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Race Matters in Bankruptcy

A. Mechele Dickerson

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Race Matters in Bankruptcy

A. Mechele Dickerson*

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I. Introduction

Bankruptcy laws are not designed to redress racial wrongs. Indeed, individuals were entitled to debt relief long before this country enacted laws designed to provide relief from racial discrimination. Because bankruptcy laws provide a complex set of remedies to financially distressed individuals and appear to be race neutral, it is not surprising that they have never been examined through a racial lens even though blacks and Hispanics appear more likely to file for bankruptcy than whites.¹ A critical examination of bankruptcy laws suggests that, in designing the type of relief to make available to potential debtors, Congress either consciously or unconsciously exhibited a bias in favor of a specific demographic profile.² Specifically, to benefit the most from bankruptcy laws, the "Ideal Debtor" should be a married, employed homeowner who (1) is the beneficiary of a spendthrift trust or has a large employer-provided retirement account; (2) has high, but reasonable, living expenses; (3) provides financial support only to legal dependents; and (4) has little (or no) student loan, alimony, or child support debt. Because statistical data suggest that white people are more likely to fit the Ideal Debtor profile, race matters in bankruptcy.

Part I of this Article discusses the goals and structure of bankruptcy relief and explains that debtors generally have the right either to discharge some debts, repay few debts, and keep certain specified property in a Chapter 7 proceeding, or to discharge more debts, repay some debts, and keep considerably more property in a Chapter 13 proceeding. By permitting debtors to keep tangible property, but not income, the federal Bankruptcy Code (the "Code")³ systematically favors debtors with wealth. Part II of the Article

1. See TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 234 (2000) (showing a greater percentage of minority homeowners in bankruptcy in 1999).

2. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 19–20 (1992) (commenting that racism "goes beyond prejudice and discrimination, and even transcends bigotry, largely because it arises from outlooks and assumptions of which we are largely unaware"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (suggesting that "[t]o the extent that [a] cultural belief system (influenced by race) has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.").

3. 11 U.S.C. §§ 101–1330 (2000).

presents the demographic features of the individual most likely to benefit from a bankruptcy discharge, that is, the Ideal Debtor, contrasts those characteristics with the demographics of potential minority debtors, and concludes that the Ideal Debtor is likely to be white. Part III argues that, given the Code's existing bias in favor of white debtors, Congress should refrain from enacting any legislative proposal that exacerbates the disparity between the type of relief a typical minority debtor and the Ideal (white) Debtor likely receives in bankruptcy, that is, the "benefits gap." This Part concludes by urging Congress to revise the Code to remove racially-biased provisions (like those that favor individuals with wealth and favor homeowners over renters) and urges courts to interpret vague terms in the Code in a pluralistic fashion that helps close (not widen) the benefits gap.

II. Bankruptcy Relief

A. Goals

Bankruptcy proceedings are designed to give poor but honest debtors a fresh financial start and to ensure that creditors are treated fairly in an orderly debt resolution proceeding.⁴ Financially-strapped people who seek bankruptcy relief have two main options and, unless there are allegations of fraud or abuse, can largely choose which option they prefer. The quicker and simpler option is a Chapter 7 liquidation.⁵ Chapter 7 debtors discharge most debts but relinquish all assets except property they are allowed to exempt (that is, keep) from creditors.⁶ The second option, available for individuals with stable and

4. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (noting that "policies of obtaining a maximum and equitable distribution for creditors and ensuring a 'fresh start' for individual debtors . . . are at the core of federal bankruptcy law"); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'") quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915)).

5. 11 U.S.C. §§ 706-728 (2000).

6. Chapter 7 is an administratively simpler proceeding because debtors are not required to attempt debt repayment and, thus, receive a discharge once the case is over. See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 422-26 (4th ed. 2001) (discussing Chapter 7 and Chapter 13 options). Principally for policy reasons, Congress made some debts—including student loans, alimony and child support, debts based on fraudulent acts, debts related to drunk driving, and certain taxes—nondischargeable. 11 U.S.C. § 523(a) (2000). Debtors can exempt the property listed in the exemption provisions contained in the Code unless they reside in a state that denies them this option and, instead, requires them

regular income, is to restructure and then attempt to repay at least some debts over a three to five year period in a Chapter 13 debt adjustment proceeding.⁷ Because Chapter 13 debtors repay their debts from future income, they are not required to liquidate their assets. For this reason, debtors typically choose Chapter 13 over Chapter 7 in order to keep homes, cars, and other nonexempt assets.⁸

Chapter 13 debtors are not, however, required to repay all their debts. Instead, they must devote all their "disposable income" to making payments pursuant to their Chapter 13 plan.⁹ Disposable income is defined as the debtor's income that is not "reasonably necessary" to pay for maintenance or support of the debtor or his dependents.¹⁰ The Code does not define the word "dependent" and courts have reached conflicting results when asked to decide whether the term requires a legal or familial relationship. For example, some courts have concluded that a dependent includes anyone who reasonably relies on the Chapter 13 debtor for support and for whom the debtor has reason to and does support financially.¹¹ Courts adopting this broad view have permitted debtors to exclude expenses they incurred to support adult children, parents, or grandchildren from disposable income.¹² Other courts have

to exempt property under applicable state law. 11 U.S.C. § 522(b)(1), (d) (2000).

7. 11 U.S.C. §§ 1301–1330 (2000). An individual can file for relief under Chapter 12 if he is a family farmer with regular income or under Chapter 11 if his debts exceed certain amounts provided in the Code. Otherwise, he must file for relief under either Chapter 7 or 13. 11 U.S.C. § 109 (2000).

8. See Raisa Bahchieva, Susan Wachter & Elizabeth Warren, *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership* (forthcoming 2005) (manuscript at 23, on file with the Washington and Lee Law Review) (explaining that homeowners disproportionately choose Chapter 13 because Chapter 7 does not protect home equity); see also WARREN & WESTBROOK, *supra* note 6, at 423–26 (discussing Chapter 7 and Chapter 13 options).

9. 11 U.S.C. § 1325(b)(1)(B) (2000).

10. *Id.* § 1325(b)(2).

11. *Sequeira v. Sallie Mae Servicing Corp.* (*In re Sequeria*), 278 B.R. 861, 867 (Bankr. D. Or. 2001); *Leslie Womack Real Estate, Inc. v. Dunbar* (*In re Dunbar*), 99 B.R. 320, 324 (Bankr. M.D. La. 1989).

12. See *In re Gonzales*, 297 B.R. 143, 150–51 (Bankr. D.N.M. 2003) (explaining that dependents can consist of more than the "nuclear" family). The opinion stated:

While Ward and June Cleaver and their two sons Wally and Beaver may represent for many people the "typical" or "normal" family, tens of millions (or more) of the population of this country live in family or household units that include one or more adult children and/or their children, (great) grandparents and (great) grandchildren, uncles and aunts, nieces and nephews, and cousins of various degrees of relationship, to say nothing of "blended" families (children from their parents' previous marriages brought together into one family), and families that foster a child or take in a neighbor child escaping a bad situation at home. Indeed, for much of the history of this country, the extended family was more common and

adopted a more restrictive view and have refused to exclude expenses for nonlegal dependents—even if the individuals are actually dependent on the debtor for support—because of a reluctance to make creditors subsidize the debtor's lifestyle choice to support parents, adult children, grandchildren, or domestic partners (and their children).¹³ Ironically, though some courts refuse to let debtors give financial support to their nonlegal dependents, debtors have a statutory right to give money to charitable institutions and to exclude those donations from disposable income.¹⁴ Once Chapter 13 debtors devote their disposable income (however calculated) to making plan payments, they are then relieved from repaying their remaining dischargeable debts.¹⁵

Even if a Chapter 7 debtor theoretically has income that could be used to repay her debts in a Chapter 13 proceeding, she is not required to do so. Courts can, however, dismiss Chapter 7 cases if they conclude that granting bankruptcy relief would be a "substantial abuse" of the Code.¹⁶ Because of the concern that allowing Chapter 7 debtors with "means" to avoid repaying their debts is abusive, some courts dismiss Chapter 7 cases if they find that the

traditional than the "nuclear" family.

Id.; see also *In re Bauer*, 309 B.R. 47, 51–52 (Bankr. D. Idaho 2004) (accepting a mother as a dependent); *In re Gonzales*, 157 B.R. at 609–11 (stating that adult children can be dependents); *In re Smith*, 269 B.R. 686, 689–90 (Bankr. W.D. Mo. 2001) (accepting adult daughter as dependent); *In re Tefertiller*, 104 B.R. 513, 515 n.1 (Bankr. N.D. Ga. 1989) (allowing an adult daughter to be claimed as a dependent); *In re Wegner*, 91 B.R. 854, 859 (Bankr. D. Minn. 1988) (deciding to allow adult children and grandchildren as dependents); *In re Tracey*, 66 B.R. 63, 67 (Bankr. D. Md. 1986) (allowing the mother to be considered a dependent).

13. See *Meler v. United States Tr.* (*In re Meler*), 295 B.R. 625, 629–31 (D. Ariz. 2003) (forbidding the defendant from counting his live-in girlfriend and her children as dependents); *In re Beharry*, 264 B.R. 398, 404 (Bankr. W.D. Pa. 2001) (declining to accept second wife's minor child as dependent); *In re Cox*, 249 B.R. 29, 32 (Bankr. N.D. Fla. 2000) (excluding mother, fiancé, and fiancé's children as dependents); *In re Haddad*, 246 B.R. 27, 37 (Bankr. S.D.N.Y. 2000) (denying the mother as a dependent); *In re Mastromarino*, 197 B.R. 171, 178–79 (Bankr. D. Me. 1996) (excluding domestic partner and her four children as dependents); *In re Richmond*, 144 B.R. 539, 542 (Bankr. W.D. Okla. 1992) (excluding grandchildren as dependents); *In re Jones*, 55 B.R. 462, 467 (Bankr. D. Minn. 1985) (refusing to recognize nonresident children as dependents).

14. See 11 U.S.C. § 1325(b)(2)(A) (2000) (explicitly providing that debtors may exclude charitable contributions of up to 15% of their gross income from disposable income calculation).

15. Chapter 13 debtors are said to receive a "super" discharge because there are fewer nondischargeable debts in Chapter 13 cases than in Chapter 7 cases. Compare 11 U.S.C. § 523 (2000) (listing nondischargeable Chapter 7 debts) with 11 U.S.C. § 1328 (2000) (listing nondischargeable Chapter 13 debts). For example, while debts that are fraudulently incurred and debts that result from a debtor's willful and malicious conduct are nondischargeable in a Chapter 7 case, they can be discharged in Chapter 13.

16. 11 U.S.C. § 707(b) (2000).

debtor has sufficient current or future income to repay those debts in a Chapter 13 proceeding.¹⁷ Courts also have dismissed Chapter 7 cases for substantial abuse when a debtor's proposed budget included household expenses perceived to be unnecessary or extravagant,¹⁸ including private school tuition payments for the debtor's minor children.¹⁹ Courts also have dismissed Chapter 7 petitions when the debtor or debtors sought to pay college expenses for their adult children or budgeted for financial support they voluntarily provided to nonlegal dependents like parents or grandchildren.²⁰ Again, while debtors may be denied Chapter 7 relief if their budgets include payments to nonlegal dependents, they are allowed to give money to a charitable institution and not risk having their Chapter 7 case dismissed.²¹

17. See, e.g., *Price v. United States Tr.* (*In re Price*), 353 F.3d 1135, 1139–40 (9th Cir. 2004) (rejecting debtor's claim that the trial court erred in finding substantial abuse because his debts were primarily trade debts); *Behlke v. Eisen* (*In re Behlke*), 358 F.3d 429, 434–38 (6th Cir. 2004) (finding that debtor's voluntary contribution to 401K plan was not reasonably necessary to the maintenance and support of debtor and dependents and could be included in gross income).

18. See *Behlke*, 358 F.3d at 435–36 (finding that monthly contribution to 401K retirement plan was not reasonably necessary); *In re Siemen*, 294 B.R. 276, 278–80 (Bankr. E.D. Mich. 2003) (concluding that debtors with \$60,000 annual income could pay a meaningful dividend of their debts in a Chapter 7 plan "[w]ith some belt tightening"); *In re Faulhaber*, 243 B.R. 281, 287 (Bankr. E.D. Tex. 1999) (stating that the debtors maintained a far more lavish lifestyle than most citizens in the area).

19. See *Lynch v. Tate* (*In re Lynch*), 299 B.R. 776, 780 (Bankr. W.D.N.C. 2003) (upholding a ruling that private school tuition for dependent children was not a reasonably necessary expense); *In re MacDonald*, 222 B.R. 69, 76–77 (Bankr. E.D. Pa. 1998) (concluding that debtors failed to prove that private school tuition was not a luxury expense).

20. See *In re Siemen*, 294 B.R. at 279 (refusing to allow debtor to support adult son and daughter and two minor grandchildren because doing so would force creditors to support nondependent family members); *United States Tr. v. Staub* (*In re Staub*), 256 B.R. 567, 571 (Bankr. M.D. Pa. 2000) (characterizing educational expenses for adult children as discretionary and concluding that creditors should not be effectively forced to pay them); *In re Stallman*, 198 B.R. 491, 495–97 (Bankr. W.D. Mich. 1996) (dismissing case where schedules included college education expenses for disabled but emancipated son because of the court's view that the son's college education "should not be wholly financed by the Debtor's creditors"); *In re Richmond*, 144 B.R. 539, 542 (Bankr. W.D. Okla. 1992) (dismissing case where debtors included voluntary support of their grandchildren); *In re Goodson*, 130 B.R. 897, 902–03 (Bankr. N.D. Okla. 1991) (finding substantial abuse where debtor sent \$750 monthly to two children who were living away from home at college); *In re Cook*, 110 B.R. 544, 456 (Bankr. N.D. Okla. 1990) (dismissing case where debtors had listed college expenses for their emancipated daughter). *But cf. In re Marcoux*, 301 B.R. 381, 386 (Bankr. D. Conn. 2003) (finding "untenable and undue the proposition that providing food for one's stepchildren is indicative of the kind of extravagant lifestyle that the substantial abuse provision of § 707(b) was intended to curb").

21. See 11 U.S.C. § 707(b) (2000) (mandating that courts ignore a debtor's charitable contributions when considering whether to dismiss a petition for substantial abuse).

B. Structure

1. Treatment of Debts

The Code specifies both the order in which debts and the costs associated with bankruptcy cases will be paid and which debts can never be discharged. Administrative expenses, which include the fees incurred by attorneys, accountants, appraisers, and auctioneers, are entitled to the highest priority of payment.²² Assuming the case is administratively solvent, these expenses will be paid before prepetition unsecured claims.²³ Because more than 95% of Chapter 7 cases are not administratively solvent and instead are no-asset cases,²⁴ most Chapter 7 debtors' counsel demand to be paid before the case is filed.²⁵ Based largely on policy grounds, the Code also gives priority payment treatment to certain unsecured claims, including a portion of an employee's wages and wage-related claims, family support debts (that is, alimony and child support), and certain tax claims.²⁶ In addition to being a priority claim, family support obligations are presumptively nondischargeable. While obligations and payments "in the nature of support" (generally, child support

22. *Id.* §§ 507(a)(1), 503(b).

23. *Id.* §§ 503(b)(2), 503(b)(4), 327(a). Creditors who have a security interest in property the debtor owns have the right to be paid in full on their claim or to receive the collateral that secures their claim before administrative claimants are paid. *Id.* §§ 725, 1325(a). In business cases, however, creditors often agree to a "carve out" that allows administrative claimants (typically attorneys and accountants) to be paid from the collateral that secures their claims. *In re Molten Metal Tech., Inc.*, 244 B.R. 515, 521–22 (Bankr. D. Mass. 2000).

24. A no-asset case is a case in which there are no assets to distribute to unsecured creditors because the only assets available are those that are either exempt (and, thus, the debtor can keep) or that serve as collateral for a secured claim (and, thus, another creditor will be allowed to take). WARREN & WESTBROOK, *supra* note 6, at 193; *see also* Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L. J. 19, 41 n.79 (2002) (citing a Justice Department Report estimating that only 3.6% of Chapter 7 cases are asset cases).

25. *See In re Burton*, 278 B.R. 645, 652 (Bankr. M.D. Ga. 2001) (suggesting that lawyer placed debtor in Chapter 13 because those fees need not be paid in advance); *In re San Miguel*, 40 B.R. 481, 485–86 (Bankr. D. Colo. 1984) (refusing to confirm a Chapter 13 plan that was filed simply to allow the client to pay the attorney's fees over time); *see also* Gordon v. Hines (*In re Hines*), 147 F.3d 1185, 1189–90 (9th Cir. 1998) (noting the fee recovery problems faced by attorneys in Chapter 7 proceedings when they accept a minimal payment at the outset and an agreement from the client for further payment from postfiling earnings).

26. 11 U.S.C. §§ 507(a)(3), (a)(4), (a)(7), (a)(8) (2000). Given the number of priority claimants, even in administratively solvent Chapter 7 cases, general unsecured creditors typically receive little, if any, payments on their claims. *See, e.g.*, Warsco v. Preferred Technical Group, 258 F.3d 557, 562 (7th Cir. 2001) (noting that the unsecured creditors received nothing from the bankruptcy estate).

or alimony) can never be discharged, debtors can sometimes discharge nonsupport obligations (typically equitable property distributions or obligations arising in hold-harmless agreements) ordered as part of a divorce or separation.²⁷

Moreover, student loans are presumptively nondischargeable in both Chapter 7 and 13 cases. Debtors can discharge student loan debt only if they can prove that repaying the debt would impose an "undue hardship" on them and their dependents.²⁸ The Code does not define "dependent" in this context either, and as previously stated, some courts use a flexible definition that includes nonlegal dependents who rely on the debtor for support if the debtor has reason to—and actually does—support them.²⁹ Other courts have refused to consider the expenses of a debtor's adult child or any other nonlegal dependent—even if that person actually depends on the debtor for financial support—when deciding whether it would be an undue hardship to force the debtor to repay a student loan.³⁰

When determining whether to discharge student loan debt, courts also refuse to consider whether the debtor received any legitimate educational benefits from the school that received the loan proceeds. Instead, if the court concludes that forcing the debtor to repay the loan would not be an undue financial hardship, the loan debt is nondischargeable even if the debtor received no marketable skills or training from the school.³¹ While most courts use a fairly onerous three-part undue hardship test,³² one circuit court recently

27. Chapter 13 debtors have an unqualified right to discharge nonsupport debts. 11 U.S.C. § 1328(a)(2) (2000). Chapter 7 debtors can discharge nonsupport obligations if the debtor does not have the ability to pay the debt from income that is not needed to support the debtor or his dependents or if the benefit the debtor receives from discharging the debt is greater than the harm the former spouse would suffer if the debt is discharged. 11 U.S.C. § 523(a)(15) (2000).

28. 11 U.S.C. § 523(a)(8) (2000).

29. See *Sequeira v. Sallie Mae Servicing Corp.* (*In re Sequeira*), 278 B.R. 861, 866 (Bankr. D. Or. 2001) (accepting mother as a viable dependent); *In re Marro*, 1999 Bankr. LEXIS 1897 (Bankr. D.N.H. 1999) (denying debtor's request to consider the three minor children of his live-in as dependants); *In re Rigdon*, 133 B.R. 460, 463–64 (Bankr. S.D. Ill. 1991) (allowing mother to be considered a dependent).

30. See *Mitcham v. U.S. Dep't of Educ.* (*In re Mitcham*), 293 B.R. 138, 141, 145 (Bankr. N.D. Ohio 2003) (considering expenses of grandchildren but refusing to consider expenses of debtor's adult son even though the son was disabled).

31. See *Pace v. Educ. Credit Mgmt. Corp.* (*In re Pace*), 288 B.R. 788, 792 (Bankr. S.D. Ohio 2003) (noting that courts should not "consider the lack of value or benefit of the education" when deciding whether debtors are entitled to an undue hardship discharge of student loan debt).

32. See *United Student Aid Funds, Inc. v. Pena* (*In re Pena*), 155 F.3d 1108, 1111 (9th Cir. 1998) (setting forth three-part undue hardship test); *Tenn. Student Assistance Corp. v.*

rejected this test and, instead, applied a less restrictive "totality of the circumstances" test that considers whether "the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living."³³ In addition, though most bankruptcy courts originally refused to partially discharge loan debt,³⁴ bankruptcy and district courts increasingly are granting debtors a partial discharge of loan debt if the debtor demonstrates that requiring him to repay all loans in full on the original terms would be an undue hardship.³⁵

Hornsby (*In re Hornsby*), 144 F.3d 433, 437 (6th Cir. 1998) (same); Ammirati v. Nellie Mae Inc., No. 95-2967, 1996 U.S. App. LEXIS 10916, at *1 (4th Cir. May 10, 1996) (same); Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 304–05 (3d Cir. 1995) (same). Under this test, originally devised by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987), a debtor must prove: (1) that forcing him to repay the loan will not allow him to maintain a minimal standard of living for himself and his dependents given his current income and expenses, (2) that facts indicate that this state of affairs is unlikely to change during the loan repayment period, and (3) that he has made a good faith effort to repay the loan.

33. Long v. Educ. Credit Mgmt. Corp. (*In re Long*), 322 F.3d 549, 554–55 (8th Cir. 2003).

34. See, e.g., Ill. Student Assistance Comm'n v. Cox, 273 B.R. 719, 723 (N.D. Ga. 2002) (concluding that the Bankruptcy Code mandates an "all or nothing" approach to student loan debt dischargeability); Mallinckrodt v. Chemical Bank (*In re Mallinckrodt*), 260 B.R. 892, 904 (Bankr. S.D. Fla. 2001) ("To authorize partial discharges is tantamount to judicial legislation and is something that should be left to Congress."); Brown v. Union Fin. Servs., Inc. (*In re Brown*), 249 B.R. 525, 530 (Bankr. W.D. Mo. 2000) (finding nothing in the Code that allows the court to restructure or reduce student loan debt); Unites States v. Kephart, 170 B.R. 787, 788, 793 (W.D.N.Y. 1994) (reversing bankruptcy court's order for partial discharge of student loan debt); Skidmore v. N. Mich. Univ., No. M88-308 CA2, 1989 U.S. Dist. LEXIS 18431, at *13 (W.D. Mich. Sept. 11, 1989) (finding that bankruptcy court decision "granting a partial discharge to the instant appellee was erroneous"); Brown v. Citi Bank (NYS) Higher Educ. Loan Program of Kan., Inc., No. 86-2220-S, 1987 U.S. Dist. LEXIS 3619, at *6 (D. Kan. Apr. 27, 1987) ("In reviewing the applicable case law, the court found only a few cases where a partial discharge of the educational loans was granted.").

35. See Saxman v. Educ. Credit Mgmt. Corp. (*In re Saxman*), 325 F.3d 1168, 1173 (9th Cir. 2003) (concluding that bankruptcy courts may partially discharge student loans); Andresen v. Neb. Student Loan Program, Inc. (*In re Andresen*), 232 B.R. 127, 136–37 (B.A.P. 8th Cir. 1999) (holding that if debtor has multiple student loans, individual undue hardship analysis of each is "not only allowed, it [is] required"); Tenn. Student Assistance Corp. v. Mort (*In re Mort*), 272 B.R. 181, 184–85 (Bankr. W.D. Va. 2002) (agreeing that the Code "does not require an 'all or nothing' approach to the discharge of student loans" and that the court has the power to partially discharge loan debt); Sequeira v. Sallie Mae Servicing Corp. (*In re Sequeira*), 278 B.R. 861, 865 (Bankr. D. Or. 2001) (stating that partial discharge of student loan debts is permissible); Coutts v. Mass. Higher Educ. Corp. (*In re Coutts*), 263 B.R. 394, 401 (Bankr. D. Mass. 2001) (same); Grigas v. Sallie Mae Servicing Corp. (*In re Grigas*), 252 B.R. 866, 873–74 (Bankr. D.N.H. 2000) (concluding that if debtor has multiple student loans court can discharge some and require repayment of others); see also Tenn. Student Assistance Corp. v. Hornsby (*In re Hornsby*), 144 F.3d 433, 440 (6th Cir. 1998) (concluding that a bankruptcy court may partially discharge student debt); Hinkle v. Wheaton College (*In re Hinkle*), 200 B.R. 690, 693

Credit card debt is presumptively dischargeable, which is fortunate (for debtors, that is) because most households have credit cards and almost all consumer bankruptcy cases involve credit card debt.³⁶ However, credit card issuers can rebut the presumption of dischargeability if they prove that the debtor fraudulently incurred the debt.³⁷ Nondischargeability complaints based on credit card debt are frequently and contentiously litigated disputes in consumer bankruptcy cases.³⁸ Courts increasingly have ruled, however, that credit card issuers cannot prevent debtors from discharging credit card debt if they failed to properly screen debtors before giving them credit cards or failed to monitor debtors' spending patterns or employment status after issuing the cards.³⁹ Indeed, these court losses caused the credit card industry to lobby Congress to seek legislation that would make it harder to discharge debts.⁴⁰

(Bankr. W.D. Wash. 1996) (finding that if debtor has multiple student loans the court can discharge some of the loans); *Griffin v. Eduserv* (*In re Griffin*), 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996) (discharging debtor's interest and attorneys' fees but requiring repayment of principal amount); *Raimondo v. N.Y. State Higher Educ. Servs. Corp.* (*In re Raimondo*), 183 B.R. 677, 681 (Bankr. W.D.N.Y. 1995) ("Although the Bankruptcy Code might not expressly provide for the partial discharge of educational loans, it does require that these debts not be discharged in the absence of undue hardship. If necessary to achieve this purpose, partial discharge is an appropriate remedy.").

36. See SULLIVAN, *supra* note 1, at 119–20 (citing data that suggest that 88% of debtors may have credit card debt); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE* 131 ("Ninety-one percent of the families in bankruptcy were carrying balances on their cards by the time they filed."); Marianne A. Hilgert & Jeanne M. Hogarth, *Household Financial Management: The Connection Between Knowledge and Behavior*, FEDERAL RESERVE BULLETIN 309, 310 (July 2003) (reporting consumer survey in which 89% of households reported having credit cards).

37. *AT&T Universal Card Servs. v. Mercer* (*In re Mercer*), 246 F.3d 391, 402 (5th Cir. 2001) (observing that 11 U.S.C. § 523(a)(2)(A) exempts from discharge fraudulently obtained debt).

38. See generally WILLIAM D. WARREN & DANIEL J. BUSSEL, *BANKRUPTCY* 186–87 (6th ed. 2002) (discussing high volume of credit card nondischargeability cases).

39. See *Citibank v. Stephens* (*In re Stephens*), 302 B.R. 227, 235 (Bankr. N.D. Ohio 2003) (discharging credit card debt because issuer failed to conduct a credit check even though the court found that debtor incurred debt with no intention of repaying it); *Compass Bank v. Meyer* (*In re Meyer*), 296 B.R. 849, 863 (Bankr. N.D. Ala. 2003) (criticizing credit card issuers who extend credit without performing a credit check or increase credit limits based on past payment performance without confirming current income or debt levels); *Am. Express Travel Related Servs., Inc. v. Dorsey* (*In re Dorsey*), 120 B.R. 592, 595 (Bankr. M.D. Fla. 1990) (finding it "absolutely appalling" and "difficult, if not impossible, to comprehend how" credit card issuer granted seven credit cards to an unemployed widow with two minor children); WARREN & BUSSEL, *supra* note 38, at 190–91 (discussing emerging theory that credit card companies that fail to conduct adequate credit checks cannot justifiably rely on customers' implied promises to pay); cf. *Mercer*, 246 F.3d at 408 (noting that debtors' financial condition, charge characteristics, and employment status are used as indicia of scienter for fraud).

40. See Lou Dobbs, *In Hock to the Hilt*, U.S. NEWS & WORLD REP., July 21, 2003, at 36

Finally, mortgage obligations, though technically dischargeable, are largely unaffected in bankruptcy cases. While a debtor's personal obligation to repay home mortgage debt can be discharged, the mortgage holder's lien on the debtor's home survives the bankruptcy.⁴¹ Thus, even if the loan is a nonrecourse loan or the debtor receives a discharge and is not personally obligated to repay the mortgage, the creditor can foreclose on the debtor's home even after the debtor receives a discharge.

2. Treatment of Assets

Most of a debtor's prepetition assets are included in the bankruptcy estate and can be used to pay creditor claims.⁴² While assets acquired after the bankruptcy petition is filed are excluded from the estates of Chapter 7 debtors, those assets (including future wages) are included in Chapter 13 estates.⁴³ The Code does, however, exclude certain types of property from the debtor's bankruptcy estate and also allows debtors to exempt property to ensure that debtors who leave bankruptcy will not be destitute. Specifically, the Code excludes from a debtor's estate property that is held in trust or is subject to a restriction on transfer under applicable nonbankruptcy laws.⁴⁴ Thus, if the debtor is the beneficiary of money held in a trust that contains a spendthrift clause, the debtor can keep the money and cannot be forced to use it to pay creditor claims in the bankruptcy proceeding.⁴⁵ Likewise, regardless of the value of the account, funds held in employer-provided ERISA-qualified (and

(describing contrasting perspectives on then-pending bankruptcy legislation); Philip Shenon, *Hard Lobbying on Debtor Bill Pays Dividend*, N.Y. TIMES, Mar. 13, 2001, at A1 ("Sponsors of the bill acknowledge that lawyers and lobbyists for the banks and credit card companies were involved in drafting it."); see also Donald L. Barlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 64-65 (arguing that Congress aggressively pursued bankruptcy reform because of campaign contributions members received from various banks, credit card companies, debt consolidators, and other financial-services businesses and because of the urging of the credit industry's politically influential lobbyists).

41. See *Zimmer v. PSB Lending Corp.* (*In re Zimmer*), 313 F.3d 1220, 1222 (9th Cir. 2002) ("In general, Chapter 13 allows debtors to avoid liens, but there is an exception for homestead liens that attach only to the debtor's primary residence.").

42. 11 U.S.C. § 541(a) (2000).

43. *Id.* § 1306(a).

44. *Id.* § 541(c)(2).

45. Most courts have ruled that a debtor's interest in a self-settled trust cannot be excluded from the estate. See, e.g., *In re Edelman*, 308 B.R. 398, 400-02 (Bankr. E.D. Mo. 2004) (finding that trust could not be excluded from estate because debtor's retained control over trust rendered it invalid under Missouri law).

certain other state and federal) retirement plans are excluded from the bankruptcy estate because these plans typically restrict the debtor's and the plan provider's ability to transfer or otherwise disburse the funds held in the plan.⁴⁶

There is a wide disparity among state laws in the type and amount of estate property debtors are allowed to exempt. Because of the public policy that favors home ownership, debtors may take a homestead exemption that lets them keep at least a portion of the value of their home.⁴⁷ Indeed, seven states (including Florida and Texas) permit debtors to exempt the entire value of their home from all creditors except those who have a consensual security interest—typically the mortgage holder—in the home.⁴⁸ If allowed by the debtor's applicable state exemption laws, a debtor can also keep real or personal property the debtor and his spouse own as tenants by the entirety and can prevent creditors from seizing that property regardless of its value.⁴⁹ In

46. *Patterson v. Shumate*, 504 U.S. 753, 765 (1992); *see, e.g.*, 5 U.S.C. § 8346(a) (2000) (providing that federal civil service retirement benefits are generally not assignable); *id.* § 8470(a) (providing same for Federal Employees Retirement System benefits); 10 U.S.C. § 1450(h) (2000) (providing same for military survivor annuities); 26 U.S.C. § 401(a)(13)(A) (2000) (providing that benefits from ERISA-qualified plan "may not be assigned or alienated").

47. *See* TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 138–39 (1989) (noting that all states restrict the forced sale of debtors' homes); Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221, 222, 247 n.8 (1997) (surveying state homestead exemptions; observing that only two states—Pennsylvania and Rhode Island—have no state exemption, and that neither has opted out of the federal exemption scheme). Likewise, the Code and most state exemption laws permit debtors to exempt at least part of the value of their automobiles, household goods, and tools of the trade or other professional supplies. *See* 11 U.S.C. § 522(d) (2000) (allowing exemption of, *inter alia*, a motor vehicle, household items, jewelry, and professional tools and equipment, up to various value ceilings); FLA. CONST. art. X, § 4(a)(1) (2004) (exempting personal property up to \$1,000); 735 ILL. COMP. STAT. ANN. § 5/12-1001 (2003) (same); OHIO REV. CODE ANN. § 2329.66 (2004) (exempting various categories of personal property); TEX. PROP. CODE ANN. §§ 42.0001–0002 (2000) (allowing exemption of, *inter alia*, a motor vehicle for each family member, home furnishings, jewelry, and livestock, up to a total of \$60,000 for a family or \$30,000 for a single adult); VA. CODE ANN. § 34-26 (Supp. 2004) (providing for similar exemptions).

48. *See* TEX. PROP. CODE ANN. § 41.001 (2000) (providing unlimited homestead exemption); *see also* FLA. CONST., art. X, § 4(a)(1) (same). While Texas, Florida, and five other states provide an unlimited exemption, debtors in half of the fifty states are entitled to exempt \$20,000 or less. Bahchieva et al., *supra* note 8, at 18.

49. 11 U.S.C. § 522(b)(1)(B) (2000). Estimates of the number of jurisdictions that still allow married couples to shield property held as tenants by the entirety from their creditors range from seventeen to thirty-seven. A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 94 n.138 (1998).

The United States Supreme Court recently held that, notwithstanding applicable state laws, married couples cannot exempt such property from tax claims asserted by the Internal Revenue

addition to allowing married debtors to exempt property held in tenancies by the entirety, the Code makes it harder to sell entirety property even if it is nonexempt.⁵⁰

Even if debtors do not own entirety property or cannot take an unlimited homestead exemption, debtors—especially Chapter 13 debtors—who own homes and have equity in those homes have greater protections than renters even if they have fallen behind on their mortgage payments. Indeed, even if the mortgage holder has accelerated the mortgage loan and has sued the debtor for the loan balance, the mortgage holder will have difficulty foreclosing on a Chapter 13 debtor's home if the debtor continues to make mortgage payments and agrees to cure the loan default through the Chapter 13 plan.⁵¹ In contrast, debtors generally will not be allowed to remain in rented residential property if they have missed rental payments unless they cure the default in full and give the landlord assurances that there will be no future defaults.⁵² Moreover, in

Service. *United States v. Craft*, 535 U.S. 274, 276 (2002). Courts have not, however, been willing to extend that holding to debtors in bankruptcy cases. *See, e.g., In re Greathouse*, 295 B.R. 562, 565–67 (Bankr. D. Md. 2003) ("[T]he recognition of the tax collection rights of the United States enunciated in the *Craft* decision is not material to the decision presented to this court in this case, and is not a development in the law that changes the settled authority on this issue."); *In re Ryan*, 282 B.R. 742, 750 (Bankr. D.R.I. 2002) (concluding that *Craft's* rationale is limited to federal taxation and does not extend to bankruptcy); *In re Knapp*, 285 B.R. 176, 182–83 (Bankr. M.D.N.C. 2002) (discussing *Craft* in bankruptcy but refusing to extend holding).

50. While a bankruptcy trustee ordinarily has the power to sell a debtor's nonexempt property free and clear of any other interest, a trustee can sell entirety property only if: (1) the property cannot easily be partitioned; (2) selling only the estate's interest would yield significantly less than selling the property free of the nondebtor spouse's interest; and (3) the benefit (to the debtor's bankruptcy estate) of selling the home outweighs the harm to the nondebtor spouse. *See* 11 U.S.C. §§ 363(h)(1)–(3) (2000) (listing conditions under which bankruptcy trustee can sell property held by tenants in common, joint tenants, or tenants by the entirety).

51. *See* 11 U.S.C. § 1322(c)(1) (2000) (allowing debtor to cure mortgage defaults until foreclosure sale completed). A creditor is entitled to relief from the automatic stay imposed by § 362 of the Code only if it can show cause, including a lack of adequate protection of the creditor's interest in the debtor's property or if the debtor lacks equity in the property and the debtor does not need the property. *Id.* § 362(d)(1)–(2).

52. 11 U.S.C. § 365(b)(1) (2000); *see Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 94 (2d Cir. 2002) ("[C]reditors also receive protection from the Bankruptcy Code. In order to assume an unexpired lease, the executory contract provision requires the bankruptcy trustee to cure defaults, . . . compensate for losses, . . . and provide adequate assurance [of future payments]."); *In re DiCamillo*, 206 B.R. 64, 71–72 (Bankr. D.N.J. 1997) (rejecting debtor's proposal to pay rental arrearages over three years); *Hobbs v. Long (In re Trusty)*, 189 B.R. 977, 982–84 (Bankr. N.D. Ala. 1995) ("Cure of a default in making payments means that a debtor must pay the payment arrearage in full.").

Chapter 7 cases, renters must cure any default within sixty days after the case is filed.⁵³

Finally, the Code and some state laws also permit debtors to exempt certain monetary payments they are entitled to receive if those payments are reasonably necessary for the support of the debtor or his dependents.⁵⁴ The Code provides a partial definition for the term "dependent" by stating that it includes a spouse, even one who is not actually dependent on the debtor.⁵⁵ Unfortunately, courts (again) have not explicitly ruled that debtors have the right to exempt property used by nonlegal dependents including adult children, parents, grandchildren, unmarried cohabitants, same-sex partners, or other family members.⁵⁶

C. Criticisms and Uses of Existing Bankruptcy Laws

Critics of existing bankruptcy laws argue that courts do not adequately detect and dismiss abusive filings, that discharging debts has become too easy, and that bankruptcy no longer carries any stigma with it.⁵⁷ The reason people

53. See 11 U.S.C. § 365(d)(1) (2000) (providing that under Chapter 7, executory contracts not assumed by trustee within sixty days of relief order are deemed rejected); *In re Stoltz*, 315 F.3d at 86 (quoting statute); *Couture v. Burlington Hous. Auth.* (*In re Couture*), 225 B.R. 58, 63 (D. Vt. 1998) (explaining statute).

54. Exempt payments include social security, public assistance, veterans', disability, illness, and unemployment benefits; alimony, support, separate maintenance, and most stock bonus, pension, profit-sharing, and annuity payments; and certain wrongful death, life insurance, and personal injury payments. 11 U.S.C. § 522(d)(10)–(11) (2000); see also, e.g., FLA. STAT. ANN. § 222.14 (2004) (exempting life insurance and annuity benefits); FLA. STAT. ANN. § 222.18 (2004) (exempting disability income benefits); FLA. STAT. ANN. § 222.21 (2004) (exempting pension, retirement, or profit-sharing benefits); 735 ILL. COMP. STAT. ANN. § 5/12-1006 (2003) (exempting retirement plans, including social security); VA. CODE ANN. § 34-34 (Supp. 2004) (exempting certain retirement plans).

55. 11 U.S.C. § 522(a)(1) (2000).

56. See *In re Sommer*, 228 B.R. 674, 677–78 (Bankr. C.D. Ill. 1998) (adopting a broad definition of dependent but finding that parents were not dependent on adult son); *In re Rigdon*, 133 B.R. 460, 465–67 (Bankr. S.D. Ill. 1991) (adopting broad definition of dependent that might allow parents to be treated as dependent of son); *In re Collopy*, 99 B.R. 384, 384 (Bankr. S.D. Ohio 1989) (defining dependent to include debtor's mother, who was physically dependent on the debtor, even though she was not financially dependent on the debtor).

57. See WARREN & TYAGI, *supra* note 36, at 17, 94–95 (2003) (presenting criticisms most often raised against existing bankruptcy relief); Daniel McGinn et al., *Maxed out*, NEWSWEEK, Aug. 27, 2001, at 34, 37 (discussing the "lack of discipline" in consumer credit card spending). See generally A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 261–267 (2001) (discussing the negative image of debtors portrayed in the media).

file for bankruptcy is hotly debated. The simple explanation is that people file because they cannot pay their debts. Of course, the simplicity of this explanation begs the question of why so many people have been unable to pay their bills, especially during times of economic prosperity. Scholars and commentators agree that credit card use, uninsured medical expenses, divorce-related expenses, and economic reversals (like being laid off, downsized or outsourced, or being forced into part-time or contract work) all cause people to seek bankruptcy relief.⁵⁸ Some suggest, however, that consumers could weather most financial setbacks *without* filing for bankruptcy if they stopped overusing credit cards, exercised greater fiscal responsibility, and made a commitment to honoring and repaying their debts.⁵⁹

Because of intense lobbying efforts from the consumer credit (especially the credit card) lobby, Congress has been under intense pressure for almost a decade to enact legislation that would prevent people deemed to have "means" from discharging their debts.⁶⁰ Though various methods have been proposed to calculate whether a debtor has the "means" to repay current debts, the goal of the legislation is quite simple: discourage people from filing for bankruptcy and force those who do to repay their debts in Chapter 13.⁶¹ Despite ample

58. See WARREN & TYAGI, *supra* note 36, at 80–81 ("Nearly nine out of ten families with children cite just three reasons for their bankruptcies: job loss, family breakup, and medical problems."); see also Melissa Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001) (estimating that nearly half of all bankruptcies involve a medical problem); Donald L. Barlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 64 ("Contrary to the popular view of bankruptcy filers as free spenders who vacation in the Caribbean and buy expensive jewelry on their credit cards, the vast majority turn to bankruptcy court only after one of three events: loss of job, divorce or extraordinary medical expenses—in short, the kind of misfortune that can befall anyone."); Terry Savage, *The Savage Truth*, CHI. SUN-TIMES, Feb. 20, 2003, at 59 ("It's a myth to think that bankruptcies are caused by the desire to commit fraud. In the largest percentage of cases, bankruptcy is preceded by unexpected budget-breaking expenses of uninsured medical costs or divorce.").

59. See Jathon Sapsford & Patrick Barta, *Precarious Balances: Despite the Recession, Americans Continue to be Avid Borrowers; Their Spending Helps Temper the Downturn, but Debts Could Hinder a Recovery*; "I Want to Enjoy Everything", WALL ST. J., Jan. 2, 2002, at A1 (discussing 24-year-old Steven Yamamoto, who had racked up \$28,000 of debt on six credit cards, while enjoying a mere \$35,000 yearly salary); see, e.g., Deborah Moore, *Rise in Bankruptcies Blamed on Overuse of Credit Cards*, CAPITAL. DIST. BUS. REV., Jan. 27, 1997, at 22 (explaining that "individuals are not sunk by secured debt like mortgage or car loans, but by a slew of unsecured credit card debts"); Maureen Feighan & R.J. King, *Thousands Sink in Ocean of Heavy Debt*, DETROIT NEWS, Apr. 8, 2002, at 1A (suggesting ways to avoid severe debt by curbing credit card use).

60. See Robert Heady, *Consumers Take 1-2 Punch: House and Senate Legislation Would Make It Much Harder for Debtors to Declare Bankruptcy*, CHI. TRIB., Sept. 16, 1998, at C7 (describing consumer credit industry's lobbying efforts).

61. See Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7

evidence that most Chapter 13 cases are dismissed before debtors complete plan payments,⁶² the credit lobby has convinced many members of Congress that too many people with income sufficient to repay their bills choose not to pay them, that permitting debtors to make this choice is not consistent with the goals of bankruptcy laws, and that preventing debtors from discharging debts will cause them to repay those debts.⁶³

Whether the increased filing rate is attributable to exogenous factors beyond the debtor's control, to debtors' irresponsible or fraudulent conduct,⁶⁴ or to creditors' increasingly lax lending practices (especially those involving credit card lending),⁶⁵ the number of people who have filed for bankruptcy has increased dramatically during the last ten years. In 2003, 1,625,208 individuals filed for bankruptcy: an increase of 5.6% from the 1,539,111 that

FORDHAM J. CORP. & FIN. L. 407, 411 (2002) (observing that proposed changes would make Chapter 7 "more expensive and inaccessible" and Chapter 13 "more burdensome and unworkable").

62. See Bahchieva et al., *supra* note 8, at 22 (stating that only 33% of Chapter 13 debtors complete plan payments, that 33% convert to Chapter 7 and that the remainder are dismissed from bankruptcy); see also WARREN & WESTBROOK, *supra* note 6, at 456-57 (discussing studies).

63. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. §§ 301-330 (2003) (taking various steps to restrict perceived abuses by debtors); H.R. REP. NO. 108-40, at 124-25 (2003) (stating a factor behind the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act is the increase in bankruptcy debtors who can pay off their debt). Many Congressmen believe the bill will help curb the abuse of the bankruptcy system by those able to pay their debts, while still protecting those unable to repay personal debts. See, e.g., Press Release, Rep. Adam Putnam, Putnam Hails Praises of Bankruptcy Reform: Congressman Says Plan Helps Stem the Rise of Bankruptcy Abuse, at <http://www.adamputnam.house.gov/pressreleases/bankruptcy.doc> (Mar. 19, 2003) (on file with the Washington and Lee Law Review). But see *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform: Hearing Before the Subcomm. on Commercial and Administrative Law Comm. on the Judiciary*, 108th Cong. 17 (2003) (statement of Rep. Jerrold Nadler, Member, House Comm. on the Judiciary), available at <http://www.house.gov/judiciary/85404.PDF> (claiming the bill will compromise the goal of bankruptcy law by making it harder for consumers to get a fresh start financially).

64. See, e.g., *In re Santaella*, 298 B.R. 793, 795 (Bankr. S.D. Fla. 2002) (stating that debtor failed to disclose Venezuelan real estate, a million dollar plus bank account in Switzerland, and his ownership and control of at least two valuable offshore corporations, then attempted to conceal his ownership and control by creating and executing documents in the names of two fictitious individuals); *Feltman v. Warmus (In re Am. Way Serv. Corp.)*, 229 B.R. 496, 533-36 (Bankr. S.D. Fla. 1999) (finding that debtor fraudulently transferred a plane, boat, and several luxury cars to defraud creditors).

65. See, e.g., *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 211 F.3d 214, 218 (5th Cir. 2000) (stating that "credit card issuers' irresponsible lending practices" lead to more consumer bankruptcies); *Compass Bank v. Meyer (In re Meyer)*, 296 B.R. 849, 863 (Bankr. N.D. Ala. 2003) (discussing issuers' failure to check debtors' income and debt levels).

filed in 2002 and almost double the number (812,898) that filed in 1993.⁶⁶ Thus, whether for good, bad, or no reason at all, more and more Americans are taking advantage of the benefits provided in bankruptcy.

D. Costs

Bankruptcy is not an administratively cost-free proceeding. Though litigants in almost every other judicial setting can file in forma pauperis and have their filing fees waived,⁶⁷ debtors must pay a nonwaivable filing fee.⁶⁸ By mandating that debtors find the funds to pay the nonwaivable filing fee, it appears that some poor people are too poor to file for bankruptcy.⁶⁹ The only concession the Code makes for paying filing fees involves married debtors, who are allowed to file a joint petition and pay only one filing fee.⁷⁰ Because only heterosexual married couples can file joint petitions, even if a long-term cohabitating heterosexual couple or a married gay or lesbian couple desired to file a joint petition and pay a lower filing fee, they could not do so.⁷¹

66. AMERICAN BANKRUPTCY INSTITUTE, U.S. BANKRUPTCY FILINGS 1980–2003, at <http://www.abiworld.org/contentmanagement/contentdisplay.cfm?contentid=8149> (last visited Nov. 10, 2004) (on file with the Washington and Lee Law Review).

67. See 28 U.S.C. § 1915(a) (2000) (giving courts the authority to allow proceedings in forma pauperis, except in bankruptcy proceedings); see also FLA. STAT. ANN. § 57.081 (West Supp. 2004) (allowing courts to waive filing fees for indigents); MASS. GEN. LAWS ANN. ch. 261, § 27B (1992) (allowing courts to waive filing fees for indigents); N.Y. COMP. CODES R. & REGS. tit. 22, § 206.5 (2003) (allowing claimant to file for waiver or reduction of the filing fee).

68. The fees range from \$155 for cases filed under Chapters 7 and 13 to \$800 for Chapter 11 cases. 28 U.S.C. § 1930(a) (2000). Additional quarterly fees are imposed in Chapter 11 cases. *Id.* § 1930(a)(6). While a few pilot tested programs permitted in forma pauperis filings in six bankruptcy districts, the pilot program expired in 1997. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, § 111(d), 107 Stat. 1153 (1993). See generally FEDERAL JUDICIAL CENTER, IMPLEMENTING AND EVALUATING THE CHAPTER 7 FILING FEE WAIVER PROGRAM (1998).

69. See *United States v. Kras*, 409 U.S. 434, 457 (1973) (Stewart, J., dissenting) (lamenting that "some of the poor are too poor even to go bankrupt"). The *Kras* Court held that regardless of a debtor's indigence or need for financial relief, there is no constitutional right to a discharge. *Id.* at 446. Because the Court concluded that bankruptcy is not the only way debtors can restructure their debts, it held that a debtor who cannot afford the filing fee has no right to federal bankruptcy relief. *Id.* at 445–46.

70. 11 U.S.C. § 302(a) (2000).

71. See *Bone v. Allen* (*In re Allen*), 186 B.R. 769, 774 (Bankr. N.D. Ga. 1995) (disallowing joint petition of gay couple); *In re Malone* 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985) (disallowing joint petition of long-term unmarried cohabitating couple who shared living expenses and owned property jointly); *In re Coles*, 14 B.R. 5, 6 (Bankr. E.D. Pa. 1981) (same). See generally Dickerson, *supra* note 49, at 90–93.

Debtors should also expect to pay attorney's fees ranging from \$400 to \$1750 if they file for relief under Chapter 7, and \$400 to \$3000 if they file a Chapter 13 petition.⁷² Married debtors who file a joint petition should incur lower attorney's fees, but again this benefit is limited to heterosexual married filers. While debtors can pay their Chapter 13 attorney's fees through their plans, lawyers who represent debtors in Chapter 7 almost always demand to be paid in full in advance.⁷³ Chapter 7 debtors are often advised to obtain the filing or attorney fees by either borrowing the money from a friend or relative or by not paying other monthly bills.⁷⁴ A person who does not receive this advice (or does not think of this strategy on her own) may find herself unable to obtain debt relief in bankruptcy unless she can find free or low-cost legal services. Though most localities have pro bono bankruptcy programs or other free legal services, those services are limited and most programs represent only those debtors who have wages that are being, or are threatened with being, garnished or nonexempt property that can be seized.⁷⁵ Because bankruptcy petitions and schedules are long and detailed, filing pro se is simply not a realistic option for most consumer filers. Moreover, even if a debtor has the competence to accurately complete the petition and schedules, many jurisdictions now require these items to be filed electronically.⁷⁶ Fortunately, pro se debtors are currently exempted from the requirement.⁷⁷

72. The Consumer Bankruptcy Letter, *Results of Survey on Fees*, at <http://www.bankruptcyfinder.com/surveyresults.html> (June 27, 2003) (on file with the Washington and Lee Law Review); JAMES H. COSSITT, AM. BANKR. INST., CHAPTER 13 ATTORNEY FEE SURVEY, American Bankruptcy Institute 2003 Annual Meeting, at www.abiworld.org (last visited Aug. 30, 2004) (on file with the Washington and Lee Law Review); see also BANKR. E.D. VA. LOCAL BANKR. R. 2016-1 (setting the basic fee range from \$1250-1500 for Chapter 13 cases). Some courts will set a base fee with allowance for additional fees based on the circumstances of the case. See, e.g., Guideline for Payment of Attorney's Fees in Chapter 13 Cases (Bankr. N.D. Ca. 2003) (setting a base fee at \$1800 and allowing for additional fees to be added based on what is involved in the case, such as real property or student loans).

73. See *supra* note 25 and accompanying text (noting that attorneys in Chapter 7 cases demand to be paid before the case is filed).

74. See Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2143-44 (2002) (observing lack of empirical studies concerning "how consumer bankruptcy lawyers get paid" and observing that some lawyers reportedly advise "clients to skip a mortgage or credit card payment to generate funds for a fee").

75. See MILLER CENTER FOR PUBLIC INTEREST ADVOCACY, PRO BONO BANKRUPTCY PROGRAMS AND RESOURCES, at http://www.dsl.psu.edu/publications/probono/pro_bono.pdf (last visited Nov. 16, 2004) (cataloguing pro bono bankruptcy programs throughout the nation) (on file with the Washington and Lee Law Review).

76. See Richmond Eustis, *Mandatory Electronic Bankruptcy Filing Urged*, FULTON COUNTY DAILY REP., Nov. 27, 2002, available at LEXIS, FULTON (requiring lawyers to file bankruptcy cases electronically); Emily Umbright, *Eastern District Goes Live with*

III. Racial Impact of Bankruptcy Relief

A. Ideal Debtor Profile

Though all individuals who file for bankruptcy should receive some debt relief, a debtor who has certain types of debts, assets, and other economic attributes (Ideal Debtor) will benefit significantly more than other filers. To increase the likelihood of becoming an Ideal Debtor, debtors should have sufficient disposable income—or have access to a relative or friend with such income—to pay a lawyer for pre-filing exemption planning advice, to pay the bankruptcy filing fee, and to pay a bankruptcy lawyer to prepare the petition and schedules. In addition, the Ideal Debtor should have few (if any) nondischargeable debts, including student loans or alimony or child support obligations. Because the Code (like most other state and federal laws) favors heterosexual married debtors and lets them file a joint petition and exempt their tenants by the entirety property from all but joint creditors, the Ideal Debtor should also be married.⁷⁸ Even though bankruptcy laws were designed to provide relief to the poor but honest debtor, the Ideal Debtor should either hold most of her property in an exempt form or convert nonexempt property to exempt property before filing for bankruptcy.⁷⁹ Indeed, to take full advantage

Electronic Case Filing Tuesday, ST. LOUIS DAILY REC., Oct. 14, 2003, available at LEXIS, SLDREC (requiring lawyers to file bankruptcy cases electronically, but waiving electronic filing fee for pro se debtors); *U.S. Bankruptcy Court Electronic Filing Becomes Mandatory Oct. 1*, N.J. LAWYER, June 30, 2003, available at 2003 WLJLNP 38 (requiring lawyers to file bankruptcy cases electronically).

77. See *Umbright*, *supra* note 76 (requiring lawyers to file bankruptcy cases electronically but waiving electronic filing fee for pro se debtors).

78. See *Dickerson*, *supra* note 49, at 87–103 (describing marital bias in state and federal laws). There is, of course, no corresponding benefit for cohabitating gay or straight couples even if they share a home together with children and want to protect the home for the sake of children. *Id.*

79. Debtors are allowed to take advantage of the exemptions allowed in bankruptcy by converting nonexempt assets into exempt assets. See *Hanson v. First Nat'l Bank in Brookings*, 848 F.2d 866, 868 (8th Cir. 1988) (allowing a debtor to convert nonexempt property into exempt property, except where the debtor intends to defraud his creditors). It is true that some courts will find that excessive prebankruptcy exemption planning constitutes fraud. See *Vensen v. Dietz (In re Sholdan)*, 217 F.3d 1006, 1010 (8th Cir. 2000) (upholding district court's decision that a debtor's purchase of a house on the eve of bankruptcy constituted fraud); *First Tex. Sav. Ass'n v. Reed (In re Reed)*, 700 F.2d 986, 991 (5th Cir. 1983) (asserting that debtor's intent to defraud in converting nonexempt assets will support denial of discharge). Nonetheless, most courts allow debtors to engage in modest exemption planning. See *Gill v. Stern (In re Stern)*, 317 F.3d 1111, 1116 (9th Cir. 2003) (finding that the conversion of nonexempt assets into exempt assets on the eve of bankruptcy is not enough to establish fraud); *Murphy v. Crater (In re Crater)*, 286 B.R. 756, 761 (Bankr. D. Ariz. 2002) (same); *Noland v. Wadley (In re*

of bankruptcy exclusions and exemption provisions, the Ideal Debtor is either the beneficiary of a spendthrift trust or the possessor of a large ERISA-qualified retirement fund that can be excluded from the bankruptcy estate. The Ideal Debtor should be employed, unless she is an unemployed beneficiary of a trust fund, because Chapter 13 debtors must have stable income in order to receive the benefits Chapter 13 provides—the rights to keep assets but discharge debts.⁸⁰ The Ideal Debtor should also have relatively high (but necessary) living expenses for herself and dependents with whom she has a legal or familial relationship.

The Code systematically favors debtors with wealth over those with income because it lets debtors—especially Chapter 13 debtors—retain some of their property but requires them to use only disposable income to repay debts. Given this, the Ideal Debtor should have high wealth but low income.⁸¹

Wadley), 263 B.R. 857, 861 (Bankr. S.D. Ohio 2001) (finding that a minimal level of prebankruptcy planning does not constitute fraud). What is "modest" and "excessive" remains a matter of dispute. *Compare Hanson*, 848 F.2d at 869 (allowing a small amount of pre-exemption planning by the debtors) with *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988) (finding that debtor's "attempt to shield property worth approximately \$700,000 goes well beyond the purpose for which exemptions are permitted").

80. *In re Donohue*, 81 B.R. 714, 715 (Bankr. S.D. Fla. 1987) (refusing to confirm unemployed Chapter 13 debtor's plan even though he expected to be employed within two months). While courts have concluded that debtors can fund plans with nonwage income (including public assistance benefits, social security, fixed pension, investment income, funds derived from self-employment, and funds provided by others) most Chapter 13 plans are funded with a debtor's future wage income. *See, e.g.*, *Bibb County Dep't of Family & Children Serv. v. Hope (In re Hammonds)*, 729 F.2d 1391, 1393–94 (11th Cir. 1984) (funding plan with public assistance benefits); *In re Lapin*, 302 B.R. 184, 188 (Bankr. S.D. Tex. 2003) (funding plan with exempt assets, including funds withdrawn from an individual retirement account); *In re Bottelberghe*, 253 B.R. 256, 260 (Bankr. D. Minn. 2000) (funding plan with spousal contributions); *In re Murphy*, 226 B.R. 601, 604 (Bankr. M.D. Tenn. 1998) (funding plan with funds provided by debtor's unmarried cohabitating partner); *In re Antoine*, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1997) (same); *In re Murray*, 199 B.R. 165, 166–70 (Bankr. M.D. Tenn. 1996) (funding seven year old debtor's plan with social security survivor benefits); *In re Sigfrid*, 161 B.R. 220, 222 (Bankr. D. Minn. 1993) (finding that spouse's income could not be used to fund Chapter 13 payments because such income was not "sufficiently stable and regular"); *Howell v. Commonwealth (In re Howell)*, 138 B.R. 484, 488 (Bankr. W.D. Pa. 1992) (same); *In re McMonagle*, 30 B.R. 899, 902 (Bankr. D.S.D. 1983) (funding plan with unemployment compensation); *In re Monaco*, 36 B.R. 882, 883–84 (Bankr. M.D. Fla. 1983) (funding plan with income determined by self-employed debtor); *Margraf v. Oliver (In re Oliver)*, 28 B.R. 420, 423–24 (Bankr. S.D. Ohio 1983) (same); *In re Cole*, 3 B.R. 346, 349 (Bankr. S.D. W. Va. 1980) (funding plan with income from odd jobs).

Moreover, employment also increases the likelihood that the debtor will participate in a pension plan, which can be excluded from the estate and kept from creditors.

81. Wealth generally is defined as the current value of all household assets ("bank accounts, stocks, bonds, life insurance savings, mutual fund shares; houses and unincorporated businesses; consumer durables" and pensions) minus liabilities (mortgage balances, consumer

Having a high income, though good in the abstract, is not as beneficial to debtors as having significant wealth largely because a high-income debtor with no assets will be unable to take advantage of most of the benefits in bankruptcy whereas a lower income debtor who owns a home or other exempt assets (or converts nonexempt property into exempt property) will. Low-income debtors who have expensive, tangible, exemptible assets (like homes) can leave both Chapter 7 and Chapter 13 with those exempt assets and will be required to devote only part of their relatively low income to repaying prepetition debts in Chapter 13.⁸² In contrast, high-income but no-exemptible-asset debtors leave Chapter 7 with no assets and may even be denied a discharge if the court concludes that it would be abusive to permit them to avoid using their future income to repay their debts. Likewise, a high-income but no-exemptible-asset debtor leaves Chapter 13 having to pay more of her debts than her high wealth but low income counterpart. While some judicial districts have a high percentage of Chapter 13 plans that repay creditors in full, most Chapter 13 debtors with modest incomes will repay only a limited amount of their debts, especially if they have relatively high, reasonably necessary living expenses.⁸³

and other outstanding debts). EDWARD N. WOLFF, *TOP HEAVY 2* (2d ed. 2002).

82. Some courts have concluded that a debtor cannot choose to have a lower income. *See, e.g.*, U.S. Dep't of Educ. v. Gerhardt (*In re Gerhardt*), 348 F.3d 89, 92–93 (5th Cir. 2003) (denying discharge because of court's view that debtor, philharmonic orchestra member, should increase income with additional or higher paying job); Grigas v. Sallie Mae Servicing Corp. (*In re Grigas*), 252 B.R. 866, 875 (Bankr. D.N.H. 2000) (discussing view that a Chapter 13 debtor cannot voluntarily depress income by being underemployed).

Courts have held that they can consider a Chapter 7 debtor's exemptible income—including tax refunds, social security, workers' compensation, and public assistance benefits—when deciding whether to dismiss a Chapter 7 petition for substantial abuse. *See, e.g.*, *In re Sohn*, 300 B.R. 332, 335 (Bankr. D. Minn. 2003) (requiring debtor to include "disposable portion" of exempt income in Chapter 13 payment plan). Though these courts could not force the Chapter 7 debtor to use the exemptible income to repay bills, they nonetheless include it when calculating a hypothetical Chapter 13 disposable income test to determine whether Chapter 7 petition should be dismissed for substantial abuse because the debtor has the means to pay debts. Likewise, courts have concluded that exempt income must be included in a Chapter 13 debtor's disposable income even though the court cannot compel the debtor to liquidate the property to fund the plan. *See* Stuart v. Koch (*In re Koch*), 109 F.3d 1285, 1289 (8th Cir. 1997) (deciding that "exempt income not reasonably needed for support then becomes 'disposable income' that must be paid to creditors"); *In re Sohn*, 300 B.R. at 335–36 (requiring debtor to include "disposable portion" of exempt income in Chapter 13 payment plan); *In re Gebo*, 290 B.R. 168, 170 (Bankr. M.D. Fla. 2002) (same).

83. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 557 (1993) (describing the efforts of the bankruptcy court in San Antonio to increase their percentage of full payouts in Chapter 13 plans); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 405–11 (1994) (citing a 1993

While the Ideal Debtor should own an expensive home and preferably live in a state that lets her exempt most, if not all, of the value of that home, she should avoid having a significant amount of equity in the home. A Chapter 13 debtor who has significant equity in a home runs the risk of having a court refuse to confirm her Chapter 13 repayment plan unless she sells her home and uses the proceeds to both secure less expensive housing and repay some debts. To ensure that she has little equity in her home, the debtor should decrease her equity by refinancing her mortgage and using the proceeds to purchase exemptible assets, add improvements to the home, or pay nondischargeable debts like taxes, child support, or student loans.⁸⁴ Because credit card debt is presumptively dischargeable, the Ideal Debtor who refinances her mortgage to ensure she has little equity in her home should not use the proceeds to pay off credit card or other nondischargeable debts.

B. Minority Demographics

1. The Family

The rearing or informal adoption of children by members of their extended family for both short and long periods of time is more likely among blacks and Hispanics than among other racial groups.⁸⁵ Over the past two decades, the number of informally adopted children living with relatives has risen sharply among black families—perhaps due to marriage or incarceration rates or because of the difficulties black family members appear to face when they attempt to adopt their blood relatives.⁸⁶ The extended black family

National Association of Chapter 13 Trustees survey that showed the percentage of 100% payout plans to be 57% in the trustee region of Tennessee and Kentucky).

84. See Bahchieva et al., *supra* note 8, at 26 (arguing that bankruptcy laws combined with state exemption laws give financially strapped households an incentive to increase their mortgage debt).

85. ROBERT B. HILL, *THE STRENGTHS OF AFRICAN AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER* 126 (1999); ROSE M. KREIDER, U.S. DEPT. OF COMMERCE, *ADOPTED CHILDREN AND STEPCHILDREN: 2000*, at 3, 9, & 13–15 (2003).

86. See LYNNE M. CASPER & KENNETH R. BRYSON, *CO-RESIDENT GRANDPARENTS AND THEIR GRANDCHILDREN: GRANDPARENT MAINTAINED FAMILIES* (1998), at <http://www.census.gov/population/www/documentation/twps0026/twps0026.html> (last visited Sept. 2, 2004) (suggesting "increased drug abuse among parents, teen pregnancy, divorce, child abuse and neglect" as well as AIDS and increased incarceration rates contribute to increase in grandparent-maintained households) (on file with the Washington and Lee Law Review).

Most adoption agencies give priority to families that have two parents and no children, are in the American middle-income bracket, and are relatively young. Given this profile, black grandparents or family members who serve as principle caregivers may find it hard to adopt

typically expands beyond blood relatives and includes "fictive kin"—unrelated individuals who may "provide more family support services than blood kin."⁸⁷ Because of these fictive kinships, black children often are adopted informally and reared by surrogate parents who are not related biologically to the children.⁸⁸

Significant racial disparities also exist in households that consist of spouses or parents with children. That is, though the number of black families has increased over the last thirty years, black households have higher "nontraditional" (non-husband-wife) family living arrangements. There are considerably more white married-couple families than minority married-couple families.⁸⁹ For example, while there were 4.9 million black families in 1970, and 8.7 million by 2000, less than half (48%) of those families consisted of married couples, a significant decline from the 68% of black married-couple households in 1970.⁹⁰ Similarly, while the number of Hispanic families dramatically increased, from 2 million in 1970 to 7.6 million in 2000, and 68% of those families were married couples in 2000, the percentage of married Hispanic couples also significantly declined from 81% in 1970. Since 1970, the number of white families also increased, from 46.2 million to 60 million in 2000. While the percentage of married white couples declined as well, from 89% in 1970 to 81% in 2000, the decline was a much smaller percentage.⁹¹ In

because of the racial marriage gap, the higher black fertility rates, and the fact that blacks tend to live in lower income households. HILL, *supra* note 85, at 127–28.

87. HILL, *supra* note 85, at 128.

88. *Id.*

89. JESSE MCKINNON, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 3 (2003), available at <http://www.census.gov/prod/2003pubs/p20-541.pdf>.

90. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 70 FAMILY AND NON-FAMILY HOUSEHOLDS, BY RACE, HISPANIC ORIGIN, AND TYPE: 1970-1994 (1995) [hereinafter U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 70], available at <http://www.census.gov/prod/1/gen/95statab/pop.pdf>; U.S. CENSUS BUREAU, FAMILY HOUSEHOLDS, BY TYPE, AGE OF OWN CHILDREN, EDUCATIONAL ATTAINMENT, AND RACE AND HISPANIC ORIGIN OF HOUSEHOLDER (June 29, 2001), available at <http://www.census.gov/population/socdemo/hh-fam/p20-537/2000/tabF2.pdf>.

91. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 70, *supra* note 90; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORT, P20-537: TBL. F2, FAMILY HOUSEHOLDS, BY TYPE, AGE OF OWN CHILDREN, EDUCATIONAL ATTAINMENT, AND RACE AND HISPANIC ORIGIN OF HOUSEHOLDER: MARCH 2000 (2000) [hereinafter CURRENT POPULATION REPORT, P20-537: TABLE F2], available at <http://www.census.gov/population/socdemo/hh-fam/p20-537/2000/tabF2.pdf>.

Black women at all education and income levels are more likely than whites to be never-married mothers and also are more likely to be never married (whether or not mothers) than their white or Hispanic counterparts. ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS

short, while more minority households exist now than in 1970, the racial marriage gap between whites and Hispanics and blacks has actually widened.

The number of single-headed households has also increased, especially black female-headed households.⁹² Currently, almost half of all black households are headed by females—not surprising given the racial marriage gap, the higher minority fertility rates, and the increased incidence of divorce generally.⁹³ Many single-headed households are entitled to financial assistance from the noncustodial parent, though not all custodial parents who are awarded financial support actually receive it. A racial gap exists among those people who receive family support payments. That is, out of the total population that received child support in 2002, 67% were white, 19% were African-American, and 12% were Hispanic.⁹⁴ While these percentages are roughly comparable to the percentage of those racial groups in the overall population in the United States, a larger proportion of minority (especially

BUREAU, CURRENT POPULATION REPORTS, P70-80: NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 8 (Feb. 2002), available at <http://www.sipp.census.gov/sipp/p70s/p70-80.pdf>; David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States since 1960*, at 12 (Oct. 2002), available at <http://www.ksg.harvard.edu/inequality/Seminar/Papers/ElwdJnck.pdf> (on file with the Washington and Lee Law Review).

92. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P20-547: UNMARRIED-COUPLE HOUSEHOLDS, BY PRESENCE OF CHILDREN: 1960 TO PRESENT (June 2003), available at <http://www.census.gov/population/socdemo/hh-fam/tabUC-1.pdf>; see also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 70, *supra* note 90 (showing the increase of Black female-headed households from 1970 to 1994). While blacks account for 15% of all children, they are 34% of the children of female-headed family groups. TERRY LUGAILA & JULIA OVERTURF, U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORTS: CHILDREN AND THE HOUSEHOLDS THEY LIVE IN: 2000, at 14 (Feb. 2004), available at <http://www.census.gov/prod/2004pubs/censr-14.pdf>. The number of single mothers with children grew nearly five times faster in the 1990s than the number of married couples with children. Jonathan Rauch, *The Widening Marriage Gap: America's New Class Divide*, 2001 NAT'L J. 1471, 1471; see also U.S. CENSUS BUREAU, U.S. DEPT'T OF COMMERCE, CURRENT POPULATION REPORTS, P20-547: LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT (June 2003) (listing statistics for two-parent and female-headed households in the 1990s), available at <http://www.census.gov/population/socdemo/hh-fam/tabCH-1.pdf>.

93. Currently 52% of all black families are headed by a single parent and 44% of all black households are headed by women. CURRENT POPULATION REPORT, P20-537: TABLE F2, *supra* note 91. In contrast, only 23% of Hispanic households are headed by women and even fewer white (14%) and Asian (13%) households have female heads. *Id.*; see also Reynolds Farley, *Demographic, Economic, and Social Trends in a Multicultural America*, in NEW DIRECTIONS: AFRICAN AMERICANS IN A DIVERSIFYING NATION 11, 13–20 (James S. Jackson ed., Nat'l Policy Ass'n 2002) (noting that black women have higher fertility rates than white women and that more whites are married than blacks).

94. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-225: CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 4 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

black) than white households are single-headed or unmarried-partner households.⁹⁵ As white, non-Hispanic custodial parents are more likely than black or Hispanic custodial parents to receive child-support payments, the gap is striking.⁹⁶

The numbers of people receiving alimony also varies dramatically by race. While the marriage (and divorce) rates differ by race, the marriage and divorce gaps are not as pronounced as the alimony gap. That is, out of the total population receiving alimony in 2000, 90% were white, 7% African-American, and 4% Hispanic.⁹⁷ While black women had a higher divorce rate (12%) than white women (10%) and Hispanic women (8.3%), white women receive alimony in a percentage (91%) that is slightly higher relative to their percentage (89%) in the overall U.S. population.⁹⁸

Though blacks and Hispanics have relatively higher fertility rates than other groups, black children are more likely to live with neither of their parents

95. See TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORTS: MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 6 (2003) (showing that in 2000, the percent of white unmarried opposite-sex partner households (7.3%) was less than half the percentage for black (15.5%) and American Indian (16%) households), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>. The number of unmarried-partner households has increased both due to the increase in self-identified gay and lesbian households and because of the increase in opposite-sex couples who choose to live together before marriage. *Id.* at 1.

96. Compare U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 513, NUMBER OF PERSONS WITH INCOME BY SPECIFIED SOURCES OF INCOME: 2000, at 342 (2002) [hereinafter STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 513] (setting forth the number of white, black, and Hispanic persons receiving child support), available at <http://www.census.gov/prod/2003pubs/02statab/socinsur.pdf> with U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 2003: NO. 13, RESIDENT POPULATION BY RACE, HISPANIC ORIGIN, AND AGE: 2000 AND 2002 (2003) (setting forth the 2002 population numbers by race and Hispanic Origin). Though white non-Hispanic custodial parents receive child-support payments in a percentage (79%) that is lower than their percentage in the overall U.S. population (80%), and black custodial parents actually receive child-support payments in a percentage (18%) that is higher than their percentage in the U.S. population (16%), Hispanic custodial parents receive a much lower percentage (9%) of child-support payments than their relative percentage (16%) in the U.S. population.

97. STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 513, *supra* note 96, at 342.

98. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORT, P20-537, TBL. A1, MARITAL STATUS OF PEOPLE 15 YEARS AND OVER, BY AGE, SEX, PERSONAL EARNINGS, RACE, AND HISPANIC ORIGIN: MARCH 2000 (2000) (showing that, as of March 2000, 10.2% of white women were divorced, 8.3% of Hispanic women were divorced, and 11.8% of black women were divorced), available at <http://www.census.gov/population/socdemo/hh-fam/p20-537/2000/tabA1.pdf>; STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 513, *supra* note 96, at 342 (showing that the percentage of white women receiving alimony is slightly greater than the percentage of white women in the overall U.S. population).

(9%) than white and Asian children (3%) or Hispanic children (5%).⁹⁹ However, of all children who live with someone other than their parents, black children are less likely (9%) to live with nonrelatives than white (27%), Asian (14%), or Hispanic children (23%), and many now appear to live with their grandparents.¹⁰⁰ Indeed, the number of grandparent-headed households has increased dramatically over the last thirty years, and the number of children living in grandparent-headed households increased 30% from 1990 to 2000.¹⁰¹ Research suggests that 17% of black grandparents have children living in their home, but only 5% of white grandparents have children living in their home.¹⁰² Black and Hispanic children also are more likely to live in intergenerational households (parent, child, grandchild) or in households headed by relatives who are not their parents. While 6% of all children in households lived in grandparent-headed households and the largest number of children who live in grandparent-headed households are white, higher percentages of minority children live in grandparent-headed households.¹⁰³ For example, blacks represent 15% of all children but represent 32% of all children who lived with grandparents and 29% of all children who lived with other relatives in 2001.¹⁰⁴ Similarly, while only 17% of all children are Hispanic, 21% of children living with grandparents and 38% of all children living with other relatives are Hispanic.¹⁰⁵ Indeed, a recent report notes that Hispanic children as a group,

99. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORT, P20-537, TBL. C2, HOUSEHOLD RELATIONSHIP AND LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS, BY AGE, SEX, RACE, HISPANIC ORIGIN, AND METROPOLITAN RESIDENCE: MARCH 2000 (2000) (listing statistics for living arrangements of children under age 18 for each race), available at <http://www.census.gov/population/socdemo/hh-fam/p20-37/2000/tab C2.pdf>.

100. See *id.* (listing statistics for living arrangements of children under age 18 for each race). Black children were also the least likely to live with both parents. Out of all black children under 18, 38% lived with both parents, compared to 75% of white children, 81% of Asian children, and 65% of Hispanic children. *Id.* Stated differently, while blacks account for 15% of all children, they represent 30% of all children who live with neither parent. LUGAILA & OVERTURF, *supra* note 92, at 14.

101. CASPER & BRYSON, *supra* note 86, at *1; KNOWLEDGE MGMT. & THE AARP GRANDPARENT INFO. CTR., AARP, LEAN ON ME: SUPPORT AND MINORITY OUTREACH FOR GRANDPARENTS RAISING GRANDCHILDREN 7 (rev. Dec. 2003) [hereinafter KNOWLEDGE MGMT. & THE AARP GRANDPARENT INFO. CTR.], available at http://research.aarp.org/general/gp_2003_a.pdf.

102. CURT DAVIES & DAMEKA WILLIAMS, AARP, THE GRANDPARENT STUDY 2002 REPORT 3 (2002), available at http://research.aarp.org/general/gp_2002.pdf.

103. LUGAILA & OVERTURF, *supra* note 92, at 2; KNOWLEDGE MGMT. & THE AARP GRANDPARENT INFO. CTR., *supra* note 101, at 7.

104. LUGAILA & OVERTURF, *supra* note 92, at 7.

105. *Id.* at 7-9. A recent study indicates that 13.2% of black, 7.8% of Hispanic, but only 4.2% of Caucasian children live in grandparent-headed households. KNOWLEDGE MGMT. & THE

followed closely by black children, are the fastest growing segment of children living in grandparent-headed households.¹⁰⁶

Given the increase in single-parent households, the economic hardships single-parent households face,¹⁰⁷ and the increase in grandparent-headed households, it is not surprising that 52% of all grandparents appear to spend money on their grandchildren's educational needs, 45% help pay for their living expenses, and 25% help pay medical expenses.¹⁰⁸ Grandparents spend, on average, \$500 per year on their grandchildren, and 33% of grandparents spend between \$500 and \$2500 on their grandchildren annually.¹⁰⁹ It is unclear whether minority grandparents provide proportionately more financial support than other grandparents. However, since black grandparents are more likely than white grandparents to be the primary caregivers of their grandchildren or to have a grandchild live in their home, they likely spend relatively more on their grandchildren even if they have no legal duty to provide this support.¹¹⁰ Likewise, one study suggests that although the black, American Indian, and Hispanic populations have the same percent of people age thirty and over who live with their grandchildren (8%), blacks are more likely than Hispanics to be responsible for those grandchildren.¹¹¹

AARP GRANDPARENT INFO. CTR., *supra* note 101, at 7.

106. KNOWLEDGE MGMT. & THE AARP GRANDPARENT INFO. CTR., *supra* note 101, at 8.

107. Children who live only with their mothers are almost five times as likely to live in poverty as children who live in a married-couple household. LUGAILA & OVERTURF, *supra* note 92, at 16. Indeed, families with a female head represent 60% of all families in poverty. Ellwood & Jencks, *supra* note 91, at 2. Children raised in single-parent homes also are more likely to dropout of school, to have higher delinquency and teen pregnancy rates, and to have higher unemployment rates as adults. These issues disproportionately affect blacks though marital status rather than race may be the most important factor. Children who live in a mother-only household are more likely to be poor than children who live in a black or white two-parent household. In other words, children are better off financially if they live with married black parents rather than a single parent of any race. *Id.* at 4; BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-222: POVERTY IN THE UNITED STATES: 2002, at 23-25 (Sept. 2003), available at <http://www.census.gov/prod/2003pubs/p60-222.pdf>.

108. DAVIES & WILLIAMS, *supra* note 102, at 33.

109. *Id.* at 36.

110. Robert Joseph Taylor et al., *Developments in Research on Black Families: A Decade Review*, 52 J. MARRIAGE & FAM. 993, 998 (1990) (observing that a racial comparison of "the grandparent role reveal[s] that, in comparison to whites, black grandparents take a more active part in the parenting of grandchildren").

111. TAVIA SIMMONS & JANE LAWLER DYE, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, at 2-3 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>. These statistics suggest that Hispanic grandparents may be the economically dependent member of intergenerational households. *Id.* at 3. This study also found that Asian co-resident grandparents were the least likely to be

Finally, black and Hispanic adults are more likely than whites to provide financial support to their parents, other nonnuclear relatives, and fictive kin.¹¹² Census data indicate that Hispanics are the most likely group to provide financial support to people both inside and outside their households, followed by blacks and then whites.¹¹³ In addition, recent studies suggest that more blacks than whites expect to support their adult children and aging parents.¹¹⁴

2. Employment

A racial gap also exists in unemployment and employment rates.¹¹⁵ Blacks have higher unemployment rates than whites and Hispanics, and the level of black unemployment is rising at a faster pace than it has since the

responsible for their grandchildren. *Id.*

112. See Taylor et al., *supra* note 110, at 997 (observing that "among blacks, the relative contributions of a wife, adult children, and non-nuclear relatives constitute a greater portion of the total household income than is the case among whites"); see also Hyoun K. Kim & Patrick C. McKenry, *Social Networks and Support: A Comparison of African Americans, Asian Americans, Caucasians, and Hispanics*, 29 J. COMP. FAM. L. 313, 315-17 (1998) (discussing support provided to fictive kin in African-American and Hispanic communities).

113. WILFRED T. MASUMURA, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P70-84: WHO'S HELPING OUT? FINANCIAL SUPPORT NETWORKS AMONG AMERICAN HOUSEHOLDS: 1997, at 2 (2002), available at <http://www.sipp.census.gov/sipp/p70s/p70-84.pdf>.

114. ARGOSY RESEARCH, THE ARIEL MUTUAL FUNDS/CHARLES SCHWAB & CO., INC. BLACK INVESTOR SURVEY: SAVING AND INVESTING AMONG HIGH INCOME AFRICAN-AMERICAN AND WHITE AMERICANS, slide 7, at http://www.arielmutualfunds.com/forms/2003-survey/Black%20Investor%20Survey%202003_files/frame.htm (2003) [hereinafter BLACK INVESTOR SURVEY] (on file with the Washington and Lee Law Review); see also Kim & McKenry, *supra* note 112, at 328-29 (suggesting that whites are less likely to rely on children for support because of the Anglo view that adults should give assistance to, not accept assistance from, children).

115. See generally BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, FREQUENTLY ASKED QUESTIONS, at <http://www.bls.gov/gps/gpsfaqs.htm#Q2> (last modified May 26, 2004) (defining unemployed persons as all persons who had no employment during the reference week, were available for work (except for temporary illness and including those waiting to be recalled to a job from which they had been laid off), and had made specific efforts to find employment some time during the four-week period ending with the reference week; defining employed persons as all persons who, during the reference week, (a) did any work as paid employees, worked in their own business or profession or on their own farm, or worked fifteen hours or more as unpaid workers in an enterprise operated by a member of their family, or (b) were not working but had jobs from which they were temporarily absent; and limiting unemployment and employment statistics to persons sixteen years of age and older residing in the fifty states and the District of Columbia, who are not inmates of institutions—for example, penal and mental facilities, homes for the aged—and who are not on active duty in the Armed Forces) (on file with the Washington and Lee Law Review). Given the proportionately higher number of black males who are incarcerated, the unemployment gap between black and white men is likely much higher than the figures reported by the government.

mid-1970s.¹¹⁶ In fact, the black-white unemployment rate gap has actually increased slightly over the last thirty years. In 1972, blacks had just over twice the unemployment rate of whites (10.4% black compared to 5.1% white) but that gap widened by 2003 (10.8% black compared to 5.2% white).¹¹⁷ Hispanics also have a higher unemployment rate than whites, but the Hispanic unemployment rate is lower than the black unemployment rates.¹¹⁸ The black unemployment rate likely is higher than the unemployment rate of other races because blacks have been more heavily concentrated in the manufacturing industry, which has been especially affected by the global outsourcing of U.S. jobs.¹¹⁹ Except possibly for workers who have advanced degrees, this black-white unemployment gap exists at all educational levels.¹²⁰ Indeed, a recent speech by the Chairman

116. Louis Uchitelle, *Blacks Lose Better Jobs Faster as Middle-Class Work Drops*, N.Y. TIMES, Jul. 12, 2003, at A1.

117. DEDRICK MUHAMMAD ET AL., UNITED FOR FAIR ECONOMY, THE STATE OF THE DREAM 2004, at 4 (Jan. 15, 2004) [hereinafter STATE OF THE DREAM] (citing Bureau of Labor Statistics, Employment Situation Historical Table A-2), available at <http://www.faireconomy.org/press/2004/StateoftheDream2004.pdf> (on file with the Washington and Lee Law Review). Census Bureau information also indicates that white unemployment rates (3%) are significantly lower than minority unemployment rates. Native Americans have the highest unemployment rates (7.6%), followed by blacks (6.9%), Native Hawaiian and other Pacific Islanders (6.7%), and Hispanics (5.5%). SANDRA LUCKETT CLARK & MAI WEISMANTLE, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: EMPLOYMENT STATUS: 2000, at 5 (Aug. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-18.pdf>.

118. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE (2000), available at <ftp://ftp.bls.gov/pub/special.requests/lf/aa2002/pdf/cpsaat3.pdf>; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYMENT STATUS OF THE HISPANIC-ORIGIN POPULATION BY AGE AND SEX (2002), available at <ftp://ftp.bls.gov/pub/special.requests/lf/aa2002/pdf/cpsaat4.pdf>.

119. Stephanie Armour, *Job Hunt Gets Harder for African-Americans*, USA TODAY.COM, Dec. 9, 2000, at http://www.usatoday.com/money/economy/employment/2002-12-08-jobless_x.htm (on file with the Washington and Lee Law Review); Jane Birnbaum, *American Jobs: Going, Going . . .*, at http://www.aflcio.org/aboutaflcio/magazine/0903_am_jobs.cfm (2004) (on file with the Washington and Lee Law Review); Dianna Solis, *African-Americans being Hurt Most by Joblessness*, at http://www.ccmacanada.org/ccma/news_room/new_articles/july2003/joblessness.htm (July 27, 2003) (noting that Hispanic workers have not been as affected as black workers by global outsourcing because they are more concentrated in the service industry and construction, areas that have fared well in the current economy) (on file with the Washington and Lee Law Review).

120. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 25 YEARS AND OVER BY EDUCATIONAL ATTAINMENT, SEX, RACE, AND HISPANIC ORIGIN (2000), available at <ftp://ftp.bls.gov/pub/special.requests/lf/aa2002/pdf/cpsaat7.pdf>. But see STATE OF THE DREAM, *supra* note 117, at 7 (suggesting that, relative to a white counterpart with the same educational level, a black worker with a high school education will earn \$300,000 less than his white

of Fannie Mae indicated racial equality in the job market would mean nearly two million more professional and managerial jobs for African Americans.¹²¹

3. Income

Not surprisingly, the racial employment gap creates a racial income gap. Incomes for whites are substantially higher than incomes for all other groups.¹²² The income gap for blacks and whites has actually increased since the late 1960s.¹²³ For example, the median household income for all races was \$42,000 in 2002.¹²⁴ The median income of \$45,000 for white households is higher than the \$33,000 median income for Hispanic households and significantly higher than the \$29,000 median black

counterpart, will earn \$500,000 less if he graduates from college, and will earn \$600,000 less on average if he has an advanced degree).

121. Franklin D. Raines, Remarks at Black Student Fund, at www.fanniemaecom/media/speeches/index.jhtml?p=Media&s=Executive+Speeches (Mar. 9, 2004) [hereinafter Raines Speech] (on file with the Washington and Lee Law Review).

122. Ana M. Aizcorbe et al., *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances*, FED. RES. BULL., Jan. 2003, at 1, 3 [hereinafter *Recent Changes in U.S. Family Finances*], available at <http://www.federalreserve.gov/pubs/bulletin/2003/0103lead.pdf>.

123. See STATE OF THE DREAM, *supra* note 117, at 7 (noting that the typical black family in 1968 had 60% of the income of a white family but had only 58% of that income in 2002). The employment gap also creates disparities in health care coverage. As 64% of people in the United States have employment-based health insurance plans, being employed remains the strongest link to health insurance coverage for the American worker. U.S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES: 2000 (INTERNET RELEASE) 15-1 (2000), available at <http://www.census.gov/population/pop-profile/2000/chap15.pdf>. The number of Americans without health insurance in 2002 increased to 43.6 million, or 15.2% of the total population, up 2.4 million from 2001. ROBERT J. MILLS & SHEILESH BHANDARI, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2002, at 4 (2003), available at <http://www.census.gov/prod/2003pubs/p60-223.pdf>. Part of this increase can be explained by a large drop in job-based coverage. *Id.* Because the likelihood of being insured increases as the level of education and income rises, not surprisingly, minorities have higher rates of uninsurance. *Id.* at 4-7 (explaining that those in poverty have a higher uninsured rate and that "the likelihood of being insured increases as the level of education rises"). See generally SHEILESH BHANDARI & ROBERT MILLS, U.S. CENSUS BUREAU, DYNAMICS OF ECONOMIC WELL-BEING: HEALTH INSURANCE 1996-1999 (2003), available at <http://www.census.gov/prod/2003pubs/p70-92.pdf> (reporting on the dynamics of health insurance). While the percentage of all people without health insurance is 15%, the white uninsurance rate is 14% while Hispanics had the highest percentage of uninsured at 32%, followed by blacks at 20%, and Asian and Pacific Islanders at 18%. *Id.* at 6.

124. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME IN THE UNITED STATES: 2002 (2003), available at <http://www.census.gov/prod/2003pubs/p60-221.pdf>.

household income.¹²⁵ In addition, blacks are more likely to live below the poverty level (23.6%) than are whites (7.7%) and are more likely to earn less than \$25,000 (40%) than whites (17.8%).¹²⁶ In contrast, twice the number of white workers (31.6%) earn more than \$75,000 annually compared to black workers (15.6%).¹²⁷ While black and Hispanic incomes lag white median household incomes, Asian households (especially native-born households) have higher median incomes (\$52,000) than white households.¹²⁸ Some attribute these higher household incomes to this racial group's relatively higher educational attainment rates and work hours, especially for the female household members.¹²⁹

Black household income is likely lower than other racial groups' income because blacks have lower marriage rates and higher percentages of female-headed households, both of which decrease household income.¹³⁰ Black and Hispanic households also have fewer households headed by college graduates, which also decreases household income.¹³¹ There has been some progress, however, in black household income. For example, the black-white income gap closes somewhat when married-couple households are considered, the gap between female workers is less than the gap between male workers, and there has been an increase in the number of black millionaires.¹³² However, the gap stubbornly persists at all income levels, black poverty levels have not radically

125. *Id.*

126. U.S. CENSUS BUREAU, BLACK POPULATION IN THE U.S., MARCH 2000, TBL. 15, 16, at <http://www.census.gov/population/www/socdemo/race/pp1-142.html> (2001) (on file with the Washington and Lee Law Review).

127. *Id.*

128. DENAVAS-WALT ET AL., *supra* note 124, at 3.

129. James S. Jackson & Nicholas A. Jones, *New Directions in Thinking About Race in America: African Americans in a Diversifying Nation*, 7 AFR. AM. RES. PERSPS. 1, 9 (2001).

130. For example, the median income in 2002 for married-couple families was \$61,254 while the median income for female households was \$29,001. DENAVAS-WALT ET AL., *supra* note 124, at 9.

131. *See infra* Part V (discussing the relationship between education and income).

132. *See* Farley, *supra* note 93, at 28 (noting an increase in the number of black millionaires); *see also* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 65, MONEY INCOME OF HOUSEHOLDS—PERCENT DISTRIBUTION BY INCOME LEVEL, RACE, AND HISPANIC ORIGIN, IN CONSTANT (2000) DOLLARS: 1980-2000 (2002) (showing an increase in the number of black millionaires), available at <http://www.census.gov/prod/2003pubs/02statab/income.pdf>; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 655, MONEY INCOME OF HOUSEHOLDS—MEDIAN INCOME AND INCOME LEVEL BY HOUSEHOLD TYPE: 2000 (2002) (showing that the gap narrows for married couples and that the gap for female workers is narrower than that for male workers), available at <http://www.census.gov/prod/2003pubs/02statab/income.pdf>.

changed in the last thirty years, and there has never been a time period where the majority of blacks have been middle-income.¹³³ One study notes that it took more than three decades—from 1968 to 2001—for blacks to close the black-white income gap by two cents (from \$.55 to \$.57) and, at this rate, it will take another 581 years for blacks to fully close the income gap.¹³⁴ In addition, recent Fannie Mae data suggest that but for the income gap, blacks would have nearly \$200 billion more in income.¹³⁵

4. Wealth

a. Overall

Individuals who have wealth are generally better off than those with income because the ability to reduce wealth to cash can protect individuals from income interruptions and can help the individual (or their children or other family members) buy a home, start a business, or pay for college.¹³⁶ Stated differently, while income affects a person's ability to purchase things in the present, wealth (or the lack thereof) affects a person's ability to provide a present and future financial cushion for himself and his heirs.¹³⁷ Because wealth is distributed among households far more unevenly than income, the racial wealth gap is even more profound and persistent than the income gap.¹³⁸

133. See Farley, *supra* note 93, at 28 (noting that "[t]here has never been a period when the majority of Blacks were members of America's middle economic class").

134. STATE OF THE DREAM, *supra* note 117, at 6.

135. Raines Speech, *supra* note 121.

136. Wealth may vary somewhat from year to year depending on the increase or decrease in value of the assets that constitute that wealth. Nonetheless, wealth tends to be more stable within families and across generations than income, and, unlike income, an occupation, or an education, it is more likely to be inherited rather than earned. DALTON CONLEY, BEING BLACK, LIVING IN THE RED 14 (1999).

137. With wealth, a person can avoid or weather a financial setback because she can either sell, exchange, or pledge those assets as collateral for a loan. See generally JOHN KARL SCHOLZ & KARA LEVINE, U.S. BLACK-WHITE WEALTH INEQUALITY: A SURVEY 1 (2002), available at http://www.russellsage.org/programs/proj_reviews/si/revscholzlevine01.pdf (on file with the Washington and Lee Law Review).

138. Indeed, eliminating the racial wealth disparity has been cited as a justification for providing reparations to blacks. Because whites reaped financial benefits from a system that allowed them to avoid paying wages to slaves, they were able to obtain wealth and to bequeath that wealth to their descendants. Moreover, though owning slaves did impose some financial costs on slave owners (minimal food, clothing, and shelter), the financial costs to slaves were significantly greater because they were deprived of wage income, were legally prohibited from owning property, and thus were prevented from accumulating wealth or passing that wealth on to their descendants. See Dalton Conley, *The Cost of Slavery*, N.Y. TIMES, Feb. 15, 2003, at

At all income levels, white households have significantly more real and personal property than black or Hispanic households. While the median household net worth for all groups in 2000 was \$55,000, the median net worth of black households was \$7,500 and was \$9,750 for Hispanic households.¹³⁹ Black and Hispanic median household net worth is dramatically less than the \$79,400 median net worth for white households.¹⁴⁰ Moreover, excluding home ownership, the median net worth of all households in 2000 was \$13,473, but whites had a higher median net worth of \$22,566 when compared to blacks \$1,166 and Hispanics \$1,850.¹⁴¹ For families in the lowest earning quintile, the gap is even more profound. While overall median net worth (including home equity) for this income group was \$7,396, white families had a median net worth of \$24,000, compared to \$57 for black families and \$500 for Hispanic families.¹⁴² The percentage of black households reporting zero or negative net worth is almost twice the rate of white households.¹⁴³ This gap no doubt contributes to the significantly higher poverty rates of blacks (24%) and Hispanics (22%) relative to their percentages of the overall population (13% black, 14% Hispanic) and to the percentage of whites (8%) and all people who live in poverty (12%).¹⁴⁴

The racial disparity at the upper level is perhaps even more striking. The total median net worth for households in the highest earning quintile was

A25 (discussing the economic issues of slavery and reparations). See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); Berta Esperanza Hernandez-Truyol & Shelbi D. Day, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*, 34 IND. L. REV. 1213 (2001).

139. SHAWNA ORZECOWSKI & PETER SEPIELLI, U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000 CURRENT POPULATION REPORTS 6, 12 (2003), available at <http://www.census.gov/prod/2003pubs/p70-88.pdf>.

140. *Id.*

141. *Id.* at 13. The racial wealth gap among homeowners likely is caused by segregated housing patterns and the generally lower market value placed on homes in predominantly minority neighborhoods. This gap likely will not close until neighborhoods become less segregated and minorities own homes in neighborhoods that have appreciating housing stock. See generally GEORGE S. MASNICK, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, HOME OWNERSHIP TRENDS AND RACIAL INEQUALITY IN THE UNITED STATES IN THE 20TH CENTURY (2001) [hereinafter HOME OWNERSHIP TRENDS AND RACIAL INEQUALITY], available at http://www.jchs.harvard.edu/publications/home_ownership/masnick_w01-4.pdf (on file with the Washington and Lee Law Review).

142. ORZECOWSKI & SEPIELLI, *supra* note 139, at 12.

143. WOLFF, *supra* note 81, at 21; see also U.S. CENSUS BUREAU, ASSET OWNERSHIP OF HOUSEHOLDS: 2000, TBL. 4 (2004), at http://www.census.gov/hhes/www/wealth/1998_2000/wlth00-4.html (last visited Nov. 10, 2004) (showing that 29% of black households had zero or negative net worth compared to only 12.7% of white households) (on file with the Washington and Lee Law Review).

144. PROCTOR & DALAKER, *supra* note 107, at 2 tbl. 1.

\$185,500. White families had a higher median net worth of \$208,023, while black family net worth (\$65,141) and Hispanic family net worth (\$73,032) trail significantly.¹⁴⁵ In fact, the net worth of black and Hispanic college graduates is comparable to the net worth of white high school graduates while black and Hispanic high school graduates' net worth is comparable to the net worth of white high school dropouts.¹⁴⁶ Though the wealth gap appears to be closing somewhat, one study projected that it would take almost 100 years for black households to reach parity with whites.¹⁴⁷

b. Real Property

Homeownership constitutes the largest component of household net worth (or wealth) for all populations in the United States—except the highest income groups—and arguably is the safest and most efficient way both to provide physical shelter and the to shelter the homeowner from financial vicissitudes of life.¹⁴⁸ More than 68% of total households owned their own homes in 2002.¹⁴⁹ There is, again, a significant racial disparity. Homeownership rates for whites in 2002 was almost 75% while the ownership rates for blacks was less than 49%.¹⁵⁰ The homeownership rates for other

145. ORZECZOWSKI & SEPIELLI, *supra* note 139, at 6.

146. SCHOLZ & LEVINE, *supra* note 137, at 3.

147. STATE OF THE DREAM, *supra* note 117, at 8; *cf.* Press Release, Consumer Federation of America, More African-Americans Save and Begin to Close Wealth Gap (Oct. 29, 2003) (explaining that, according to an analysis of the most recent Federal Reserve Survey of Consumer Finances data by an Ohio State professor, there has been a 221% increase in net wealth of African-American households from 1989 to 2001 but only a 32.9% increase in overall U.S. households), *available at* <http://www.consumerfed.org/102903blackamsaves.pdf> (on file with the Washington and Lee Law Review).

148. HOME OWNERSHIP TRENDS AND RACIAL INEQUALITY, *supra* note 141, at 10, 20–22. Owning a home theoretically should give homeowners greater protection against economic misfortunes because a debtor who has equity in a home can use that equity to pay living expenses and reduce existing debt. This appears to be the case for white homeowners, as a smaller percentage of white homeowners file for bankruptcy than white renters. Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1773, 1782–86 (2004). In contrast, blacks *increase* their risk of filing for bankruptcy by becoming homeowners. Thus, unlike white homeowners, a greater percentage of black homeowners file for bankruptcy than black renters. *Id.*

149. JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., STATE OF THE NATION'S HOUSING 6 (2003) [hereinafter STATE OF THE NATION'S HOUSING], *available at* <http://jchs.harvard.edu/publications/markets/son2004.pdf> (on file with the Washington and Lee Law Review).

150. *Id.* at 35; *see also* Aizcorbe, *supra* note 122, at 19 (reporting that 67.7% of all families and 74.1% of white families owned their own homes but only 47% of nonwhite or Hispanic

minority groups also lag the white homeownership rate, with Hispanics having a 47% rate, Asians a 54% rate, and Native Americans having rates which range from 33% to 55%.¹⁵¹ While blacks and Hispanics are less likely to be homeowners, they are more likely to have more mortgage debt than whites.¹⁵²

While the majority of white households have owned their homes since the end of World War II, most minority groups still have not yet reached this level. Indeed, though the increase in household ownership during the 1990s resulted from concerted efforts to bolster minority home ownership rates,¹⁵³ the home ownership rate for blacks increased by almost 6% from 1993–2003, and Hispanic ownership rates increased by more than 7% during that ten-year period, there is still a significant racial homeownership gap which has remained constant since the 1980s.¹⁵⁴ One study has projected that these homeownership rates would not achieve parity until the year 3666 at the current rate.¹⁵⁵

families did); MENNA DEMESSIE, CIVILRIGHTS.ORG, NATIONAL URBAN LEAGUE REPORTS RACIAL DISPARITIES CONTINUE, at <http://civilrights.org/issues/housing/details.cfm?id=9727> (July 30, 2002) (reporting that 48% of blacks own their homes compared to a 74% ownership rate for whites) (on file with the Washington and Lee Law Review).

151. FANNIE MAE, AMERICAN DREAM COMMITMENT 8 (2002) (stating that homeownership rates for Native Americans range between 33% and 55%), available at <http://www.fannie.mae.com/initiatives/pdf/adc/full2002.pdf>; STATE OF THE NATION'S HOUSING, *supra* note 149, at 35 (showing that homeownership rates for Hispanic and Asian/Other ethnic groups are 47.4% and 53.8% respectively); see also Press Release, National American Indian Housing Council, Native American Homeownership: Far Below Other Americans; But Mortgage Default Data Shown As Less Risky (Nov. 13, 2002), at <http://naihc.indian.com/pr/mortgage-data-11-02.html> (explaining that the Native-American homeownership rate of 40.7% lags behind the 47.1% rate for African Americans and 47.2% rate for Hispanics) (on file with the Washington and Lee Law Review).

152. See generally Bahchieva et al., *supra* note 8, at 8 (discussing data that indicate families with children and single parents have more mortgage debt than families without children).

153. GEORGE S. MASNICK, JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., UNDERSTANDING THE MINORITY CONTRIBUTION TO U.S. OWNER HOUSEHOLD GROWTH 3 (1998) (explaining that recent economic trends and innovative mortgage lending initiatives that target minorities partially explains minority owner growth in the 1990s).

154. STATE OF THE NATION'S HOUSING, *supra* note 149, at 35; U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES OWNERSHIP RATES, at <http://www.census.gov/hhes/www/housing/census/historic/ownrate.html> (last modified Aug. 20, 2004) (on file with the Washington and Lee Law Review).

155. See STATE OF THE DREAM, *supra* note 117, at 14 (noting parity would be achieved in 1664 years); see also SULLIVAN, *supra* note 1, at 231 (indicating that minorities show "no sign of making up the [homeownership] gap"). For example, while home equity makes up 32% of the total net worth of all households, it is much greater than that in Hispanic households (51%) and almost double that amount in black households (62%). In contrast, home equity makes up only 31% of white household net worth. ORZECZOWSKI & SEPIELLI, *supra* note 139, at 15.

Lower minority homeownership rates may be attributable to several factors. On average minority households tend to be younger than their white counterparts. Because homeownership rates rise with age, minority homeownership rates may lag white rates because of the lower average age of minority heads of household.¹⁵⁶ In addition, the lower marriage rate among black households, the higher percentage of Hispanic and Asian recent immigrant households, and the higher fertility rates for blacks and Hispanics also likely suppress overall minority homeownership rates.¹⁵⁷ The concentration of Asians, and to a lesser extent Hispanics and blacks, in metropolitan areas with relatively high housing costs may also depress both minority homeownership rates and the value of their homes.¹⁵⁸ Moreover, because median income and, as discussed in the next Part, average educational attainment rates for black and Hispanics households remain lower than for non-Hispanic whites, this too likely contributes to the homeownership gap because homeownership rates rise with income and educational attainment rates.¹⁵⁹

Racial discrimination also plays (and has always played) a role in homeownership patterns and rates. Although recent federal housing policy aimed to correct the imbalances in homeownership rates,¹⁶⁰ early federal

156. U.S. CENSUS BUREAU, *supra* note 154; SULLIVAN ET AL., *supra* note 1, at 232; *see also* MCKINNON, *supra* note 89, at 2–3 (discussing the proportionately younger black population).

157. *See* MARK DUDA & ERIC S. BELSKY, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE ANATOMY OF THE LOW-INCOME HOMEOWNERSHIP BOOM IN THE 1990s, at 8 (2001) (discussing studies that attribute lower ownership rates to immigrant status, age, fertility rates, and dispersal in high-cost urban areas), *available at* <http://www.jchs.harvard.edu/publications/homeownership/liho01-1.pdf>; STUART S. ROSENTHAL, JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., ELIMINATING CREDIT BARRIERS TO INCREASE HOMEOWNERSHIP: HOW FAR CAN WE GO? 22 (2001) (suggesting black homeownership rates would increase by 5.55 percentage points if the black marital status equaled that of the white population), *available at* <http://www.jchs.harvard.edu/publications/homeownership/liho01-3.pdf>.

158. DUDA & BELSKY, *supra* note 157, at 8 (noting that Hispanics and Asians are unevenly dispersed in metropolitan areas throughout the United States); *see also* MCKINNON, *supra* note 89, at 2 (noting that blacks are more than twice as likely (51%) to live inside a metropolitan central city than whites (21%)).

159. *See* U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES OWNERSHIP RATES, *supra* note 154 (showing, for example, while the homeownership rate in 2000 was 87.1% for high-income households, that rate was only 46.2% for low-income households); *see also* ORZECZOWSKI & SEPIELLI, *supra* note 139, at 15 (comparing levels of wealth and asset ownership with various socio economic factors such as income and race).

160. Bahchieva et al., *supra* note 8, at 11 (discussing incentives the government provides to lenders to encourage them to loan to lower and middle income households). For example, Fannie Mae, Freddie Mac, and the FHA all adopted initiatives designed to increase homeownership generally and minority homeownership specifically. These initiatives included lowering down payment requirements, recognizing multiple income sources to qualify for a housing loan, providing loan documentation in Spanish, and conducting fair housing audits of lender practices to combat realtors and lenders' racially discriminatory marketing and lending practices. HOME OWNERSHIP TRENDS AND RACIAL INEQUALITY, *supra* note 141, at 7–8.

housing policies, especially underwriting policies of the Federal Housing Administration, officially sanctioned racial "redlining" by discouraging lenders from making loans to nonwhite neighborhoods and questioning the stability of white neighborhoods that were integrated.¹⁶¹ Even today, minorities are more likely to be rejected for home mortgages than white applicants after controlling for virtually all of the risk factors lenders consider in the underwriting process.¹⁶² Likewise, blacks and Hispanics experience less favorable treatment more often than whites before they apply for loans and receive less information about financing their home purchases.¹⁶³ While minorities are receiving more conventional loans than they did twenty years ago, conventional lenders still provide proportionately fewer loans to low or moderate income neighborhoods, which forces minorities and lower income homebuyers to rely heavily on the subprime, high-interest loan market to finance their home purchases.¹⁶⁴

Other factors that depress minority home ownership rates include exclusionary zoning and other "smart growth" policies that state and local jurisdictions use to manage growth and preserve undeveloped land.¹⁶⁵ These

161. Redlining was a practice whereby banks coded minority neighborhoods "red," the lowest possible rating, which effectively made it impossible for blacks to get a mortgage since most neighborhoods were (and remain) racially segregated. See OLIVER & SHAPIRO, *supra* note 138, at 18–19 (discussing the guidance provided by the Federal Housing Administration to appraisers).

162. See Jackson & Jones, *supra* note 129, at 10–11 (discussing a recent study that found blacks in the Boston area more likely to be turned down for federal mortgages than whites of similar backgrounds); see also SCHOLZ & LEVINE, *supra* note 137, at 41 (stating that "blacks are almost twice as likely to be rejected for a loan"); Paul Gores, *Study Finds Major Racial Gap in Home Lending*, *White Lending*, MILWAUKEE J. SENTINEL, Oct 2, 2002, at D1 (finding blacks 5.6 times more likely to be turned down for mortgage loan); *No Excuse for Biased Lending*, ST. LOUIS DISPATCH, Oct. 4, 2002, at B6 (finding the gap between minority and nonminority rejection rates has grown over time); Lew Sichelman, *Homeownership Gap Widens as Racial Lending Disparities Worsen*, ORLANDO SENTINEL, Oct 13, 2002, at J1 (claiming that despite efforts to put minority home buyers on a more even level, the lending gap between races has worsened); Novelda Sommers, *Blacks' Mortgage Door is Narrow*, DAILY PRESS (Hampton Roads, Va.), Oct. 17, 2003, at C7 (discussing disparity in home loan denial rates for blacks and whites).

163. See MARGERY AUSTIN TURNER ET AL., THE URBAN INSTITUTE, METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 iv-v (2002) (discussing the discrimination faced by African-American and Hispanic homebuyers), available at http://www.urban.org/UploadedPDF/410821_Phase1_Report.pdf.

164. See Raines Speech, *supra* note 121 (discussing how many minority families rely on high-cost subprime lenders and predatory lenders). See generally A. Mechele Dickerson, *Bankruptcy and Mortgage Lending: The Homeowner Dilemma*, 38 J. MARSHALL L. REV. (forthcoming 2005) (discussing racial disparity in subprime lending).

165. See Michael Laris, *Legality of Growth Initiatives Debated; Panel Hears Views on Property Rights*, WASH. POST, Oct. 1, 2001, at Loudoun Extra 1 (reporting a debate before the Loudoun County Planning Commission on property rights, slow-growth policies, and the law).

policies, especially restrictions on multifamily and manufactured housing developments and large-lot zoning, likely contribute to the racial homeownership gap by discouraging builders from constructing smaller, higher density communities of townhouses, apartments or single unit homes that would be affordable to people with moderate or low incomes.¹⁶⁶ Given the income gap between whites and most minority groups, zoning policies that discourage smaller, more affordable homes will inevitably depress minority homeownership rates.

Blacks and Hispanics also appear to have lower home ownership rates because of the racial wealth gap and their lack of intergenerational wealth accumulation.¹⁶⁷ Becoming a homeowner requires wealth because homeowners typically must make a down payment and pay closing costs.¹⁶⁸ Wealth also helps homeowners "buy down" their mortgage (and reduce monthly payments) because it enables them to put down a larger down payment or reduce their interest rates by paying up-front points. Whites are four times more likely than minorities to receive down payment assistance from their parents, are more likely to inherit property from parents, and are more likely to inherit property of greater value.¹⁶⁹ This large racial gap in intergenerational wealth transfer has retarded minority homeownership rates and will contribute to future racial wealth and homeownership gaps.¹⁷⁰

166. See STATE OF THE NATION'S HOUSING, *supra* note 149, at 28 (discussing the effects of state and local policies aimed at managing residential growth and preserving open space); see also SCHOLZ & LEVINE, *supra* note 137, at 41 (discussing the differences in housing between whites and blacks).

167. See THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN 69–84 (2004) (discussing the black-white inheritance gap).

168. Many lenders now make zero down mortgage loans, so low-income homebuyers can now take out a first and second mortgage to purchase their homes. Though this may initially increase minority homeownership rates, recent trends suggest that the larger mortgage payments associated with low (or no) down payment home purchases has caused an increase in default and foreclosures. Compare STATE OF THE NATION'S HOUSING, *supra* note 149, at 18–19 (suggesting that record level foreclosures are due to an increased share of loans extended to borrowers with weak credit histories) with Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 541, 552–53 (2000) (arguing that lenders extended loans to borrowers who could never afford to repay the loans).

169. See SCHOLZ & LEVINE, *supra* note 137, at 21 (discussing research that shows that 42% of white households but less than 10% of black households get downpayment assistance from parents); see also STATE OF THE NATION'S HOUSING, *supra* note 149, at 16–17 (postulating that the \$1.4 trillion housing wealth that will pass to white heirs sharply contrasts with \$135 billion in wealth likely to pass to minority heirs).

170. Moreover, research suggests that the children of homeowners are more likely to own a home earlier than the children of renters and that earlier ownership leads to a greater increase in housing wealth accumulation. THOMAS P. BOEHM & ALAN M. SCHLOTTMANN, JOINT CTR.

Even when minorities *do* become homeowners, their homes tend not to appreciate as rapidly as white-owned homes. The median value of homes owned by all families in 2001 was \$122,000 and the median value for homes owned by whites was \$130,000.¹⁷¹ In contrast, the median value for homes owned by nonwhites or Hispanics was \$92,000.¹⁷² For a number of reasons, homes owned by black families simply are not valued as highly in the real estate market as homes owned by white families. One reason for this may be that blacks lack access to the same type of housing stock as whites, which has caused them to live in smaller homes in more segregated urban areas where housing appreciation historically has underperformed suburban housing appreciation.¹⁷³ In addition, racial steering and the reluctance of some whites to live near minorities often prevents minorities from living in integrated, suburban neighborhoods and the relatively more expensive homes in those neighborhoods.¹⁷⁴ Thus, while the median home value in the United States in 2003 was \$119,600, the median home value for blacks (\$80,600) was one-third lower than the national median and significantly lagged home value for Asians (\$199,300, which was more than 50% higher than the national median) and whites (\$122,800).¹⁷⁵ Hispanic median home value (\$105,600) was lower than white or Asian home values, but higher than black or Native-American (\$81,000) home value.¹⁷⁶ Because a home's market value affects the home's resale value and most minority wealth consists of home equity, lower median home

FOR HOUS. STUDIES OF HARV. UNIV., HOUSING AND WEALTH ACCUMULATION: INTERGENERATIONAL IMPACTS 15 (2001).

171. Aizcorbe et al., *supra* note 122, at 19.

172. *Id.*

173. See DUDA & BELSKY, *supra* note 157, at 6 (discussing a study that explored the reasons for gaps in minority and white homeownership and partially attributed this gap to the treatment of minorities by housing market agents); see also SCHOLTZ & LEVINE, *supra* note 137, at 41 (suggesting that subtle forms of discrimination may restrict the sizes, locations, and types of houses available to black homeowners). See generally Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a "Race-Making Situation,"* 35 U. MICH. J.L. REFORM 749 (2002).

174. See DUDA & BELSKY, *supra* note 157, at 6 (suggesting that, even controlling for income, minorities are more likely to own homes in central cities than whites and that even whites who are "wealth-constrained" are more likely to own homes in the suburbs than are minorities who are not wealth-constrained). See generally A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences,* 103 MICH. L. REV. (forthcoming 2005).

175. ROBERT L. BENNEFIELD, U.S. CENSUS BUREAU, HOME VALUES: 2000, at 3 (2003).

176. *Id.*

values likely will continue to depress black and Hispanic overall wealth and perpetuate the racial wealth gap.¹⁷⁷

c. Personal Property

There also is a racial gap in personal property ownership.¹⁷⁸ Because median black and Hispanic household income remains lower than median white household income, blacks and Hispanics not surprisingly have substantially fewer personal assets than whites. The percentage of whites who own stocks (24.5%) is more than double the percentage of nonwhites or Hispanics who own stocks (11%).¹⁷⁹ While 21.3% of all families owned stocks in 2001, that rate increases to more than 60% for the highest income group but less than 12% for the two lowest income groups in 2001.¹⁸⁰ The racial disparity also persists within the higher income groups as 61% of the blacks who earn more than \$50,000 owned stocks in 2003, but this rate lags the 79% investment rate of whites in the same income group.¹⁸¹ In addition, stocks and mutual fund shares constitute a smaller percentage of the net worth of black and Hispanic households (4% and 8.3%, respectively) than white households (16.2%) and total households (15.6%).¹⁸² Similarly, the value of the stock and mutual fund accounts held by blacks and Hispanics is considerably less than the value of those owned by whites, blacks tend to have few interest-bearing bank accounts, and the blacks who receive "property income" receive mostly interest income—not dividends, rents, royalties, or income from trusts or estates.¹⁸³ Without this gap, recent research suggests

177. See SCHOLTZ & LEVINE, *supra* note 137, at 41–42 (recognizing a study that found home equity to be 31–35% of white wealth compared to 53–64% of black wealth); see also ORZECOWSKI & SEPIELLI, *supra* note 139, at 15 (citing a U.S. Census Bureau survey that indicated homeownership accounted for 31% of total net worth for non-Hispanic whites compared to 61.8% of total net worth for blacks in 2000).

178. This gap also appears rooted in this country's slavery practices that systematically denied slaves (and later freed blacks) the opportunity to accumulate property and then to bequeath that property to their descendants. OLIVER & SHAPIRO, *supra* note 138, at 50. See generally Raines Speech, *supra* note 121 (discussing systematic denial of slaves to obtain and protect their property and to raise capital to create wealth).

179. OLIVER & SHAPIRO, *supra* note 138, at 50.

180. Aizcorbe et al., *supra* note 122, at 13.

181. BLACK INVESTOR SURVEY, *supra* note 114, at 12.

182. ORZECOWSKI & SEPIELLI, *supra* note 139, at 15.

183. William A. Darity, Jr. & Samuel L. Myers, Jr., *Languishing in Inequality: Racial Disparities in Wealth and Earnings in the New Millennium*, in NEW DIRECTIONS 86, 102, 107 (James S. Jackson ed., 2000) [hereinafter *Languishing in Inequality*]. For example, the median

that blacks would have \$200 billion more in the stock market and \$80 billion more in bank accounts.¹⁸⁴

The wealth gap in personal property ownership appears particularly apparent in the retirement savings rate, likely because ownership of tax-deferred retirement accounts increases with income and wealth.¹⁸⁵ Slightly more than half of all families have some type of retirement account.¹⁸⁶ The percentage of household net worth that is held in retirement accounts, and the total amount invested, is significantly higher for whites than blacks, and the white rate is also higher than the rate for Hispanics.¹⁸⁷ Specifically, while 77% of white workers have saved for retirement and appear to participate in 401(k) plans, Asian Americans have a 73% participation rate, blacks a 59% rate, and Hispanics only a 50% participation rate.¹⁸⁸ Another study found that, while 52.2% of all families hold retirement accounts, whites hold 56.9% of these accounts compared to only 37.3% of nonwhites or Hispanics.¹⁸⁹ Studies also show that workers who lack pension income are largely young, lower income, nonwhite, female, and single.¹⁹⁰

White workers are more likely to work for employers with pension plans, and are more likely to participate in those plans, than blacks and Hispanics. Specifically, while 73% of overall workers are offered a retirement savings

value of 401K/thrift savings plans owned by blacks in 2000 was \$7,500 and for Hispanics was \$9,740, while the median for whites was \$79,400. Likewise, the value of stocks and mutual fund shares for whites (\$20,000) is double the value for Hispanics (\$10,000) and more than double the value of stock and mutual funds owned by blacks (\$8,000). U.S. CENSUS BUREAU, ASSET OWNERSHIP OF HOUSEHOLDS: 2000, at http://www.census.gov/hhes/www/wealth/1998_2000/wlth00-1.html (last visited Nov. 10, 2004) (on file with the Washington and Lee Law Review).

184. Raines Speech, *supra* note 121.

185. Aizcorbe et al., *supra* note 122, at 11.

186. *Id.* at 13; see ORZECOWSKI & SEPIELLI, *supra* note 139, at 5 (citing a U.S. Census Bureau survey that indicated 23.1% of households own an IRA or Keogh account and 29.9% own a 401K and thrift savings plan).

187. See ORZECOWSKI & SEPIELLI, *supra* note 139, at 15 (citing a U.S. Census Bureau survey that indicated retirement savings accounted for 18.6% of non-Hispanic white total net worth compared to 9% for blacks and 15.2% for Hispanics); see also BLACK INVESTOR SURVEY, *supra* note 114, at 36 (showing the median amount invested in retirement savings accounts is \$36,500 for blacks and \$63,700 for whites).

188. THE 2003 MINORITY RETIREMENT CONFIDENCE SURVEY: SUMMARY OF FINDINGS I (2003) [hereinafter 2003 MINORITY RETIREMENT CONFIDENCE SURVEY], available at <http://www.ebri.org/rcs/2003/03mrccsf.pdf>.

189. Aizcorbe et al., *supra* note 122, at 13.

190. Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1526–27 (2004) (“Those who lacked pension income were more likely . . . to be single, female, Hispanic or not white, or less educated compared to those with pension income.”).

plan by their current employer, the participation rate for blacks (58%) and native-born Hispanics (65%) lags the overall rate, though this disparity largely disappears for black workers if income is held constant.¹⁹¹ Another study found that only 36% of black and 41% of native-born Hispanic workers have an employer that contributes money to their retirement savings account, in contrast to the 49% contribution rate for all workers.¹⁹² Hispanic workers who earn less than \$35,000 are less likely than overall workers to have an employer contribute to a retirement account for them and less likely to work for an employer who offers a retirement savings plan.¹⁹³ One reason blacks and Hispanics may lag in retirement savings is because they have relatively higher unemployment and underemployment rates, often work for smaller employers who do not sponsor retirement plans, or work part-time and are excluded from coverage by their employers because of their part-time status.¹⁹⁴

There also appears to be a disparity in retirement savings outside of work. While whites and blacks with comparable incomes have approximately the same savings rate,¹⁹⁵ high income households generally have higher savings rates than lower income households.¹⁹⁶ Overall, 57% of households have tax-qualified retirement savings plans outside of work in contrast to black (43%) or Hispanic (39%) households, and retirement savings constitute a much larger percentage of white household net worth than the net worth of either blacks or Hispanics.¹⁹⁷ In short, recent data prepared by Fannie Mae indicate that if the

191. 2003 MINORITY RETIREMENT CONFIDENCE SURVEY, *supra* note 188, at 3. Again, the rate for non-native-born Hispanic workers is lower at 49%. *Id.* at 6; *see also* CONLEY, *supra* note 136, at 29 (noting that higher educated blacks save at a higher rate); Brown, *supra* note 190, at 1528–30 (discussing the association between race, ethnicity, and a lack of pension coverage).

192. The savings rate for non-native-born Hispanic workers (22%) is even lower. 2003 MINORITY RETIREMENT CONFIDENCE SURVEY, *supra* note 188, at 6.

193. Lower income workers generally have lower participation rates because they cannot afford to make the matching contributions some employers require. Brown, *supra* note 190, at 1528–29.

194. 2003 MINORITY RETIREMENT CONFIDENCE SURVEY 3, *supra* note 188, at 6; *see also* CONLEY, *supra* note 136, at 99 (discussing statistics that show that black workers who do have jobs are likely to be given fewer hours than white workers); Brown, *supra* note 190, at 1524–30 (discussing the eligibility restrictions that many employers place on their pension plans).

195. CONLEY, *supra* note 136, at 29 (“[A] look at data over a five-year period (1984–89) does not indicate that blacks save a lower percentage of income than their white counterparts.”).

196. *Id.* at 31 (“Historically, low wages have meant a low savings rate in both absolute and percentage terms.”).

197. OLIVER & SHAPIRO, *supra* note 138, at 106; ORZECOWSKI & SEPIELLI, *supra* note 139, at 6; 2003 MINORITY RETIREMENT CONFIDENCE SURVEY, *supra* note 188, at 6. While high-income blacks and whites have comparable retirement savings in most categories, whites appear to have more money in individual retirement accounts than blacks. BLACK INVESTOR SURVEY,

retirement gap could be closed for blacks, blacks potentially would have \$120 billion more in retirement funds.¹⁹⁸

d. Unincorporated Businesses

Because self-employment correlates positively with wealth, it is not surprising that blacks are less likely to own businesses than whites and more likely to be wage earners.¹⁹⁹ And even when blacks *do* own businesses, those businesses tend to be sole proprietorships that largely provide products and services for a local black clientele.²⁰⁰ Black-owned businesses account for just 4% of all U.S. businesses (though the U.S. black population is more than 12%) and one report suggests that if the combined revenues for the 100 largest black-owned businesses were combined and then assigned to one business, that business would still not rank as one of the top seventy-five businesses on the Fortune 500 list.²⁰¹ The business ownership gap is attributable to a number of factors, including the historical effects of slavery, racially discriminatory

supra note 114, at 34.

198. Raines Speech, *supra* note 121.

199. SCHOLZ & LEVINE, *supra* note 137, at 42. In 1997, 83% of total businesses were owned by whites, compared to 4% black, 6% Hispanic, and 4% Asian. The numbers are comparable for individual proprietorships. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2002, at 484 (2002) (calculating wage earner by finding the difference between the number employed and the number owning firms), available at <http://www.census.gov/prod/2003pubs/02statab/business.pdf>.

200. HACKER, *supra* note 2, at 126; Gwen Shaffer, *In Depth: Minority Business*, PHILA. BUS. J. May 30, 2003, at <http://philadelphia.bizjournals.com/philadelphia/stories/2003/06/02/focus4.html> (last visited Nov. 10, 2004) (on file with the Washington and Lee Law Review); Wiggins, *supra* note 173, at 785. Minority businesses also accounted for significantly less of the sales and receipts than white businesses. In 1997, white business accounted for 42% of the total sales and receipts, compared to black businesses accounting for 0.38% of sales and receipts, Hispanics accounting for 1%, and Asian businesses accounting for 2% of total sales and receipts. U.S. CENSUS BUREAU, SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES: ASIAN AND PACIFIC ISLANDERS 1997, at 9 (2001), available at <http://www.census.gov/prod/ec97/e97cs-5.pdf>; U.S. CENSUS BUREAU, SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES: BLACK 1997, at 9 (2001), available at <http://www.census.gov/prod/ec97/e97cs-3.pdf>; U.S. CENSUS BUREAU, SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES: HISPANIC 1997, at 9 (2001), available at <http://www.census.gov/prod/ec97/e97cs-4.pdf>; U.S. CENSUS BUREAU, SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES: SUMMARY 1997, at 115 (2001), available at <http://www.census.gov/prod/ec97/e97cs-7.pdf>.

201. Shaffer, *supra* note 200; U.S. CENSUS BUREAU, 1997 ECONOMIC CENSUS MINORITY- AND WOMEN-OWNED BUSINESSES UNITED STATES, at <http://www.census.gov/epcd/mwb97/us/us.html> (last modified July 12, 2001) (on file with the Washington and Lee Law Review); see also Wiggins, *supra* note 173, at 785 (discussing intercommunity wealth disparity).

practices that prevented minorities from owning property, and a relatively higher loan denial rate for black-owned businesses due to inaccurate or unfair asset appraisals. Because potential black and Hispanic business owners tend to have less wealth and, thus, less access to credit markets, they have fewer assets to pledge as collateral for a bank loan.²⁰² But for this ownership gap, blacks most likely would own more than 600,000 more businesses with \$2.7 trillion more in revenues.²⁰³

5. Education

Education, especially post-secondary education, serves as a buffer to job loss and also increases the likelihood of finding a high-income job that provides benefits.²⁰⁴ Like the marriage, unemployment, income, and wealth rates, however, there is a gap between white and minority educational attainment rates. In 2000, the overall high school completion rate nationally for people 25 and older was 80% whereas the completion rates for blacks was 72% (up from 20% in 1960) and for Hispanics was 52% (up from 32% in 1970).²⁰⁵ While the education gap between whites and blacks is closing, the gap between whites and Hispanics is still significant and may grow if the Hispanic population increases because of migration from non-English speaking countries.²⁰⁶ Moreover,

202. See SCHOLZ & LEVINE, *supra* note 137, at 41 (suggesting that if credit is less available to blacks, they are less likely to become self-employed); Darity & Myers, *supra* note 183, at 107 (noting that without equity capital—pledgeable assets—blacks and Hispanics cannot acquire debt capital (loans) and that without debt capital, they cannot get operating capital to run a business); Wiggins, *supra* note 173, at 790 (noting that black-owned businesses are often denied loans based on inaccurate or unfair asset appraisals).

203. Raines Speech, *supra* note 121.

204. In 2002, 28% of individuals without a high school diploma were without health insurance as compared to the 8% without coverage who had a bachelor's degree or higher. BHANDARI & MILLS, *supra* note 123, at 2. Because medical expenses increasingly contribute to a debtor's likelihood of filing for bankruptcy, higher minority unemployment and under-education rates likely contribute to the proportionately higher numbers of blacks who are filing for bankruptcy. See Warren, *supra* note 148, at 1779 ("Medical problems are next on the list, accounting for about half of all [bankruptcy] filings."). See generally WARREN & TYAGI, *supra* note 36, at 88–92 (discussing uninsured medical expenses as contributing to bankruptcy filings).

205. KURT J. BAUMAN & NIKKI L. GRAF, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT: 2000, at 5 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-24.pdf>. The rate for Asians was identical to the national rate of 80.4%. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT, BY RACE AND HISPANIC ORIGIN, 1960-1998 (1999) [hereinafter EDUCATIONAL ATTAINMENT: 2000], available at <http://www.census.gov/prod/99pubs/99statab/sec04.pdf>.

206. There are significant differences in high school completion rates within the Hispanic subgroups. The 2002 Census data gives the completion rates for Mexican Americans as 50.6%,

though the overall gap between whites and blacks is closing, one study has projected that it will not completely close until 2013—almost six decades after the Supreme Court ordered the end to separate and unequal school systems in *Brown v. Board of Education*.²⁰⁷

Despite a steady increase in the number of minorities earning college degrees, there remains a racial gap. Indeed, the post-secondary attendance rates vary greatly by race for young adults age 18 to 24. Nationally, 34% of that age group attend college compared to 56% for Asians, 38% for whites, 27% for blacks, 21% for Native Americans, and 14% for Hispanics.²⁰⁸ Another difference is the racial distribution by enrollment level. Black and Hispanic students are much more likely to be enrolled in vocational, technical, or business schools than white or Asian students, and are less likely to be enrolled in graduate schools.²⁰⁹ Post-secondary completion rates also differ by race. Asians are much more likely to have a bachelor's degree (40%) than whites (26%), blacks (14%), Native Americans (11%), or Hispanics (10%).²¹⁰ Overall in 2003, 27.2% of individuals 25 and older had completed 4 or more years of college and 28.4% of individuals between the age of 25 and 29 hold a bachelor's degree or higher.²¹¹ The college completion rate for whites 25 or older was 30.0%, and for the 25 to 29 age group was 34.2%.²¹² In contrast, for

for Puerto Ricans as 66.8% and Cuban Americans as 70.8%. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT OF THE POPULATION 25 YEARS AND OLDER, BY SEX AND HISPANIC ORIGIN TYPE: MARCH 2002 (2003), available at <http://www.census.gov/population/socdemo/hispanic/ppl-165/tab07-2.pdf>. Closing the gap will be especially difficult given the intergenerational transmission of education; for example, the higher the educational attainment of parents, the more likely that their children will be better educated. SIDNEY VERBA ET AL., FAMILY TIES: UNDERSTANDING THE INTERGENERATIONAL TRANSMISSION OF PARTICIPATION 9–10 (Russell Sage Found., Working Paper, 2003), available at http://www.russellsage.org/programs/proj_reviews/si/wpschloz_manverba01.pdf.

207. THE STATE OF THE DREAM, *supra* note 117, at 17; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Moreover, the overall gap somewhat masks the still substantial gap involving students who attend high poverty, racially segregated schools. Students who attend those schools have a graduation rate that is 15–18% behind the overall graduation rate. Raines Speech, *supra* note 121.

208. JENNIFER CHEESEMAN DAY & AMIE JAMIESON, U.S. CENSUS BUREAU, SCHOOL ENROLLMENT: 2000, at 9 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-26.pdf>.

209. SCOTT BOGCESS & CAMILLE RYAN, U.S. CENSUS BUREAU, FINANCING THE FUTURE—POSTSECONDARY STUDENTS, COSTS, AND FINANCIAL AID: 1996–1997, at 4 (2002) [hereinafter FINANCING THE FUTURE], available at <http://www.sipp.census.gov/sipp/p70s/p70-83.pdf>.

210. EDUCATIONAL ATTAINMENT: 2000, *supra* note 205, at 5.

211. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY EDUCATIONAL ATTAINMENT, TBL. A-2, PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940–2003 (2004), available at <http://www.census.gov/population/socdemo/education/tabA-2.pdf>.

212. *Id.*

black individuals age 25 and over, the college completion rate was 17.4% and was 17.5% (almost half the white rate) for those between the ages of 25 and 29.²¹³ Likewise, for Hispanics over the age of 25, 11.4% had completed 4 or more years of college as had 10.0% of the 25 to 29 year olds.²¹⁴ Indeed, recent data indicate that, if America had reached racial equity in education, blacks would have more than two million more high school and college degrees.²¹⁵

Given the lack of intergenerational wealth and disproportionately lower incomes, blacks and Hispanics who attend college tend to borrow more to pay for their college education due to skyrocketing college costs, cuts to federal grants, and fewer race-based scholarships because of attacks from conservative political groups.²¹⁶ Likewise, a higher percentage of minorities attend trade schools and, until crackdowns and increased enforcement efforts in the 1990s, many of these proprietary schools provided few marketable skills and some gave little meaningful educational benefits.²¹⁷ Because the typical black college student is more likely to come from a lower income household and low-income students are statistically more likely to default on student loans than other students, blacks also appear to have higher student loan default rates.²¹⁸ Blacks who attend college tend to receive less money from their parents to pay for their education. Because of this, they find it increasingly difficult to increase their wealth by saving for (then buying) a house even after

213. *Id.*

214. *Id.* There also is a somewhat surprising gender disparity. Among whites, proportionally more men than women earned college degrees—31.7% of white men compared with 27.3% of white women. *Id.* Among blacks and Hispanics the reverse is true: 17.7% of black women and 11.2% of Hispanic women age 25 or over but only 16.5% of black men and 11.0% of Hispanic men of the same age had completed four or more years of college by March 2002. *Id.*

215. Raines Speech, *supra* note 121.

216. See THOMAS J. KANE, COLLEGE-GOING AND INEQUALITY: A LITERATURE REVIEW (Russell Sage Found., 2001) (discussing the role of rising tuition costs in widening the enrollment gaps by family income), available at https://secure1.sc.netnation.com/~russells/programs/proj_reviews/si/revkane01.pdf; Barry Klein, *UF Ends Race-Based Scholarship Programs*, ST. PETERSBURG TIMES, Aug. 31, 2001, at 1A (describing the University of Florida's decline in black student enrollment following implementation of the Florida governor's plan to admit freshman without the use of racial preferences); see also Lyle Denniston & David Folkenflik, *UM Ends Suit Over Aid Based on Race*, BALTIMORE SUN, Dec. 19, 1995, at 1B (discussing a student's successful lawsuit against the school's race-based scholarship program).

217. See Michele Collison, *Proprietary Preference For-Profit Colleges Gain Momentum in Producing Graduates of Color*, BLACK ISSUES IN HIGHER EDUC., July 9, 1998 (discussing the increasing popularity of attending proprietary schools, especially among minorities), available at <http://www.phdproject.com/phd13.html> (on file with the Washington and Lee Law Review).

218. Bob Dart, *Loan Defaults Threaten 14 Black Colleges' Aid*, ATLANTA J.-CONST., July 9, 1999, at 3A.

they graduate from college and get high-income jobs because they need to use their income to repay student loans.²¹⁹

IV. A Race Conscious Model To Reform the Code

A. Benefits Gap

The Code generally favors employed debtors with wealth over unemployed debtors or those with income. Given the racial employment and wealth gaps, the Code systematically favors white debtors. Likewise, given the racial homeownership and marriage gaps, whites are more likely to benefit from the Code's provisions that favor homeowners (including homestead exemptions), provisions that benefit married debtors who own tenancy by the entirety property, and provisions that permit married debtors to save expenses by filing a joint petition.²²⁰ Likewise, because blacks are more likely to provide financial support to family members who are not their legal dependents or to support "fictive kin," they are more likely to have dependents with whom they have no legal or familiar relationship. Black and Hispanic debtors may, however, benefit from the alimony and child support gaps if the racial balance in the percentage of people required to pay support is similar to the percentage of people who are ordered to receive aid. Because fewer blacks and Hispanics receive alimony and child support, black and Hispanic debtors would be less likely to have nondischargeable alimony child support debt.

219. Raines Speech, *supra* note 121.

220. Debtors who live in Texas and Florida, which both have high minority populations, would benefit from those states generous homestead exemptions. Texas has the second largest black population, the second highest Hispanic population, and the fourth highest Asian and American-Indian populations. Florida has the third largest black population, the fourth highest Hispanic population, the eighth highest Asian population, and the eleventh highest American-Indian population. Nicholas A. Jones & James S. Jackson, *The Demographic Profile of African Americans, 1970-2000*, THE BLACK COLLEGIAN, Apr. 1, 2001, at 74. See generally JESSICA S. BARNES & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2000, at 4 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>; STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 4 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>; U.S. CENSUS BUREAU, HISPANICS IN THE U.S., 2000, 2001, at http://www.census.gov/mso/www/pres_lib/hisorig/tsld001.htm (last visited Nov. 10, 2004) (on file with the Washington and Lee Law Review). Of course, living in a state with an unlimited homestead exemption is of little use if you cannot afford to buy a home or you are discouraged from becoming, or hampered in your efforts to become, a homeowner.

B. Proposal

Though bankruptcy laws should not be used to remedy all forms of racial discrimination, they also should not operate to consistently provide greater benefits to any one demographic group. Thus, in determining how to interpret bankruptcy laws and how (or whether) to revise those laws, decisionmakers should use a race-conscious approach that helps close the racial benefits gap. It is highly unlikely that the members of Congress who enacted the Bankruptcy Code were overly bigoted or intended to discriminate against minorities. Likewise, there is no reason to believe courts that interpret ambiguous provisions of the Code—for example, how "dependent" should be defined, when a petition should be dismissed for "substantial abuse," or what types of expenses are "reasonably necessary"—intend to discriminate against racial minorities. Though Congress no doubt believed that it was enacting facially neutral bankruptcy laws and bankruptcy judges likely believe they are applying facially neutral criteria when interpreting those laws, by acting based on unspoken beliefs and assumptions, both Congress and the courts grant bankruptcy relief based on unrecognized white norms.

That decisionmakers do not explicitly intend to discriminate against minorities largely is irrelevant to minorities if the laws have the effect of favoring whites or if racial groups perceive that the laws are biased. Racial minorities who conclude that bankruptcy relief either is biased in favor of whites or who believe that filing for bankruptcy would give them nominal benefits will be less likely to use bankruptcy laws to help them resolve their financial difficulties. Worthy potential minority debtors who refuse to seek the financial relief provided by a discharge will be harmed as will their existing and potential creditors. If minorities avoid filing for bankruptcy, they will be forced to find other ways to resolve their financial crises, including hiding from creditors, adopting aliases, or simply refusing to pay their debts. If they are driven from the mainstream credit industry, they will then be forced to rely even more heavily on "fringe" banking services including rent-to-own businesses, payday or cash advance loans, and check cashing services.²²¹ Creditors will be harmed both because debtors will refuse to pay their bills and

221. Minorities are disproportionately less likely to have checking, savings, and money market accounts. Aizcorbe et al., *supra* note 122, at 9. For a discussion and explanation of the potential harm caused by these fringe banking practices, see generally Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 MINN. L. REV. 1 (2002); Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221 (discussing the rent-to-own business); Mary Kane, *From Pawnshops to "Financial Supermarkets" Fringe Banking Gains a Foodhold in the Mainstream*, S. EXPOSURE, Summer 2003, at 54–59.

also because debtors will be unable to quickly return to mainstream credit markets and borrow more from those (or other) lenders in the future.

The existing benefits gaps in the Code largely could be eliminated by a few legislative amendments and by courts' willingness to adopt a more pluralist view when interpreting the Code. For example, to help close the gap overall, debtors who lack the funds (or cannot borrow money from friends or relatives) should be allowed to file in *forma pauperis*, and districts that require electronic filings should continue to provide an exemption for *pro se* filers. Likewise, Chapter 13 debtors should be allowed to pay their attorneys over time through the plan (even if they intend to discharge most debts) just as they can cure home or car debt in the Chapter 13 plan, keep those assets, yet repay few, if any, nondischargeable debts.

To level the playing field for renters, Congress should either eliminate, cap, or regionally index the homestead exemption. Doing so would prevent the Code from favoring homeowner debtors, especially those who live in high-exemption states. Likewise, Congress should permit Chapter 13 renters to cure lease arrearages over the course of their Chapter 13 plan just as Chapter 13 homeowners can cure mortgage arrearages. Also, Chapter 13 renters should be allowed to assume a lease even if they default prepetition and do not cure the default before they start plan payments as long as they give the landlord adequate assurances that they will cure the default within a reasonable time period after they commence plan payments.

To close the benefit gap between married and unmarried homeowner debtors, the Code should allow both married and unmarried debtors who live in states that recognize tenancy by the entirety to exempt real property as long as the debtors are married, in a domestic partnership or civil union, or in a long-term relationship and the debtors prove that they need the property to provide a home for their family. This change initially may provide disproportionately more benefits to unmarried black debtors. However, given the decrease in the number of white and Hispanic unmarried couple households and the likely increase in the number of same-sex households, debtors who live in households with adults who are not their spouses (or with children who may not be their biological offspring) may soon become the norm. Likewise, to recognize differences in family structures, unmarried couples should be allowed to file a joint petition as long as their financial lives are intertwined.²²²

Courts also should define dependent broadly and not limit it to people with whom the debtor has either a legal or familial relationship. Just as

222. Dickerson, *supra* note 49, at 93.

Congress allows debtors to give (or propose to give) money to charitable institutions and still be eligible for relief under Chapter 7, debtors should be allowed to give money, or otherwise provide support, to their nonlegal dependents and still discharge their debts in Chapter 7. Debtors also should be allowed to exempt monetary payments that are necessary to support their nonlegal dependents who are in fact dependent on them. Similarly, courts should confirm a Chapter 13 plan that excludes from disposable income funds that the debtor uses to support nonlegal dependents, just as debtors currently are allowed to exclude funds they give to a charitable institution.²²³

To help decrease the wealth gap and the appearance that the Code favors the ultra-wealthy, Congress should include spendthrift trusts in property of the estate and should cap the value of retirement savings debtors can exclude. To eliminate the information asymmetry between debtors who have access to lawyers who give them exemption planning advice and those who do not, the Code should allow debtors to contribute a specified amount of nonexempt funds to an exempt pension fund either prepetition (as part of exemption planning) or postpetition.

To recognize that the income and wealth gaps likely cause minorities to incur significantly higher student loan debt, courts should abandon the undue hardship student loan dischargeability test in favor of a totality of the circumstances test. They also should consider the quality of the education the debtor received when deciding whether to discharge the debt and should continue to grant debtors a partial discharge (assuming they satisfy the totality of circumstances test). Relaxing the rigid undue hardship test will be especially beneficial to minority debtors who have attended college because recent empirical data suggest that they are *more likely* to file for bankruptcy than whites who attended college.²²⁴

Finally, given the existing benefits gap, Congress should not "means test" bankruptcy relief. Doing so would further widen the benefits gap between debtors with wealth and those with income because high-income debtors who

223. In addition, courts should reconsider whether a fraudulent transfer occurs when debtors transfer property to their dependents, but receive only intangible, noneconomic benefits in exchange. *See, e.g.,* Hinsley v. Boudloche (*In re Hinsley*), 201 F.3d 638, 643 (5th Cir. 2000) (holding that a debtor who transfers property because of a desire to preserve the marriage does not receive an economic benefit in exchange for the property). Debtors who consistently provide financial support to indigent family members should not necessarily be deemed to have committed a fraudulent conveyance unless it is clear that the transfer was designed to defraud creditors or hinder creditor collection attempts.

224. Warren, *supra* note 148, at 1782 ("These data reveal a deeply vulnerable middle class in which African Americans who have gone to school and worked like whites are nonetheless more than three times more likely to find themselves in bankruptcy.").

would be deemed to have the ability to repay their debts in Chapter 13 would be denied a quicker Chapter 7 discharge, and thus would be prevented from discharging their debts and retaining their (potentially meager) wealth. In contrast, high-wealth but low-income Chapter 7 debtors likely would not be forced to liquidate their wealth to fund a Chapter 13 plan. For similar reasons, Congress should reject proposals to make it harder to discharge credit card debt. Since blacks and Hispanics have lower incomes and significantly fewer assets than whites, they appear to rely more on credit card debt than whites.²²⁵ Similarly, blacks, Hispanics, and Asians (who have higher median incomes than whites) all appear to pay more than the national average toward their monthly credit card bills and also have higher credit card debt than the national average.²²⁶ Given the racial wealth and income gaps and the fact that those gaps appear to cause minorities to rely more heavily on credit cards, making it harder to discharge credit card debt will have a disproportionately negative effect on minorities.

V. Conclusion

Despite the sheer volume of people who are affected by federal bankruptcy laws, neither bankruptcy nor critical race scholars have considered whether federal bankruptcy laws are raced.²²⁷ On the surface, bankruptcy laws appear race neutral. And, even if courts were to consider the race of the debtor, it is unlikely that the outcome of many bankruptcy cases would change. If, however, members of Congress (in considering ways to reform the Code) or bankruptcy judges (when interpreting ambiguous phrases in the Code) consciously consider the racial impact of their decisions, the contours of the benefits the Code provides would be different. A race-conscious Bankruptcy Code would not just benefit minority debtors, however. Instead,

225. TAMARA DRAUT & JAVIER SILVA, DEMOS, BORROWING TO MAKE ENDS MEET THE GROWTH OF CREDIT CARD DEBT IN THE '90S, at 23 (2003), available at http://www.demos-usa.org/pubs/borrowing_to_make_ends_meet.pdf.

226. See *Charge It: Minorities are Carrying Much More Credit Card Debt*, MINORITY MKTS. ALERT, Sept. 1, 1997, at 1 (noting that credit card debt among black and Hispanic families is 25.2% and 24.5% above the national average, respectively).

227. See generally Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 966 (1993) (discussing race and facially neutral laws). Bankruptcy may not be viewed as a critical race issue because it "presents devilishly complex policy issues" and because "its partial debt forgiveness and partial debt ratification [make it] a difficult concept to grasp, even in its most basic form." See Warren, *supra* note 24, at 43–44 (explaining why bankruptcy may not be viewed as a women's issue).

as is true in many other areas of law and in life, minorities serve as the miner's canary for all debtors.²²⁸ If Congress and the courts commit to using the Code to achieve substantive racial justice, then bankruptcy laws will better provide fairer and more just benefits to financially strapped Americans of all races.

228. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002).