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Articles

America's Uneasy Relationship With the Working Poor

by

A. MECHELE DICKERSON*

Introduction

Americans historically have supported efforts to provide financial assistance to the truly needy members of our society. Indeed, we believe that the government has a *duty* to give the “deserving” poor enough to help them pull themselves up by their bootstraps and become economically sufficient. We have a long-standing, deep-seated fear, however, that giving cash or other forms of economic assistance to the unemployed but able-bodied is morally corrupting and fosters economic dependency. Thus, while we are happy to give economic assistance to the “truly needy,” we want to make sure that none of the assistance goes to the “merely greedy.”¹

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1. See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 259 (1994) (“Like most citizens, members of Congress want to help the ‘truly needy’ without rewarding the ‘merely greedy’; to promote ‘family values’ while protecting the privacy of [welfare] recipients; to promote work without forcing those unable to work to take a job.”).

Recent efforts to overhaul welfare and bankruptcy laws resulted from the public's perception that too many people failed to become economically self-sufficient during this country's extended peacetime period of economic prosperity. Congress sought to reform the systems to ensure that only the *deserving poor* received welfare benefits or were allowed to file for bankruptcy. In fact, Congress ended "welfare as we knew it" in 1996 because of its conclusion that too many non-working but able-bodied mothers were receiving welfare benefits, that they were financially dependent because they were lazy, that lazy people did not *deserve* welfare benefits, and, that the best way to force these lazy, able-bodied women to become economically self-sufficient was to push them off the welfare rolls and into the work force. Similarly, bills presented in Congress during the last few years suggest that lawmakers have concluded that too many able-bodied people are deeply in debt because they used credit irresponsibly, that these debtors do not *deserve* the right to discharge their debts in bankruptcy, and that the best way to force them to become economically self-sufficient is to make them repay their debts.

These reform efforts sound reasonable and are politically popular. Unfortunately, they are unlikely to cure the ills of either welfare mothers or debtors because reformers fundamentally (and, perhaps, intentionally) misdefined "the problem." The "problem" with welfare, critics argued, is that welfare recipients are lazy and refuse to earn wages to support themselves and their children.² Welfare reforms then proceeded based on the premise that non-work created the welfare crisis and that the "solution" to the non-work problem is to force people into the labor market. This solution should solve the welfare problem if laziness (as evidenced by non-work) is the cause of the problem. If, however, the welfare crisis was caused by the long-term effects of poverty (minimal vocational and educational skills, limited work opportunities, etc.) not non-work, then the work solution will not work. Imposing additional work obligations on people who already work but remain poor will not make them economically self-sufficient or ensure they will earn enough to support their families. This solution will simply strip them of the economic relief they (and their children) need while they struggle to work their way out of poverty.

Similarly, the "problem" with bankruptcy, critics argued, is that people live extravagantly, spend irresponsibly, then seek to discharge their debts in bankruptcy rather than make sacrifices to repay their bills.³ Critics argued that the "solution" to the irresponsible spending

2. See *infra* notes 42-56.

3. See *infra* notes 134-40.

problem was to make it harder for people to discharge their debts. This solution should solve the bankruptcy problem if irresponsible spending caused the problem. If, however, the bankruptcy problem is caused by factors unassociated with credit (i.e., an increased divorce rate, lack of health insurance, the globalization of the U.S. economy) not irresponsible spending, then the solution of preventing debtors from discharging debts will not work. Telling people to pay their bills will not make them self-sufficient or ensure that they earn enough to support their families. The solution will simply force some people to continue to drown in debt.

This Article examines our society's uneasy relationship with the working poor and our hesitancy to provide economic relief to able-bodied people who appear to have contributed to their inability to support themselves economically. Using the recent legislative efforts to solve both the welfare and bankruptcy crises as a backdrop,⁴ I argue that attempts to reform bankruptcy laws have been, and will always be, controversial because society has never been willing to admit that some employed (or employable) able-bodied people may need ongoing public economic support.

Part I of the Article discusses the welfare crisis. This Part briefly describes the historical justifications for providing public economic assistance. Given the emphasis this country places on individualism and economic self-sufficiency, only non-able-bodied people were deemed to be entitled to receive ongoing, long-term financial assistance from the government. Able-bodied people were deemed to deserve only short-term public financial support and only if forces completely beyond their control (i.e., unexpected unemployment or illness) temporarily prevented them from earning wages to support themselves. This Part then describes recent federal welfare reforms and argues that they were driven by the public's belief that most welfare recipients were lazy, able-bodied women who refused to work in the market. Having defined the problem as non-work, Congress decided that the solution to the problem was to force all welfare mothers to work in the market and to make it hard for all recipients—even the deserving ones—to receive welfare benefits.

Part II of the Article discusses the bankruptcy crisis. This Part

4. It is unfortunate that both the welfare and bankruptcy systems were cast as irretrievably broken and beyond repair, rather than splintered and in need of simple mending. This is not totally surprising, given the tendency of Americans to find fault with all aspects of a government system and say that the system is "hopelessly corrupt" rather than just in need of tweaking. See THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 3 (1990); see also JOEL F. HANDLER & YEHEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 5 (1997) (noting that when welfare became an issue in the 1992 presidential campaign, it was "[p]redictably labeled a 'crisis'").

briefly describes the historical views the American public has held toward people who either could not, or did not, repay their debts. This Part notes that recent criticisms of, and efforts to reform, bankruptcy laws assumed that debtors are unwilling (not *unable*) to pay their bills and that most of those bills represented irresponsible credit card use. Having defined the problem as an unwillingness to pay bills that were incurred irresponsibly, critics concluded that people would act more responsibly if Congress made it harder for all potential debtors to discharge their debts by making debtors work to repay their bills.

Part III of the Article argues that it is unfair to vilify and demonize people whose main fault seems to be that they find themselves unable to move from the ranks of the working poor. Before “ending bankruptcy as we know it,” I argue that Congress should carefully consider why so many people seem to be unable to pay their bills during a period of relative economic prosperity. Relying principally on current labor indicators, this Part suggests that Congress will find that many people are unable to move from the ranks of the economically dependent working poor into the ranks of the economically sufficient due to non-credit-based social factors, including an unraveling manufacturing economy, inadequate health care, increased divorce rates (and the corresponding increase in single-family households), and inefficient child support collection mechanisms. The Article concludes by arguing that any potential debtor who can establish that external factors prevent him from being able to support himself (or his family) financially should be deemed deserving of bankruptcy relief even if providing the relief appears to redistribute income from able-bodied economically self-sufficient workers to the able-bodied, but economically dependent, working poor.

I. The Welfare⁵ Crisis

A. Historical Justifications for Public Assistance

The public's current ambivalence toward unemployed (but employable) able-bodied people who claim they need public assistance can be traced back to the philosophical and ideological perspectives of some of our country's earliest residents. Many early settlers and voluntary immigrants in the United States were self-sufficient, rugged individualists who often came here with nothing. Part of the American lore is the perception that, with just a little help from family, friends, neighbors, or church members, people could pull themselves up by their bootstraps and become economically self-sufficient, productive members of society.⁶ Indeed, much of the early economic relief for the poor was provided by private groups, not the government.⁷ Because the private charities had no duty to give aid to the poor, the charities frequently discriminated between the worthy poor (those deemed to be the innocent victims of misfortune) and the unworthy poor (those who were indolent, criminals or substance abusers).⁸

Giving public income to people who do not work is deemed to undermine our market system, which rewards hard work with income.⁹ That is, many argue that giving the unworthy or

5. "Welfare" properly defined includes a number of government entitlements or transfer programs that provide income support and create financial safety nets for the poor. These programs include Social Security, Medicaid, food stamps, and Aid to Families with Dependent Children (AFDC). Because welfare critics principally targeted AFDC, "welfare" as discussed in this Article will be limited to AFDC. See JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM 1* (1995) (observing that despite the number of assistance programs for the poor, critics actually mean AFDC when they say welfare). In adopting this narrow conceptualization of welfare, I do not adopt the view that AFDC recipients are solely responsible for the increase in federal government entitlements, for the problems with the United States budget, or for the decline of civilization as we know it.

6. See Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1967 (1993) ("We are at ease with the idea of voluntary charity, with neighbors coming together to give alms to the needy or to raise a barn. But national level income transfer programs are another matter entirely. It simply makes no sense, within the country's dominant political creed, for the state to confiscate some people's hard-earned money to subsidize other people's bad luck, especially if those who receive the transfer are deemed able to work.").

7. See DAVID KELLEY, *A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* 37-38 (1998) (listing relief organizations created along ethnic lines that served as insurance societies to help shield their members against economic risk).

8. See *id.* at 37.

9. See William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1435 (1986) (noting that redistributing income from workers to dependent welfare recipients "suggested a breach of the morally fundamental distribution

undeserving poor economic assistance violates a fundamental tenet of our American market-based economy: people should be paid based on the value of work they perform in the market.¹⁰ Characterizing public welfare assistance as guaranteed income was deemed to create an immoral economic structure that delegitimizes the distribution of resources based on market principles.¹¹ Giving unearned income to able-bodied but unemployed people was incompatible with the principle that only people who work hard are entitled to be paid,¹² that they should be paid more than people who work less, and that each individual should strive for economic independence.¹³ Under this market-based view of income entitlement, people are *entitled* to income or other economic resources only if they earn money using their own labor in the market.¹⁴

Characterizing welfare as an “entitlement” or a guaranteed source of income was also thought to create the moral hazard known as “welfare opportunism.” Welfare opportunism is said to occur when welfare is treated as a guaranteed economic safety net and the existence of that net causes potential or actual welfare recipients to engage in riskier activities because of their knowledge that society will subsidize or otherwise bear a portion of the costs of those activities.¹⁵ Having a welfare regime that encourages recipients to

accomplished through the workings of the private law regime of the self-regulating market”).

10. See, e.g., William S. Kern, *Current Welfare Reform: A Return to the Principles of 1834*, J. ECON. ISSUES 427, 428 (1998) (noting that classical economists demonstrated the “incompatibility of poor laws with the self-regulating market order and principles of political economy”).

11. See William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 11 (1985) (observing that classical legalists “could not see welfare as a matter of right because welfare was not consistent with the intermediate distributive premises of effort and exchange”).

12. See *id.* at 10.

13. See Martha Albertson Fineman, *The Nature of Dependencies And Welfare Reform*, 36 SANTA CLARA L. REV. 287, 291 (1996) (characterizing the American society as one that “mythologizes concepts such as ‘self-sufficiency,’ ‘independence,’ and ‘autonomy,’ and vilifies the concrete indications all around us that these ideals are unrealizable and unrealistic”); DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 6 (1988) (noting conflict between public welfare assistance and societal values of autonomy, responsibility, and work).

14. See Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 370 (1996). Many hold this view despite the fact that the American government legally sanctioned the acts of early American settlers who stole or otherwise misappropriated land, minerals, and other economic resources from Native Americans and who prospered because of the unpaid, involuntary labor of Negro slaves.

15. See Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1402 (1985); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to*

make riskier investments (like, for example, choosing to have more children even though they are not married) theoretically enhances the risk of economic failure, distorts the actor's behavior in the direction of risk taking, and, ultimately increases the cost of welfare. To deter welfare opportunism and discourage the needy from becoming economically dependent on the assistance, early forms of public financial relief provided meager benefits which were administered in ways designed both to stigmatize the recipients of the relief and to encourage them to engage in socially desirable behavior, i.e., keep (or get) a job rather than quit (or not look for) one and apply for public welfare relief.¹⁶

Given the prevalence of the pull-yourself-up-by-your-bootstraps mentality, our society generally has been willing to provide permanent unrestricted economic support only to groups who have a socially acceptable reason not to work in the market. Thus, though early public assistance may have provided meager benefits, U.S. society eventually became willing to provide relatively generous benefits to groups deemed to have a reason not to work, i.e., the very young, the very old, and people who have physical or mental disabilities.¹⁷ Although there is no bright-line distinction between people who have a reason not to work and people who do not work but are willing to work, and some question whether such distinctions are necessary,¹⁸ the public has diametrically opposing views toward

Contract, 24 J. LEGAL STUD. 283, 286 (1995).

16. See KELLEY, *supra* note 7, at 35-36 (discussing Elizabethan relief for the poor and the imposition of workhouses with prisonlike characteristics that were "considered sufficiently unpleasant to discourage anyone who was capable of working. In that way, it was hoped, relief would be sought only as a last resort, and only by those who truly needed it."); HANDLER, *supra* note 5, at 13-18, 20 (noting early twentieth century views that the "conditions of [welfare] relief had to be sufficiently miserable and stigmatic as to deter the working poor. Relief policy was less to reform the poor—who, for the most part could not work anyway—than to send a message to the working population."); cf. MELNICK, *supra* note 1, at 129 (describing efforts of the Reagan Administration to "reduce welfare dependency by imposing norms of work and family responsibility—even if this meant leaving some families without assistance").

17. See Diller, *supra* note 14, at 373 (noting that society differentiates between the "worthy" and "unworthy" poor and that programs that benefit the worthy poor provide more generous benefits, are more secure, and are more efficiently administered). Ironically, while people with disabilities may be discriminated against in other contexts, having a physical or mental disability always has been a favored status in the context of the social welfare system. The permanently disabled always have been viewed as "deserving" recipients of public assistance because the public has never doubted that disabled people have a legitimate excuse not to work. See Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1014 (1998).

18. See, e.g., Glenn C. Loury, Comment, in WORK AND WELFARE 45, 48-49 (Amy Gutmann ed. 1998) ("[I]s the distinction between deserving and undeserving—between

those who have an undeniable excuse for their economic dependence and those who appear to have no excuse.¹⁹ For example, if jobs are available, but an able-bodied person seeks financial assistance to support himself and his family, many will assume that he needs financial assistance only because he is either lazy or has made a conscious choice not to support himself.²⁰ Indeed, the only weak or dependent able-bodied people that the American society has willingly embraced are slaves (whose involuntary dependence, weak wills, and loyalty to their masters was deemed necessary to maintain the social order), children (who outgrow their weakness and dependency), and wives (whose subservience and dependency was expected and demanded in a patriarchal society).²¹

'good' and 'bad'—poor people a political and moral necessity in our time?").

19. See generally CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 78 (1992) (discussing the legislators' willingness to generously support the "deserving poor" (children, the elderly, and the disabled) but not the undeserving poor (single mothers and "marginally employable men whose unemployment benefits had run out")); cf. White, *supra* note 6, at 1965 ("[T]he public,' just like a large outdated computer, simply cannot process complex social problems except in one or zero, on or off, black or white terms."); HANDLER & HASENFELD, *supra* note 4, at 21-22 (tracing the distinction in treatment between the deserving poor (those who cannot work) and the undeserving poor (those who will not work)).

20. That the mainstream American culture expresses hostility toward the idea of helping the healthy poor is not surprising, as America's first welfare laws appear to be patterned after early English laws. See William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 102-104 (1998). See also HANDLER, *supra* note 5, at 10 (citing England's Statute of Laborers):

Because that many valiant beggars, as long as they may live of begging, do refuse to labor, giving themselves to idleness and vice, and sometimes to theft and other abominations; none upon said pain of imprisonment, shall under the color of pity or alms, give anything to such, which may labor, or presume to favor them towards their desires, so that thereby they may be compelled to labor for their necessary living.

21. See Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315 (1995), where Professor Federle observes that slavery apologists justified the dependent relationship between slaves and their masters because it "fostered peace and good will and promoted true affection between slaves and their owners." *Id.* at 1343-44. She further observes that these apologists compared the relationships men had with other presumptively dependent people (children and wives) to further support the necessity of having dependent slaves:

A man loves his children because they are weak, helpless and dependent; he loves his wife for similar reasons. When his children grow up and assert their independence, he is apt to transfer his affection to his grand-children. He ceases to love his wife when she becomes masculine or rebellious; but slaves are always dependent, never the rivals of their master. Hence, though men are often found at variance with wife or children, we never saw one who did not like his slaves, and rarely a slave who was not devoted to his master.

Id. (quoting GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH* 247 (1850)). See also HANDLER & HASENFELD, *supra* note 4, at 27 (discussing earlier acceptance of wives'

Though public assistance primarily was designed for the non-able bodied, our country also has deemed a person to be deserving of public assistance if he is temporarily prevented from earning a living because of an unanticipated economic setback caused solely by external factors, like unexpected illness or sudden, involuntary unemployment. We are willing to give a limited amount of support to an able-bodied impoverished person, because we assume that the person will use this support to pull himself up by his bootstraps and become self-sufficient. For example, when Congress initially agreed to provide welfare benefits to mothers it assumed that their financial need was temporary and would dissipate once they either qualified to receive social security (or other widows' retirement benefits) based on their husbands' work or they found a job that paid them enough to support them and their children.²² Ironically, this assumption proved to be erroneous as welfare recipients increasingly were divorced or never-married,²³ often had difficulties collecting child support, and lived in inner cities where high-wage, high-benefit manufacturing jobs were disappearing.²⁴ Moreover, even if the mothers *did* find jobs, the service jobs that replaced manufacturing jobs in urban areas typically paid wages at the lower end of the scale, provided few (if any) benefits, and, thus, made it extraordinarily difficult for mothers to support their children solely on their own wages.²⁵

dependence because the "patriarchal 'domestic code'" dictated that "proper women stayed home and took care of their husbands and children").

22. See Peter B. Edelman, *Recent Developments Welfare Reform Symposium: Introduction*, 50 ADMIN. L. REV. 579, 580 (1998); Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 889 (1994); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 824-27 (1994).

23. Between 1940 and the mid-1990s, the percentage of white, widowed AFDC residents dropped from approximately 85% to less than 40%. Moreover, by the mid-1990s, half of the AFDC recipients were mothers who had never been married whereas less than 2% of the recipients were widows. See Dan Bloom, *After AFDC: Welfare-to-Work Choices and Challenges for States* 6-7 (1997) (visited 29 June 1999) <http://www.mdrc.aa.psiweb.com/ReportsAfterAFDC/After%20AFDC.htm>.

24. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 174 (1987); Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L. J. 1697, 1718 (1993). See generally E. Douglass Williams & Richard H. Sander, *The Prospects for "Putting America to Work" in the Inner City*, 81 GEO. L.J. 2003, 2016 (1993) (observing that "the ravages of deindustrialization have decimated the number of low-skilled manufacturing jobs upon which working class blacks have traditionally relied").

25. See Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1760-61 (1993). Some argued that this also led to the creation of the "underclass." See WILSON, *supra* note 24, at 7-8 ("[T]he term *underclass* suggests that changes have taken place in ghetto neighborhoods, and the groups that have been left behind are collectively different from those that lived in these neighborhoods in earlier years.").

Once the government realized that too many welfare recipients did not work and might never receive financial support from the fathers of their children, it attempted to solve the non-work problem by creating programs to increase welfare recipients' educational²⁶ and vocational²⁷ skills. These programs, designed primarily to modify welfare recipients' perceived negative attitude toward wage-earning work, were criticized because they did not produce quantifiable indicators that they actually caused welfare mothers to leave home and work in the market.²⁸ Indeed, some argued that the programs, as structured, could never be expected to solve the non-work problem.

For example, critics contended that even if increasing a welfare recipient's educational level arguably increased her long-term job opportunities, this was of little use to women who were not motivated to learn. For these women, education became important only *after* they were in the job market and realized that having more education would help them get a promotion or a better job.²⁹ Thus, this type of program had few (if any) tangible short-term benefits, especially for women trapped in a culture or cycle of dependency. Vocational training programs also were viewed as ineffective. Critics argued that even if these programs eventually caused welfare mothers to readjust their attitudes toward wage-paying work or gave them the discipline to find and keep jobs, vocational training alone would not solve the work problem. Virtually all welfare experts agreed that the one thing crucial to keeping welfare mothers out of poverty and off the welfare rolls is a wage-paying job, something neither vocational nor educational programs could provide.³⁰ Though some critics proposed that welfare recipients be *forced* to work, liberal politicians consistently defeated these proposals, though they supported the

26. See generally DANIEL FRIEDLANDER & GARY BURTLESS, *FIVE YEARS AFTER: THE LONG-TERM EFFECTS OF WELFARE-TO-WORK PROGRAMS* 55 (1995).

27. See generally Robert Preer, *Boot Camp's Tough Love Boosts Job Searchers: Training Program Targets the Chronically Unemployed*, THE PATRIOT LEDGER (Quincy, Mass.), Jul. 14, 1998, at 14E (describing a Boston job search training course designed to provide job training to help overcome the trainees' negative attitudes toward work).

28. See generally William F. Goodling, *The Successful Work in Welfare*, 9 STAN. L. & POL'Y REV. 45, 47-48 (1998) (arguing that long-term education programs that have been proposed generally do not work).

29. See generally Rebecca M. Blank et al., *A Primer on Welfare Reform*, in LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM 54-55 (R. Kent Weaver & William T. Dickens eds., 1995) [hereinafter *Primer*]; MARY JO BANE & DAVID T. ELLWOOD, *WELFARE REALITIES: FROM RHETORIC TO REFORM* 108 (1994).

30. See, e.g., MARMOR ET AL., *supra* note 4, at 121 (stressing the importance of putting welfare recipients in jobs because the "principal determinant of poverty is unemployment, and of long-term poverty, long-term unemployment. This is true not only in the United States; it is what our Western European allies have found as well.").

notion that mothers should be given the *opportunity* to work.³¹ They opposed compelled work on a number of grounds: they believed that jobs were not available; and that, even where jobs were available, welfare recipients did not have the requisite educational or employment skills to get jobs;³² or that available jobs were menial or demeaning. They also cited factors unrelated to a “work ethic,” such as the inability to collect court-ordered child support,³³ inadequate child care, lack of transportation, and other factors which prevented single mothers from keeping jobs.³⁴ Conservatives responded that work—even if “dirty”—should be obligatory because work was something welfare recipients owed to recompense society for the financial support of welfare.³⁵

B. Recent Congressional Attempts to Solve the Welfare Problem

By the time Congress resolved to end welfare as we knew it in 1996, the public had developed an extremely negative attitude toward entitlements in general, and toward welfare and welfare recipients

31. See LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 91-126 (1986) (tracing the dispute from 1935 through the early 1980s).

32. See CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* 143 (1997) (“[M]aking welfare mothers take low-wage jobs is only likely to generalize the problem of working poverty, as people with little education and burdensome family responsibilities will be forced into the low-wage, low-skilled jobs that already prevent millions of working Americans from escaping poverty.”); HANDLER, *supra* note 5, at 33-39 (arguing that “[t]he problems attributed to welfare are, in reality, the problems of poverty” and positing that the increase in the poverty rate of full-time workers correlates to the substantial decline in the real earnings of less skilled, less educated workers).

33. Not receiving child support appears to be a major economic detriment to single mothers. For example, the total child support collected in 1996 was \$12,018,767, of which less than 24% (\$2,854,502) went to AFDC recipients. While 2,563,716 cases involving non-AFDC mothers successfully collected child support, the average number of AFDC cases which collected child support in 1996 was 940,452, or approximately 27% of the total number of cases. See COMM. ON WAYS AND MEANS, 1998 GREEN BOOK, 630-39.

34. See MARMOR ET AL., *supra* note 4, at 121 (expressing the concern that placing welfare recipients in jobs “addresses the supply side of the problem but not the demand side” because the jobs most likely available to these workers do not provide wages “sufficient to lift them out of poverty.”); see also NOBLE, *supra* note 32, at 143 (“[E]nforced work is not likely to improve either the attitudes of the poor (if attitudes are a problem), or their expectations that something positive will come from that work without changes in job markets, remedial education, and job training.”).

35. See, e.g., MEAD, *supra* note 31, at 67 (“The moral lessons most people learn, that they must work and take care of their families if they are to prosper, were blocked for much of the underclass by federal policy. Society normally exacts work or other contributions from its members in return for support.”); see also Stephen D. Sugarman, *Financial Support of Children and the End of Welfare As We Know It*, 81 VA. L. REV. 2523, 2543-52 (1995) (discussing prior welfare-to-work programs and the “any job is a good job” views expressed by some reformers).

specifically.³⁶ Indeed, by then even the term “welfare” carried negative connotations.³⁷ Critics maintained that giving non-working, able-bodied women welfare benefits denigrated the importance of work in the market³⁸ and discouraged them from even trying to pull themselves up by their bootstraps.³⁹ In addition, the public felt that the welfare system itself had created a perpetually dependent, morally unworthy underclass.⁴⁰ Some even suggested that politicians intentionally created and maintained a voting bloc of welfare dependents.⁴¹

36. See, e.g., HANDLER, *supra* note 5, at 148 (“Today’s AFDC recipients suffer from so many negatively ascribed characteristics—African-American, sexual promiscuity, underclass, criminality, substance abuse, spawning a new generation of criminals—that one wonders whether attitudes will ever change.”); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235, 286-98 (discussing the perceived losses and gains behind the negative public sentiment on welfare); Nancy Gibbs, *The Vicious Cycle (young single mothers on welfare)*, TIME, June 20, 1994, at 24 (citing reform measures against the backdrop of public opinion and stories of welfare abusers).

37. Though the word “welfare” generally means well-being or prosperity, and once connoted a vision of a potentially good life, the term came to be viewed as grudging aid to the unworthy. See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935*, at 1 (1994).

38. See Robert Solomon, *Ending Welfare Mythology as We Know It*, 15 YALE J. ON REG. 177, 189-90 (1998) (book review) (citing findings which support the notion that some mothers choose welfare over work rationally); JENCKS, *supra* note 19, at 223-25 (positing that welfare mothers refuse to work in low-wage jobs if they are left as poor as if they remained in the home); MEAD, *supra* note 31, at 81-82 (asserting that “[w]ork is normative for the poor, but it is not something they feel they *must* do, whatever the personal cost”).

39. Data indicated that some welfare recipients chose to receive welfare benefits rather than earn wages because prior welfare laws had weak work incentives. See COMM. ON THE BUDGET, *A HELPING HAND, NOT A HANDOUT*, H.R. REP. NO. 104-651, at 3-4 (1996) (citing a Cato Institute study which found that welfare benefits were more generous than work and thereby encouraged long-term dependency). See also MEAD, *supra* note 31, at 81 (citing a study that indicated that non-working welfare mothers properly could be classified as “traditional” women who prefer to stay home and raise their families and felt that society should support them in their role as mothers).

40. See MARMOR ET AL., *supra* note 4, at 115 (“[T]he emerging image of poverty is one of permanent deprivation combined with serious social pathology; it is a vision of what has come to be called ‘the underclass.’”); Simon *supra* note 11, at 11 (“[D]ependence connoted the morally inferior status of living on income not acquired through effort or exchange.”). A study of residents of a large public housing project in Chicago (Cabrini-Green) indicated that some recipients remained on welfare because of the “dramatic difference between the rules of the workplace and norms of behavior in the neighborhood where the recipients resided.” *Primer*, *supra* note 29, at 40. See also Joel F. Handler, *Ending Welfare As We Know It—Wrong For Welfare, Wrong For Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 7 (1994) (discussing the “cycle of welfare dependency”).

41. The noted newspaper columnist Anthony Lewis once described a letter he received from a person whose parents came to the United States as refugees “with just \$10 in their pockets.” Anthony Lewis, Comment, in *WORK AND WELFARE* 55, 55 (Amy Gutmann ed., 1998). The letter writer expressed his hostility to welfare laws and

Recent federal reforms assumed that most welfare recipients were unwilling (not *unable*) to find or hold jobs and that they harmed society, themselves and their dependent children by refusing to work.⁴² The 1996 welfare reforms can in many ways be viewed as an attempt to settle the debate over the best way both to force the poor to understand that they *must* work⁴³ and to eliminate welfare opportunism while simultaneously providing a safety net for the undeniably deserving poor (i.e., children).⁴⁴ Because able-bodied unemployed welfare mothers were not deemed worthy to receive public financial assistance, recent reforms sought to prevent these non-deserving women from receiving benefits in the future. The modern stereotype of the non-deserving welfare mother is the well-known “welfare queen.”

The welfare queen was portrayed as a long-term dependent, unmarried, urban black woman⁴⁵ who (1) had a herd of illegitimate

characterized them as a “DIABOLICAL LIBERAL INVENTION to keep a large population destitute, and to guarantee a voting bloc for politicians who promise the best handout.” *Id.*

42. See Margo D. Butts, *Urban Welfare Reform: A Community-Based Perspective*, 22 FORDHAM URB. L.J. 897, 898 (1995) (“Many of these families and individuals do not perceive gainful employment as a realistic option; instead, they rely exclusively on welfare on account of low self-esteem and lack of marketable skills.”). Critics of former welfare laws argued that society overall is harmed when users abuse the system because taxpayers are forced to subsidize the irresponsible behavior of others. See generally MEAD, *supra* note 31, at 54-61 (stressing the need for welfare users to accept responsibility for their problems).

43. Some argued that the poor understood that they *should* work, but felt that they should not be forced to take certain jobs. See MEAD, *supra* note 31, at 76-82 (positing that poor blacks may refuse to accept “dirty” or menial jobs because of their political view that white society used those jobs to control them).

44. Notwithstanding the demonization of the primary beneficiaries of welfare (mothers), reformers felt sympathy toward (and wanted to protect) the secondary beneficiaries, i.e., the “innocent” children of single mothers who receive AFDC. See R. Kent Weaver et al., *Public Opinion on Welfare Reform: A Mandate For What?*, in LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM 109, 110-11 (R. Kent Weaver & William T. Dickens eds., 1995) [hereinafter *Public Opinion*]. But cf. Fineman, *supra* note 13, at 292-93 (arguing that if children (“inevitable dependents”) are the deserving poor, then the mothers who are caretakers of inevitable dependents (“derivative dependents”) also should be viewed as the deserving poor).

45. See *Public Opinion*, *supra* note 44, at 110-11 (noting that the term “welfare” stimulates an association with racial minorities); GWENDOLYN MINK, WELFARE’S END 23 (1998) (referring to the “racial mythology” of welfare); Lucie E. White, *On the “Consensus” To End Welfare: Where are the Women’s Voices?*, 26 CONN. L. REV. 843, 854 (1994) (discussing the “counterfactual racist stereotypes of the lazy unmarried welfare mother with many children and the ‘welfare queen’—stereotypes that are statistically and experientially false”—and noting that “AFDC was becoming identified as ‘black’”). See generally Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL

children,⁴⁶ (2) felt she had a God-given right to stay home full-time to rear those children,⁴⁷ (3) steadfastly refused to work in the labor market to earn income to support those children,⁴⁸ but (4) wore designer clothing while driving her Cadillac to the grocery store to buy filet mignon with her food stamps.⁴⁹ Rather than assume that the welfare queen profile was either an outright myth or an aberrant exception,⁵⁰ welfare reform proceeded as if all welfare recipients were welfare queens and welfare mothers were lazy and chose not to work to support their families.

Because welfare mothers willingly accepted public economic support, many felt that welfare laws should be used to force them to modify their personal behavior.⁵¹ For example, critics argue that

REALITY 323, 330, 332 (Toni Morrison ed., 1992).

It is not terribly surprising that modern welfare reform discussions were tinged with racial overtones since race has always played a role in AFDC discussions. See MELNICK, *supra* note 1, at 68-69 (stating that the most vocal opposition to initial federal control of state AFDC programs "came from two devoted segregationists, Representative Howard Smith and Senator Harry Byrd (Democrats of Virginia)" because they "clearly did not want to be told how to treat poor blacks").

46. See HANDLER, *supra* note 5, at 44-45 ("The popular stereotype or myth is that welfare is composed primarily of young black women who have lots of children, are long-term dependent, and pass on this dependency from generation to generation."). *But cf.* 1998 GREEN BOOK, *supra* note 33, at 435-437, Table 7-19 (indicating that, in 1995, only 25% of welfare mothers had more than two children); MINK, *supra* note 45, at 33 (arguing that 72% of welfare mothers have no more than two children).

47. See Nichola L. Marshall, Note, *The Welfare Reform Act of 1996: Political Compromise or Panacea for Welfare Dependency?*, 4 GEO. J. ON FIGHTING POVERTY 333, 340-41 (1997) (discussing the lives of two single mothers (one wage earner, the other on welfare) and the welfare mother's view that the other mother was "crazy for going to work because of the negative impact it has had on her children's lives").

48. One welfare commentator argues that welfare should be used to redistribute income security toward family caregivers and that welfare should be thought of "as the income owed to persons who work inside the home caring for, nurturing, and protecting children." MINK, *supra* note 45, at 19. See generally Minow, *supra* note 22, at 830, 841-42 (arguing that taking care of children, especially the young, is valuable work and that welfare mothers should not necessarily be made to work outside of the home).

49. See Steven V. Roberts, *Food Stamps Program: How It Grew and How Reagan Wants to Cut It Back*, N.Y. TIMES, Apr. 4, 1981, at 11 (discussing the "legend of the so-called 'welfare queen,' a heavy woman driving a big white Cadillac and paying for thick steaks with wads of food stamps"); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 40, 49-50 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (discussing the public's obsession with welfare fraud and the "Black, jewel-bedecked, Cadillac-driving welfare queen").

50. See NOBLE, *supra* note 32, at 142 (suggesting that only a "minority of families who have received AFDC benefits since the program expanded have depended on it for a long time").

51. See, e.g., HANDLER, *supra* note 5, at 89-90 (discussing reforms that sought to change social behavior and reformers' beliefs that poverty primarily is behavioral, not economic or environmental); MELNICK, *supra* note 1, at 118 (noting "Congress's

imposing moral or “family” values on welfare mothers was the most effective way to modify their attitude toward work, to make them engage in socially acceptable behavior and, ultimately, to break their psychological dependence on welfare.⁵² Imposing these values, critics claimed, would prevent welfare mothers from viewing welfare as a guaranteed, life-long source of income, would discourage them from having children outside of marriage,⁵³ would encourage men to marry (or at least agree to support) the mothers of their children⁵⁴ and, thus, would prevent the threatened destruction of the “traditional”⁵⁵ family.⁵⁶

Because both Congress and the public seemed convinced that welfare laws encouraged welfare opportunism, Congress sought to incorporate behavioral restrictions in the new welfare law. Specifically, to instill in welfare recipients the importance of earning their own wages and to curb the expansion of the underclass, the reforms (1) conditioned welfare benefits on the recipients’ willingness to take jobs—any jobs—in the workforce, and (2) imposed eligibility

inclination to insist upon behavioral prerequisites for welfare”); *cf.* MEAD, *supra* note 31, at 46-47 (arguing that prior welfare reforms were doomed to fail because recipients were never told what was expected of them in terms of their personal conduct). For general discussions of earlier attempts to use welfare to modify recipients’ behavior, see generally Simon, *supra* note 11, at 2-3; William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 723 (1992).

52. See Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 351 (1996) (“There also seems to be a growing belief that when people resort to AFDC it is not a temporary status, but instead leads to generations of welfare dependency, crime, and low academic achievement.”). See, e.g., MELNICK, *supra* note 1, at 129 (discussing the Reagan Administration’s imposition of family norms on welfare users).

53. See MELNICK, *supra* note 1, at 66 (discussing view held by conservatives that the AFDC program “subsidize[s] immorality by providing benefits to illegitimate children, . . . treats unmarried parents better than married ones . . . [and] creates a form of dependency that is . . . passed from one generation to another”).

54. See HANDLER & HASENFELD, *supra* note 4, at 7 (stating that one of the “family values” themes of 1996 welfare reforms was to require states to terminate welfare benefits if mothers refused to cooperate in establishing paternity and obtaining child support); MINK, *supra* note 45, at 69-77 (characterizing 1996 welfare reform as an attempt to force men to act like responsible providers for the families).

55. Not everyone would agree that a “traditional” family can only be defined as a husband, wife and, children. See generally Jane Mauldon, *Family Change and Welfare Reform*, 36 SANTA CLARA L. REV. 325, 330-33 (1996); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2486-90 (1994).

56. See NOBLE, *supra* note 32, at 127 (observing that social conservatives felt that the availability of AFDC encouraged single women to have children and caused families to break up). See generally MELNICK, *supra* note 1, at 117 (discussing the results of experimental programs that “indicated that income guarantees significantly increased the rate of family breakup, especially for racial minorities”).

restrictions designed to decrease the number and type of welfare recipients.

C. Work Mandate

By 1996, both conservatives and liberals agreed that, since many non-welfare mothers worked outside the home, welfare mothers should not receive welfare benefits unless they also were willing to work both to *earn* their welfare benefits and to eliminate the need to receive public assistance in the future.⁵⁷ As non-work by the poor was identified as the problem,⁵⁸ the 1996 reforms were designed to solve that problem by imposing rigid work rules and mandating dire consequences for anyone who failed to follow these rules.⁵⁹ To avoid the perceived deficiencies of prior work programs,⁶⁰ Congress made the lynchpin of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁶¹ the requirement that all recipients work as a condition of receiving benefits. Though liberal politicians had defeated previous attempts to condition welfare benefits on the recipients' willingness to leave their homes to earn wages, many ultimately supported the 1996 reforms (though many out of political necessity) even though the reforms included mandatory work requirements.⁶²

D. Eligibility Caps

The 1996 reforms sought to modify the behavior of non-working but able-bodied mothers by imposing value-based eligibility caps. An important moral belief that the public held, but welfare recipients allegedly did not, was the importance of rearing children in a married, two-adult parent home. An equally important value that the public

57. See generally JENCKS, *supra* note 19, at 226-32 (noting that legislators agreed single mothers should be encouraged (if not forced) to work outside the home because the majority of married mothers now hold wage-paying jobs).

58. Of course, non-work in and of itself is not a problem, as witnessed by the fact that Congress has never suggested that the beneficiaries of trust funds should be forced to work.

59. The federal government now provides block grants to states conditioned on the state governments' willingness to mandate that welfare recipients work in return for receiving benefits. See 42 U.S.C. § 608(a)(7)(a).

60. See *supra* notes 27 and 30, and text accompanying note 30.

61. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. and 8 U.S.C.).

62. See Guy Gugliotta & Ruth Marcus, *Election-Year Politics Help Democrats Deal With Differences on Welfare*, WASH. POST, Aug. 2, 1996, at A8 (citing election-year politics and the high profile nature of welfare reform as reasons for Democratic liberal support for reforms); *The End?*, RICHMOND TIMES-DISPATCH, June 16, 1998, at A10 (suggesting that liberals had to embrace welfare reforms that they "deplored" because of the change in public opinion concerning welfare).

seemed to conclude both teenage and adult welfare recipients lacked was the importance of giving birth only to the number of children one can afford to support financially through one's own labor in the market. To "convince" welfare mothers to embrace these values, the 1996 reforms changed the availability and level of financial support for unmarried mothers and for mothers who had additional children after they initially began to receive welfare benefits.

Welfare critics argued that welfare laws gave teenage girls an incentive to be sexually promiscuous and to bear children outside of marriage and that children should not be encouraged to give birth to children.⁶³ In addition, critics contended that unmarried teenage mothers were not deserving welfare recipients and that society had no duty to support teen mothers.⁶⁴ The best way to alleviate the need for the public to support pregnant teens and to discourage them from getting pregnant in the first place was to (1) deny welfare benefits to minors and (2) force teenage mothers to remain home with their parents or to live with the fathers of their children.⁶⁵ To remove the incentive for teenage girls to get pregnant, give birth, then set up house with their babies, the 1996 reforms required states to deny benefits to mothers who were under the age of 18 unless they attended school and either lived with an adult or in an adult-supervised group home.⁶⁶

The 1996 reforms also sought to break the economic dependency of long-term *adult* welfare recipients and to force fathers to financially support their children. To end the psychological cycle of dependency, the 1996 welfare reforms required states to restrict a recipient's ability to receive benefits to no more than twenty-four continuous months.⁶⁷ Similarly, to combat the problem of

63. Most agree that having a newborn is the most important factor that causes teen mothers to apply for AFDC. See 1998 GREEN BOOK, *supra* note 33, at 537-41 (citing results of a 14-year study).

64. For a discussion of early attempts to curtail welfare use by teen mothers, see R. Kent Weaver, *The Politics of Welfare Reform*, in LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM 91, 94-95 (R. Kent Weaver & William T. Dickens eds., 1995) [hereinafter *Politics*].

65. See HANDLER, *supra* note 5, at 107 (discussing reform efforts in Massachusetts); cf. MINK, *supra* note 45, at 33 (citing data that only 1.2% of welfare recipients were under 18). Some argued that this approach threatens the well-being of the teens and their babies because it is at least as likely that denying welfare benefits to young mothers will simply force them to move (or remain) in an abusive arrangement with parents or partners who batter the teen or her child(ren). See *Primer*, *supra* note 29, at 47-48.

66. See 42 U.S.C. § 608(a)(4)—(a)(5) (1999).

67. See 42 U.S.C. § 602(a)(1)(A)(ii). For example, Virginia law imposes a time limit for users to receive AFDC benefits such that families receive 24 months of benefits and are then ineligible for benefits for the next 24 months, except upon a showing of "hardship." VA. CODE ANN. §§ 63.1-133.50 to .51 (Michie 1999).

intergenerational poverty, Congress prevented welfare recipients from receiving more than sixty cumulative months of benefits throughout their lives.⁶⁸ Critics also felt that treating welfare benefits as an entitlement gave women an incentive to increase their benefits by giving birth to more children, yet gave the men who impregnated them no incentive to either marry the women or financially support their children. To combat this, the 1996 reforms allowed⁶⁹ states to impose a “family cap” that denied benefits to women who bore additional children after they first entered the welfare system.⁷⁰ Finally, the 1996 reforms gave states the authority to reduce or eliminate the benefits of any mother who fails to cooperate with the state’s efforts to establish the paternity of her minor child.⁷¹

E. Why Lawmakers Compromised on Welfare Reform

Some statements made during the welfare reform debate were undoubtedly raw political posturing.⁷² Most welfare reformers (both conservative and liberal), however, genuinely appeared to support the reform process because of their belief that existing welfare laws caused welfare mothers to become economically dependent.⁷³ Though liberals overwhelmingly rejected the myth of the welfare queen while some conservatives seemed to think that all welfare recipients were welfare queens, reformers ultimately agreed to the twenty-four month continuous and sixty-month lifetime limitations. They reached this compromise in large part because they had reliable

68. 42 U.S.C. § 608(a)(7)(A). *See generally* HANDLER, *supra* note 5, at 114 (discussing time-limited welfare programs).

69. Federal law allowed, but did not mandate, family caps. *See* General Accounting office, *Restructuring State Welfare Programs*, GAO/HEHS-98-109 (June 18, 1998) at 71. [hereinafter GAO Report].

70. *See* HANDLER, *supra* note 5, at 105 (referring to family cap programs as attempts to influence poor mother’s procreation decisions); *see also* Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: “Personal Responsibility,” “Family Values,” and the Right to Choose*, 85 GEO L.J. 155, 181-82 (1996), where the author questions whether welfare reforms—especially family caps—promote abortion. *Cf.* MINK, *supra* note 45, at 33 (arguing that 61% of welfare recipients do not have additional children while on welfare).

71. *See* 42 U.S.C. § 608(a)(2).

72. Professor Martha Fineman argues that “more than mere money or concern with poverty is at issue in this debate. . . . It seems the real concern for many politicians is the imposition of their own morality, which entails the prevention of unmarried women having children and the curtailment of divorce.” Fineman, *supra* note 13, at 310. *See also* Appleton, *supra* note 70 (arguing that the actual purpose of welfare reform was to give public officials an opportunity to express and advance societal views against illegitimacy and teen pregnancy).

73. *See* MELNICK, *supra* note 1, at 260 (observing that legislators “acted not on the basis of their desire to be reelected or to maintain their power in Congress but on the basis of strongly held beliefs about the public interest”).

empirical data demonstrating that most welfare recipients left the welfare rolls within two years, and that those who returned often did so because of educational and vocational limitations.⁷⁴ Indeed, to soften the potentially harsh effect of the work requirements and term limitations, and in recognition of the problems welfare mothers faced that were *not* related to their alleged lack of a work ethic, the 1996 reforms supported states' efforts to provide day care assistance and educational programs for welfare mothers.⁷⁵

F. Did Recent Reforms Solve the Welfare Problem?

In one major aspect, recent reform efforts can be hailed a success. Overall, the number of welfare recipients has declined considerably.⁷⁶ Teen pregnancy rates also have dropped since the effective date of the 1996 welfare reforms.⁷⁷ Given these quantifiable

74. Reformers could agree on the 24-month continuous limit and 60-month lifetime limit in large part because empirical data indicated that the vast majority of mothers stayed in the system less than four years. See HANDLER, *supra* note 5, at 48. Data also suggested that more than 50% of the welfare recipients at any point in time had received benefits for more than eight years because they either could (or would) not work. See BANE & ELLWOOD, *supra* note 29, at 28-36. Thus, it appeared that while the typical welfare recipient received benefits short-term and left welfare rolls to get a job, the majority of welfare recipients in the welfare system at any point in time were long-term recipients.

See generally Greg J. Duncan & Gretchen Caspary, *Welfare Dynamics and The 1996 Welfare Reform*, 11 NOTRE DAME J. L. ETHICS & PUB. POL'Y 605, 619-623 (1997) (arguing that there are at least two different types of welfare recipients: short-term cyclical welfare users and long-term, less educated, less vocationally qualified ones. Those with higher educational levels and prior work experience tended not to return to the system or, if they did return, stayed only for short periods.). See also *Primer*, *supra* note 29, at 36-39; HANDLER, *supra* note 5, at 50; CONG. REC. E2157 (daily ed.) (Nov. 10, 1995) (statement of Rep. Jacobs) (quoting Professor Fran Quigley, *Confronting the Myths: The Truth About Poverty and Welfare*, NURO NEWSPAPER, Nov. 2-9, 1995, who asserts that "once the programs and the people enrolled in them are examined beyond rhetoric about 'lazy deadbeats' and 'welfare queens,' that actual data show that many of the assumptions of the welfare debate are incorrect").

75. See 42 U.S.C. § 618 (day care assistance) and §604 (educational assistance)(Supp. 1997).

76. See, e.g., *Most States Meet Welfare Law Demands; Work Requirements of 1996 Act Praised*, CHI. TRIB., Dec. 30, 1998, at 12 ("Nationwide the number of people on welfare has dropped by nearly one-third. . ."); James Bennet, *900,000 More Leave the Welfare Rolls*, N.Y. TIMES, May 28, 1998, at A26; Paul Glastris, Elise Ackerman, Dorian Friedman, and Warren Cohen, *Was Reagan Right? Welfare Rolls Are Shrinking in Part Because Reform Has 'Smoked Out' a Lot of Cheaters, Though Few Are 'Queens'*, U.S. NEWS & WORLD REPORT, Oct. 20, 1997, at 30 (asserting that welfare reform is cleaning out system abusers who received cash assistance despite having sufficient income from sources not reported to the government).

77. See Carolyn Starks, *District 50 Board Rejects Anti-Pregnancy Program*, CHI. TRIB., May 20, 1998, at 1 (citing that nationally, the teenage birth rate has dropped in recent years); Ellen Nakashima, *Fewer Teens Receiving Abortions in Virginia: Notification Law to*

indicators of "success," one certainly could argue that a woman's decision to get pregnant, bear the child, and keep it, is affected by the availability of welfare benefits. Moreover, the drop supports the view that ending welfare as we knew it removed the financial incentive for women to bear children outside of marriage and to bear additional children while receiving public assistance.

If success is measured by the number of mothers who left the welfare rolls since 1996, and if having too many people on the welfare rolls was "the problem," then the 1996 reforms solved the problem. Unfortunately, it is unclear why fewer mothers are receiving welfare.⁷⁸ It is possible that reforms succeeded in pushing mothers off welfare rolls into wage-paying jobs or sent them into (or back to) the arms of a man who could financially support them and their children.⁷⁹ It also is possible that the mothers no longer receive welfare benefits because they failed to comply with their state's eligibility or work requirements and, thus, were kicked off the welfare rolls *before* they found a job (or could snare a wage-earning man). Recent research indicates that, while some mothers found wage-paying jobs, a large percentage of the women were who pushed off the TANF rolls are not employed.⁸⁰ While it is undisputed that, after the 1996 reforms, welfare rolls shrunk, no one really knows what caused the decline or whether the welfare rolls will expand again when the U.S. economy suffers a setback.

Even if the 1996 reforms succeeded in pushing more welfare mothers into wage-paying jobs, this does not mean that the reforms succeeded in solving the "welfare problem." Specifically, if success is measured by the number of mothers who left the ranks of the

Get Court Test, WASH. POST, Mar. 3, 1998, at A1 (citing that teen birth rates are down nationally).

78. See GAO Report, *supra* note 69, at 96 (admitting there is a lack of consensus about the extent to which economic growth and state welfare reforms caused the decline in welfare caseloads); *Tracking Welfare Reform*, THE PLAIN DEALER, Aug. 17, 1998, at 8B (noting that gauging the success of the reforms is difficult given the complexity of the welfare problem); Bill Archer, *Welfare Reform's Unprecedented Success*, WASH. POST, Aug. 10, 1998, at Op-Ed A17 (citing changes in values and expectations as well as finding work as reasons for the decline in the welfare rolls); *Welfare Rolls are Smallest in 25 years*, CHI. TRIB., Jan. 21, 1998, at N6 ("Officials say the decline in welfare rolls results in part from federal waivers allowing states to experiment with new welfare policies and from the 1996 law, which established stringent work requirements.").

79. See *Good News on Welfare Reform*, L.A. TIMES, Apr. 26, 1998, at B8 (stating that one of the reasons for the decline in the rolls in Orange County, California is the good economy and therefore the availability of more jobs).

80. See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 607 (1999) (citing research that indicates that a large percentage of welfare recipients who have left the TANF rolls are not employed).

working poor (rather than the welfare rolls), then it is less clear that the 1996 reform efforts can be hailed as a success. Though welfare rates have decreased, poverty rates have not dropped as dramatically as welfare rates.⁸¹ This suggests that many ex-welfare recipients moved off welfare rolls, but did not move out of poverty.⁸² Since the percentage of people who left the welfare rolls is four times the percentage of people who moved out of poverty, it is reasonable to assume that some former welfare recipients are working in jobs that do not pay them enough to support their families or move them from the ranks of the working poor.⁸³

Given the limited job and educational skills some welfare mothers possess, the standard of living for these currently employed former welfare recipients may be worse now than it was when they received welfare benefits.⁸⁴ Moreover, given the inadequate child support collection mechanisms that exist in most states,⁸⁵ it is

81. Census data indicates that, while the number of people receiving welfare assistance dropped by more than 20% from 1995-97, the number of female-headed families still living in poverty dropped by less than 5%.

82. See Robert M. Solow, *Guess Who Likes Workfare*, in *WORK AND WELFARE* 22 (Amy Gutmann ed., 1998) ("If the end of 'welfare as we know it' means simply the end of welfare, simply throwing even the least capable onto the labor market to live off their earnings, the result is likely to be a higher incidence of abject poverty.").

83. In addition, welfare reforms may have inadvertently caused the problem of worker displacement or poverty substitution. Given the limited job skills of many welfare mothers, some low-wage workers may have been terminated or replaced when employers hired the former welfare recipients. If this occurred, then welfare reform would have succeeded in moving one welfare mother off the welfare rolls, but forcing a now-unemployed-worker into (or deeper into) poverty. See Solow, *supra* note 82, at 26 ("Some former welfare recipients will find jobs, perhaps many will . . . but only by displacing formerly employed members of the assiduously working poor.").

84. See Anuradha Mittal, *Is There an End to Hunger? Coming to Terms with Food Deprivation*, L.A. TIMES, Nov. 30, 1998, at 5B (noting that the decline of welfare rolls has caused an increase in the poor at soup kitchens and shelters); Alissa J. Rubin, *Poor Kids Loose Health Care: Ineptitude, Fear Cut Medicaid Rolls*, CHI. SUN-TIMES, Nov. 19, 1997, at 45; Lesley Clark, *New Welfare Reforms Hurt Children, Critics Say*, ORLANDO SENTINEL, Feb. 27, 1997, at D3.

85. See generally Jane C. Murray, *Legal Images of Motherhood: Conflicting Definitions From Welfare 'Reform', Family, and Criminal Law*, 83 CORNELL L. REV. 688, 723-32 (1998) (outlining child support laws and their effect on mothers and their children and suggesting it is harder for low income mothers to get support than other mothers); Mink, *supra* note 22, at 896 (arguing against relying on enforcement of child support in the welfare context because "[m]ost obviously for many of the poorest mothers, the fathers of their children are poor"); Hon. Mark S. Coven, *Welfare Reform, Contempt, and Child Support Enforcement*, 30 SUFFOLK U. L. REV. 1067, 1067-70 (1997) (arguing that lack of child support drives single parent families into poverty); Greg Gordon, *GAO: Child Support Shouldn't Supplant Welfare, The Agency Said That While States—Minnesota Among Them—Have Good Collection Records, That Money Would Be a Risky Safety Net*, STAR TRIBUNE (Minneapolis, MN), Aug. 4, 1998, at 6A (discussing 1998 GAO report that cautions against relying on child support payments to provide safety net for mothers who

reasonable to assume that some currently employed mothers remain poor because the income they receive from their low-wage jobs simply is not sufficient to support their entire family.⁸⁶ Finally, it is likely that some mothers remain unemployed, and thus ineligible for welfare benefits, because they lack reliable day care, live in areas with limited employment opportunities, lack transportation to get to work, or choose to be unemployed so they can return to welfare and receive health coverage for their children.⁸⁷

Forcing welfare recipients to work meets the short-term goal of breaking the cycle of poverty and moving women off the welfare rolls. Unfortunately, it is unclear whether it can achieve the long-term goal of eliminating the need for welfare or of moving the women and their children out of poverty. Because welfare was never designed to redistribute income between the classes, one could argue that the 1996 reforms intended simply to break welfare mother's dependence on the welfare system. If this is the goal, then the reforms should be deemed an unqualified success as long as welfare mothers who are forced off the welfare rolls do not live in *abject* poverty. If, however, the 1996 reforms were intended to accomplish more than break the

are forced off welfare rolls); 104 CONG. REC. H3721 (Mar. 23, 1995) (statement of Rep. Fazio) *Profile of Welfare Recipients In Our Country* (observing that only 25 percent of poor women receive child support whereas 43 percent of unmarried women above the poverty level receive child support payments).

86. A Nobel prize-winning economist recently observed that the "evidence implies inescapably that the jobs obtainable by former welfare recipients will pay very low wages and pay them irregularly." See Solow, *supra* note 82, at 41.

87. One welfare scholar suggests that female heads of households in poverty do not lack a work ethic and, in fact, consistently have worked. See HANDLER, *supra* note 4, at 51-55. What they lack, Professor Handler argues, is the ability to find and keep a job that pays better than welfare. See *id.* at 54. See also 104 Cong. Rec. H9904 (Aug. 2, 1996) (statement of Rep. Millender-McDonald) (rejecting theory that most welfare recipients "are able-bodied persons who do not want to work. Research has provided evidence that there is much movement between welfare and work . . .").

See also Mink, *supra* note 45, at 116 (questioning how single, working mothers can survive in the market when they are required to leave work to care for sick children); Elspeth K. Deily, *Working With Welfare: Can Single Mothers Manage?*, 12 BERKELEY WOMEN'S L.J. 132, 135-37 (1997) (arguing that finding work is not hard but keeping it is difficult due to the job market and finding available affordable child care); Greg A. Lohr, *Keeping a Job, Not Finding One, A Problem*, DAILY PRESS (Newport News, VA), Jun. 4, 1998, at A1 (same); Rena A. Koontz, *Welfare Ex-Clients, Deplore Reform Law Say Training is Sparse, Transit hard to Get*, PITTSBURGH POST-GAZETTE, May 23, 1998, at A12 (citing poor transportation, unavailable childcare, and poor training as problems); Stacy Hawkins Adams, *Back on Welfare—Temporarily*, RICHMOND-TIMES DISPATCH, May 17, 1998, at A14 (reporting that one mother had to go back on welfare after childcare assistance ended); Sheba R. Wheeler, *Longtime Recipient Drags Feet on Finding Work*, THE DENVER POST, Jan. 13, 1997, at A8 (recounting stories of mothers who cannot make ends meet, one of whom had to quit working and get back on welfare to get medicaid coverage for a daughter bitten by a dog).

cycle of dependency, and, instead, were intended to help mothers become economically independent so they could support their families based solely on the income they earned in the market, then the reforms ultimately may be deemed an unqualified failure. Indeed, given the societal factors that impede the employment opportunities of some poor women and that keep some working mothers poor, our society may need to prepare for the reality that some able-bodied people may always need long-term ongoing public assistance. Accepting this reality, however, would conflict with our long-standing belief that our market-based society works efficiently and allows every able-bodied citizen who is willing to work to become economically self-sufficient. As the ambiguous success of recent welfare reforms demonstrates, we cannot expect to solve the "welfare problem" until we correctly define the problem and unless we are willing to concede that poverty may in fact be the primary cause for the problem.

II. The Bankruptcy Crisis⁸⁸

A. Historical View of Debt Relief

The view that people have a moral duty to keep their word, make good on their promises, and pay their bills is one that is embedded in the American culture.⁸⁹ To encourage debt repayment, early bankruptcy laws were designed to punish and deter financial irresponsibility.⁹⁰ These law essentially treated debtors as criminals and gave creditors the right to have debtors adjudged as

88. This Article discusses only individual debtors' perceived abuse of bankruptcy laws. While recent legislative efforts and recommendations made in the Report by the National Bankruptcy Review Commission (the "Commission") also addressed perceived abuse by business debtors, business bankruptcy filings are not alleged to have contributed to the current "crisis." See NATIONAL BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT 20 YEARS* (1997) [hereinafter REPORT]. For an empirically-based analysis of the crisis, see Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079 (1998).

89. See Edith H. Jones and Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177, 215 ("Promise-keeping and an instinct for fairness and reciprocity are deeply embedded in our natures and underlie our social structure."); Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy"*, 21 UCLA L. REV. 403, 452-53 (1973) (characterizing the "view of obligation of debt as a social phenomenon, the common assumption being that in this society debtors should pay their debts to creditors. It is considered by many to be a part of our whole social fabric."); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretative Theory*, 21 U. RICH. L. REV. 49, 140 (1986) ("[T]he moral obligation to keep one's promises is a virtually universal ethical precept.").

90. See G. Stanley Joslin, *The Philosophy of Bankruptcy—A Re-Examination*, 17 FLA. L. REV. 189, 192 (1964) ("In the past, the law of bankruptcy has been intended to punish and deter, much as criminal law was fashioned.")

“offenders.”⁹¹ Indeed, until the mid-nineteenth century, creditors could have debtors imprisoned for failing to pay their bills.⁹² Bankruptcy, thus, was initially viewed as a distributive process designed solely to benefit creditors.⁹³

Bankruptcy later ultimately developed a somewhat more humanitarian approach that expressed a concern for rehabilitating financially distressed consumers, who originally were small business owners.⁹⁴ This change in attitude developed as a result of the practical reality that keeping entrepreneurs hopelessly insolvent created expensive social costs, not because the government felt debtors were entitled to forgiveness for their prior debts.⁹⁵ Thus, the focus of bankruptcy laws largely remained on assisting creditors throughout the nineteenth century.⁹⁶

Both business owners and wage earners have had the ability to discharge their debts with relative ease throughout this century.⁹⁷ Since most people felt a moral duty to pay their bills,⁹⁸ people typically would file for bankruptcy only if they were in dire financial need.⁹⁹ Thus, because of the stigma previously attached to being labeled a bankrupt or debtor,¹⁰⁰ Americans historically were reluctant

91. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 ABI L. REV. 5, 7-8 (1995).

92. See *id.* at 12. For a discussion of the general change in approach to a debtor's right to discharge legal obligations in bankruptcy, see Charles Tabb, *Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L. J. 325 (1991).

93. See Joslin, *supra* note 90, at 191.

94. See *id.* (noting attitude change that “included a concern for the debtor and his rehabilitation”).

95. See *id.*

96. See Tabb, *supra* note 91, at 14-23.

97. For an overview of the history of American bankruptcy laws, see CHARLES TABB, *THE LAW OF BANKRUPTCY* 32-36 (1997).

98. See Shuchman, *supra* note 89, at 455-56 (“many, probably most, persons in our society view debt payment as a matter of duty. They pay their debts (and judge others accordingly) not so much because they think that it is just to do so or because it will bring about the most good for themselves or for all, but because it is proper and right to pay one's debts.” (footnote omitted)).

99. See *Resolved: The Time Has Come for Means Testing Consumer Bankruptcy—A Debate*, 17 AM. BANKR. INST. J. 6 (1998) (hereinafter ABI DEBATE)(Comment of George Wallace):

a second practical limit upon the use of bankruptcy [has] been a sense of personal responsibility amongst Americans that they will not use bankruptcy and shed their contractual, their moral obligations, to repay people that have loaned them money, unless they are in dire need. We call this bankruptcy stigma sometimes, but it is essentially a feeling of personal responsibility that has controlled the abuse of bankruptcy. The statute is vulnerable to abuse, but a sense of personal responsibility amongst Americans has controlled its use.

100. Before Congress adopted the Bankruptcy Code in 1978, a person who filed for bankruptcy was referred to as a “bankrupt.” Now, the person is called a “debtor.”

to file for bankruptcy and, in some instances, would repay debts even if those debts had been discharged in bankruptcy.¹⁰¹ Though certain groups or types of people may have elected to avoid the stigma of being labeled a bankrupt or debtor, bankruptcy relief has not been restricted to any socio-economic class nor has it been based on the debtor's ability to work to repay her debts. That is, unlike welfare laws, bankruptcy eligibility is not "means" tested, needs-based, or otherwise indexed to a debtor's current, or reasonably anticipated future, needs or income. Because of this, a rich person who chooses not to repay her current debts from current income is *eligible* to be a debtor in bankruptcy even though technically she may not be insolvent.

Whatever stigma previously was associated with filing for bankruptcy appears to have decreased (or disappeared) in recent years.¹⁰² Currently, if an individual is eligible for relief under Chapter 7, she cannot be forced to repay her debts through a Chapter 13 plan even if she has the means to repay some of her debts out of future income.¹⁰³ As a result, debtors increasingly have sought to discharge their debts in a Chapter 7 liquidation case though they theoretically have the means to pay at least some of those debts over time through a Chapter 13 wage earner's plan.¹⁰⁴ Indeed, it is because of the relatively recent filings of the rich and famous, and filings by debtors who amassed massive credit card debts, that critics now question the validity of the goals and purposes of debt-relief for the able-bodied.¹⁰⁵

101. See F.H. Buckley and Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 194(1998) (noting that Sir Walter Scott and Mark Twain worked to repay debts even though they had been legally discharged). See also Jones and Zywicki, *supra* note 89, at 215 (bemoaning the decline of bankruptcy shame and stigma); Peter Pae and Stephanie Stoughton, *Personal Bankruptcy Filings Hit Record, Easy Credit Blamed, Congress May Act*, WASH. POST, Jun. 7, 1998, at A1 (noting concern expressed by Rep. Bill McCollum (R-Fla), a major supporter of current reforms, that the "stigma" of filing for bankruptcy is gone).

102. See sources cited in *supra* note 101. One wonders when the stigma allegedly associated with bankruptcy last existed, as an academic commentator observed over 30 years ago that "while one may become somewhat stigmatized as a result of bearing the label of a bankrupt, this stigma is becoming of diminishing social importance." Joslin, *supra* note 90, at 192.

103. As long as a debtor has not engaged in certain acts of misconduct and has not dismissed any case within the past 180 days, she is entitled to a Chapter 7 discharge. See 11 U.S.C. § 109(b) and § 727(a)(1994). If the court finds that allowing the case to proceed would be a substantial abuse of the bankruptcy laws, however, it may dismiss the case under 11 U.S.C. § 707(b)(1994).

104. For an exhaustive discussion of the factors courts should consider when determining what it means to have the "ability to pay" debts, see *In re Attanasio*, 218 B.R. 180 (Bankr. N.D. Ala. 1998).

105. See *In re Brown*, 211 B.R. 183, 184 (Bankr. E.D. Penn. 1997) (bankruptcy filing of recording artist Rachele Ferrell); *Lax Bankruptcy Laws Make Everyone Pay*, USA

B. Justification for Bankruptcy Relief

Throughout this century, bankruptcy laws have had two primary goals. The first goal is to maintain a uniform and orderly debt repayment system.¹⁰⁶ This goal primarily helps creditors as a group because it prevents individual creditors from pursuing their self-interest in collecting their debts by racing to the courthouse to seize a financially ailing debtor's assets.¹⁰⁷ Though some bankruptcy scholars have questioned the wisdom of creating a federal bankruptcy scheme that is inconsistent with or disrupts state law collection repayment schemes,¹⁰⁸ bankruptcy commentators generally agree that having a systematic distribution of a debtor's assets is preferable to having the assets dissipated in an ad hoc disorderly fashion.¹⁰⁹

The second goal is to provide economic relief to overburdened debtors. The Supreme Court repeatedly has stated that the fresh start is designed to excuse the *honest* but *unfortunate* debtor from repaying debts.¹¹⁰ It is unclear whether a person who could repay her debts but chooses not to do so can genuinely be called *honest* or – notwithstanding the fresh start doctrine – whether allowing people to avoid the responsibility of repaying debts they appear able to pay is

TODAY, Jun. 12, 1997, at 14A (noting bankruptcy filings of former baseball commissioner Bowie Kuhn, former Arizona Governor Fife Symington, and wall street financier Paul Bilzerian); Tonya Pendleton, *The Price of Fame Can Be Bankruptcy*, THE RECORD (New Jersey), Apr. 11, 1998, at Y1 (reporting the bankruptcy filings of recording artists MC Hammer, TLC, and Toni Braxton). See also *In re Rembert*, 141 F. 3d 277 (6th Cir. 1998) (debtor filed for bankruptcy after using credit card to get cash advances for gambling purposes); *In re MD Uddin*, 196 B.R. 19 (S.D. N.Y. 1996) (debtor misrepresented income to get credit cards, charged \$60,000 in perfume, electronics and other luxury items, then filed for bankruptcy); John O'Brien, *Court Clerk Lived High Before Fall*, POST-STANDARD (Syracuse, NY), Oct. 20, 1997, at A1 (reporting on local court clerk who amassed \$47,000 credit card bill in travel expenses, then filed for bankruptcy).

106. See H.R. REP. NO. 95-595, at 366-68 (1977), reprinted in 1978 U.S.C.A.N. 5963, 6321-24 (discussing debt repayment goal).

107. See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554 (1915).

108. See e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 21-22 (1986) (positing that bankruptcy collectivization does not justify reordering state law entitlements).

109. See *id.* at 21 (agreeing that bankruptcy laws "may be an occasion to collectivize what hitherto had been an individual remedies system").

110. The fresh start policy gives "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Other cases referring to the "honest but unfortunate debtor" include *Cohen v. De La Cruz*, 523 U.S. 213, 217 (1998), *Grogan v. Garner*, 498 U.S. 279, 287 (1991), and *Brown v. Felsen*, 442 U.S. 127, 128 (1979).

ever a worthwhile goal. Likewise, bankruptcy laws have never specified exactly how destitute a debtor must be before her economic plight is deemed unfortunate enough to give her the right to seek a fresh start.

Not surprisingly, bankruptcy courts and commentators sharply disagree over the extent to which bankruptcy laws should be used to protect an able-bodied person's right to discharge debts and embark on a "fresh start" in life free of the obligation to repay debts.¹¹¹ The original purpose of the discharge was, like bankruptcy laws overall, designed to benefit creditors. That is, under early bankruptcy laws, only creditors could initiate a bankruptcy case: voluntary debtor-filed cases were not permitted.¹¹² To reward debtors for disclosing assets to the trustee and for willingly participating in this creditor-initiated collection process, bankruptcy laws gave debtors a fresh financial start.¹¹³ Because bankruptcy cases can now be filed by debtors, the fresh start is now designed to benefit only the debtor.

In justifying the fresh start, some argue that financially strapped debtors who have a present inability to repay their debts should be allowed to discharge them because the discharge will help restore their self-esteem and will increase the likelihood that they will be contributing, goods-purchasing members of society in the future.¹¹⁴ Others argue that debtors should be allowed to discharge debts they

111. Providing an in-depth definition of, or justification for, the fresh start (especially in the light of the recent explosion in bankruptcy filings) is beyond the scope of this article. Other commentators previously have addressed various aspects of the justification, scope and contours of the fresh start. See Lawrence Ponoroff and F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235 (1995); Lawrence Ponoroff and F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement; Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U.L. REV. 919 (1991); Charles J. Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56 (1990); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L. J. 1047 (1987); Hallinan, *supra* note 89; Jackson, *supra* note 108.

112. The Bankruptcy Act of 1841 was the first American law that abandoned the idea that bankruptcy laws existed for the benefit of the creditors alone and allowed debtors to voluntarily bring their estates into the bankruptcy courts for equitable distribution. See H. REMINGTON, *A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES*, § 8 at 17 (1950).

113. See Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 350-51 (1982); Hallinan, *supra* note 111, at 54; Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 202 n.87 (1994).

114. See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785-86 (1983) (arguing that the fresh start is needed to restore the debtor's confidence in his capacity to govern his economic life in the future); Hallinan, *supra* note 89, at 57 (referring to the "socioeconomic policy and social utility" purposes of the fresh start).

presently cannot repay because forgiveness is good philosophically and morally and that our society should give the financially burdened a second chance.¹¹⁵ Finally, debtors arguably should be allowed to discharge debts they lack the present means to pay to ensure that the fresh start will remove the “stigma” of being destitute and is consistent with modern bankruptcy laws’ less punitive nature.¹¹⁶

It is impossible to simultaneously maximize debt repayment and maximize an honest and unfortunate debtor’s ability to discharge the very debts that creditors seek to have repaid.¹¹⁷ As a result, bankruptcy courts often find themselves asked to resolve unresolvable conflicts created by these competing goals.¹¹⁸ Because bankruptcy laws are not need-based or means-tested, the tension between debt repayment and the fresh start policy is especially pronounced when deciding whether a person who lacks the present means to repay his bills should be allowed to discharge his debts if he could work to repay some of the debts from future earnings. Due in large part to the urging of a well-funded credit card lobby,¹¹⁹ Congress

115. See KAREN GROSS, *FAILURE AND FORGIVENESS* 97 (1997), where Professor Karen Gross refers to the fresh start as the “legal analogue to divine intervention” because it gives debtors the emotional recovery they need to start over in life, and Hallinan, *supra* note 89, at 57 (noting that the fresh start noted that “mercy or forbearance [w]as the morally correct response to financial failure and depicted collection efforts as a morally repugnant effort to inflict suffering for greedy motives”). Cf. MARMOR ET AL., *supra* note 4, at 24 (observing that, under the “behaviorist vision” of social welfare policy, people who believe that society has a duty to support the poor – even if they are poor by choice – concede that this may do more harm than good and may perpetuate the economic plight of the poor and reinforce their dependency on the welfare system).

116. Cf. Shuchman, *supra* note 89, at 459 (listing that bankruptcy was designed to be a “means of redistributing wealth and a psychological liberation, a possibly stigmatizing experience”). Of course, one might respond that modern bankruptcy abuse occurs precisely because there no longer is a stigma attached to filing for bankruptcy. See Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard to Get Harder Laws – But Whether Many People Shirk Bills They Can Pay Remains Open to Debate – Changing the Lender’s Image*, WALL ST. J., Jun. 17, 1998, at A1 (reporting that creditor groups contend that the “bankruptcy boom” is driven by “a decline in the social stigma of bankruptcy”).

117. Indeed, the goals are unrelated and could be accomplished independently of each other. That is, bankruptcy laws could allow debtors to discharge their debts without requiring that the discharge take place in a collective debt proceeding. Likewise, bankruptcy laws could force creditors to participate in a collective debt proceeding while denying the debtor the right to discharge any debts or keep any assets.

118. See Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. & MARY L. REV. 333, 336 (1992) (“A decisionmaker in bankruptcy must apparently be capable of unattainable wisdom – of resolving seemingly intractable conflicts between and among fundamentally incommensurable values.”); Hallihan, *supra* note 89, at 143-46 (observing the conflict between competing two primary bankruptcy goals and suggesting that “the availability of a means for release from payment is in some respects at odds with [the collection of debts] policy”).

119. See Schlesinger, *supra* note 116 (reporting that credit industry spent more than \$2

recently became convinced that too many undeserving able-bodied people were filing for bankruptcy. To prevent those potentially unworthy debtors from discharging debts allegedly within their means to pay, Congress sought to end bankruptcy as we know it.

C. Recent Attempts to Solve the Bankruptcy Problem

(1) *Characterizing the Problem*

Recent bankruptcy reform discussions were contentious because pro-debtor and pro-creditor advocates disagreed over several fundamental issues, including what type of person deserves the right to file for bankruptcy, why so many people are filing for bankruptcy, and whether debt repayment should be mandatory.¹²⁰ By far, the most controversial topic was whether debtors should be forced to repay their debts if they appear to have the future means to do so. Indeed, critics argued that the bankruptcy problem was created because people are allowed to discharge debts that are within their ability to pay.¹²¹

Academic commentators have long suggested that providing a risk-free, guaranteed safety net encourages what generally can be called bankruptcy opportunism. Bankruptcy opportunism occurs when a potential debtor systematically and strategically engages in reckless spending because of his knowledge that bankruptcy law will subsidize the costs of his irresponsible conduct.¹²² The bankruptcy safety net thus underestimates the real costs of the debtor's irresponsible spending by forcing creditors and society as a whole to

million in lobbying in 1997). See also Common Cause, *Going for Broke: Big Money, Big Banks & Bankruptcy* (1998) (reporting that consumer credit industry gave \$61.6 million, an average of \$100,000 in political action committee contributions to each member of the Senate, since 1987) (on file with author).

120. In discussing the process the Commission used to develop proposed changes to the consumer bankruptcy system, Professor Elizabeth Warren (the reporter for the Commission) observed that debtors and creditors who testified before the Commission wanted a system that helps those who need help (debtors' recommendation) but does not give help to those who do not need it (creditors' message). See Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 492-93 (1997). Thus, the battleground was not whether needy debtors should be allowed to use the system but, rather, how "needy" should be defined. See *id.* at 493. See also *Consumer Bankruptcy Reform Roundtable*, 7 A.B.I. L. REV. 3, 4 (1999) (comments of Judge Eugene Wedoff) (stating that "I don't think that anyone can deny" that making debtors who have a "genuine ability to repay their debts" is a "legitimate aim").

121. See generally Jones and Zywicki, *supra* note 89.

122. See Jackson, *supra* note 15, at 1402. See also Buckley and Brinig, *supra* note 101, at 189-91 (noting that 1984 bankruptcy reforms were designed to curb debtor opportunism).

subsidize or at least bear a portion of those costs.¹²³ The concept of bankruptcy opportunism is not merely an academic concern. Courts, Congress, and to some extent the public also are disturbed by the notion that a person can choose not to repay bills that are within her ability to pay. To minimize the moral hazard created by a bankruptcy system that does not require debtors to repay debts within their means, over the last decade courts and Congress searched for ways to interpret or modify the Code in ways that would discourage debtors from making risky, ill-advised credit decisions.

(2) *Judicial Characterization*

The Code does not give bankruptcy courts the authority to order able-bodied, employed debtors to work (or get another or a better paying job) to repay their bills in Chapter 13 rather than discharge them in Chapter 7. Despite this, courts increasingly consider a debtor's work status when reviewing the debtor's bankruptcy petition or plan. Courts most often consider a debtor's employment opportunities when the debtor files for relief under Chapter 7 rather than Chapter 13, seeks to discharge debts that presumptively are non-dischargeable, or proposes a Chapter 13 plan that repays only a small percentage of debts.¹²⁴ While courts understand that they cannot order a debtor to get a job (or a better-paying job), they increasingly have been willing to dismiss Chapter 7 petitions¹²⁵ and to refuse to discharge presumptively non-dischargeable debts¹²⁶ or confirm

123. See Jackson, *supra* note 15, at 1402. Cf. Jackson, *supra* note 15, at 1422 n.95 (explaining why allowing a debtor to switch to a lower wage job to avoid repaying a debt creates a negative externality because the decision to earn less (but consume more leisure) costs the debtor nothing but imposes a social cost on creditors).

124. For example, debtors may discharge student loan debt only by showing that it would be an undue hardship to force them to repay the debt. See 11 U.S.C. § 523(a)(8)(B)(1994). Similarly, Chapter 7 debtors may discharge certain non-support divorce debts only if they can show either that they do not have the ability to repay the debt or that the harm of forcing them to repay the debt is greater than the benefit the ex-spouse will receive by if the debt is repaid. See 11 U.S.C. § 523(a)(15)(1994).

125. See, e.g., *In re Kamen*, 231 B.R. 275, 279 (N.D. Ohio 1999) (considering unemployment of debtor-spouse as factor in deciding to dismiss debtors' Chapter 7 petition).

126. See *In re Lehman*, 226 B.R. 805, 809 (Bankr. D. Vt. 1998) (finding that able-bodied debtor with an advanced degree from Oxford who earned a living by selling pottery must repay his student loans); *In re Jenkins*, 202 B.R. 102, 106 (Bankr. C.D. Ill. 1996) (noting that an unemployed party who was trained as a surgical technical had voluntarily reduced her income through underemployment); *In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996) (finding that when either the debtor or creditor has voluntarily reduced their income, court can consider the reduction when determining whether to discharge a divorce debt); *In re Slover*, 191 B.R. 886, 892 (Bankr. E.D. Okl. 1996) (considering debtor's capacity to earn \$1,200 monthly as an automobile financier); *Klaue v. Thompson (In re Klaue)*, 181 B.R. 487, 495 (Bankr. C.D. Cal. 1995) (finding that a debtor who was

Chapter 13 plans that repay a small percentage of debts¹²⁷ when they conclude that a debtor has made a conscious decision to be un- or under-employed.

Allowing a debtor to discharge debts would help protect a debtor's fresh start. Yet, in deciding whether to allow a debtor to proceed in Chapter 7 or to discharge presumptively non-dischargeable debts, or in evaluating whether a debtor has committed all disposable income to making plan payments,¹²⁸ courts now routinely consider whether the debtor appears to have made a choice *not* to maximize her earnings potential. Likewise, courts routinely conclude that allowing a debtor to choose not to maximize his earning potential would not be fair to creditors and would frustrate the goal of maximizing debt repayment.

(3) *Legislative Characterization*

Comments made during recent legislative debates echo the concerns expressed in court opinions involving voluntarily un- or under-employed debtors. Congress sought to reform bankruptcy laws because the public in general, and certain specific creditors, felt the typical debtor – like the typical welfare recipient – was fiscally irresponsible, refused to work (or otherwise sacrifice) to repay his bills, then relied on federal law to resolve his financial crisis.¹²⁹ There

trained in real estate management was voluntarily underemployed and that underemployment permits the court to impute income based on the party's earning ability); *In re Erickson*, 52 B.R. 154, 158 (Bankr. D. N.D.1985) (finding student loans nondischargeable, though the debtor's current employment and income levels would not permit repayment because her income prospects in view of her educational level are bright).

127. *See, e.g., In re Petersen*, 228 B.R. 19 (Bankr. M.D. Fla. 1998) (refusing to confirm plan of attorney who had the potential to substantially increase his earnings and who had an annual salary that exceeded \$500,000 three years prior to filing).

128. *See* 11 U.S.C. § 1325(b)(1)(B)(1994) (requiring the debtor to apply all projected disposable income to making plan payments).

129. *See Improved Bankruptcy Law a Worthy Goal for Congress*, OMAHA WORLD-HERALD, Jun. 14, 1998, at 32A (stating that the government can help the bankruptcy filing problem by stamping "out the notion that the bankruptcy laws are just another way of working the system"); Jamie Clary, *Bill Would Make it Harder to Wipe Away Bankruptcy Debt*, NASH. BUS. J., Apr. 17, 1998, at 9 (quoting statement by general counsel of the Tennessee Bankers Association that "Bankruptcy is no longer a last resort. It has become a first resort."); *Going for Broke*, THE BOSTON GLOBE, Mar. 10, 1998, (Editorial) at A10 (stating that present abuse of the system "requires tightening the mechanism for awarding bankruptcy protection"); *Bankruptcies*, RICHMOND TIMES-DISPATCH, Jan. 9, 1998, (Editorial) at A12 (stating that reform is necessary to curb the practice of using bankruptcy as "something less than" a last resort); *End Abuses of Bankruptcy Option with Regulations, Common Sense*, SUN-SENTINEL (Ft. Lauderdale, FL), Dec. 18, 1997, (Editorial) at 30A (stating that many debtors "treat bankruptcy as a first choice option not a last resort").

is support for this view: even a quick perusal of reported court decisions reveals that some debtors use bankruptcy laws to subsidize lavish lifestyles,¹³⁰ punish former spouses¹³¹ or avoid paying debts that clearly are within their means to repay.¹³² Given the presence of these non-deserving debtors and the public's response to them, Congress created a "bankruptcy queen" profile. That is, to many legislators the typical debtor is the owner of a multi-million dollar exempt¹³³ mansion,¹³⁴ charges lavish trinkets on a Visa card (or takes

130. See, e.g., *In re Kamen*, 231 B.R. 275, 278-79 (Bankr. N.D. Ohio 1999) (dismissing case because, despite unemployment of debtor-wife, the debtors substantially increased their credit card balances and took out a loan from their retirement plan to pay for their daughter's extravagant wedding); *In re Petersen*, 228 B.R. 19, 26 (Bankr. M.D. Fla. 1998) (characterizing debtor who recently owned mudslide-damaged California mansion, firebombed Lamborghini, and Rolls Royce as having "little integrity and even less sincerity in seeking bankruptcy protection"); *Kornfield v. Schwartz (In re Kornfield)*, 214 B.R. 705, 711 (Bankr. W.D. N.Y. 1997) (noting debtors' monthly food expenses of \$1,200, clothing expenses of \$400, and housing expenses of \$3,000 for family of six); *In re Stewart*, 201 B.R. 996, 1007 (Bankr. N.D. Okla. 1996) (stating that debtor claimed monthly food expenses of \$500 for himself); *In re Mastromarino*, 197 B.R. 171, 180 (Bankr. D. Me. 1996) (objecting to debtor's proposed monthly contribution to a family trust); *In re Gavita*, 177 B.R. 43, 46 (Bankr. W.D. Pa. 1994) (noting that debtor subscribed to cable and premium movie channel and claimed monthly movie rental expense of \$100).

131. See *In re Lewis*, 227 B.R. 886, 889 (Bankr. W.D. Ark. 1998) (finding debtor's "sole motive in filing" was to circumvent state court alimony and child support orders); *In re Maras*, 226 B.R. 696, 702 (Bankr. N.D. Okla. 1998) (finding debtor's "sole motivation" for filing for bankruptcy was to avoid paying his former wife); *In re Traub*, 140 B.R. 286, 291 (Bankr. D. N.M. 1992) (finding that debtor filed to avoid paying property settlement to ex-spouse); *In re Palmer*, 117 B.R. 443, 448 (Bankr. N.D. Iowa 1990) (noting that debtor filed to avoid a single debt owed to ex-spouse); *In re Shands*, 63 B.R. 121, 124 (Bankr. E. D. Mich. 1985) (finding that debtor filed to "spite" ex-spouse).

132. See *Kornfield*, 214 B.R. at 710-71 (dismissing the debtors' Chapter 7 petition after concluding that they could curtail their extravagant lifestyle and repay their consumer debts from future earnings); *Scheinberg v. United States Trustee*, 134 B.R. 426, 429 (Bankr. D. Kan. 1992) (rejecting debtors' unsubstantiated expenses and finding they could use their monthly disposable income of \$2,000 to fund a Chapter 11 plan); *In re Rushing*, 93 B.R. 750, 752 (Bankr. N.D. Fla. 1988) (finding that debtors who owned luxury boat for recreational purposes could afford to repay debts).

133. Debtors from states with liberal exemption statutes frequently are used to illustrate the "bankruptcy queen" profile. Texas debtors are often branded as non-deserving manipulators of the bankruptcy laws because they are entitled to "exempt" (i.e., keep from creditors) a homestead of unlimited value. See TEX. PROP. CODE ANN. §41.001(a) (West Supp. 1997). See also *Border v. McDaniel (In re McDaniel II)*, 70 F.3d 841, 843 (5th Cir. 1995) ("[W]e must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly—or even knowingly but powerless to avoid it—assist a dishonest debtor in wrongfully defeating his creditor." This may account for the oft-repeated creditor's lament: "Debtors either die or move to Texas.") (footnote omitted). See also *In re Bruski*, 226 B.R. 422, 423 (Bankr. W.D. Wisc. 1998), where the debtors relied on state law to exempt money held in an annuity even though the court conceded that annuities generally are used as "an investment vehicle which Congress designed to afford tax relief for the rich." The court compared the debtors to Mark

a cash advance from the credit card to fund a gambling trip to Reno), then cavalierly files for bankruptcy rather than selling the exempt assets, curtailing spending habits, or working to repay the credit card debt.¹³⁵

No one disputes that there has been a dramatic increase in the number of consumer bankruptcy filings over the past twenty years.¹³⁶ As was true during welfare reform efforts, however, critics relied on the presence of what may in fact be a small number of able-bodied, employed, but irresponsible debtors to “prove” that bankruptcy is too easy, that most debtors have the ability to repay their bills (and, thus, do not *deserve* bankruptcy relief), that the availability of bankruptcy relief encourages deviant, socially undesirable behavior, and, consequently that bankruptcy laws harm society overall.¹³⁷

Just as the welfare queen profile unfairly mischaracterized

Twain's PRINCE AND THE PAUPER, because they “suddenly found themselves able to partake of one of the retirement luxuries of the wealth.” *Id.* The court then noted that the debtors' ability to exempt the property “highlights the tension which often results between [bankruptcy's] two divergent goals.” *Id.*

134. It is possible—probably likely—that current bankruptcy laws permit some debtors to discharge most of their debts yet keep expensive homes. For example, the debtors in *Bank Leumi Trust Co. of N.Y. v. Milton Lang*, 898 F. Supp. 883 (S.D. Fla. 1995), moved from New Jersey to Florida then purchased (and were allowed to keep) a home and annuities with a combined value of one million dollars. Likewise, the debtors in *In re Joseph & Elaine Primack*, 89 B.R. 954 (Bankr. S.D. Fla. 1988), exempted a \$450,000 house even though they purchased it 16 months before they filed for bankruptcy and they moved from Colorado, which had a limited homestead exemption.

135. See Bill DiPaolo, *Arising From the Debt*, NEWS SENTINEL (Ft. Wayne, Indiana), March 3, 1997, (Business Monday) at 1B (citing studies that indicate “many people who declare bankruptcy actually have money to pay a portion of the bills.”); ABI DEBATE, *supra* note 99, at 6 (indicating that one of the debaters (George Wallace, representing the American Financial Services Association) stated that many who file for Chapter 7 actually have the ability to pay 30-40% of their unsecured debts, and therefore should be required to do so). See also Hon. Dorothy Eisenberg, *Consumer Debtors: Combining Chapters 7 and 13*, 4 AM. BANKR. INST. L.J. 511 (1996) (arguing that Chapters 7 and 13 should be combined to encourage debtors to repay some of their debt from future earnings).

136. There were 282,570 non-business filings in 1980, 718,107 in 1990, and 1,398,182 in 1998. See ABI World (visited May 26, 1999) <http://www.abiworld.org/stats/newstatsfront.html>. See also Pae and Stoughton, *supra* note 101 (reporting that filings increased 20% from 1996 to 1997 and that 1 in every 70 households filed for bankruptcy). Given the American business ingenuity, it is not surprising that some people are not upset by (and, indeed, have profited from) this increase. See Bridig McMenemy, *Uncle Sam Is My Collection Agent*, FORBES, June 15, 1988, at 44 (discussing unit of investment bank Bear Stearns that purchases debts owed by Chapter 13 debtors in bulk then relies on Chapter 13 trustees to collect their claims).

137. See *In re Mathenia*, 220 B.R. 427, 433 (Bankr. W.D. Okla. 1998) (referring to debtors in the case as “the poster children for the standard creditors' argument, to which this court does not subscribe, that bankruptcy is too easy, is constantly taken advantage of by unscrupulous debtors, and operates against the interest of society in general, not to mention creditors in particular”).

welfare recipients, characterizing all debtors as irresponsible spendthrifts is misleading and unwarranted. Though some debtors may properly be characterized as liars, cheats, and frauds, media reports and court decisions indicate that many people file for bankruptcy because they are financially naive and have little experience using credit,¹³⁸ or have encountered economic crises beyond their control, like incurring uninsured medical expenses,¹³⁹ being forced to pay divorce-related expenses,¹⁴⁰ or finding themselves unexpectedly unemployed.¹⁴¹ In addition, the most recent comprehensive empirical research on consumer filings refutes the contention that the typical debtor is an irresponsible spendthrift who has the ability to repay the debts sought to be discharged.¹⁴²

138. See Gene Tharps, *Students: Beware the credit card trap*, ATL. J. & CONSTITUTION, Sep. 27, 1998, at R8 (citing consumer group report that only 20% of students knew how long it would take to pay off credit card debt if they make only the monthly minimum payment); Sarah Rose, *Prepping for college credit*, MONEY MAG., Sep. 1998, at 156-57 (discussing credit card companies' aggressive marketing efforts toward college students and noting two states' efforts to bar card marketers from colleges); Kia Shant'e Breaux, *Stakes are High for Student Gamblers*, WASH. POST, Apr. 19, 1998, at A9 (noting that college students are flooded with credit card offers); Charles A. Jaffe, *A Noteworthy Lesson Charge Cards 101: This College Course Carries No Credit*, CHI. TRIBUNE, Sep. 15, 1997, at C1 (same).

139. See Pae and Stoughton, *supra* note 101 at A1 (discussing debtor who filed because of medical expenses for which she was personally liable because she was never employed long enough to become eligible for health insurance). See also *In re Attanasio*, 218 B.R. 180, 230 n.75 (Bankr. N.D. Ala. 1998) ("Medical problems represent the most common form of calamity that causes economic problems and persistently impairs a debtor's ability to pay debts.").

140. See *In re Waters*, 227 B.R. 784, 785 (Bankr. W.D. Va. 1998) (noting that debtor filed for relief under Chapter 7 after becoming unemployed and separating from her husband); Pae and Stoughton, *supra* note 101 (reporting that bankruptcy attorneys and economists attribute the increase in consumer filings to sudden downturns in debtors' lives, like divorce and illness); *Going Broke: Bankruptcy Stigma Lessens*, USA TODAY, Jun. 10, 1997, at 1A (citing poll results that suggest that job loss, divorce, and medical expenses frequently push debtors into filings for bankruptcy). Cf. Jagdeep S. Bhandar and Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 AM. BANKR. L.J. 1, 8-9 (1993) (discussing study that found that, while divorce was not significantly related to bankruptcy filings, divorce affects an individual's capacity to service debt and debt servicing is significantly related to bankruptcy filings).

141. See, e.g., *In re Beles*, 135 B.R. 286, 287 (Bankr. S.D. Ohio 1991) (debtors incurred extensive credit card debt primarily for living expenses after the husband had a heart attack and lost his job); Pae and Stoughton, *supra* note 101, at A1 (discussing married couple who filed for bankruptcy after their income was reduced by one-third when the wife unexpectedly was laid off). Unemployment, accidents, and illness seem to have been the leading causes for consumer filings for at least 20 years. See Shuchman, *supra* note 89, at 454 (citing same three factors as the typical reasons for consumer filings under the Bankruptcy Act).

142. The most comprehensive empirical study of consumer bankruptcy filings examined 1600 debtors in three states. See TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989) [hereinafter AS

Despite critics' efforts to present a monolithic debtor profile, debtors tend to fall into three broad categories. The first group consists of able-bodied and financially responsible people who cannot make ends meet after they encounter an economic crisis like a financially devastating divorce, involuntary unemployment or recurring, uninsured medical expenses. The "problem" with Group I debtors does not appear to be irresponsible spending. Instead, their inability to support themselves seems to be caused by societal factors unrelated to their spending habits. Debtors in the second group are able-bodied (but financially unsophisticated) people who, when presented with "easy" credit, choose to use that credit irresponsibly after they encounter an unexpected financial setback.¹⁴³ The "problem" with Group II debtors is irresponsible spending, but they decided to spend irresponsibly only after they encountered the same types of non-credit based economic crises that affect Group I debtors.¹⁴⁴ Group III debtors consist of able-bodied people who intentionally overextend themselves on credit then seek to use bankruptcy laws to support or subsidize their extravagant lifestyle. The "problem" with Group III debtors is just plain, inexcusable, unforgivable, irresponsible spending.

The problems of Group I debtors are best remedied by protecting their fresh start and allowing them to quickly discharge

WE FORGIVE]. Though this study is rarely attacked on its methodology, the data these scholars examined is approximately ten years old and, thus, cannot be relied on to explain the recent explosion in consumer bankruptcy filings. Ironically, before they completed that study, the authors noted that "empirical research had played almost no role in the development of bankruptcy policy." Teresa A. Sullivan, et. al, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195, 195 (1987). Unfortunately, we now find ourselves back in the same position we faced in 1987 with massive reforms proposed, yet no empirical research to support those reforms.

143. See Pae and Stoughton, *supra* note 101, at A1 (relating woes of automobile repairman with \$55,000 household income who used credit cards to pay household expenses after two children were born and his wife crashed the family car); *id.* at ___ (medical technician reporting that he filed for bankruptcy to discharge credit card debt incurred to buy groceries and clothes).

144. I am not suggesting that debtors in Group II are *forced* to overspend, or *forced* to incur debt involuntarily. I merely suggest that many people who do not live frivolous lives, but want to achieve the 1950s version of the American Dream, may find it increasingly difficult to do so given the changes in the wage labor market. Indeed, the credit industry appears to have encouraged consumers to overextend themselves for the last several decades. See Joslin, *supra* note 90, at 194 ("It does not seem that the average small consumer-debtor alone is to be condemned for his overpurchasing, but much of the blame may be placed on easy credit, discount paper, and high-pressure and commission-type selling in which the seller may impose his will upon the gullible wage earner."). *But see* Jones and Zywicki, *supra* note 89, at 222-26 (criticizing the view that "debt causes bankruptcy" and positing that "[c]onsumers do not collect debt, they collect the things they buy with debt").

their debts.¹⁴⁵ In contrast, the problems of Group III debtors can best be remedied by maximizing debt repayment and forcing them to work to repay their bills.¹⁴⁶ Deciding what to do about Group II debtors is more complicated. Policymakers have not developed a theoretical framework to address, or have created an effective solution to, the problems that affect Group II, i.e., basically honest people who arguably are non-deserving because they contributed to their inability to pay their bills. Indeed, most consumer bankruptcy theories developed during the 1970s and 1980s are based on two debtor profiles, Group I debtors who encounter unavoidable financial crises and Group III debtors who “imprudently calculate their income and outlays.”¹⁴⁷ Existing bankruptcy theories largely fail to address debtors who prudently calculate their income, realize they cannot make ends meet on that income, then rationally choose to overspend.¹⁴⁸ Unfortunately, recent reforms have proposed that a one-size-fits-all approach be used to solve the bankruptcy problem.

D. Recent Congressional Attempts to Solve the Bankruptcy Problem

Just as critics reached the conclusion that welfare laws needed to be reformed to eliminate welfare opportunism, media reports suggest that the public has concluded that Congress needs to reform bankruptcy laws to prevent bankruptcy opportunism. Critics argued that current bankruptcy laws subsidize debtors' decisions to maintain lavish, unaffordable lifestyles and that the laws encouraged debtors to engage in morally and legally unconscionable behavior.¹⁴⁹ Thus, critics argued that bankruptcy laws must force debtors to use credit cards responsibly and make debtors with disposable current or

145. Bankruptcy critics and supporters alike consistently have agreed that the fresh start applies to this type of debtor and that this type of debtor is the prototypical honest and unfortunate debtor. See Hallinan, *supra* note 89, at 66 (“[T]here appears to have been little dispute about the propriety of bankruptcy for consumers whose inability to pay their debts could be attributed to external economic events or personal misfortune.”).

146. During a debate on means testing, an opponent of means testing observed that both sides could agree that people at the very high end ought not to be able to discharge their debts without payments. See ABI DEBATE, *supra* note 99, at 44 (Rebuttal of Gary Klein).

147. Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. Rev. 953, 979 (1981); Hallihan, *supra* note 89, at 66, 155.

148. See Ted Appel, *Consumer Debts Climbing Bankruptcies Rise, Businesses Fare Better*, PRESS DEMOCRAT (Santa Rosa, CA), Mar. 31, 1999, at E1 (quoting bankruptcy attorney who stated that his clients use credit cards “to try to bridge a gap between their living expenses and their income”).

149. Cf. Jones and Zywicki, *supra* note 89, at 181 (“A promise to repay money is an important legal and moral obligation, neither lightly to be undertaken nor lightly cast away.”).

anticipated future income repay their debts.¹⁵⁰ To accomplish this, Congress supported legislation that (1) forces debtors with “means” to repay their bills¹⁵¹ and (2) imposes eligibility caps to bar certain debtors from bankruptcy altogether.

(1) *Mandated Work Via Means-Testing*¹⁵²

In general, means-testing requires debtors with disposable income or non-exempt assets to either sell those assets or to use future income to repay present debts.¹⁵³ If bankruptcy becomes a means-tested system, debtors will be prevented from discharging debts in Chapter 7 if they are deemed to have the current or future means to repay a certain percentage of those debts in a Chapter 13 plan.¹⁵⁴ Making bankruptcy a means-tested system would radically

150. See *Make Bankruptcy Filing Tougher*, THE PATRIOT LEDGER (Quincy, MA), May 6, 1998, (Editorial) at 14 (arguing that lenient bankruptcy laws harm people who live within their means); Jane Seaberry, *Personal bankruptcies draw little sympathy from Texans*, DALLAS MORNING NEWS, Feb. 23, 1998, at 1D (noting Texans’ objection to current bankruptcy laws because they discourage personal responsibility); *Bankruptcy Theory: No Matter What Economists Say, the Consumer Debt Bomb is Ticking, Ticking . . .*, BARRON’S, Feb. 3, 1997, at 17 (reporting that economists blame the increase in consumer bankruptcies on “lenient judges and antiquated laws that make it easy for people to escape their financial responsibility”).

151. See H.R. 3150, 105th Cong. (1998). H.R. 833, a virtually identical bill to H.R. 3150, was introduced in the 106th Congress as “The Bankruptcy Reform Act of 1999.” Though means-tested bankruptcy legislation failed to pass during the 105th Congress, the failure was due more to Congressional interest in the sex lives of William Jefferson Clinton and Monica Lewinsky during the fall of 1998 than to lack of interest in requiring means-testing. See, e.g., *Consumer Roundtable*, *supra* note 120, at 7 (1999) (comments of John McMickle, legal counsel to the Senate Judiciary Committee’s Subcommittee on Administrative Oversight) (stating that there were enough votes in the House and Senate to pass means-tested legislation during 105th Congress).

152. This article will not enter the debate over the virtues or vices of means-testing. Others already have tackled this divisive and controversial topic. For views opposing means-testing, see Warren, *supra* note 88; Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission’s Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. (1998); Gary Klein, *Means Tested Bankruptcy: What Would It Mean*, 28 U. MEM. L. REV. 711 (1998). For a particularly vitriolic critique of the views expressed by the opponents of means-testing, see Jones and Zywicki, *supra* note 89, at 178 (characterizing views as “overwrought responses” and expressing concern that “well-known academics and bankruptcy specialists have chosen to oppose means-testing viscerally”); *id.* at 207 (characterizing views as “Apocalyptic rhetoric”).

153. See H.R. 3150. See generally Warren, *supra* note 120, at 503-06 (discussing consumer credit industry’s proposal to the Commission to add a “means test” to limit debtors’ access to Chapter 7).

154. See H.R. 3150 § 101. Both House Bill 3150 and House Bill 833 contain formulae that govern when a court must deny bankruptcy eligibility to a potential Chapter 7 debtor. In general, the bills require the court to prevent a debtor from discharging debts in Chapter 7 if the debtors’ income exceeds a certain state or national average and if, after

change modern bankruptcy policy and procedure.¹⁵⁵ In fact, some have objected to prior proposals to means-test or otherwise make Chapter 13 debt repayment plans mandatory based on their view that forcing debtors to repay their debts violates the constitutional ban on involuntary servitude.¹⁵⁶ Other have criticized forced debt repayment proposals because (1) the majority of existing (i.e., voluntary) Chapter 13 plans already are unsuccessful,¹⁵⁷ (2) debtors are unlikely to repay debts over a protracted period of time unless they are personally committed to doing so,¹⁵⁸ and (3) unexpected economic crises unrelated to a debtor's work or financial ethics often prevent debtors from making all payments required by the Chapter 13 plan.¹⁵⁹

deducting expenses (also determined by a state/national figure), the debtor could repay a certain percentage of his debts over a three to five year time period. See H.R. 3150 § 409; H.R. 833 § 102. Given the high failure rate of three year, voluntary Chapter 13 plans, it is curious that current reforms seek to force more debtors into Chapter 13, to force them to make higher monthly payments, and in limited circumstances, to mandate that their plan last five years.

155. See Harris, *supra* note 113, at 346-47 (discussing proposals in the 1960s and 1970s to make Chapter 13 mandatory for some debtors and noting that the prior Bankruptcy Commission and the House Judiciary Committee rejected these proposals).

156. See, e.g., Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167 (1990); Harris, *supra* note 113, at 348-49 (presenting the views of various scholars that suggest that mandatory Chapter 13 cases would be unconstitutional); Eisenberg, *supra* note 147, at 987 (suggesting that some scholars reject mandatory Chapter 13 cases because "society has progressed away from peonage, other forms of involuntary servitude, and imprisonment for debt" and that mandatory Chapter 13 plans "are a step backwards"). But see Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 447-49 (1997) (detailing proposal requiring debtors to repay debts and rejecting argument that such a requirement violates the Thirteenth Amendment's prohibition against involuntary servitude); Eisenberg, *supra* note 147, at 988 (rejecting view of involuntary Chapter 13 cases as involuntary servitude and arguing that "despite the presence of the word 'involuntary' in its label, [such a plan] bears none of the offensive attributes of involuntary servitude or peonage. Such a plan does not require the debtor to work under threat of imprisonment. Unlike involuntary servitude, it involves no physical compulsion to work.") (footnote omitted).

157. See Braucher, *supra* note 152, at 11 (citing Commission's finding that the failure rate for Chapter 13 plans "exceeds 60 percent"); *In re Attanasio*, 218 B.R. 180, 195 (Bankr. N.D. Ala. 1998) (discussing the "high failure rate of Chapter 13 cases").

158. See Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 AM. BANKR. INST. L. REV. 293, 322 (1997). The author states that due to the "substantial commitment" required by a Chapter 13 plan, the debtor must enter the plan voluntarily or it will have "little chance of success." This is similar to views expressed by opponents of compelled workfare for welfare recipients. But see Eisenberg, *supra* note 147, at 989 (rejecting notion that debtors will not be motivated to fund a plan because of unlikelihood that debtors would refuse to work "just to frustrate a Chapter 13 plan"). Cf. MEAD, *supra* note 31, at 109 (discussing statements that forcing welfare recipients to take dead-end jobs will not solve poverty problem and will instead inevitably lead to high job turnover).

159. See Klein, *supra* note 158, at 335 & 339 n.263. Klein, a leading consumer rights advocate, acknowledges the great difficulty that Chapter 13 debtors have in meeting

Means-testing does not explicitly require debtors to work to repay their debts. It does, however, prevent debtors from receiving a quick, unimpeded Chapter 7 discharge if a formula determines that they have the current or anticipated future means to repay some of their debts. Though a major business entity,¹⁶⁰ prominent bankruptcy scholars,¹⁶¹ professional organizations,¹⁶² and judges¹⁶³ objected to earlier means-testing reforms, few argue that means-testing is per se objectionable. Indeed, as long as the income ceiling is low enough to protect the truly deserving Group I debtor, yet high enough to screen out Group III debtors, means-testing should help eliminate much of the existing abuse of bankruptcy law.¹⁶⁴ Means-testing does not

surprise financial responsibilities because all funds not required for maintenance and support of the debtor's household must be used to make plan payments (which the Chapter 13 trustee will then use to repay debts). He argues that allowing Chapter 13 debtors to put ten percent of their plan payments into a contingency fund "greatly enhance the success of Chapter 13 cases because debtors would have savings available in the event of new short-term financial problems." *Id.* at 335 n.263. The author suggests that the fund be paid to creditors if no problems arise. *See also Attanasio*, 218 B.R. at 195 (noting that debtors fail to complete Chapter 13 plan payments because "[l]ife is full of surprises. Unanticipated expenses are the rule rather than the exception.>").

160. Congress created the U.S. Small Business Administration to serve as an independent voice for small businesses and to represent the views of small businesses before Congress and federal regulatory agencies. In a letter dated April 22, 1998, the Chief Counsel for Advocacy expressed the concern that the Bankruptcy Act of 1998 "would make fundamental, expansive and potentially detrimental changes to entrepreneurship." *See* Letter from Office of Chief Counsel for Advocacy (April 22, 1998) (on file with author).

161. *See* Letter to Congress signed by 60 law professors (March 31, 1998) (arguing that reform debate was "ill-considered, rushed and unbalanced") (available at <http://www.law.indiana.edu/~bmarkell/slowdown.html> (visited June 2, 1999)). In the spirit of full disclosure, I acknowledge that I was one of the professors who signed this letter.

162. *See* Section-by-Section Analysis of H.R. 3150, National Bankruptcy Conference (on file with author) (describing proposal to add needs-based bankruptcy as "ill-advised" and "without credible evidence that such substantial change is cost-justified"); *Bankruptcy Reform Act of 1998: Hearings on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of American College of Bankruptcy) (warning that legislating "complicated tests of eligibility for bankruptcy without further careful review of the causes may unduly burden the system by requiring more judges and higher costs" and urging "that serious consideration be given to slowing down the legislative process and for a more deliberative approach to evolving a modest solution").

163. *See* Letter to Congress signed by 110 United States Bankruptcy Judges (April 9, 1998) (expressing their concern over proposed reforms) (available at <http://www.abiworld.org/legis/bills/judgesapr98.html>) (visited June 2, 1999)).

164. Even with a sufficiently low income ceiling, however, deserving debtors may be harmed in the future if Congress continues to increase the number of categories of debts that are non-dischargeable. For example, if Congress capitulates to the credit card industry's desire to prevent debtors from discharging *all* credit card debt that is incurred in a short window (60-90 days) preceding a bankruptcy filing, then it is likely that some Group II (and perhaps some Group I) debtors will be prevented from discharging

mandate work (as welfare reforms did). Nonetheless, preventing debtors from discharging their debts in Chapter 7 if they are deemed to have the means to repay them uses the potential of future earnings to restrict a debtor's ability to discharge debts, thus, effectively forcing the debtor into an involuntary Chapter 13 debt repayment case. In short, means or needs-based testing effectively tells debtors that, in return for accepting bankruptcy relief, they must: get a job (or a second job, or a higher paying job), keep that job, and, use the earnings they receive over a five year period to repay their debts.

(2) *Eligibility Caps*

Just as welfare reform was designed to modify the values of welfare recipients, recent bankruptcy efforts and, before then, judicial interpretations of bankruptcy law, sought to modify the values of able-bodied debtors. During legislative reform discussions, many suggested that some debtors file for bankruptcy too often and too cavalierly.¹⁶⁵ To force moral values on debtors and make them act responsibly, Congress considered ways to restrict debtors' access to bankruptcy relief.

Currently, there is only one type of restriction that could be construed as a "term-limit." This restriction, contained in Section 727(a)(8) of the Bankruptcy Code, prevents a debtor from receiving a Chapter 7 discharge more frequently than once every six years. Current bankruptcy law does not restrict the number of times a debtor can file for relief under Chapter 13 case, or the number of times a debtor can file for bankruptcy in his lifetime. Since Chapter 13 cases are designed to be used to repay the debtor's bills, it is understandable that the Code would not prohibit multiple debt repayment plans. In response to allegations that too many people filed serial Chapter 13 cases but failed to complete plan payments in any of those cases, the National Bankruptcy Review Commission considered whether to recommend that Congress restrict the number of times a debtor can file a Chapter 13 petition.

The Commission originally recommended imposing a two-year bar on refilings, without regard to whether the debtor made all, some, or no plan payments in the prior case.¹⁶⁶ Because, however, the

purchases of non-frivolous items even though the debts were not fraudulently incurred. See 11 U.S.C. § 523(a)(2)(1993) (making fraudulently incurred debts non-dischargeable); 11 U.S.C. §523(a)(2)(C)(Supp. 1999) (making purchases of luxury goods or services presumptively non-dischargeable if incurred 60 days pre-petition).

165. *But cf.* Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257, 1283 (1994) (citing a study that found "very few debtors filed more than once").

166. See REPORT, *supra* note 88, at 279 n.736.

Commission was unable to conclusively state that there is a prevalence of serial filings in Chapter 13 cases, it ultimately refused to recommend a filing bar. Instead, it recommended that a debtor who filed two petitions within a six-year time frame then files a third petition within six months of the dismissal or conversion of the second petition, be deprived of the protections of the automatic stay when he filed the third petition.¹⁶⁷

Congress also considered several types of bankruptcy term or eligibility restrictions during the 105th and 106th Congressional sessions. The same bills that proposed means-testing also proposed that debtors be deemed ineligible for bankruptcy relief unless they completed credit counseling before they filed for bankruptcy.¹⁶⁸ One bill effectively prevented all debtors (whether Group I, II, or III) from filing for bankruptcy unless they received counseling within ninety days before they filed for bankruptcy even though many people who are about to file for bankruptcy cannot afford to pay for credit counseling and may lose their homes or have their wages garnished unless they are given immediate bankruptcy protection.¹⁶⁹

Congress also considered increasing the time period that governs Chapter 7 cases and imposing a time period for Chapter 13 cases. The legislation proposed that, for Chapter 7 cases, the time period be extended from six to eight years.¹⁷⁰ The proposed time limit restriction for Chapter 13 cases would be, in many aspects, even more burdensome since one bill proposed that a Chapter 13 debtor (1) receive a discharge only after he makes all payments (over a three to five year period) and (2) be barred from filing another Chapter 13 petition for five additional years – even if he repaid all his debts in full

167. *See id.* at ¶ 1.5.5. *See also id.* at 10 & App. G-1.a (recommending that the automatic stay terminate fifteen days after the filing by a debtor of a third party bankruptcy petition within a five-year period unless no party in interest objects).

168. *See* H.R. 3150, 105th Cong. § 104 (1998). A Senate bill was substantially similar as it also required debtors to participate in pre-petition debt counseling and made participation a prerequisite to receiving a discharge. *See* S. 1301, 105th Cong. §321(a)(1998). This bill provided that the United States Office of the Trustee could waive this requirement by certifying that “suitable” courses were not available. Unfortunately, Congress gave no guidelines or criteria that explained when a debt-counseling program should be deemed to be “suitable.”

A conference bill submitted during the 105th Congress proposed to make debtors ineligible to file unless they received credit counseling during the 90 days preceding filing unless they showed that “exigent circumstances” exist or they requested credit counseling but could not obtain it during that five day period. H.R. CONF. REP. NO. 105-794 §302(a)(1998).

169. In addition, potential debtors may use funds they had earmarked for paying an attorney to pay for pre-petition credit-counseling. If these individuals ultimately become *pro se* debtors, this would impose an additional administrative cost on the bankruptcy clerk’s office, trustees, and (ultimately) bankruptcy judges.

170. *See, e.g.*, H.R. 3150 § 171.

during the initial case.¹⁷¹

Neither the Commission's Report nor legislative reforms proposed the type of family caps adopted by the 1996 welfare reforms. The court in *In re Nelson*,¹⁷² however, imposed the functional equivalent of a family cap in a Chapter 13 case. In that case, the debtor asked the court to allow her to reduce the amount of her Chapter 13 plan payments due to increased monthly expenses associated with her new, physically disabled, spouse. While the court conceded that the new spouse was too disabled to work outside the home, it nonetheless refused to allow the debtor to adjust her monthly plan payments to account for his living expenses. The court refused to allow the debtor to decrease her plan payments and, thus, pay her creditors less based on its conclusion that it is inappropriate and unfair to creditors to allow a debtor to decrease plan payments because of a choice to marry a disabled person.¹⁷³

The court ruled that the debtor's choice was "voluntary," that she "must have known that the disability would limit [her husband's] ability to contribute to their marital expenses," and, that, as a result, his living expenses did not constitute the type of "unanticipated" adverse change in circumstances that warrants a modification of plan payments.¹⁷⁴ The court did not impose a family cap that categorically prevented the debtor from using bankruptcy law to subsidize expenses associated with a post-filing dependent. Nevertheless, the court's reasoning is analogous to and consistent with the arguments used to justify the welfare family cap.

E. Are Work or Eligibility Restrictions Warranted?

Means-testing, time restrictions, or family caps should be used to prevent Group III debtors from discharging their debts in bankruptcy. It is not clear, however, whether these restrictions should apply to Group I or II debtors, many of whom need debt relief for the same reasons that many welfare mothers need ongoing financial assistance. Indeed, Congress should not radically alter bankruptcy law to prevent people from receiving debt relief based solely on a misguided perception of why people seem unable to pay their bills.

Unfortunately, no one knows precisely what percentage of people who file for bankruptcy are Group I, II, or III debtors, or are one-time or repeat filers. Certainly, imposing means-testing, term limits, or other eligibility caps will benefit creditors in the short-term.

171. *See, e.g.*, H.R. 3150 §§ 102, 171, 406, 409.

172. 189 B.R. 748 (Bankr. D. Minn. 1995).

173. *See id.* at 749-50.

174. *Id.* at 751.

These restrictions will prevent debtors in all three Groups from discharging at least some of their debts and, in fact, may discourage some Group II debtors from engaging in reckless spending if they know they can no longer erase their debts in bankruptcy. Unfortunately, while means-testing may prevent some current debts from being discharged, this "solution" to the bankruptcy problem will not help creditors in the long-term if able-bodied, working class debtors simply *cannot* become permanently self-sufficient due to non-credit societal factors. In other words, while means-testing and other eligibility caps may prevent a debtor from discharging debts in the present, these restrictions do nothing to ensure that working class Group I or II debtors will have the means to repay these and future debts.

Before erecting any bars that effectively prevent Group II debtors from discharging their debts, reformers should decide whether Group II working poor debtors should be treated as non-deserving simply because they exacerbated their financial predicament by using credit irresponsibly. While the notion that some people may never keep their word or pay their bills may offend the American psyche, we will never solve "the bankruptcy problem" until we correctly define it, and then attempt to remedy the underlying economic disabilities of the working poor.

III. Why America Should Support The Able-Bodied Working Poor

A. Society Has Always Supported the Deserving Poor

Bankruptcy and welfare laws should provide temporary economic relief to deserving Americans who, despite working full (or near-full) time, find themselves unable to make ends meet. Neither public polls nor media reports suggest that the public is unwilling to support the truly deserving working poor. Indeed, despite the concern that non-deserving mothers were receiving welfare benefits, welfare was generally viewed as an entitlement program for the deserving poor until the 1996 reforms.¹⁷⁵ Indeed, public sentiment expressed before Congress enacted the 1996 welfare reforms suggested that the public felt that the government had a duty to support the deserving poor.¹⁷⁶ Public perception polls indicated,

175. See Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 618 (1998) (arguing that the 1996 welfare reforms destroyed the welfare "entitlement" because the block grant system no longer mandates that all eligible persons are entitled to benefits).

176. See Hugh Hecl, *Poverty Politics*, in CONFRONTING POVERTY: PRESCRIPTIONS

however, that the public was concerned that prior welfare laws created a culture of poverty, a cycle of dependency, and encouraged welfare recipients to engage in deviant behavioral patterns.¹⁷⁷ Because the public supported giving economic relief to the truly deserving poor, these polls not surprisingly showed that the public wanted reforms to create a system that encouraged the importance of work, made users self-sufficient, and ended long-term dependency – not a system that necessarily saved money or reduced the federal budget deficit.¹⁷⁸

Similarly, since most Americans are not directly affected by the increase in bankruptcy filings (since most are not creditors), the public's concern with the bankruptcy problem seems to have little to do with the cost of allowing debtors to discharge debts. Instead, the public seems outraged by increased bankruptcy filings because it concluded that non-needy, employed, able-bodied people were using bankruptcy laws to avoid the responsibility of sacrificing to pay their bills. As such, the public wanted a system that encouraged the importance of paying one's bills, remedied debtors' bad credit habits, and taught them how to avoid overextending themselves in the future.¹⁷⁹

FOR CHANGE 396, 400 (Sheldon H. Danziger et. al, eds. 1994) (noting that Americans currently reject the view that "charity is a purely private duty" and agree that the government has a duty to help those who lack the basic necessities of life); Solow, *supra* note 82, at 20 ("[M]ost voters are prepared to sacrifice some private economic advantage so that those with the very lowest earning power should not have to live at the impoverished standard that their own wages could support.").

177. See Lawrence Bobo & Ryan A. Smith, *Antipoverty Policy, Affirmative Action, and Racial Attitudes*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE, 365, 368 (Sheldon H. Danziger et. al, eds., 1994). Many critics maintained that their primary goal in reforming welfare was to end the "culture of poverty" and the poor's "cycle of dependency" – not to save money. See Karen Hosler & Carl M. Cannon, *Clinton, Congress Close on Welfare: Election-year Pressure May Force Him to Sign Tough Republican Bill*, THE BALTIMORE SUN, July 31, 1996, at A1 (noting that supporters of the 1996 welfare reform bill felt that it would free welfare recipients from the intergenerational cycle of poverty and dependence); 142 CONG. REC. H8588 (daily ed. July 26, 1996) (statement of Rep. Gutknecht) (encouraging President Clinton to sign the 1996 welfare bill and stressing that the bipartisan effort was "not simply trying to save money . . . we are trying to save people, especially kids, from a lifetime of poverty").

178. See Boko & Smith, *supra* note 177 at 368; see also Solow, *supra* note 82, at 20 (arguing that while the public supports relief for the truly deserving, "common observation suggests that it may be weakened by the observation that many people seem to violate the norm of self-reliance, or by the perception that the welfare benefit is relatively high compared with the earning power of many working citizens"); Lewis, *supra* note 41, at 56 (suggesting that the public's hostility toward welfare is because of their belief that "those who do not make it have only their own shiftlessness to blame").

179. For example, one poll indicated that most Americans believe that debtors should be required to pay back at least some of the debts and that current laws make it too easy for people to avoid paying their bills. See TechnoPolitics/Public Opinion Strategies Poll,

Although Group II and III debtors may erroneously view bankruptcy as an entitlement system,¹⁸⁰ and some commentators have referred to bankruptcy as a social welfare system,¹⁸¹ the public has never viewed the ability to discharge one's debts as an entitlement. Despite the differences in the perception of a person's entitlement to welfare benefits or bankruptcy relief, current attitudes toward the dramatic increase in bankruptcy filings during a period of relative economic prosperity are strikingly similar to the response in 1996 to the expanding numbers of welfare mothers who continued to "need" public assistance.¹⁸² Despite the public's concern that non-deserving people were receiving direct or indirect public assistance, it does not appear to have developed a *per se* view that people who work but cannot make ends meet should categorically be denied government-provided economic relief. Indeed, the public's current resistance to providing economic support to able-bodied debtors (or able-bodied but unemployed welfare recipients) stems from the fear that the debtors (and mothers) *chose* not to support themselves. Given this, it is likely that the public would support allowing Group I or II debtors to discharge their debts as long as those debtors worked full-time, lived frugally, but still could not support themselves. Determining whether people remain among the working class poor by choice or by force would necessarily require reformers to reconsider the cause of the bankruptcy problem.

B. The Importance of Correctly Defining The Bankruptcy Problem

Bankruptcy critics cannot state with any reasonable degree of

(June 18, 1998) (on file with author).

180. *But see* United States v. Kras, 409 U.S. 434, 445-46 (1973) (holding that there is no constitutional or statutory right to bankruptcy relief).

181. *See* Posner, *supra* note 15, at 307 ("[B]ankruptcy law is analogous to the welfare system: it is social insurance for the nonpoor. Bankruptcy law restricts credit and establishes a minimum welfare level."). A bankruptcy professional recently referred to bankruptcy as a "social welfare program" and a "system that provides a welfare benefit" at a public debate on Capitol Hill. *See* ABI DEBATE, *supra* note 99, at 6. Likewise, in a dissent to the Commission's Report, several of the Commissioners referred to bankruptcy as "a social welfare program . . . subsidized by creditors." *See* REPORT, *supra* note 88, *Recommendation for Reform of Consumer Bankruptcy Law By Four Dissenting Commissioners*, at 15. *See also* Schlesinger, WALL ST. J. *supra* note 116, at A1 (noting that credit industry's characterization of bankruptcy filers as "the 1990s version of President Reagan's 'welfare queens'").

182. This response was the White House and Congressional vow to end welfare "as we know it." *See We Offer Our People a New Choice Based on Old Values*, WASH. POST, July 17, 1992, at A26 (reprint of Clinton's Democratic nomination acceptance speech); David Whitman, *War on Welfare Dependency*, U.S. NEWS & WORLD REP., Apr. 20, 1992, at 34, 37; *GOP 'Contract with America'*, 52 CONG. Q. WKLY. REP. 3216, 3217 (1994). *See also* Barbara Vobejda, *GOP Welfare Plan Would Shrink the System*, WASH. POST, Dec. 7, 1994, at A23 (discussing GOP goal of ending welfare as an entitlement system).

certainty why able-bodied, employed Americans currently cannot seem to pay their bills. Indeed, during a debate sponsored by the American Bankruptcy Institute, the primary participants sharply disagreed on one fundamental question: why are more American families using the bankruptcy system?¹⁸³ One could assume that most debtors are Group III debtors who file for bankruptcy because they abused credit then refused to sacrifice to repay their bills. If this is “the problem,” then an easy (and probably the best) solution is to tighten bankruptcy laws to make it harder to discharge debts and to force debtors to participate in debt counseling to ensure they learn how to use credit cards responsibly and conservatively.¹⁸⁴

But, what if this is not the problem? What if most debtors are members of the working poor who, despite working full-time and not spending irresponsibly, cannot make ends meet?¹⁸⁵ Or can make ends meet as long as both spouses are employed, but cannot make ends meet when one of them suddenly loses her job?¹⁸⁶ Or can make ends meet as long as the two wage-earners remain married, but cannot make ends meet when they divorce and are required to maintain two

183. See ABI DEBATE, *supra* note 99, at 6 (statements of George Wallace and Gary Klein). Mr. Wallace, the proponent of means-testing, argued that the increase in consumer filings is attributable to the loss of “stigma” associated with filing for bankruptcy. Mr. Klein, the opponent of means-testing, responded that “[t]here is no question of stigma involved at all; people file bankruptcy because they need to file bankruptcy.” Both opinions could be construed as speculative or, at best, theoretical, as neither debater could cite to current, comprehensive empirical evidence to support either opinion nor did either define what would make a person “need” to file for bankruptcy.

184. See, e.g., REPORT, *supra* note 88, at App. G-1.a, *American Bankruptcy Institute Consumer Bankruptcy Reform Forum Report* (recommending that credit bureaus record a debtor’s completion of a consumer finance education program in debtor’s credit report); but cf. Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 479 (1997) (proposing that participation in educational programs be limited to debtors whose histories demonstrate a “curable” lack of understanding of budgeting and using credit).

185. See Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 168, 171-72 (Sheldon H. Danziger, et al. eds., 1994); Marlene Kim & Thanos Mergoupis, *The Working Poor and Welfare Reciprocity: Participation, Evidence, and Policy Directions*, 31 J. ECON. ISSUES 707, 711 (1997) (discussing data that show that most of the working poor hold jobs “that are so low paid [that] even if they worked full-time and year-round, they would still be poor” and that those jobs “offer few benefits, hold little advancement possibilities, and have little job security”). See also Elaine Rivera et al., *Hungry at the Feast: In Spite of Prosperity and Job Growth, a New Study Warns of a Festering Crisis Among the Working Poor*, TIME, July 21, 1997, at 38 (reporting that the working poor increasingly are seeking food from food banks).

186. See Gary Klein, *Consumer Bankruptcy in the Balance: Providing an Effective Safety Net for Overwhelmed Families*, 52 CONSUMER FIN. L.Q. REP. 185, 186 (1998) (commenting on economic vulnerability of families who rely on two wage earners to make ends meet).

households?¹⁸⁷ If these factual scenarios explain the increase in consumer bankruptcy filings, then a facile solution like “make it harder to discharge debts” will yield no long-term benefits. Indeed, recent government reports and statistics suggest that the bankruptcy problem, like the welfare problem, may be tied to the working poor’s employment limitations.

The Bureau of Labor Statistics recently reported that over five million people lived below the poverty level even though they essentially worked full-time¹⁸⁸ and over four million families lived below the poverty level even though at least one family member participated in the labor market for over half of the year.¹⁸⁹ Though there is no scientific definition of the “working poor,” social scientists generally agree that members of that group work full-time for at least part of the year (typically in low-paid jobs with limited upward mobility), have incomes below a certain percentage of the official poverty line, and remain poor due to shifts in technology and a globalized economy that have increased the supply of less-skilled workers and decreased their labor bargaining power.¹⁹⁰

The economic plight of the working poor generally has deteriorated over the last two decades. Census data indicate that, despite a strong economy and plentiful jobs, the earnings gap between the rich and the working poor currently is the widest it has been since World War II¹⁹¹ and that jobs currently held by the working poor pay lower wages and provide fewer benefits than those held by working class Americans fifteen to twenty years ago.¹⁹² Similarly, Census data indicate that family income for the bottom 40% of the population was

187. See *id.* (noting that debtors are disproportionately single parents).

188. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, A PROFILE OF THE WORKING POOR 1996, at tbl.1 (1997).

189. See *id.* at tbl.6.

190. See Blank, *supra* note 185, at 173 (commenting that the demand for less-skilled workers is declining faster than the number of less-skilled workers and that the increased internationalization of the U.S. economy places American workers at a competitive disadvantage with less-skilled (and typically lower-paid) foreign workers).

191. See HANDLER & HASENFELD, *supra* note 4, at 13. See also *Wages: Income Inequality at Unprecedented Levels Imperil Social Stability, Researcher Says*, BNA DAILY LAB. REP., Apr. 11, 1997 (noting that between 1979 and 1994, the income of the poorest 20 percent of families dropped more than 11 percent, while the income of the wealthiest 20 percent of families increased by more than 24 percent); Kim & Mergouis, *supra* note 185, at 719 (observing that “an increasing problem for the working poor is structural changes in the economy that have created an ever-widening gap between the top and bottom earners”).

192. See generally Rivera, *supra* note 185, at 38 (noting decline in middle-income jobs and indicating that the largest gains in job growth in recent years is in the lowest-paying categories); Bruce W. Klein & Philip L. Rones, *A Profile of the Working Poor*, MONTHLY LAB. REV. 3, 5-7 (Oct. 1989) (identifying low pay as the primary cause of poverty among workers).

lower in 1996 than it was in 1979 and, for that period, income for the lowest quintile dropped from an average of \$20,908 to an average of \$19,680.¹⁹³ Though low wage jobs account for much of the economic disparity between the rich and the poor, the fact that these low-wage jobs are also low-benefit ones that do not provide medical insurance, transportation stipends, or subsidized child care is perhaps the main reason many members of the working poor find themselves unable to move out of that socio-economic class.¹⁹⁴

Since many members of the working poor appear to be unable to make ends meet even when they work full-time, it is not surprising that sudden unemployment, or the need to shift to a lower paying job, triggers bankruptcy filings.¹⁹⁵ Unfortunately, rather than looking to government data and other types of labor statistics to help define, and craft a solution for, the bankruptcy problem, bankruptcy reform efforts proceeded largely based on anecdotal evidence provided, and studies funded, by a major special interest group, i.e., the credit card industry.¹⁹⁶ This was unfortunate both because the data was limited, because industry-funded studies inherently are susceptible to claims of bias, and because legislation enacted as a result of industry-funded studies is always susceptible to claims of industry capture.¹⁹⁷

193. See U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES—FAMILIES, TABLE F-1. INCOME LIMITS FOR EACH FIFTH AND TOP 5 PERCENT OF FAMILIES (ALL RACES): 1947 to 1996 (last modified Sept. 29, 1997) <http://www.census.gov/hhes/income/histinc/f01.html>.

194. See Jane Bryant Quinn, *Managed Care Health Plans' Costs Rise, Too*, SAN DIEGO UNION-TRIBUNE, Apr. 12, 1998, at I1, where the article observes that because employers have "shifted more of the cost of health insurance to their employees," employees face increased expenses at the same time their real income has decreased. The author concludes that, since many workers cannot afford the medical plans, "the number of uninsured people is rising by roughly one million a year."

195. See Klein, *supra* note 186, at 186 (observing that poor families are impacted by instability in employment income).

196. See REPORT, *supra* note 88, App. G.2.a. ("Consumer Bankruptcy: Causes and Implication"); JOHN M. BARRON & MICHAEL E. STATEN CREDIT REPORT CENTER, GEORGETOWN UNIVERSITY SCHOOL OF BUSINESS, *Personal Bankruptcy: A Report on Petitioner's Ability to Pay*, Monograph #33 (October 1997); ERNST & YOUNG, L.L.P., CHAPTER 7 BANKRUPTCY PETITIONERS' ABILITY TO REPAY: ADDITIONAL EVIDENCE FROM BANKRUPTCY PETITION FILES (Feb. 1998).

197. Reforming bankruptcy law based on the results contained in studies commissioned and paid for by a special interest group is consistent with principles associated with the public choice theory. In general, public choice theory posits that organized special interest groups can make campaign or other monetary contributions to politicians to ensure that they will enact legislation that favors the special interest group even if the legislation imposes costs on people or groups who lack the ability to organize to opposed the interest group's proposed legislation. See Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 341-46 (1993) (suggesting that standard public choice theory explains some bankruptcy provisions).

For a humorous account of the credit industry's recent lobbying efforts, see Molly

Objective, comprehensive empirical data is crucial to accurately defining and solving the bankruptcy problem. If bankruptcy reformers can at least identify objective causes for consumer bankruptcy filings, they may ultimately agree on the most appropriate way to reform the bankruptcy system to stem future filings. This is essentially what happened during welfare reform. That is, welfare reformers had current, comprehensive data that indicated who received welfare benefits, how long they typically received benefits, and the types of economic crises that precipitated the need for benefits. Due in large part to the existence of this data, liberals (who never accepted the welfare queen stereotype) and conservatives (some of whom seemed to think that there were nothing *but* welfare queens) ultimately reached a compromise agreement on welfare reform. While it is unclear whether the 1996 welfare reforms will ever solve welfare mother's poverty-based problems, because the reformers had access to comprehensive empirical data they at least could propose reforms based on a realistic idea of the types of mothers who most likely would need to receive temporary economic assistance.

Admittedly, even with comprehensive, objective empirical data similar to that available to welfare reformers, bankruptcy reformers probably will not agree on the proper interpretation of the data, just as welfare reformers argued over the most appropriate way to respond to welfare data.¹⁹⁸ Indeed, it would be surprising if bankruptcy critics did not disagree philosophically over the best way to interpret the data or the incentives debtors should receive to make

Ivins, *Bankruptcy "Reform" Shows Pay-for-Play Strategy at Work*, SALT LAKE TRIB., June 22, 1998, at A9, where the writer suggests that industry-funded empirical studies "[a]mazingly often . . . will come out saying just what you want it to."

198. For example, while most welfare commentators agreed that some welfare mothers had additional children after they began receiving welfare benefits, liberal and conservative reformers disagreed over the best way to discourage this. Some supported family caps, while others rejected this proposal citing a lack of credible data that suggests that this would actually decrease the number of out-of-wedlock births. See *Primer, supra* note 29, at 49-52.

Likewise, empirical evidence indicated that women remained on welfare because they were single-parent heads of households. Some reformers argued that making welfare more onerous would discourage out-of-wedlock births and encourage marriage. In response, one commentator suggested that reformers "asked the wrong question. The question should not be 'why are more single women having children?' The question should be 'why aren't more women getting married?'" *Primer, supra* note 29, at 34. Because the data also showed that most welfare recipients are single, high school dropouts with limited prior work experience, welfare advocates countered by arguing that the way to prevent long-term use is to improve the educational and vocational skills of poor mothers. See CONG. REC. H3721 (daily ed. Mar. 23, 1995) (statement of Rep. Fazio) (asserting that 45% of consumers use welfare because of divorce or separation and stressing that only 30% entered the system as unmarried mothers).

them conform their behavior to any given societal norm. Nonetheless, it is imperative both for the legitimacy of the process (and for the sake of actually implementing meaningful reform that will help solve debtors' economic deficiencies) that bankruptcy reformers obtain objective data that explains why people seem unable to pay their bills.

C. The Need to Develop Humane, Rational Expectations

Finally, bankruptcy reformers must fundamentally readjust their expectations of what reasonably can be accomplished, and how much debtors' behavior can be altered, merely by changing bankruptcy laws. Just as some single mothers may have become dependent on welfare benefits, some debtors use bankruptcy to avoid accepting the consequences of their decision to overspend on material goods they have deemed "essential."¹⁹⁹ Unfortunately, the proposed bankruptcy reforms do nothing to discourage present consumption or to help debtors resist the billion dollar advertising industry's lure for them to buy, buy, buy.²⁰⁰ Indeed, despite bankruptcy reforms in the 1970s and 1980s, bankruptcy commentators quickly deemed the reforms a failure because consumers still incurred substantial debt, seemed unable (or unwilling) to repay that debt, then sought relief in bankruptcy all during periods of relatively stable economic growth and while unemployment rates were low.²⁰¹

199. See Ed Barna, *Bankruptcies Have Another Record Year: Here's Why*, VT. BUS. MAG., Mar. 1, 1997 (commenting that the present generation feels "[w]e want the good things and we want them now"); see generally Jackson, *supra* note 15, at 1405 (discussing theories that suggest that decisions about wealth allocation are systematically biased in favor of current consumption); see also Hirsch, *supra* note 113, at 207 n.97 (characterizing proneness to over-borrow as "cultural in nature—a sequel to the rise of a consumerist ethic that cherishes material possessions and encourages persons to favor present over future consumption, coupled with the concurrent development of modern marketing").

200. See Jackson, *supra* note 15, at 1408 ("When presented with an either-or choice, people, like animals, exhibit a tendency to choose current gratification over postponed gratification, even if they know that the latter holds in store a greater measure of benefits."). See also Kathryn Rem, *Feeling Swamped by Sales Pitches*, THE STATE JOURNAL-REGISTER (Springfield, IL), May 31, 1998, at 21, where the author cites data provided by the American Advertising Federation that indicates that total U.S. advertising expenditures for 1997 were \$187 billion and that Americans receive an estimated 600-1200 advertising messages each day. Aside from typical media like television and newspapers, new media such as television monitors at gas stations, airport terminals and checkout lines in grocery stores add to the advertising industry's "endless assault on our eyes and brains." *Id.* (quoting Gary Ruskin, a consumer advocate who works with Ralph Nader).

201. Indeed, the first line of one frequently cited bankruptcy article that discussed the then-recently enacted Bankruptcy Code was "The new bankruptcy act is a failure." Eisenberg, *supra* note 147, at 953. See, e.g., Steven H. Resnicoff, *Barring Bankruptcy Banditry: Revision Of Section 523(a)(2)(C)*, 7 BANKR. DEV. J. 427 (1990); Lloyd D. Cowell, Jr., Comment, *The Debtor and Conversion of Nonexempt Assets to Exempt Assets*

Critics must acknowledge that both the bankruptcy and welfare reform debates are part of a larger societal dilemma over the importance of economic self-reliance, the changing nature of the "traditional" family, growing economic inequality, the deterioration of the low-wage labor market, the globalization of the American economy, persistent poverty, and consumers' excessive spending habits in our materialistic, credit-deluged society.²⁰² Unless and until we commit to resolving these larger societal issues, we cannot reasonably expect to solve the welfare or bankruptcy problems. Unfortunately, neither the public, academic critics, nor Congress seem willing to concede that some (perhaps many) debtors currently find themselves in need of bankruptcy relief for societal reasons wholly beyond their control.²⁰³ Current reformers appear to have concluded that preventing debtors from discharging their debts will prevent them from needing to file for bankruptcy again in the future. This view is justified only if depriving debtors of a discharge will give debtors adequate health insurance, will enhance their employment opportunities, will increase their educational levels, will collect child support payments for them, etc. Since a bankruptcy discharge does not, and is not designed to, cure these non-credit based societal problems, it is unlikely that merely preventing a debtor from discharging current debts will increase the likelihood that, in the future, the debtor will incur only those debts that he can afford to pay.

Means-testing most likely will decrease both the current number of bankruptcy filings and the number of cases that ultimately proceed through bankruptcy courts. Even if it accomplishes this, however, preventing Group I or II debtors from discharging debts may not improve their long-term prospects for an improved standard of living or significantly reduce the likelihood that they will again find

on the Eve of Bankruptcy: Astute Bankruptcy Estate Planning or Fraud?, 18 CAP. U. L. REV. 567 (1989); Conrad K. Cyr, *The Chapter 13 'Good Faith' Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 279 (1981); Elizabeth Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333, 1333 (1984); Theodore Eisenberg, *Bankruptcy Law in Perspective: A Rejoinder*, 30 UCLA L. REV. 617, 617 (1983).

202. Cf. Shuchman, *supra* note 89, at 443-44 (noting that some critics viewed bankruptcy "as a social and moral problem and the process as a moral lesson" and that the practices used to resolve this problem should punitively impress that understanding that bankruptcy, like other social issues such as divorce and abortion, is a "grave" and important event).

203. Indeed, making such a concession essentially would require critics to embrace a doctrine referred to as "environmental determinism." See KELLEY, *supra* note 7, at 50 ("The doctrine of environmental determinism held that human beings are so shaped by their circumstances that they have no more genuine choice in the face of economic restraints and inducements than they have in the face of literal physical force.").

themselves in financial distress.²⁰⁴ Moreover, the short-term benefits of a reformed bankruptcy system may have devastating long-term effects and arguments in support of means-testing fail to consider whether denying assistance to the working poor will saddle states and localities with the fiscal burden of supporting people who can no longer look to federal bankruptcy laws for relief.²⁰⁵ Bankruptcy reformers need look no further than the welfare reform experience to understand why they should temper their optimism about the results of the current reform efforts.

Welfare was never designed to completely eradicate poverty or to redistribute income between economic classes.²⁰⁶ It was, however, designed to prevent deserving people from being forced to live in abject poverty. Yet, as is true with bankruptcy reform, after each prior "major" reform of the welfare system, critics soon deemed the system a failure or disaster²⁰⁷ because—despite welfare—poor people were still here. Welfare reformers, like bankruptcy reformers, unfairly condemned each "reformed" system as a failure even though the prior reforms were not meant to help welfare mothers collect support payments from a non-custodial parent, obtain dependable and affordable child care, find a higher-wage or higher-benefit job, etc.

204. See Hon. Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 460 (1997) ("Bankruptcy at its best offers temporary relief which ought never be confused with a cure."); cf. ELLWOOD, *supra* note 13, at 6, (noting that welfare "treats the symptoms of poverty, not the causes").

205. Cf. 142 CONG. REC. H9904 (daily ed. Aug. 2, 1996) (statement Rep. Millender-McDonald) (predicting disastrous consequences for localities as a result of 1996 welfare reform legislation). Because states cannot enact insolvency laws for people and most businesses, they cannot circumvent federal bankruptcy laws by providing an alternate method for debtors to discharge their debts. See U.S. Const., art. VI, cl. 2; *International Shoe Co. v. Pinkus*, 278 U.S. 261, 263-64 (1929).

206. See Gary Burtless, *Public Spending on the Poor: Historical Trends and Economic Limits*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 51, 51 (Sheldon H. Danziger, et al. eds., 1994) (observing that "the most costly social programs do not even aim to reduce poverty as it is officially defined. They have specific objectives, such as improving diet, basic medical care, and housing conditions, which are not measured by a family's money income.").

207. See MELNICK, *supra* note 1, at 75 (describing "sense of crisis" Congress felt concerning rising welfare costs in late 1960s); *Id.* at 84-85 (recounting President Nixon's characterization of existing welfare system as a "certain disaster"); *Id.* at 112 (summarizing reform efforts during Nixon and Carter Administrations and asserting that efforts were driven by "the pervasive sense that welfare was in crisis"); MINK, *supra* note 45, at 34 (commenting that welfare was reformed six times between 1967-1988); HANDLER & HASENFELD, *supra* note 4, at 8 (noting repeated attempts over past 30 years to change welfare with "major reforms"); JENCKS, *supra* note 19, at 204 (predicting that the Family Support Act of 1988 would fail to save much money or move many users out of the welfare system because there were few jobs available to the users that paid better than welfare); ELLWOOD, *supra* note 13, at 10 (predicting failure for 1988 reform).

Just as it is unrealistic to expect that the presence of low-wage, low-benefit jobs will completely eradicate a welfare mother's poverty, it is unrealistic to expect that a robust economy with plentiful jobs will completely eliminate the possibility that employed, able-bodied people will need to discharge their debts in bankruptcy. Indeed, many suggest that the strength of the economy since the 1980s, consumer optimism that the economy will remain strong, and credit card companies' aggressive marketing efforts to these overly optimistic consumers has, in fact, given consumers the incentive to increase spending (and decrease savings).²⁰⁸ Because debtors file for bankruptcy for a variety of reasons, it is possible that after careful study reformers will conclude that the two historical goals of bankruptcy laws (facilitating debt repayment and affording a fresh start to the honest debtor) no longer provide a feasible justification for providing debt relief to the working poor. Instead, since many debtors appear unable to make ends meet because of changes in our economy, we may need to consider whether bankruptcy should be viewed as a federal public assistance or entitlement program.²⁰⁹

Certainly, bankruptcy laws are not, and have never been, designed to redistribute income or to serve as social welfare assistance for the working poor. Empirical data may prove, however, that the working poor can no longer make ends meet even when they are employed full-time. If this is true, the public should deem Group II debtors to be deserving of bankruptcy relief even if they used credit cards to try to support themselves or their families. That is, if Group I or II debtors cannot reasonably be expected to support themselves or consistently pay all their bills in the light of the fairly dramatic changes in the U.S. labor force, then the public will need to brace itself for the reality that unless we fundamentally redefine who is entitled to bankruptcy relief, we may *always* have a "bankruptcy problem."

Perhaps the best way to solve the bankruptcy problem is to stop

208. See *Consumer Debt Rises at Weak Pace: Increase of \$400 million in May Was Less than Expected*, L. A. TIMES, July 9, 1998, at D3 (expressing concern that excessive credit use will persist and noting accusation by the Consumer Federation of America that major banks aggressively expanded credit card companies' activity). Scholars and economists have commented that consumer bankruptcies can be expected to rise when consumer debt increases and that consumer debt increases during periods of economic expansion. See Warren, *supra* note 88, at 1081-82; Bhandar & Weiss, *supra* note 140, at 1; cf. Alejandro Bodipo-Memba & Neal Templin, *Consumers Approach Holidays with Open Wallet*, WALL ST. J., Nov. 27, 1998, at A2 (noting consumers' concern that the global economic crisis could affect the U.S. economy and their expectation that it will take longer than anticipated).

209. I consider this issue in greater detail in another article. See A. Mechele Dickerson, *Bankruptcy: Public Assistance for the Working Class* (unpublished manuscript, on file with author).

viewing it as a problem and accept the fact that bankruptcy filings are the logical and natural consequences of changes in the U.S. labor market.²¹⁰ Admittedly, treating bankruptcy as a form of social insurance that redistributes benefits from economically independent workers to the economically dependent working poor conflicts with the public's historical attitude toward the importance of debt repayment and the view that public assistance recipients must make both financial and emotional sacrifices in return for accepting public financial assistance. If, however, we are truly committed to permanently decreasing the need for consumer bankruptcy filings, then we must be willing to accept the harsh reality that it is impossible to accomplish this goal without first tackling other more controversial societal issues.

Conclusion

As a society, we have never had great sympathy for people who voluntarily choose to be poor or for the able-bodied working poor because we want to believe that a healthy, employed person in this country can work his way up the economic ladder. It is undisputed that some debtors (like some welfare mothers) behave irresponsibly. It is equally undisputed, however, that other debtors filed for bankruptcy (and some mothers sought welfare benefits) for reasons caused by external societal factors principally beyond their control. Though the latter group deserves our sympathy, we generally have been unwilling to deem anyone deserving of public assistance if he has contributed to his financial downfall.

In many ways, it is easy to demonize welfare recipients and debtors since both groups are politically weak, are not terribly popular with the public, have few (if any) powerful or influential lobbyists, and are stigmatized and sometimes vilified by the media and general public.²¹¹ Though we may not like *those people* and may hope that they will wake up one day economically self-sufficient, it is

210. See Shuchman, *supra* note 89, at 424 (“[O]ne may well speak of bankruptcy as class legislation, and, in many respects, for accurate analysis one must break down the rights and remedies of bankruptcy by reference to some such rough economic classification.”); cf. Lawrence H. Thompson, *The Roles of Social Insurance, Tax Expenditures, Mandates, and Means-Testing*, in SOCIAL WELFARE POLICY AT THE CROSSROADS RETHINKING THE RULES OF SOCIAL INSURANCE, TAX EXPENDITURES, MANDATES, AND MEANS-TESTING 10-11 (Robert B. Friedland et al. eds., 1995) (commenting that, because the poor often lack access to a good education and a decent job, welfare could be thought of as the price we pay for not attending to these basic rights).

211. See MARMOR, *supra* note 4, at 80 (noting that programs for the needy, non-aged are “often morally controversial” and lack effective lobbyists because “[c]hildren don’t vote and the poor are unorganized”); Hecl, *supra* note 176, at 397 (observing that the poor have no political action committees and make no major campaign contributions).

inevitable that someone—even during robust economic times—will need welfare benefits or will be unable to pay all his bills.²¹² Bankruptcy laws, like welfare laws, should be committed to giving working Americans a fair opportunity to participate in the economic life of this country. Though it is politically popular to tell welfare mothers to get a job or to tell debtors to pay their bills, it simply is not realistic to believe that depriving the working poor of public economic relief will make them economically self-sufficient. While focusing on an individual's moral shortcomings allows policymakers to avoid addressing the more politically volatile issues of labor markets, credit lending practices, and, the lack of national health insurance, this narrowly tailored focus will not accomplish the ultimate goal of decreasing the number of economically dependent citizens or reducing their need for public assistance to cure their economic ills.

212. *See, e.g.*, 141 CONG. REC. H450 (daily ed. Jan. 20, 1995) (statement of Rep. Martinez) (observing that the “eradication of poverty has confounded leaders since before the time of Christ”). *See also* Posner, *supra* note 15, at 295 (noting that “most economists and legal academics concede the importance or unavailability of poor relief”).