law Review 8, no. 191 (2014) at 194.

<sup>4</sup> *Ibid*

bankruptcy, there is unrelenting social stigma<sup>5</sup> which has been found to have great effect on the Debtor's social and mental health.<sup>6</sup> 100% of MDRF clients surveyed cited stress and harm to health as the most harmful consequence of living with debt. One elderly female client, who filed alone, said this about how her debt made her feel,

[h]ealth issues & loss of my own living space were demoralizing; fear of being sued with no resources was extremely stressful; the mental stress of being in an abyss with no way out and the social shame/stigma. . .

This stress and stigma stems from the idea that debt and bankruptcy are moral failures and popular culture depicts indebted women in particular as careless and irresponsible shoppers whose out-of-control consumption has gotten them in trouble. In reality, women, especially single women, are not filing bankruptcy because they can't stop buying designer shoes, but because they are facing real financial stress stemming from job loss, divorce, medical bills and expenses related to their children.<sup>7</sup> All of these factors make a convincing case for women's rights activists to add debt and bankruptcy to their list of concerns because women who are healthier and more financially stable are more likely to break away from their subordinate status and break down patriarchal barriers that stand in their way.

## II. Single Women and Bankruptcy

Single women are uniquely predisposed to finding themselves in contact with bankruptcy courts. As discussed above, women are most likely to suffer from extreme indebtedness and seek to discharge debts in a Chapter 7 or enter a Chapter 13 payment plan. What's more, women are more likely than men to be named as support creditors who are owed child support or alimony in filings by their ex-partners.<sup>8</sup> The issue of support creditors most often brings women into the center of bankruptcy discussion. The bankruptcy code does not allow for discharge of domestic support payments,<sup>9</sup> meaning the beneficiaries of child support or alimony are owed the entire sum of the payments, regardless of their ex-partner's bankruptcy<sup>10</sup>. From 2011-2020 MDRF has represented 21 debtors with child support arrears, 100% of these clients were women. These clients were owed as little as \$97 and as much as \$77,396 in child support arrears from their ex-partners. The financial status of a woman whose ex-partner files for bankruptcy can be enhanced

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<sup>5</sup> Addo, Fenaba R. "Seeking Relief: Bankruptcy and Health Outcomes of Adult Women." *SSM Population Health* 3 (2017) at 327.

<sup>6</sup> *Ibid.* at 331.

<sup>7</sup> Warren, Elizabeth. "What Is A Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics." *SSRN Electronic Journal* 25 (2002) at 46.

<sup>8</sup> Kalsem, Kristin Brandser. "Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters." *Brooklyn Law Review* 71, no. 1181 (2006): 1203.

<sup>9</sup> 11 USC § 523(a)(5).

<sup>10</sup> 11 USC § 523(a)(5).

because her financial stability might be connected to that of her ex-partner.<sup>11</sup> While this can be helpful to the individual woman, it only reinforces the traditional patriarchal notion that individual women and children's stability is tied to the support and protection of the male. This protectionist ideal harkens back to notions of coverture which was accepted as a means to keep women subordinate and reliant on men in the nineteenth century.<sup>12</sup> By keeping the focus on the individual woman and the "deadbeat dad" who had been dodging child support and alimony payments, we distract ourselves from the larger societal issues that lead a family to implode and why a woman is more likely to experience poverty after divorce without continued support from her ex-partner.

### III. Can women use the bankruptcy code to help themselves?

While looking at the bankruptcy code through a critical feminist lens brings to light many flaws, women can use a bankruptcy as a tool to overcome financial burdens. The bankruptcy code's automatic stay stops collections, enforcement of liens and even foreclosure of the debtor's residence as soon as the case is filed.<sup>13</sup> A successful Chapter 7 case can discharge tens of thousands of dollars of consumer debt in a matter of months. The elderly MDRF client quoted above discharged \$58,886.74 of consumer debt through a Chapter 7 in under six months. This client had been living with debt for 19 years and she reported that a bankruptcy helped stabilize her situation and "achieve relief and peace of mind."

Studies of middle-class heterosexual married couples have shown that severe indebtedness preceding a bankruptcy is a contributing factor to marital dissatisfaction, and that this dissatisfaction is felt more extremely by women.<sup>14</sup> However, for couples who remain married, the relief of a bankruptcy often increases marital satisfaction<sup>15</sup> thus increasing the happiness of women. This gendered difference in marital satisfaction before bankruptcy can be explained by the fact that women are twice as likely to take on bill paying responsibilities thus are the ones fielding calls from collectors or picking and choosing which bills to pay.<sup>16</sup> Women taking on these responsibilities suggests that "the experience of financial distress and bankruptcy is itself gendered...[women] are more likely to suffer from the experience."<sup>17</sup> As soon as a bankruptcy is filed, the collections notices and calls stop and the Debtor(s) make a plan to pay or discharge their debt thus eliminating much of the stress triggers associated with debt.<sup>18</sup>

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<sup>11</sup> Warren, Elizabeth. "What Is A Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics." SSRN Electronic Journal 25 (2002) at 34.

<sup>12</sup> Kalsem, Kristin Brandser. "Bankruptcy Reform and the Financial Well-Being of Women:: How Intersectionality Matters in Money Matters." Brooklyn Law Review 71, no. 1181 (2006) at 1203., quoting Professor Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex," 1989 U. CHI. LEGAL F. 139 at 155.

<sup>13</sup> 11 USC § 362(a)

<sup>14</sup> Porter, Katherine. *Broke How Debt Bankrupts the Middle Class*. Stanford, CA: Stanford University Press, 2012. at 150-151

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid. at 139*

<sup>17</sup> *Ibid. at 151*

<sup>18</sup> *Ibid. at 152*

#### IV. Why is bankruptcy missing from conventional conversations about women's rights?

Warren postulates that bankruptcy is not a conventional women's issue because bankruptcy law is complex and hard to distill into a sound bite,<sup>19</sup> unlike the familiar "My Body, My Choice" rallying cry of reproductive rights activists. Further, women's resources are stretched thin across a myriad of issues, leaving relatively little power to match the lobbying efforts of the credit industry whenever bankruptcy reform is on the table.<sup>20</sup> Perhaps the biggest reason that bankruptcy is not associated with women is that while discussions of finance are presented as facially gender neutral, in reality they are associated with maleness.<sup>21</sup> Simply put, women lack visibility in discussions surrounding bankruptcy. The government tracks certain statistics about debtors in all chapters of bankruptcy<sup>22</sup> however, none of this data is gender-driven, "[t]his information is not part of our nation's discourse about bankruptcy — or our discourse about women"<sup>23</sup> says Warren. Specific statistics are tracked by the government<sup>24</sup> and while these statistics are useful, they do not tell us enough about the folks who find themselves making the decision to file bankruptcy. Statistics related to gender, age, race and familial status would be helpful in shaping discourse about bankruptcy and relevant to bankruptcy reform and general economic equity.

*The Massachusetts Debt Relief Foundation is a 501(c)(3) non-profit law firm that serves residents in all Massachusetts counties. MDRF attorneys offer free comprehensive legal advice on debt matters to any Massachusetts resident as well as pro bono legal representation in Chapter 7 Bankruptcy to low-income residents in accordance with their eligibility requirements. MDRF has helped discharge nearly \$11.5 million of consumer debt since 2011. Bailey Bickford is currently a 2L law student at Northeastern*

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<sup>19</sup> Warren, Elizabeth. "What Is A Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics." SSRN Electronic Journal 25 (2002) at 43

<sup>20</sup> *Ibid.* at 44-45

<sup>21</sup> *Ibid.* at 52

<sup>22</sup> 28 USC § 159(a)

<sup>23</sup> *Ibid.* at 49.

<sup>24</sup> 11 USC § 159(c)(3) mandates tracking of (1) figures related to debtors' assets and liabilities; (2) debtors' income and expenses; (3) the aggregate of debt discharged; (4) figures related to the period of time between date of filing and closing; (5) reaffirmations; (6) dismissals for failure to make payments; (7) repeat filers; and (8) misconduct of creditors and/or attorneys.