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## Growing Inequality and Racial Economic Gaps

Thomas W. Mitchell

Texas A&M University School of Law, [thomas.mitchell@law.tamu.edu](mailto:thomas.mitchell@law.tamu.edu)

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# Growing Inequality and Racial Economic Gaps

THOMAS W. MITCHELL\*

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## INTRODUCTION

Over the course of the past several decades, economic inequality in the United States has grown rapidly. Not only is economic inequality in this country at its highest level since the years before the Great Depression,<sup>1</sup> but the United States also continues to be among the most economically unequal countries in the industrialized world. While the very affluent in this country continue to increase their share of the country's income and wealth, the middle class has been squeezed, and record numbers of Americans find themselves in poverty.<sup>2</sup>

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1. JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 5 (2012).

2. Kevin Fagan, *Federal Funding Cut Hurts S.F. Food Bank*, S.F. CHRON. (Oct. 9, 2012), <http://www.sfgate.com/bayarea/article/Federal-funding-cut-hurts-S-F-Food-Bank-3929513.php> (indicating that 49.1 million Americans are now in poverty).

Not only is there dramatic economic inequality in the United States at this time, but there has also been reduced intergenerational economic mobility in the United States. This increasingly has resulted in what social scientists refer to as stickiness, at the top and bottom of the income distribution, which means that it is increasingly likely that children born to very affluent and very poor families will replicate their parents' economic status when they become adults. Furthermore, though measuring economic mobility is an inherently backwards-looking type of analysis as one must compare the economic status of people who have been adults for a long period of time to the economic status of their parents during a similarly long period of their adult years, there are many reasons to believe that children in our society today will experience less economic mobility than their parents did.

Without question, millions of Americans of all races have suffered economically over the course of the past several years. Nevertheless, by one measure, African Americans and Hispanics as a whole were downwardly mobile and net losers in terms of their income status during the period of 2001-2011, while whites were net winners.<sup>3</sup> Not only has the Great Recession hit African Americans and Hispanics particularly hard economically but also the economic decline for these groups started several years before the official beginning of this recession.<sup>4</sup> A review of any number of economic measures including wealth,<sup>5</sup> unemployment,<sup>6</sup> and poverty<sup>7</sup> yields evidence of this down-

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3. *Fewer, Poorer, Gloomier: The Lost Decade of the Middle Class*, PEW RESEARCH CTR. 12 (Aug. 22, 2012), <http://www.pewsocialtrends.org/files/2012/08/pew-social-trends-lost-decade-of-the-middle-class.pdf> (determining net winners and losers in terms of changes in income status since 2001 by analyzing the difference in a group's percentage in the upper-income category from the change in a group's percentage in the lower-income category).

4. See, e.g., Kitty Calavita, *The Struggle for Racial Justice: The Personal, the Political, and . . . the Economic*, 44 LAW & SOC'Y REV. 495, 498 (2010); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948-2009*, 44 LAW & SOC'Y REV. 431, 442-44 (2010).

5. See *infra* notes 39 to 47 and accompanying text.

6. In 2011, the white unemployment rate was 7.9 percent; the black unemployment rate was 15.8 percent; and the Hispanic unemployment rate was 11.5 percent. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2011, at 41 (2012), available at <http://www.bls.gov/cps/cpsrace2011.pdf>. In contrast, in 2001, the white unemployment rate was 4.2%, the black unemployment rate was 8.6%, and the Hispanic unemployment rate was 6.6 percent. *Id.*

7. In 2011, 12.8% of whites lived in poverty; 27.6% of blacks lived in poverty; and 25.3% of Hispanics lived in poverty. *People in Poverty by Selected Characteristics: 2010 and 2011*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2011/table3.pdf> (last visited Mar. 1, 2013).

ward mobility for African Americans and Hispanics relative to white Americans.

Part I presents a summary of the overall trends in income and wealth inequalities in the United States. This section also establishes that the United States is more economically unequal than most other industrialized countries. Part II establishes that as economic inequality in the United States has increased dramatically, intergenerational economic mobility has fallen. As a result, the likelihood that those born to the more affluent will be affluent themselves as adults and that those born into poverty will remain in poverty when they become adults has increased considerably over the course of the past few decades. Part III establishes the fact, notwithstanding the Occupy Wall Street movement, that there has been very little sustained, broad-based protest in the United States in recent decades pertaining to issues of economic fairness and equality. This section identifies some of the factors, which suggest that it is unlikely that a mass social movement will emerge and endure over a long period of time to address economic inequality and poverty. Part IV claims that greater economic equality in the United States is achievable only if policymakers make fundamental changes in certain key areas of public policy. Although it is unlikely that the legal system can serve as a primary tool to reduce economic inequality in any substantial way, there are a number of legal strategies and initiatives that lawyers and legal organizations, including law schools, could pursue in an effort to increase economic equality and security for many Americans, including for many persons of color.

## I. OVERALL TRENDS IN INCOME AND WEALTH INEQUALITIES

Since the mid-1970s, income inequality in the United States has grown dramatically. Growth in income inequality has been particularly pronounced at the very top of the income distribution. Though the distribution of income has become more and more unequal, at present, wealth is even more highly concentrated among those at the top of the wealth distribution than income is among the highest income earners. Further, in our country there are persistent and dramatic racial income and wealth gaps, though the racial wealth gap is particularly galling. Furthermore, the economic developments in our country over the past several decades that have resulted in dramatic income and wealth inequalities appear to have resulted in much less

intergenerational economic mobility in the past quarter century than was the case in the aftermath of World War II through the 1970s. This decreased mobility calls into question a fundamental underpinning of the notion of the American dream.

#### A. Trends in Income Inequality

Between the end of World War II and the mid-1970s, family income roughly doubled in inflation-adjusted terms for families, whether these families were at the top, middle, or bottom of the income distribution.<sup>8</sup> To this end, according to the United States Census Bureau (Census Bureau), between 1947 and 1975, family income in the bottom four quintiles of the income distribution increased between 90.3% and 99.2%, while family income for those in the top five percent of the income distribution increased by 85.5%.<sup>9</sup> As will be discussed below, this general pattern of equitable income accumulation during this period masks significant income earning gaps along racial and gender lines.

The period of general shared prosperity for the majority of American families came to an end beginning in the early- to mid-1970s.<sup>10</sup> By the end of the 1970s, a pattern began to emerge in which those in the lower to middle rungs of the income ladder experienced only modest income growth while those at the top of the income distribution experienced much more rapid income growth.<sup>11</sup> This pattern has not only persisted over the course of the past three decades but also has intensified quite dramatically, with only very limited exceptions.<sup>12</sup>

Between 1975 and 2010, according to the Census Bureau, those families in the bottom two quintiles of the income distribution experienced a 3.7% and 13.2% increase in family income, respectively.<sup>13</sup> In

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8. Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET AND POLICY PRIORITIES, 7–8, <http://www.cbpp.org/files/11-28-11pov.pdf> (last modified Oct. 23, 2012).

9. *Percentage Change in Family Income 1947-1975 and 1975-2010*, RUSSELL SAGE FOUND., [hereinafter *Percentage Change*] <http://www.russellsage.org/sites/all/files/chartbook/real-median-individual-income-by-race-large.jpg> (last visited Mar. 1, 2013).

10. *Id.*

11. *Trends in the Distribution of Household Income Between 1979 and 2007*, CONG. BUDGET OFF. 2-3 (Oct. 2011), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf>.

12. *U.S. Cong., Trends in the Distribution of Household Income Between 1979 and 2007*, CONG. BUDGET OFFICE, 17 (2011), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf>.

13. *Percentage Change*, *supra* note 9.

contrast, families in the second highest quintile of the income distribution experienced a 39.3% increase in their incomes, while families in the top five percent of the income distribution experienced a 56.7% increase in their incomes.<sup>14</sup> Using more comprehensive and sophisticated measures of income,<sup>15</sup> the Congressional Budget Office's (CBO) analysis of after-tax household income growth between 1979 and 2007 is consistent with the Census Bureau's analysis of income growth for the period between 1975 and 2010 in terms of demonstrating that income inequality in this country grew sharply during this period. However, the CBO's analysis provides some finer grain analysis.

Although the CBO report indicates that income for households in the lowest quintile grew somewhat more than the Census Bureau report indicates, the CBO report demonstrates that income at the very top of the income distribution grew at an incredible rate. To this end, the CBO report indicates that after-tax income growth for the lowest quintile was 18%, which is almost 15% higher than the Census Bureau's analysis of income growth—using a different methodology to calculate income—for the lowest quintile.<sup>16</sup> Further, the CBO report demonstrates that after-tax income for those households in the 81st through 99th percentiles grew by 65% between 1979 and 2007. Much more dramatically, after-tax income for those households in the top 1% of the income distribution grew by 275%, which means that household income for these extremely high income earners nearly quadrupled between 1975 and 2007.<sup>17</sup>

Furthermore, although federal taxes and government transfer payments are progressive in the United States, in the past several years they have had only a very small impact on reducing the concentration of income. For example, in 2007, the top 1% of households in terms of income received 21% of overall income before federal taxes and transfer payments; these households received 17% of overall income after federal taxes and transfers. Similarly, the top 81 to 99% of households in terms of income received 39% of overall income before federal taxes and transfer payments; these households received 35% of overall income after federal taxes and transfers. Furthermore, due

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14. *Id.*

15. Stone et al., *supra* note 8, at 8.

16. CONG. BUDGET OFFICE, *supra* note 12, at 3.

17. *Id.* The CBO is able to provide a better analysis of income at the top of the income distribution in part because the Census Bureau's information is more limited information with respect to income at the top of the income distribution for both methodological and policy reasons. Stone et al., *supra* note 8, at 3.

to changes in federal tax law and in government transfer programs over the course of the past several years, federal taxes and federal transfer programs now have less of a redistributive effect on market income<sup>18</sup> than federal taxes and transfers had on redistributing market income in 1979. These developments have resulted in increased income inequality.<sup>19</sup>

As compared to other major industrialized countries, the United States has one of the highest levels of income inequality after accounting for the redistributive effect of federal taxes and government transfers.<sup>20</sup> In fact, though a couple of industrialized countries, such as Belgium and France, have a higher degree of pretax income inequality than the United States, after-tax income inequality in the United States is much higher than it is in most other industrialized countries including Belgium and France because taxation in this country redistributes far less income than it does in most other industrialized countries.<sup>21</sup> Furthermore, a cross-country study of income inequality from the mid-1970s to 2000 revealed that in the United States income inequality continued to rise from the mid-1970s through 2000.<sup>22</sup> In contrast, in most other industrialized countries, levels of inequality rose for a number of years but then slowed in the latter years of the period under study.<sup>23</sup> Furthermore, the United States ranks amongst the developed countries with the most unequal distributions of income in part because the federal government in the United States provides far less government support to its citizens with respect to public services, higher education, pensions, and other forms of support than do governments in other developed countries.<sup>24</sup>

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18. Market income includes income earned from labor, business income, capital gains, capital income, and other sources of income including any income an individual receives in retirement in consideration of past services. See CONG. BUDGET OFFICE, *supra* note 12, at II.

19. See *id.*

20. Linda Levine, *The U.S. Income Distribution and Mobility: Trends and International Comparisons*, CONG. RESEARCH SERV. 9-10 (Nov. 29, 2012), <http://www.fas.org/sgp/crs/misc/R42400.pdf>.

21. DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 257-58 (2007).

22. Levine, *supra* note 20, at 9.

23. *Id.*

24. Tami Luhby, *Global Income Inequality: Where the U.S. Ranks*, CNN MONEY (Nov. 8, 2011, 3:24 PM), [http://money.cnn.com/2011/11/08/news/economy/global\\_income\\_inequality/index.htm](http://money.cnn.com/2011/11/08/news/economy/global_income_inequality/index.htm). Other reasons that account for the exceptionally high level of income inequality in the United States than in other developed countries are the comparatively steeper decline in union membership in the United States and the greater restrictions that countries in Europe place upon executive compensation which results in lower levels of executive compensation in Europe than in the United States. *Id.*



B. Trends in Wealth Inequality

Family wealth, also known as net worth, is the gross assets a family owns minus the financial liabilities the family has incurred.<sup>25</sup> Assets fall into two categories: consumable assets, which include equity in homes and vehicles; and financial assets, such as stocks, bonds, mutual funds, 401(k) accounts, rental property, the equity in a business, and assets one owns that are held by a bank or other financial institution.<sup>26</sup> Liabilities may be secured, such as is the case with mortgages on real estate one owns or vehicle loans, or unsecured, such as credit card debt or student loans.<sup>27</sup>

The discourse about economic inequality in our society tends to predominately focus upon income inequality. Nevertheless, wealth inequality in the United States is substantially more concentrated than income inequality.<sup>28</sup> Given that there is substantial overlap between those at the top of the income and wealth distributions, overall economic inequality as measured by the economic resources under the control of the very well-off is greater than one might glean from analyzing income or wealth inequality in isolation.

In 2007, those in the top 1% of the income distribution received 21% of all income; however, the top 1% of the wealth distribution held 35% of wealth in this country.<sup>29</sup> More broadly, though the top 10% of the income distribution received 47% of income in 2007, the top 10% of the wealth distribution in 2007 held 74% of our country's wealth.<sup>30</sup> Although these data clearly demonstrate that the distribution of wealth is much more skewed in favor of the very wealthy than income is skewed in favor of those at the top of the income distribution, income inequality in this country has been increasing much more rapidly than wealth inequality.<sup>31</sup>

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25. Stone et al., *supra* note 8, at 10.

26. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 106 (1997).

27. *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, PEW RESEARCH CTR. 7 (July 26, 2011), [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf).

28. Stone et al., *supra* note 8, at 10.

29. *Id.* at 12.

30. *Id.*

31. *Id.* at 10.

## C. Racial Income and Wealth Gaps

### 1. Racial Income Gaps

In addition to substantial income and wealth inequalities among those differentially situated on the income and wealth distributions, significant gaps exist in terms of both distributions when one compares median non-Hispanic white income with median African American and Hispanic incomes. These gaps have been longstanding, though the income gap between white households and African American households has remained constant since the early 1970s, while the income gap between non-Hispanic whites and Hispanic households has increased slightly during this same time period. In 2011, the ratio of black to non-Hispanic white household income was 0.58, a ratio which has stayed constant in terms of statistical relevancy for the past four decades.<sup>32</sup> In comparison, the ratio in 2011 for Hispanic to non-Hispanic white household income was 0.70, which represents a statistically significant decline from the 1972 ratio of 0.74.<sup>33</sup> For 2011, black real median individual income was 79% of white real median individual income, and Hispanic real median individual income was 72% of white real median individual income.<sup>34</sup>

Non-Hispanic white households, African American households, and Hispanic households each had lower household incomes in 2011 than each of these groups had just before the 2001 recession. Even so, the 7% decline in non-Hispanic white household income during this period was lower than the decline was for the other groups. In contrast, African American households have experienced a 16.8% decline in household income during this period, which was by far the largest decline for any racial or ethnic group during this period.<sup>35</sup>

### 2. Racial Wealth Gaps

More than fifteen years ago, Melvin Oliver and Thomas Shapiro published a groundbreaking book that attempted to reframe an important aspect of the economic debate on racial inequality by shining the light on the vast racial wealth gap between African Americans and

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32. Carmen DeNavas-Walt et al., *Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. CENSUS BUREAU, 9 (Sept. 2, 2011), <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

33. *Id.*

34. *Percentage Change*, *supra* note 9.

35. DeNavas-Walt et al., *supra* note 32, at 8.

white Americans.<sup>36</sup> Using one measure of wealth, Oliver and Shapiro demonstrated that the median white household in 1988 had approximately twelve times the net worth of the median black household.<sup>37</sup> Given that most academic study and policy analysis about economic inequality previously had tended to focus on the significant and persistent income inequality between African Americans and whites, it appeared that Oliver and Shapiro's book could serve as a catalyst in fundamentally transforming the academic study of and public policy responses to racial economic inequality. In fact, the book received a very positive reception from a diverse group of readers, including from some people and groups in important positions of power in certain sectors. For example, the Ford Foundation has provided support to a number of individuals and organizations that have been working to address the racial wealth gap in one way or another. Among these organizations is the Insight Center for Community and Economic Development, which has developed an ongoing initiative called the *Closing the Racial Wealth Gap Initiative*.<sup>38</sup>

In spite of all of the efforts that academics, foundations, nonprofit organizations, government, and others have made over the past fifteen years or so to narrow the racial wealth gap, a gap that was already quite alarming fifteen years ago, the racial wealth gap has become dramatically larger during this period. By one measure, the white-to-black median wealth ratio increased from eleven to one in 2005 to twenty to one in 2009.<sup>39</sup> By this same measure, the white-to-Hispanic median wealth ratio increased from seven to one in 2005 to eighteen to one in 2009.<sup>40</sup>

The black-white and Hispanic-white racial and ethnic wealth gaps have been increasing in large part as a result of the different experiences these different racial and ethnic groups have had with respect to homeownership over the course of the past several years. Over the course of the past several years, the black homeownership rate has declined sharply (and likely will continue to decline in the next few years). By 2011, the gap in the black-white homeownership rate increased by 2.3% over what it was in 2001 when the white homeowner-

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36. OLIVER & SHAPIRO, *supra* note 26, at 106.

37. *Id.* at 86.

38. See *Closing the Racial Wealth Gap Initiative*, INSIGHT CTR. FOR CMTY. ECON. DEV., <http://www.insightccd.org/communities/Closing-RWG.html> (last visited Mar. 1, 2013).

39. PEW RESEARCH CTR., *supra* note 27, at 14.

40. *Id.*

ship rate was 26.6% higher than the black homeownership rate.<sup>41</sup> The Hispanic homeownership rate has also declined steadily since 2005 when it reached 49.5% (a record high), and the current Hispanic-white gap in homeownership rates stands at 26.9%, which is virtually unchanged from 2001.<sup>42</sup> Though steeply declining values for owner-occupied homes account for the greatest erosion in household wealth for all racial and ethnic groups over the course of the past several years, Hispanics have experienced the greatest loss in home equity. From 2005 to 2009, Hispanic homeowners lost 51% of their home equity, as measured by the median value of home equity for Hispanic homeowners during this period.<sup>43</sup> In contrast, African Americans lost 23% of their home equity, and white Americans lost 18% as measured by the median value of home equity for these groups during this period.<sup>44</sup>

More broadly, wealth gaps between the median white household and the median African American and Hispanic households increased dramatically between 2005 and 2009, despite the fact that the median white household lost nearly \$22,000 in net worth during this period, which represented a 16% drop in white household wealth.<sup>45</sup> The wealth gaps increased because African American and Hispanic households experienced a far greater percentage reduction in their net worth. African American households lost more than \$6,400 in net worth between 2005 and 2009, and this loss represented a 53% decline in net worth for these households during this period.<sup>46</sup> Hispanic households lost more than \$12,000 in net worth between 2005 and 2009, and this loss represented a 66% decline in net worth for these households during this period.<sup>47</sup>

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41. In terms of homeownership, the black homeownership rate was 44.9% in 2011, which represented nearly a three percentage point drop from the 47.7% black homeownership rate in 2001. *Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2011*, U.S. CENSUS BUREAU, [www.census.gov/housing/hvs/files/annual11/ann11t\\_22.xls](http://www.census.gov/housing/hvs/files/annual11/ann11t_22.xls) tbl.22 (last modified Sept. 21, 2012, 4:00 PM). The black homeownership rate has been declining steadily from the 2004, 49.1% black homeownership rate, which represented the high-water mark for black homeownership in this country's history. *See id.* In addition, the last time the black homeownership rate was below 45% was in 1997 when it was 44.8%. *See id.* By contrast, the white homeownership rate was 73.8% in 2011 and in 2001 it was 74.3%. *Id.* In addition, the white homeownership rate in 2011 was 23.4% higher than the 46.9% Hispanic homeownership rate. *See id.*

42. *See id.*

43. PEW RESEARCH CTR., *supra* note 27, at 2.

44. *See id.* at 4.

45. *Id.* at 14–15.

46. *Id.* at 15.

47. *Id.*

A significant reason black and Hispanic households lost substantially more wealth in percentage terms between 2005 and 2009 is due to the fact that both black and Hispanic families derived much more of their net worth from home equity in 2005 than did white families. In 2005, black households derived 59% of their net worth from home equity, and Hispanic households drew 65% of their net worth from home equity.<sup>48</sup> In contrast, though home equity was the largest asset by far for white households, it accounted for 44% of net worth for white households. In short, in analyzing comparative data on mean net worth for households, black and Hispanic households had asset portfolios that had a much higher percentage of home equity from ownership of a primary residence and were much less diversified in terms of financial assets such as stocks, mutual funds, IRAs, and Keogh accounts.<sup>49</sup> As a result, the sharp decline in real estate values in this country from 2005 to 2009 had an especially large and negative impact on the net worth of black and Hispanic households. The fact that many other types of assets fared much better than real estate did during this period did not cushion the loss black and Hispanic households experienced in their real estate holdings as much as it did for white households given that white households had much more diversified asset portfolios than either black or Hispanic households.

In analyzing the data that the government first began collecting on household wealth in the early 1980s, it becomes apparent that, through 2009, white households and African American and Hispanic households have had very different experiences in terms of being able to build and maintain wealth, despite the fact each group lost wealth between 2005 and 2009. Although, as discussed above, white households experienced a significant decline in their wealth between 2005 and 2009, white household wealth in 2009 was substantially higher than it was for many if not most years between 1984 and 2009.<sup>50</sup> In contrast, black and Hispanic households possessed less wealth in 2009 than in any year since the Census Bureau began publishing data on household wealth in 1984.<sup>51</sup> Further, not only were the 2009 ratios of white household wealth to black and Hispanic household wealth respectively higher than they ever had been based upon the data the Census Bureau began collecting on household wealth in the early

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48. *Id.* at 24.

49. *Id.* at 25.

50. *Id.* at 29.

51. *Id.*

1980s, but they were also about double the ratios for the pre-2009 years the Pew Research Center used in its 1984-2009 time series analysis.<sup>52</sup>

## II. AS INEQUALITY HAS RISEN, ECONOMIC MOBILITY HAS DECLINED

### A. Trends in Economic Mobility in the United States

Academics—mostly in the fields of sociology and economics—have long studied intergenerational mobility. Sociologists have tended to focus upon mobility in terms of status as measured by comparing the occupations (or some other similar indicator of status) of parents with the occupations of their children.<sup>53</sup> Economists, on the other hand, have primarily measured mobility in terms of income by using a statistic known as intergenerational elasticity in earnings, “which is the percentage difference in earnings in the child’s generation associated with the percentage difference in the parental generation.”<sup>54</sup> In terms of this statistic, there is more economic mobility in countries with lower measures of intergenerational elasticity. Nevertheless, the academic literature on the relationship between economic inequality and intergenerational mobility is somewhat underdeveloped, although there appears to be growing academic interest in studying this relationship.<sup>55</sup>

Despite high levels of income inequality in this country, Americans do not support the redistribution of market income by the government to the degree that citizens in other Western democracies support such governmental redistribution.<sup>56</sup> In fact, in a twenty-seven-country study on social attitudes, only 33% of Americans agreed with the view that the government has a responsibility to help reduce income inequalities, which resulted in the United States being the country in the study with the lowest percentage of its citizens hold-

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52. *See id.*

53. Miles Corak, *Inequality from Generation to Generation: The United States in Comparison*, in *THE ECONOMICS OF INEQUALITY, POVERTY, AND DISCRIMINATION IN THE 21ST CENTURY* 109 (Robert S. Rycroft ed., forthcoming Mar. 2013).

54. *Id.*

55. *See, e.g.*, Dan Andrews & Andrew Leigh, *More Inequality, Less Social Mobility*, 16 *APPLIED ECON. LETTERS* 1489, 1489 (2008), <http://econpapers.repec.org/article/tafapect/default16.htm>.

56. Isabel Sawhill & Sara McLanahan, *OPPORTUNITY IN AM.*, at 3 (2006).

ing this view.<sup>57</sup> Such aversion to more robust redistribution can be explained in part by a long-held conviction among most Americans that nearly everyone in this country has the opportunity to achieve upward economic mobility based upon their intelligence and skills irrespective of the economic circumstances into which they are born.<sup>58</sup> Of course, throughout American history there have been many examples of people such as Benjamin Franklin, Henry Ford, and Oprah Winfrey, to name just a few, who have achieved remarkable upward mobility despite starting life in relatively humble or even impoverished circumstances.<sup>59</sup> Moreover, there is strong evidence that economic mobility in the United States in the nineteenth century and in the early part of the twentieth century was exceptional as compared to many other countries.<sup>60</sup>

In the years before the onset of the Great Recession, there was little popular discussion about whether people in the United States were as economically mobile as they had been in the decades after World War II or whether people in the United States in fact have greater opportunities for upward mobility than people in other comparable countries.<sup>61</sup> Further, despite growing economic inequality in the United States, many Americans believe that the overall economic system in the United States is fair because they believe that economic mobility in the United States is especially high as compared to other countries.<sup>62</sup> Nevertheless, there is fairly strong evidence that some-

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57. Julia B. Isaacs, *International Comparisons of Economic Mobility*, in GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 37–38 (Julie Clover & Ianna Kachoris eds., 2008), available at [http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02\\_economic\\_mobility\\_sawhill.pdf](http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02_economic_mobility_sawhill.pdf). The percentage of Americans who held this view was significantly lower than the percentage of respondents who held this view in any other country in the study as between 46% and 89% of respondents in all of the other countries held this view. *Id.* at 38.

58. See Sawhill & McLanahan, *supra* note 56. In a twenty-seven-country study of social attitudes, the United States had the highest percentage of respondents (69%) who agreed with the statement that “people are rewarded for intelligence and skill” and one of the lowest percentage of its people (19%) who consider it essential or very important to be born into a wealthy family in order to get ahead economically. Isaacs, *supra* note 57, at 37.

59. See Trina Jones, *Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry: Article: Race, Economic Class, and Employment Opportunity*, 72 L. & CONTEMP. PROBS. 57, 58 n.7 (2009); Jason DeParle, *Harder for Americans to Rise from Economy’s Lower Rungs*, N.Y. TIMES, Jan. 5, 2012, at A1; Sawhill & McLanahan, *supra* note 56 at 3.

60. Joseph P. Ferrie, *HISTORY LESSONS: THE END OF AMERICAN EXCEPTIONALISM? MOBILITY IN THE UNITED STATES SINCE 1850*, 19 J. ECON. PERSPECTIVES 199, 214 (2005).

61. *But cf.* DeParle, *supra* note 59 (showing how the discussion of American economic mobility has recently moved towards center stage).

62. See Isabel Sawhill, *Trends in Intergenerational Mobility*, in GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 27–29 (Julie Clover & Ianna Kachoris eds., 2008), available at <http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobil>

time between 1980 and 1990, intergenerational mobility in the United States declined sharply from the rates of intergenerational mobility that had prevailed in this country from 1950 to 1980.<sup>63</sup>

It also appears that the decline in intergenerational economic mobility is not evenly distributed. Although many Americans continue to experience significant upward and downward mobility, economic opportunity for many others is very sticky, which means it may depend to a significant degree upon the economic status of the family into which one is born. Very well-off families and poor families have transferred their respective privileged and impoverished economic statuses to their children over the course of the past few decades at a much higher rate than is the case for middle-income families in which there has not been a strong link between parents' income and the earnings of their children.<sup>64</sup> To this end, a 2008 study concluded that 42% of children born into families in the bottom fifth of the income distribution remained in the bottom fifth as adults, and that 39% of children born into the top fifth of the income distribution remained in the top fifth as adults.<sup>65</sup>

Although traditional measures of economic mobility are backwards-looking, which means they cannot be used to predict the economic mobility for today's generation of children,<sup>66</sup> there is great cause for concern for the prospects of economic mobility for today's generation of children in the United States. To this end, some researchers have demonstrated that there is significantly less intergenerational economic mobility in countries that have comparatively greater economic inequality than countries that have less economic

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ity%20sawhill/02\_economic\_mobility\_sawhill.pdf; DeParle, *supra* note 59. In fact, there are some economists who argue that countries throughout the world depend economically upon so-called cutthroat capitalist countries such as the United States that tolerate great economic inequality. They argue that the form of capitalism found in the United States provides the proper incentives for innovation and technological breakthroughs, and that in turn, such innovation and technological breakthroughs fuel global economic growth that in turn benefits other countries including countries that have a more so-called cuddly form of capitalism. DARON ACEMOGLU ET AL., CAN'T WE ALL BE MORE LIKE SCANDINAVIANS? ASYMMETRIC GROWTH AND INSTITUTIONS IN AN INTERDEPENDENT WORLD 1-4 (2012), available at <http://economics.mit.edu/faculty/acemoglu/paper>.

63. Bhashkar Mazumder, *Is Intergenerational Economic Mobility Lower Now Than in the Past?*, CHI. FED. LETTER (2012).

64. Corak, *supra* note 53, at 116; DeParle, *supra* note 59.

65. ISABEL SAWHILL, OVERVIEW, IN GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 4 (Julie Clover & Ianna Kachoris eds., 2008), available at [http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02\\_economic\\_mobility\\_sawhill.pdf](http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02_economic_mobility_sawhill.pdf).

66. Mazumder, *supra* note 63.



inequality.<sup>67</sup> One reason that there may be less economic mobility in countries with high income and wealth inequalities is that parents who are better off economically are often able to make investments of money and time to improve their children's development of forms of human capital that the market values than are parents who are less well-off.

An exceptionally important form of human capital is education. Despite the great potential that education can have in terms of promoting social and economic mobility, in the United States, "the average effect of education at all levels is to reinforce rather than compensate for the differences associated with family background and the many home-based advantages and disadvantages that children and adolescents bring with them into the classroom."<sup>68</sup> The public K-12 school systems in the United States provide at best "only a modest boost to poor and minority children's chances of moving up the economic ladder."<sup>69</sup>

In addition, the way the labor market in a given country rewards people based upon their educational attainment can have a significant impact upon economic mobility. Therefore, to the extent that labor market returns increase in a particular country for those with more or better education than for others with less or inferior education, parents will have an incentive to invest more in their children's education.<sup>70</sup> If there is significant economic inequality in a given country, the parents with both the incentive and the wherewithal to make greater investments in their children's education inevitably will be the wealthier parents.<sup>71</sup> Further, if the wealthier parents do increase their investments as one rationally would expect, economic mobility is likely to decline in that country unless public policies with respect to education sufficiently counteract market forces by providing a net benefit to the economically disadvantaged as opposed to those who are not so disadvantaged.<sup>72</sup>

In the United States, wealthier parents have in fact been increasing their investments of time and money into their children's educa-

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67. Corak, *supra* note 53, at 114-15; Andrews & Leigh, *supra* note 55, at 8-10.

68. Sawhill, *supra* note 65, at 6.

69. *Id.* at 98.

70. Gary Solon, *A Model of Intergenerational Mobility Variation Over Time and Place*, in *GENERATIONAL INCOME MOBILITY IN NORTH AMERICA AND EUROPE* 37, 41 (Miles Corak ed., 2004).

71. CORAK, *supra* note 53, at 114.

72. *Id.*

tion over the course of the past number of decades.<sup>73</sup> As of yet, public policies in the area of education have not benefited disadvantaged families in any substantial way to counteract the increased investments that wealthier parents have made in their children's education. In fact, there has been a reduction in the commitment to provide resources to poor and minority students in public kindergarten through 12th grade school systems over the course of the past three decades or so.<sup>74</sup> Further, over the course of the past several years, the share of financial aid benefitting low-income undergraduate and graduate students has been falling "as needs-based assistance has been increasingly replaced by merit-based aid."<sup>75</sup>

Not only has the education system in the United States done little to improve economic mobility in the country over the course of the past few decades, it appears that the education system may well be contributing to growing income and wealth inequalities. Without significant reforms, this pattern may persist for generations. A few examples make this point. At a time in this country's history in which a person's ability to attain economic security depends more and more upon the extent to which one has high levels of educational achievement, a wide achievement gap has opened between the rich and the poor. To this end, the gap in test scores sorted by family income has

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73. Robert Haveman & Timothy Smeeding, *The Role of Higher Education in Social Mobility*, OPPORTUNITY IN AM., 125, 128 (2006); see also Jason DeParle, *Leap to College Often Ends in a Hard Fall*, N.Y. TIMES, Dec. 22, 2012, at A1.

Certainly as the payoff to education has grown . . . affluent families have invested more in it. They have tripled the amount by which they outspend low-income families on enrichment activities like sports, music lessons and summer camps . . . [and] upper-income parents, especially fathers, have increased their child-rearing time, while the presence of fathers in low-income homes has declined.

DeParle, *supra* note 73, at A1.

74. See THE EDUCATION TRUST, *The Funding Gap 2005: Low-Income and Minority Students Shortchanged by Most States 2* (2005) ("Across the country, \$907 less is spent per student in the highest-poverty districts than in the most affluent districts. . . . Across the country, \$614 less is spent on students in the districts educating the most students of color as compared to the districts educating the fewest students of color."); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 571 (2006); *New Data from U.S. Department of Education Highlights Educational Inequities Around Teacher Experience, Discipline and High School Rigor*, U.S. DEPT. EDUC. (Mar. 6, 2012), <http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache>. The data on the funding gaps between rich and poor students actually understate the amount by which poor students are being shortchanged relative to wealthier students given that those who work on education policy commonly employ a forty percent adjustment in calculating the financial resources students who grow up in poverty need to achieve the same outcomes as wealthier students. THE EDUCATION TRUST, *supra* at 74.

75. Haveman & Smeeding, *supra* note 73, at 137.

grown by thirty to forty percent for children who were born in 2001, as compared to children who were born in 1976.<sup>76</sup>

There are also huge gaps in educational attainment by socioeconomic status that make achieving greater economic mobility in this country much more unlikely. Based upon one measure of family income to family needs, 71% of youth from families in the top quartile of the “family permanent income-to-needs” distribution attended college as compared to just 22% of youth from families in the bottom quartile.<sup>77</sup> Further, there was a 35 point gap in college graduation rates between families in the top and bottom quartiles of the distribution with only 6-9% of youth from families at the bottom of the distribution managing to graduate from college.<sup>78</sup> Additionally, one study divided all four-year colleges and universities in the United States into four tiers. The study revealed that 74% of students in the entering classes for the 146 colleges and universities in the top tier were from families in the highest socioeconomic quartile and that just 3% of students in the entering classes for these colleges and universities were from the lowest quartile.<sup>79</sup>

#### B. Assessing Claims of American Exceptionalism in Terms of Mobility

Over the course of the past two decades, a significant number of academic studies have undermined the conventional wisdom that people in the United States enjoy a particularly high degree of economic mobility as compared to people in many countries that are otherwise significantly comparable to the United States.<sup>80</sup> These studies come to similar conclusions, regardless of whether they measure intergenerational mobility in terms of income or in terms of occupation.<sup>81</sup> Though studies appear to demonstrate that Americans enjoy a reason-

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76. Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011).

77. Haveman & Smeeding, *supra* note 73, at 131.

78. *Id.*; see also DeParle, *supra* note 73 (noting that while a greater percentage of rich and poor Americans alike have completed college over the course of the past thirty years, there is now a forty-five point gap between the percentage of wealthy Americans who earn a bachelor's degree and poor Americans who earn a bachelor's degree and that the gap thirty years ago was thirty-one percent).

79. Haveman & Smeeding, *supra* note 73, at 130.

80. DeParle, *supra* note 59.

81. Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective*, *OPPORTUNITY IN AM.*, 19, (2006).

ably high degree of occupational mobility, the United States is just average in terms of occupational mobility when compared to other industrialized countries.<sup>82</sup>

In addition, among many rich countries, the United States ranks below average in terms of income mobility.<sup>83</sup> In fact, in a study that measured intergenerational elasticity of earnings in twenty-two countries, Italy, the United Kingdom, and the United States each had intergenerational elasticity estimates of approximately 0.5, which resulted in these countries being ranked as the least economically mobile countries of the wealthy countries in the study.<sup>84</sup> Not only did the United States rank significantly below countries such as Germany, Japan, and Australia in terms of mobility, but the United States also had an elasticity measure that was two to three times as large as the wealthy countries with the greatest degree of mobility.<sup>85</sup> To this end, the estimate of intergenerational mobility in the United States was approximately two-and-a-half times larger than the estimate for intergenerational mobility in Canada. Given how similar the two countries are otherwise in many respects, the difference in economic mobility between the countries suggests that Canada and the United States have among other differences some key public policies that are very different and that the labor market in Canada operates somewhat differently from the labor market in the United States.<sup>86</sup> These apparent differences in public policy and in how the labor market operates in the two countries appear to make Canadians significantly more economically mobile than Americans.

### C. Intergenerational Income Mobility for African Americans

Without question, there has been significant intergenerational economic mobility within the African American community over the course of the past several decades. In 1940, 90% of African American men and women lived in poverty; full-time working black men earned just 43% of what comparable white men earned on average; and just 2% of African Americans who were aged twenty-five to twenty-nine

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82. *Id.* at 30. Occupational mobility is higher in Canada, Sweden, and Norway than it is in the United States. *Id.* In contrast, occupational mobility is lower in West Germany, Ireland, and Portugal than it is in the United States. *Id.*

83. *Id.*

84. Corak, *supra* note 53, at 111,

85. *Id.*

86. *Id.* at 120.

were college graduates.<sup>87</sup> By 2000, the poverty rate for African Americans was 30%; full-time working black men earned 73% of what comparable white men earned on average; and 15% of African Americans who were aged twenty-five to twenty-nine were college graduates.<sup>88</sup>

Despite the fact that economic conditions have improved dramatically for African Americans over the course of the past several decades, African Americans remain much less upwardly mobile and much more downwardly mobile than white Americans when one considers the overall distribution of income. In terms of cycles of poverty, 42% of black children born in the bottom tenth of the income distribution remain in the bottom decile of income as adults, as compared to 17% of comparable white children.<sup>89</sup> African Americans also have been unable to move up from the bottom rungs of the income distribution to the top nearly as frequently as white Americans. Fewer than 4% of African American children born into families in the lowest quartile of the income distribution have ended up in the top quartile as adults, as compared to 14% of comparable white children.<sup>90</sup> Conversely, black children born in the top quartile of the income distribution have just a 15% chance of remaining there as adults while comparable white children have a 45% chance of remaining in the top quartile in their adult years.<sup>91</sup>

### III. WHY ISN'T THERE A MORE SUBSTANTIAL SOCIAL MOVEMENT FOR GREATER ECONOMIC EQUALITY?

At first blush, one might think that the socioeconomic conditions that millions of Americans have endured over the course of the past few years would create the conditions for a broad-based social movement and that those in such a movement would relentlessly press both decision-makers in both the public and private sectors to take actions that would promote greater equality.<sup>92</sup> With the growing concentrations of income and wealth, many more people in this country should be similarly situated economically, given that the middle class has

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87. Melissa S. Kearney, *Intergenerational Mobility for Women and Minorities in the United States*, OPPORTUNITY IN AM., 37, 38 (2006).

88. *Id.*

89. *Id.* at 48.

90. *Id.*

91. *Id.* at 49.

92. See Bekad Mandell, *Putting Theory into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement*, 1 COLUM. J. RACE & L. 402, 408 (2012).

struggled considerably as the affluent have become much more affluent, which in turn has resulted in greater polarization among those in different economic classes.<sup>93</sup> Nevertheless, consistent with what occurred during some other periods of economic crisis in this country's history, the overwhelming majority of Americans—including the overwhelming majority of the disadvantaged or those who have recently experienced significant downward mobility—have not taken to the streets or otherwise participated in any social movement.<sup>94</sup>

Why do Americans appear to have little appetite for building any mass social movement to address inequality or for challenging in some other ways those who may be in positions to alleviate the economic suffering millions are enduring? Obviously, the reasons are complex. However, this phenomenon can be explained in part by how Americans misperceive their individual economic circumstances and how they improperly estimate the overall distribution of income and wealth in this country, by longstanding internal divisions within those otherwise similarly situated in terms of class status, and by the manner in which some with substantial economic and political power have been able to foster conflict among middle and working class people.

#### A. Americans' Perceptions and Misperceptions about Economic Inequality and the Economy

Americans' perception of their own economic status, as well as the overall distribution of wealth in this country, undercuts the effort to challenge the United States' actual (and very high) degree of economic inequality. In terms of wealth distribution, professors from Harvard Business School and Duke University's Department of Psychology have demonstrated that Americans severely underestimate the degree of wealth inequality in this country.<sup>95</sup> The nationally representative group of more than 5,500 Americans who responded to the survey that Norton and Ariely developed estimated that the wealthiest 20% of Americans held approximately 59% of the wealth, though the actual percentage these Americans held at the time of the survey was approximately 84%.<sup>96</sup> Further, in response to the question asking these respondents for their ideal distribution of wealth, the re-

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93. *Id.* at 408–09.

94. *Id.* at 409.

95. Michael I. Norton & Dan Ariely, *Building a Better America – One Wealth Quintile at a Time*, 6 PERSP. ON PSYCHOL. SCI. 9, 9 (2011).

96. *Id.* at 10.

spondents indicated that they preferred the top 20% to hold 32% of wealth and for those in the bottom three quintiles to receive a substantially larger share of the overall wealth than they (incorrectly) believed these groups held at the time of the survey.<sup>97</sup>

Though there were small differences between some of the different demographic groups of respondents in terms of perceptions of the actual distribution of wealth and construction of an ideal distribution of wealth, there was much more consensus. No group, whether comprised of those by income status, party affiliation, or gender, believed that the wealthiest 20% of Americans held more than approximately 60% of the wealth in this country.<sup>98</sup> Perhaps unexpectedly, there was general consensus among the different groups of respondents that the wealthiest 20% of Americans should hold somewhere between approximately 30% and 40% of the country's wealth and that the bottom four quintiles in the wealth distribution should hold a substantially higher percentage of the country's wealth than is presently the case.

Many Americans also appear to have a significant misperception about their place in the income distribution. A recent Gallup poll indicates that 55% of Americans consider themselves to be middle class or upper-middle class and that this percentage has remained stable over the course of the past several years, though it was slightly higher before the onset of the Great Recession.<sup>99</sup> In addition, 31% of Americans identify themselves as working class, a percentage that has remained almost unchanged over the course of the past eleven years.<sup>100</sup> Though Gallup reports that the percentage of Americans who perceive themselves as lower class has grown over the course of the past decade from 3% to 10%, there is some evidence that low-income Americans overestimate their standing in the income distribution<sup>101</sup> and that wealthy Americans underestimate their position in the income distribution.<sup>102</sup>

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97. *Id.*

98. *Id.* at 11.

99. Andrew Dugan, *Americans Most Likely to Say They Belong to the Middle Class*, GALLUP (Nov. 30, 2012), <http://www.gallup.com/poll/159029/americans-likely-say-belong-middle-class.aspx>.

100. *Id.*

101. Catherine Rampell, *Everyone Is "Middle Class," Right?*, N.Y. TIMES, Apr. 27, 2011, 9:30 AM, <http://economix.blogs.nytimes.com/2011/04/27/everyone-is-middle-class-right/>.

102. *Id.*

The misperceptions Americans have about their relative economic standing likely negatively impact support for redistributive policies. This may be the case because many lower-income people who overestimate their earnings incorrectly believe they would benefit by supporting regressive tax and other governmental policies favoring wealthier Americans, and many wealthy Americans believe their taxes are far too high based upon an incorrect belief that they are not in fact upper income (and despite the fact that many of these wealthy Americans believe that the wealthy as a group pay too little in taxes).<sup>103</sup> Even to the extent that low-income Americans properly estimate their position in the income distribution, studies indicate that many such Americans are overly optimistic about the opportunity for upward social and economic mobility in this country, which may explain why many of these people do not support greater redistributive policies.<sup>104</sup>

Whether or not black and Hispanic Americans severely misperceive their current economic circumstances or are overly optimistic about their future economic opportunities, they feel more optimistic about the national economy at this time and their economic prospects for the future than whites. This is the case despite the fact that the Great Recession had a particularly devastating impact upon African Americans and Hispanics, and despite the fact that they otherwise have been unable over the past few decades to close in any substantial way some of the more longstanding economic gaps that have separated them from whites.<sup>105</sup> Despite these facts, a substantially higher percentage of blacks and Hispanics believes that their economic condition will be better in the next several years than is the case for white Americans, and three times as many blacks and Hispanics aged eighteen to thirty-four as compared to similarly situated whites believe they will be better off economically than their parents during the course of their lives as adults.<sup>106</sup> Substantially higher percentages of middle-class African Americans and Hispanics than white Americans indicate that they are now financially better off than they were before

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103. See *id.*; Catherine Rampell, *Rich People Still Don't Realize They're Rich*, N.Y. TIMES Apr. 19, 2011, 1:41 PM, <http://economix.blogs.nytimes.com/2011/04/19/rich-people-still-dont-realize-theyre-rich/>.

104. Norton & Ariely, *supra* note 95, at 12.

105. See Luke Reidenbach & Christian Weller, *The State of Minorities in 2010: Minorities Are Suffering Disproportionately in the Recession*, CTR. FOR AM. PROGRESS 1 (Jan. 15, 2010), [http://www.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/state\\_of\\_minorities.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/state_of_minorities.pdf).

106. See Yolanda Young, *Blacks, Hispanics Find Reasons for Optimism*, USA TODAY, Dec. 15, 2011, 5:36 PM, <http://usatoday30.usatoday.com/news/opinion/forum/story/2011-12-15/blacks-hispanics-white-economy-optimism/51980916/1>.



the onset of the Great Recession<sup>107</sup> although substantially more middle-class African Americans and Hispanics than middle-class whites report that they endured two or more negative economic experiences in the past year or so.<sup>108</sup>

In terms of political activism, it seems clear that blacks and Hispanics have not been engaged in mass protests in the past several years in any substantial way, and they show no signs of preparing to engage in any mass protests in which they would demand greater economic opportunities or greater economic equality in terms of class and race.<sup>109</sup> Given the fact that blacks and Hispanics first passed whites in expressing greater levels of satisfaction with the national economy in 2008 and 2009 around the time of President Barack Obama's historic election and during the early months of his presidency,<sup>110</sup> it will be interesting to track whether this racial trend in reported satisfaction with the national economy will continue after President Obama's second term ends, especially if our country's next President is not a person of color who receives widespread support from racial and ethnic minorities.

#### B. The Role Low-Income People and the Working Class Play in Creating Self-Reinforcing Inequality

Throughout the history of the United States, it has often been a challenge for those in similar social or economic classes to work together in a collective way in an effort to achieve greater economic equality for all. Oftentimes, certain groups of working or middle-class people have taken actions which have disadvantaged others in the working class or middle-class. Though one might think that during periods of economic crisis and growing economic inequality, working and middle-class people would be more inclined to work in solidarity with one another to improve their collective economic circumstances, oftentimes just the opposite has happened. Instead of working together in solidarity during these times, many in the working and mid-

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107. PEW RESEARCH CTR., *supra* note 3, at 3 (reporting that just 28 percent of middle-class whites claim they are better off now than they were before the recession while 49 percent of middle-class blacks and 43 percent of middle-class Hispanics report that they are better off).

108. *Id.* at 3.

109. See Paul Taylor, *Losing Wealth, Not Faith*, WASH. POST, July 29, 2011, at A17.

110. See *id.*

dle-class have competed against each other based upon the notion that economic opportunities overall represent a zero sum game.<sup>111</sup>

There have been many reasons that Americans who are considered working or middle-class, in terms of their income or wealth, have not worked together in greater numbers to achieve greater economic equality in this country or have not supported public policies that would provide particular benefits to those in the working or middle-class. I will highlight three of these reasons. First, many people who are working class or middle-class by economic status form a greater sense of themselves along identity axes of race, gender, religion, geography, sexual orientation, or culture, for example, as opposed to along economic lines.<sup>112</sup> Second, the working class is segmented in important ways, which often creates economic incentives for different groups of people in the working class to be in conflict with other groups of working-class people.<sup>113</sup> Third, and consistent with the second reason just noted, racial and ethnic conflict often has resulted in many working-class people of one race or ethnic group failing to support or even actively working against working-class people of another race or ethnicity for economic and non-economic reasons.<sup>114</sup> Not only have there been conflicts or divisions between whites and minorities in the working class, but there often have also been inter-minority conflicts among working-class people.<sup>115</sup>

Many political scientists, economists, and others worry that economic inequality may become self-reinforcing because the more affluent may be able to use their wealth to gain more political influence that they use in turn to enhance their wealth, while those who are poorer lose political influence and as a result the ability to secure for themselves vital governmental resources that are often needed for up-

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111. Sherry Linkon, *The Changing Working Class*, in *WORKING-CLASS PERSPECTIVES: COMMENTARY ON WORKING-CLASS CULTURE, EDUCATION, AND POLITICS* (Nov. 19, 2012), <http://workingclassstudies.wordpress.com/category/issues/understanding-class/> (“[Claiming that contemporary] workplaces no longer provide as many opportunities for workers to come together or recognize their shared interests, and in a tight economy, working-class people sometimes see each other as the competition.”).

112. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1783 (2011).

113. See Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States*, 8 CONN. PUB. INT. L.J. 207, 216 (2009).

114. See *id.* at 245, 249.

115. See *id.* at 249 n.171.

ward mobility.<sup>116</sup> Nevertheless, two political scientists have recently concluded that during periods in which economic inequality increases, the rich and the poor alike both become more conservative and express decreased support for government policies that would reduce economic inequality.<sup>117</sup> Though this conclusion may seem counterintuitive to many, a recent Pew Research Center report that in part evaluated the percentage of Americans who support a government social safety net offers some support. According to the report, in 1987, 71% of Americans supported the view that the government is responsible for taking care of people who cannot take care of themselves; however, in 2012, just 59% of Americans agreed with this view.<sup>118</sup> While public support for a government safety net has decreased over the course of the past twenty-five years or so, inequality has increased.<sup>119</sup>

### C. Examples of Internal Divisions Among Working-Class People

The following paragraphs will present two examples of how divisions among working-class and middle-class Americans have made it more difficult to address economic inequality. The first example, and a very contemporary example, describes the political battles and mass protests in Wisconsin that began in February 2011 after Governor Scott Walker announced his intention to eliminate, for all intents and purposes, collective bargaining for most public employees who were members of public sector unions. This example highlights the manner in which many working-class and middle-class Americans are bitterly divided along political lines with respect to important economic issues and the fact that there are limits to the efficacy of mass protests given the level of partisan division among the electorate.

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116. See JACOB S. HACKER ET AL., *INEQUALITY AND PUBLIC POLICY*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 156, 197–200 (Lawrence R. Jacobs & Theda Skocpol eds., 2005); see also Stiglitz, *supra* note 1, at 39–52.

117. Nathan T. Kelly & Peter K. Enns., *Inequality and the Dynamics of Public Opinion: The Self-Reinforcing Link Between Economic Inequality and Mass Preferences*, 54 AM. J. POL. SCI. 855, 867–69 (2010).

118. See *Partisan Polarization Surges in Bush, Obama Years: Trends in American Values: 1987-2012*, PEW RESEARCH CTR. 55 (2012), available at <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>.

119. It should be noted, however, that the Pew Research Center's study does indicate that there was some downward and upward fluctuation in levels of support of a government safety net between 1987 and 2012. Even so, the overall trend has been downward over this period of time and public support for a government safety net fell steadily from the onset of the Great Recession through 2012. *Id.*

The second example is an example from the New Deal. Though the New Deal era is widely considered a very progressive period in American history, New Deal policy and the general public's response to government efforts to address the dire economic circumstances millions of Americans experienced during this period were highly racialized. Though the New Deal example is obviously from a prior period in this country's history, some of the dynamics that contributed to government officials in the New Deal providing many minorities with much less support than they needed based upon their economic circumstances have also informed the way that government officials today have responded to the economic conditions many minorities face.

1. Protests and Labor Strife in Wisconsin: A Cautionary Tale on the Limits of Large-Scale Protests to Affect Political Change in a Time of Polarization

Without question, there is an incredibly high level of polarization and divisiveness in the body politic in the United States today.<sup>120</sup> Although significant gaps in values persist between different demographic groups of Americans sorted in terms of their race and ethnicity, educational attainment, economic class, religiosity, and gender, these divisions have neither increased nor decreased appreciably over the course of the past quarter century.<sup>121</sup> In contrast, the gap in values between those who identify as Democrats or as Republicans has almost doubled in the past twenty-five years, and this partisan gap now represents the largest gap among all other demographic divisions.<sup>122</sup> Not only has the partisan gap overtaken the racial and educational gaps, it is now fifty percent larger than the racial values gap, which represents the second largest values gap.<sup>123</sup>

In terms of political polarization, many now believe that the state of Wisconsin, a state previously long known for civility in its politics,<sup>124</sup> is the most politically divisive state in America.<sup>125</sup> In 2011, polls

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120. See PEW RESEARCH CTR., *supra* note 3, at 2 (explaining the high level of polarization in American politics).

121. *Id.*

122. *Id.*

123. *Id.*

124. Dan Kaufman, *Land of Cheese and Rancor*, N.Y. TIMES, May 27, 2012, <http://query.nytimes.com/gst/fullpage.html?res=9804E6DA1E3CF934A15756C0A9649D8B63&pagewanted=all>

125. Dan Kaufman, *How Did Wisconsin Become the Most Politically Divisive Place in America?*, N.Y. TIMES, May 24, 2012, [http://www.nytimes.com/2012/05/27/magazine/how-did-wisconsin-become-the-most-politically-divisive-place-in-america.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/05/27/magazine/how-did-wisconsin-become-the-most-politically-divisive-place-in-america.html?pagewanted=all&_r=0); see

showed that the gap between Democrats and Republicans in terms of whether they approved or disapproved of Governor Scott Walker made Governor Walker one of the most, if not the most, polarizing governors in the United States, given that the so-called partisan gap in approval ratings for Governor Walker was 78%.<sup>126</sup> Governor Walker's announcement of his decision to seek to end collective bargaining rights for most public employees who were members of public sector unions<sup>127</sup>—rights which Wisconsin public employees gained in 1959, making them the first public employees in any state to be granted collective bargaining rights<sup>128</sup>—sparked massive protests in February and early March of 2011.<sup>129</sup> During this period, tens of thousands of people participated in protests against Governor Walker and the Republicans who controlled the state legislature, with 100,000 or more people joining one of the protests on February 26, 2011.<sup>130</sup> Many believe that the massive protests in Wisconsin provided some significant inspiration for the Occupy Wall Street movement.<sup>131</sup>

After the Republican-controlled legislature passed the bill stripping most public employees of their collective bargaining rights, Governor Walker signed the bill into law on March 11, 2011.<sup>132</sup> Those who opposed Governor Walker next turned their attention to seeking to recall certain Republican lawmakers, including Governor

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also Bob Sexter, *Bruised-Purple Wisconsin Takes Political Beating State's Near-Even Red-Blue Split Fuels Barrage of Attack Ads in Tight Races for Senate, President*, CHI. TRIBUNE, NOV. 2, 2012, [http://articles.chicagotribune.com/2012-11-02/news/ct-nw-wisconsin-wrap-20121102\\_1\\_wisconsin-dells-republican-party-chairman-scott-walker](http://articles.chicagotribune.com/2012-11-02/news/ct-nw-wisconsin-wrap-20121102_1_wisconsin-dells-republican-party-chairman-scott-walker).

126. See Craig Gilbert, *Scott Walker Could Be the Most Polarizing Governor?*, MILWAUKEE J. SENTINEL Mar. 8, 2011, at A1.

127. Michael A. Fletcher, *Thousands Turn Out for Latest Protest Against Wis. Governor's Budget Plan*, WASH. POST, Mar. 6, 2011, [http://www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2\(011030503728.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2(011030503728.html)); see also Barbara Rodriguez, *Madison, Wis.: Protests Mark Year Since Gov. Scott Walker's Collective Bargaining Law*, TWINCITIES.COM (Mar. 10, 2012, 8:37 PM), [http://www.twincities.com/wisconsin/ci\\_20148202/madison-wis-protests-mark-year-since-collective-bargaining](http://www.twincities.com/wisconsin/ci_20148202/madison-wis-protests-mark-year-since-collective-bargaining).

128. *WLHS Primer on Wisconsin Labor History*, WIS. LABOR HISTORY SOC'Y, [http://www.wisconsinlaborhistory.org/?page\\_id=34](http://www.wisconsinlaborhistory.org/?page_id=34) (last visited Jan. 18, 2013).

129. See Fletcher, *supra* note 127; Rodriguez, *supra* note 127.

130. See Abby Sewell, *Protesters Out in Force Nationwide to Oppose Wisconsin's Anti-Union Bill*, L.A. TIMES, Feb. 26, 2011, <http://articles.latimes.com/2011/feb/26/nation/la-na-wisconsin-protests-20110227>.

131. Kira Zalan, *The Wisconsin Protests' Widespread Influence – From Obama to Occupy Wall Street*, U.S. NEWS & WORLD REPORT (Mar. 2, 2012), <http://www.usnews.com/opinion/articles/2012/03/02/the-wisconsin-protests-widespread-influence-from-obama-to-occupy-wall-street>.

132. Stephanie Condon, *Wisconsin Gov. Scott Walker Signs Anti-union Bill – But Democrats Say They're the Political Victors*, CBS NEWS (Mar. 11, 2011, 11:19 AM), [http://www.cbsnews.com/8301-503544\\_162-20042122-503544.html](http://www.cbsnews.com/8301-503544_162-20042122-503544.html).

Walker.<sup>133</sup> After those who opposed the governor filed more than one million signatures of people seeking to recall and remove him from office, many in Wisconsin and in the country assumed that Governor Walker would have a very difficult time becoming the first governor in United States history to survive a recall election.<sup>134</sup>

However, in spite of the massive protests and the huge number of Wisconsinites who signed the recall petition, Governor Walker convincingly won the recall election by more than seven points.<sup>135</sup> In an election that featured the issue of collective bargaining for union members, the exit polls provided evidence of the substantial polarization of the Wisconsin electorate, even among those in the working and middle classes.<sup>136</sup> Fifty-six percent of middle-class voters, as well as 56% of those without a college degree, voted for Governor Walker.<sup>137</sup> What may be particularly surprising to many is the fact that of the one-third of the voters who either belonged to a union or who had someone in their household who belonged to a union, 38% voted for Governor Walker.<sup>138</sup> Though it is likely that many of these voters were in households that had people who were members of the police, firefighters, and State patrol unions—public sector unions exempted from the collective bargaining bill<sup>139</sup>—it is also apparent that many other people from union households supported Governor Walker.<sup>140</sup>

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133. See Rachel Weiner, *Wisconsin Recall Petition Gets Over 1 Million Signatures; Democratic Challenger Falk Steps Forward*, WASH. POST, Jan. 18, 2012, [http://www.washingtonpost.com/politics/wisconsin-recall-petition-gets-over-1-million-signatures-democratic-challenger-falk-steps-forward/2012/01/18/g1QAD4sr8P\\_story.html](http://www.washingtonpost.com/politics/wisconsin-recall-petition-gets-over-1-million-signatures-democratic-challenger-falk-steps-forward/2012/01/18/g1QAD4sr8P_story.html).

134. See *id.*

135. Clay Barbour et al., *Re-Affirmed: After More Than a Year of Fierce Partisan Battles, Gov. Scott Walker and His Fellow Republican Lawmakers Dominate the Polls on Tuesday*, WIS. STATE J., June 6, 2012, at A1.

136. *Wisconsin Recall Exit Polls: How Different Groups Voted*, N.Y. TIMES, June 5, 2012, <http://www.nytimes.com/interactive/2012/06/05/us/politics/wisconsin-recall-exit-polls.html>.

137. *Id.*

138. *Id.*

139. See Steven Verburg, *Special Collective Bargaining Status for Police and Fire Unions Causing Problems*, WIS. STATE J., Jan. 7, 2012, 6:50 AM, [http://host.madison.com/news/local/govt-and-politics/special-collective-bargaining-status-for-police-and-fire-unions-causing/article\\_c8900f50-38c7-11e1-a949-0019bb2963f4.html](http://host.madison.com/news/local/govt-and-politics/special-collective-bargaining-status-for-police-and-fire-unions-causing/article_c8900f50-38c7-11e1-a949-0019bb2963f4.html).

140. Sarah Dutton & Jennifer De Pinto, *How Scott Walker Won the Wisconsin Recall Election*, CBS NEWS (June 6, 2012, 1:07 AM), [http://www.cbsnews.com/8301-503544\\_162-57447980-503544/how-scott-walker-won-the-wisconsin-recall-election/](http://www.cbsnews.com/8301-503544_162-57447980-503544/how-scott-walker-won-the-wisconsin-recall-election/).

2. Government Officials and Politicians Have Felt Constrained to Deal with Racial Disparities Including in Times of General Economic Crisis

Just as they are today, African Americans were significantly over-represented among the poor in the early 1930s. Further, for most African Americans, the Great Depression simply worsened their longstanding economic plight and oppression.<sup>141</sup> If Congress and the Roosevelt Administration had designed many New Deal programs in a universal way to benefit Americans largely on the basis of demonstrated need, and if they had implemented such programs in a nondiscriminatory way, the New Deal would have dramatically improved the socioeconomic status of African Americans, as well as the socioeconomic status of other people of color. Nevertheless, the government designed or administered many New Deal programs in a racially discriminatory way in part to appease certain powerful economic interests and many white Americans.

Racial discrimination in these programs took many forms.<sup>142</sup> In a particularly damaging manifestation of racism, certain New Deal programs excluded an extremely large percentage of impoverished African Americans. For example, three major New Deal legislative acts explicitly excluded agricultural laborers and those who worked in the domestic service sector. These acts included the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act.<sup>143</sup> The exclusion of these occupational categories, which accounted for two-thirds of black employment in the United States and between seventy and eighty percent of black employment in many parts of the South<sup>144</sup> helped solidify racial divisions within the labor market.<sup>145</sup>

While our country is still recovering from the worst economic crisis Americans have experienced since the Great Depression, many politicians and government officials still feel constrained to address

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141. Robert C. Weaver, *The New Deal and the Negro: A Look at the Facts*, 13 OPPORTUNITY: J. OF NEGRO LIFE 200, 200 (1935).

142. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1353–71 (1987). Over time, most of the discriminatory provisions included in different pieces of New Deal legislation were stricken. *Id.* at 1336.

143. Juan F. Perea, *Destined for Servitude*, 44 U.S.F. L. REV. 245, 250 (2009).

144. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 43 (2005). By amendment to the original Social Security Act, domestic laborers were added in 1950 and agricultural laborers were added in 1954. *Id.*

145. Mandell, *supra* note 92, at 407.

the range of economic issues particularly facing minorities because they often worry that focusing on these type of issues would generate backlash from white Americans. To be clear, few people claim that the federal programs that were designed to heal the economy in the wake of the Great Recession and that were enacted into law after President Barack Obama took office have been racialized to the detriment of minorities in the way that many New Deal programs were racialized. Nevertheless, there are many who believe that President Barack Obama and others in his administration have shied away from developing policies to specifically address severe racial issues in our society out of a concern that addressing issues of racial injustice would erode the support he has received from white Americans and would prevent him from building upon this support.<sup>146</sup> These purported concerns are not unfounded, as President Obama has experienced political setbacks when he has addressed certain racial issues in an open way no matter how sensitively he has sought to address them.<sup>147</sup> Nevertheless, one commentator claims that severe racial economic gaps together with other serious racial gaps “are becoming unremarkable features of the post-racial world” in which critical and unresolved racial issues are not framed, for pragmatic political reasons, as arising from racial discrimination or injustice.<sup>148</sup>

#### IV. THE LEGAL PROFESSION CAN DO MORE TO PROMOTE GREATER ECONOMIC EQUALITY

##### A. A Multifaceted Strategy Is Needed to Reduce Economic Inequality

The effort to reduce economic inequality and to increase intergenerational economic mobility in this country must draw upon the expertise of many different types of people and organizations from a broad spectrum of backgrounds. In terms of such an overall strategy, law will not play the largest role or perhaps even a central role in efforts to promote more economic equality, including in the effort to reduce the substantial racial economic gaps that now exist in our

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146. Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1336 (2011).

147. Paul Glastris, *Introduction: Race, History, and Obama's Second Term*, *WASH. MONTHLY*, Jan./Feb. 2013, available at [http://www.washingtonmonthly.com/magazine/january\\_february\\_2013/features/introduction\\_race\\_history\\_and042044.php?page=1](http://www.washingtonmonthly.com/magazine/january_february_2013/features/introduction_race_history_and042044.php?page=1).

148. Crenshaw, *supra* note 146, at 1336–40.



country.<sup>149</sup> Nevertheless, there is an important role for lawyers and legal institutions of one kind or another to play in the effort to increase economic opportunities for millions of Americans, so that the American dream can become more of a reality for a broader swath of the American public.

To create greater income equality and economic mobility in the United States, there is broad consensus among academics, policymakers, and others that we, as a country, must dramatically improve the educational system and educational opportunities for poor and low- to moderate-income Americans.<sup>150</sup> Many others believe that to reduce income inequality, our tax system also needs to be changed to make it much more progressive and more like tax systems in many other industrialized countries that do much more to redistribute pretax income.<sup>151</sup> Others suggest that to reduce economic inequality in the United States, we must reform our criminal justice system, given that the United States incarcerates more people per capita than any other country in the world.<sup>152</sup> Still others argue that major reforms are needed with respect to our country's policies impacting family structure and the capacity of parents to make important financial and non-financial investments in their children, among other relevant areas of policy.<sup>153</sup> Although reforming policies in any of the aforementioned policy areas would help promote greater equality in this country, for inequality to be addressed in a substantial way, significant reforms would need to be made in a number of different policy areas, whether in areas implicating education, tax, the criminal justice system, health care and nutrition, family life, housing, etc.

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149. See, e.g., Calavita, *supra* note 4, at 499; Jones, *supra* note 59, at 87.

150. See, e.g., Ron Haskins, *Education and Economic Mobility*, in *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 101 (Julie Clover & Ianna Kachoris eds., 2008), available at [http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02\\_economic\\_mobility\\_sawhill.pdf](http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02_economic_mobility_sawhill.pdf); Dan Ariely, *Americans Want to Live in a Much More Equal Country (They Just Don't Realize It)*, *ATLANTIC* (Aug. 2, 2012, 12:41 PM), <http://www.theatlantic.com/business/archive/2012/08/americans-want-to-live-in-a-much-more-equal-country-they-just-dont-realize-it/260639/>; Beller & Hout, *supra* note 81, at 31; Haveman & Smeeding, *supra* note 73, at 143; Jones, *supra* note 59, at 87; Sawhill, *supra* note 62, at 4–5.

151. See, e.g., STIGLITZ, *supra* note 1, at 273–74; Calavita, *supra* note 4, at 500; Ariely, *supra* note 150.

152. See Eduardo Porter, *At the Polls, Choose Your Capitalism*, *N.Y. TIMES*, Oct. 31, 2012, at B1.

153. See, e.g., Beller & Hout, *supra* note 81, at 31; Corak, *supra* note 53, at 120. However, there is not universal agreement on the extent to which changes in family structure in the United States alone have contributed to increased economic inequality. Hacker et al., *supra* note 116, at 163.

In terms of promoting greater wealth equality, a number of organizations that are not primarily legal organizations have developed detailed policy agendas setting forth policies that would enable low- to moderate-income individuals and households to build wealth. One such leading organization is the Corporation for Enterprise Development (CFED). CFED's policy agenda addresses the following five issue areas: financial assets and income, businesses and jobs, housing and homeownership, education, and health.<sup>154</sup> Within these five issue areas, a limited number of CFED's proposals do have an explicitly legal component, such as proposals encouraging states to adopt more robust laws designed to prevent foreclosure or to protect some of the assets of those who have their property foreclosed.<sup>155</sup>

In terms of efforts to address racial economic gaps, those working on behalf of the Insight Center for Community Economic Development's *Closing the Racial Wealth Gap Initiative* have developed policy briefs and papers to address strategies to close racial wealth gaps.<sup>156</sup> Just like CFED's policy proposals, some of the policy proposals that are part of the package of proposals that those (including this author) working on behalf of the *Closing the Racial Wealth Gap Initiative* have developed have an explicit legal component.<sup>157</sup> Further, over the course of the past four years, a few organizations have sponsored an annual African American economic summit to address the many severe economic challenges currently facing the black community. Howard University hosted this year's fourth annual summit on February 1, 2013,<sup>158</sup> and a number of the university's departments and centers, as well as the Joint Center for Political and Economic Studies and Duke University's Research Network on Racial and Ethnic Inequality, sponsored the summit.<sup>159</sup> It is somewhat striking that no legal or-

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154. See *Policy Agenda*, CORP. FOR ENTERPRISE DEV., [http://cfed.org/policy/policy\\_agenda/](http://cfed.org/policy/policy_agenda/) (last visited Feb. 26, 2013).

155. See *Policy Brief: Foreclosure Prevention and Protections*, CORP. FOR ENTERPRISE DEV., (2012), available at [http://cfed.org/assets/scorecard/2013/pb\\_Foreclosure\\_Prevention\\_2013.pdf](http://cfed.org/assets/scorecard/2013/pb_Foreclosure_Prevention_2013.pdf).

156. See *Publications and Materials*, INSIGHT CENTER FOR COMM. ECON. DEV., <http://www.insightcced.org/index.php?page=Policy> (last visited Feb. 26, 2013).

157. See *The Racial Gap in Land Retention, Acquisition, and Development*, INSIGHT CTR. FOR COMM. ECON. DEV., (2009), available at <http://www.insightcced.org/uploads/CRWG/Racial-Gap-Land-Retention-6-09.pdf>.

158. See Michael A. Fletcher, *Financial Picture for Black Americans Bleak, Scholars Say*, WASH. POST, Feb. 2, 2013, at A10; *Fourth Annual Economic Summit*, HOW. U. DEP'T. ECON., [http://www.coas.howard.edu/economics/news&events\\_livestream.html](http://www.coas.howard.edu/economics/news&events_livestream.html) (last visited March 1, 2013).

159. See *Fourth Annual Economic Summit*, *supra* note 158.

ganization took part in the summit and that no practicing attorneys participated as speakers.

**B. Legal Organizations Should Develop Detailed Strategic Plans Setting Forth Legal Strategies to Promote Greater Economic Equality**

Irrespective of whether it is in a leading or supporting way, there is a very important role for lawyers and legal organizations to play in the broader effort to promote greater economic equality in this country. Just as some primarily non-legal organizations have developed detailed policy proposals designed to promote economic equality in general or to address economic challenges that various communities of color are experiencing, more legal organizations can also develop such comprehensive policy agendas or legal strategies. In some instances, legal organizations that would develop these types of agendas or legal strategies could help complement the initiatives that many non-legal organizations have pursued. In other instances, legal organizations that would develop such policy agendas or legal strategies to promote greater economic equality could play a leading role in addressing certain relevant stand-alone legal issues, given that many if not most non-legal organizations lack a comparative advantage to address these types of legal issues in a sophisticated way.

Though there are many legal and non-legal organizations that promote social justice or civil rights that have made promoting economic justice a central part of their work,<sup>160</sup> there is still much room for other legal institutions committed to social justice to promote greater economic equality in a more robust way. To this end, there are important roles for lawyers with expertise in many different substantive areas of the law to play, including those with expertise in business and transactional areas of the law. In terms of developing this generation's social engineers in the field of law, law schools with a commitment to promoting social justice and civil rights should make an intentional effort to make sure that their law students appreciate the fact that many different types of lawyers can play a meaningful

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160. See, e.g., Letter from Marc H. Morial, President and Chief Exec. Officer, Nat'l Urban League, to Barack Obama, President of the U.S., Nancy Pelosi, Minority Leader of the U.S. House of Representatives & John Boehner, Speaker of the U.S. House of Representatives, *available at* <http://nul.iamempowered.com/content/national-urban-league-calls-president-obama-congressional-leaders-make-economic-opportunity>; *Economic Equality*, LAW. COMM. FOR CIV. RTS. S. F. BAY AREA, <http://www.lccr.com/economic-equality.php> (last visited Mar. 1, 2013).

role in helping to promote economic justice and equality. Finally, given that the goal of reducing economic inequality in our society represents an enormous, long-term challenge, lawyers and legal organizations committed to addressing the issue should utilize every legal tool and resource that they can deploy in the struggle to promote greater equality, including some that public interest and civil rights lawyers have underutilized in some significant ways to date.

C. Examples of How the Law Could Be More Effectively Utilized to Promote Equality

Based upon the work I have done in the area of real property and real estate law, I will offer two concrete examples of ways in which lawyers and legal institutions could play a more significant role in promoting economic equality. These examples serve as examples of what can be done in other areas of law as well. Though these particular examples address the role lawyers can play in addressing certain racial economic issues, the examples also offer insight into the role lawyers can play in addressing the overall issue of reducing economic inequality in this country.

1. Lawyers Should Play a More Active Role in Developing Strategies to Increase Minority Homeownership and to Make Such Ownership More Secure

Given that equity in a primary residence represents the largest asset most Americans of any race or ethnicity possess in their asset portfolios, lawyers should undertake efforts to increase homeownership within the African American and Latino communities, particularly given the current substantial racial homeownership gaps between these groups and white Americans. As indicated earlier, 28.9% fewer African Americans own their own homes as compared to white Americans, and this gap is larger than it was in any year between 1994 and 2009.<sup>161</sup> This means that all the progress that had been made in narrowing the black-white homeownership gap in the mid to late 1990s and early 2000s has been reversed. Similarly, the progress made during the late 1990s and early 2000s in narrowing the Hispanic-white homeownership gap has been set back as the Hispanic-white home-

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161. *Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2011*, *supra* note 41.

ownership gap has been growing in recent years and is now approximately as large as it was in 2001.

Nevertheless, those who advocate for a renewed push to increase minority homeownership must learn important lessons from the drive to increase minority homeownership during the 1990s and 2000s. Many who began advocating for increased minority homeownership approximately two decades ago had all the best intentions and did in fact develop detailed strategies to accomplish their goal.<sup>162</sup> However, the progress that was made in increasing minority homeownership in the 1990s and early 2000s masked a number of troubling issues that in the end contributed to washing away all of the gains that African Americans and Latinos made in increasing their homeownership rates. Not only have many African Americans and Latinos lost their homes, they have also lost tens of billions of dollars in home equity over the course of the past several years.

In terms of lessons that should be learned, it has become clear, for example, that a number of troubling aspects of the way in which lenders made subprime loans resulted in homeownership resting on a foundation of sand for far too many. For many, terms in many subprime loans that did not allow for prepayment of the loan or that required balloon payments many times the size of the normal monthly payment, for example, were factors that contributed to driving homeowners into foreclosure.<sup>163</sup> In other instances, there is evidence that lenders steered minorities into taking out subprime loans, though they may have qualified for prime loans that had much lower interest rates and more favorable terms for the borrower.<sup>164</sup> Some of those who advocated for increased minority homeownership in the 1990s now realize that the efforts to increase minority homeownership in the past couple of decades did not place enough emphasis on the role that the law could play in making homeownership for minorities more viable and sustainable. One of these advocates now claims that legal reform in the areas of foreclosure law and fair lending practices, among other areas, must “become central to public policy debates” about minority homeownership.<sup>165</sup>

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162. Taylor, *supra* note 109.

163. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 69–70 (2006).

164. See, e.g., Thomas W. Mitchell et al., *Forced Sale Risk: Class, Race, and the “Double Discount”*, 37 FLA. ST. U. L. REV. 589, 654–55 (2010); Shapiro, *supra* note 163, at 72.

165. Shapiro, *supra* note 163, at 71–72.

To this end, more legal organizations committed to promoting civil rights and social justice should consider how they can play a meaningful role in helping minorities become homeowners in a financially sustainable way and in helping those who are homeowners maintain their homes. At the national level, more civil rights and public interest legal organizations should seek to participate in a proactive way in developing and championing policy agendas that include the legal reforms necessary to address critical housing issues impacting minorities. Law schools that have a commitment to promoting civil rights and social justice should consider undertaking initiatives to enhance in a substantial way the real estate offerings that are available to their students, including by developing real estate certificate or concentration programs.<sup>166</sup>

Students who would take advantage of these enhanced real estate offerings would be able, once in practice, to provide effective counsel to prospective minority homeowners considering various options they may have to finance a purchase of a home, including financing options with complex legal terms. Many of these students also would be better positioned once in practice than many other law graduates who did not take many real estate-related courses in law school to advise minorities who already own homes who may be experiencing financial problems about the legal options they may have to retain their homes—or at least, the wealth associated with such homes. Still others who pursued a real estate concentration in law school would be well positioned once in practice to advise developers interested in building affordable housing or, in some cases, could even become affordable housing developers themselves. In addition, some of these students would be in a better position than students who lack such training in real estate law and finance to work within a few years of graduating from law school with others on developing public policy in the areas of housing and real estate.

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166. A few years ago at the University of Wisconsin Law School, I worked with a number of other professors, administrators, and members of the practicing bar to develop a real estate concentration and certificate program. See *Real Estate Law Concentration*, U. WIS. L. SCH., <http://law.wisc.edu/academics/courses/concentrations/realestate.html> (last updated Nov. 10, 2011). Students interested in obtaining a real estate law certificate in our program must take a number of real estate and business law courses, as well as a course at our business school that reviews the business fundamentals of a real estate transaction. *Id.*

## 2. Developing National Model State Statutes to Promote Greater Economic Equality in Certain Areas of the Law

Over the course of the past several decades, thousands of minority landowners have lost their land as a result of court-ordered partition sales of property owned under the tenancy in common form of ownership.<sup>167</sup> These partition sales have been a major source of black land loss. Over the course of the past forty to fifty years, in an effort to stem black land loss, law professors and public interest attorneys have proposed many legal reforms including legal reforms to the law governing partition of property that people own under the tenancy in common form of ownership. However, those reform proposals as a whole got little, if any, traction, and the legislative reform proposals more specifically did not fare any better in state legislatures across the country. Nevertheless, significant progress has been made on partition law reform in the past few years. Progress began to be made after a group of lawyers was able to convince the National Conference of Commissioners on Uniform State Laws (NCCUSL) to form a drafting committee in 2007 to develop a uniform act designed to reform partition law in many important ways.

In terms of law reform, NCCUSL, which is commonly known as the Uniform Law Commission, has developed national model statutes for possible enactment at the state level over the course of the past 121 years, making it the most prominent organization that has developed model state statutes during this period.<sup>168</sup> The Uniform Law Commission has promulgated more than 300 uniform acts—the terminology it uses for its model state statutes that it advocates should be adopted in their entirety without significant revision by various jurisdictions—since its establishment.<sup>169</sup> It is best known for promulgating the Uniform Commercial Code, which it developed in conjunction with the American Law Institute.<sup>170</sup> NCCUSL also promulgated the Uniform Partnership Act, the Uniform Probate Code, the Uniform Conservation Easement Act, the Uniform Declaratory Judgments

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167. See Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. REV. 505, 579 (2001).

168. ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 12–13 (1969).

169. See *Frequently Asked Questions*, Unif. Law Comm'n, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Mar. 16, 2013).

170. Fred H. Miller & William B. Davenport, *Introduction to the Special Issue on the Uniform Commercial Code*, 45 Bus. Law. 1389, 1389 (1990).

Act, and the Uniform Trade Secrets Act, among its many other uniform acts.<sup>171</sup>

Notwithstanding the critical role NCCUSL has played in reforming many state laws around the country, very few civil rights or public interest law organizations have developed proposals requesting the Uniform Law Commission to establish drafting committees to develop uniform laws that would benefit low- to moderate-income and minority individuals and communities. Civil rights and public interest law organizations have done so little to develop uniform acts through the Uniform Law Commission because most of these organizations are unfamiliar with the Uniform Law Commission, the procedures it uses in considering proposals to develop a uniform act, and the procedures it uses once it does establish a drafting committee to develop a uniform act. In contrast, those who represent the interests of powerful interest groups are quite familiar with the process that is used to develop uniform acts, and these representatives repeatedly play a role in the development (or sometimes in the stymieing to one degree or another) of uniform acts from the proposal phase to the drafting phase to the enactment phase.<sup>172</sup>

Nevertheless, a group of law professors and lawyers, including civil rights and public interest lawyers, did work with the Section of Real Property, Trust and Estate Law of the American Bar Association (ABA) to develop a proposal to submit to the Uniform Law Commission in 2006 requesting the Uniform Law Commission to develop a uniform act reforming the law of partition as that law applies to tenancy-in-common property that families have owned for a long period of time.<sup>173</sup> The Uniform Law Commission accepted this proposal in

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171. ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (forthcoming June 2013) (manuscript at app. F at 1-10, on file with author).

172. See, e.g., Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Universal Commercial Code*, 78 MINN. L. REV. 83, 120 (1993).

173. Letter from David J. Dietrich, Co-Chair Property Preservation Task Force to Shannon Skinner, ABA Rep. to NCCUSL Joint Editorial Board for Uniform Real Property Acts (Nov. 27, 2006) (on file with author). The Property Preservation Task Force was a task force of the ABA's Section of Real Property, Trust & Estate Law. See *Section of Real Property, Probate & Trust Law: 2006-2007 Leadership Directory*, 2006 A.B.A. SEC. OF REAL PROP., PROB. & TR. 26. The author served as one of the members of the Property Preservation Task Force and was able to convince the co-chairs of the task force to consult with certain civil rights and public interest lawyers who had significant experience working with poor and minority landowners in preparing the proposal that the ABA's Section of Real Property, Trust & Estate Law sent to NCCUSL.



2007.<sup>174</sup> After the drafting committee spent three years working on developing a uniform act to reform the law of partition, NCCUSL promulgated the Uniform Partition of Heirs Property Act (UPHPA) in 2010.<sup>175</sup> The ABA approved UPHPA in 2011 as a uniform act that was appropriate for states to consider enacting into law.<sup>176</sup> So far, Georgia, Montana, and Nevada have enacted UPHPA into law, while legislatures in Connecticut, the District of Columbia, Hawaii and South Carolina are currently considering it as well.<sup>177</sup>

The development of UPHPA was quite unusual in several important ways from how most other uniform acts have been developed by NCCUSL. As mentioned, it was quite unusual that civil rights and public interest legal organizations—most of which were local and regional as opposed to national organizations—played an important role in developing the proposal that was sent to NCCUSL in the first instance requesting NCCUSL to establish a drafting committee to develop a uniform act that could be used to reform partition law. Second, I served as the Reporter, the person tasked with the primary responsibility for drafting a uniform act, for UPHPA, and became just the second African American ever to serve as a Reporter on a uniform act project for the Uniform Law Commission. I was selected not just because of my national reputation for being an expert scholar on partition law and black landownership but also because of the extensive outreach work I had done with, among others, the ABA and a large number of public interest law and community-based organizations that work on property matters impacting poor and minority communities. Third, a large part of the success we have had so far with the act is attributable to the decision of many civil rights and public interest legal organizations together with some community-based organizations—organizations that for the most part had not had

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174. NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 116TH YEAR 191 (2007).

175. See *Uniform Partition of Heirs Property Act*, NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS (2010), available at [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf).

176. See *Approval for the Uniform Partition of Heirs Property Act*, ABA Now, <http://www.abanow.org/2011/01/109a/> (last visited Mar. 16, 2013).

177. See *Partition of Heirs Property Act*, NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS, <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act> (last visited Mar. 16, 2013).

any history of working together in a collective way—to form an organization called the Heirs' Property Retention Coalition (HPRC).<sup>178</sup>

This coalition actively participated in the drafting of UHPHA and has played a very important role in working to enact UHPHA into law, complementing the excellent enactment work NCCUSL has done. In addition to HPRC's letter endorsing UHPHA, some individual HPRC members have submitted letters to NCCUSL endorsing UHPHA, including the Lawyers' Committee for Civil Rights Under Law and the Federation of Southern Cooperatives.<sup>179</sup> Finally, HPRC made a very important decision to seek a partner at one of the country's largest law firms who had expertise in real estate law who would serve as HPRC's pro bono legal representative during the drafting of UHPHA. The partner who agreed to serve as HPRC's pro bono counsel played an indispensable role in helping HPRC advocate for reforms that would improve the ability of those who own heirs' property to retain their property or at least their heirs' property-related wealth.

Those of us who have worked with the American Bar Association and the Uniform Law Commission to develop UHPHA and to get it enacted into law hope that our example will inspire other civil rights and public interest legal organizations to consider developing strategies to pursue law reform initiatives through institutions such as the Uniform Law Commission and other prominent institutions that work (at least in part) on law reform, such as the various state law revision commissions across the country and the American Law Institute. Given the magnitude of the challenges civil rights and public interest organizations face in addressing vital issues such as economic inequality, lawyers within these organizations should use every legal tool at their disposal in their effort to promote social justice including tools that have been underutilized to date.

## CONCLUSION

Though reversing the trends in economic equality and intergenerational mobility in this country will require fundamental changes in public policy as it relates to our tax system and educational system, among other areas, lawyers and law schools can play an important role in promoting greater economic equality and security for many in

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178. See, e.g., *HPRC News*, HEIRS' PROP. RETENTION COAL., <http://www.southerncoalition.org/hprc/> (last visited Mar. 16, 2013).

179. See *Partition of Heirs Property Act*, *supra* note 177.

this country. Law schools committed to promoting social justice should consider whether there is more they could be doing to promote civil rights and reduce economic inequality, including by enhancing the range of business and transactional courses and programs offered at their schools. Efforts should be made to involve a greater number of lawyers, whether these lawyers are public interest lawyers or lawyers in private practice, and whether these lawyers are litigators or transactional attorneys, in legal efforts to reduce economic inequality. Civil rights and public interest law organizations should consider whether there are legal strategies and tools that they have underutilized to date that would help them better promote their social justice agendas. If lawyers and legal organizations make more of an effort to coordinate their work in addressing economic inequality with others who are working on this issue, and if more legal tools are used in the effort to address economic inequality, law can play a more substantial role in promoting economic justice.